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DIGEST

OF

ALL REPORTED CASES DECIDED BY ALL FEDERAL AND PROVINCIAL COURTS OF CANADA, AND BY THE PRIVY COUNCIL ON APPEAL THEREFROM AND INCLUDING DOMINION LAW REPORTS VOLS. 1 TO 50 INCLUSIVE

DURING THE YEARS 1911 TO JANUARY 1, 1920

BY

THE EDITORIAL DEPARTMENT OF THE CANADA LAW BOOK COMPANY, LIMITED

C. E. T. FITZGERALD
A. H. O'BRIEN
J. T. HARRIS
F. J. FLYNN

VOLUME II

1920
TORONTO
CANADA LAW BOOK COMPANY LIMITED
84 BAY STREET
AGENTS FOR QUEBEC, WILSON & LAFLEUR, MONTREAL

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Can. Cr. Cas. .....Canadian Criminal Cases (1898-1920), 31 vols.
Can. Ex. .....Canada Exchequer Court Reports, 18 vols.
Can. Ry. Cas. .....Canadian Railway Cases (1904-1920), 24 vols.
Can. S. C. R. .....Canada Supreme Court Reports, 58 vols.
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Ch. Cham. or Ch. Ch. ..Chancery Chamber Reports (Ontario).
Chip. R. .....Chipman's Reports, New Brunswick (same as 1 N. B. R.).
Clarke & Sc. .....Clarke & Scully, Drainage Cases.
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Con. Ord. N. W. T. .....Consolidated Ordinances of North-West Territories, 1898.
Corp. Jur. .....Corpus Juris.
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L. C. G. .....Local Courts Gazette (Ontario).
L. C. J. .....Lower Canada Jurist.
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L. C. R. .....Lower Canada Reports.

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Pyke .....Pyke's Quebec Report (1810), 1 vol.

Q. L. R. .....Quebec Law Reports.
Que. P. R. .....Quebec Practice Reports.
Que. Q. B. or K. B. ....Quebec Reports, Queen's Bench or King's Bench.
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R. E. D. .....Russell's Equity Decisions (Nova Scotia).
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R. S. B. C. .....Revised Statutes of British Columbia (1911).
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R. S. Q. .....Revised Statutes of Quebec (1909).
R. S. S. .....Revised Statutes of Saskatchewan (1909).
Ramsey .....Ramsey's Appeal Cases (Quebec).
Rev. de Crit. .....Revue de Critique, Quebec (1871-1875), 3 vols.
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Rev. Leg. .....Revue Legale (Quebec).
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S. C. Cas. .....Supreme Court Cases (Cameron's) (1905).
S. L. R. .....Saskatchewan Law Reports.
Stew. Adm. R. .....Stewart's Admiralty Reports (Nova Scotia).
Stock. Adm. .....Stockton's Admiralty Reports (New Brunswick).
Stuart's Adm. .....Stuart's Vice-admiralty Reports, Quebec, (1836-1874), 2 vols.
Stuart K. B. .....Stuart's King's Bench Reports, Quebec (1810-1835), 1 vol.

Tay. .....Taylor's Upper Canada K. B. Reports (1823-1827), 1 vol.
Terr. L. R. .....Territories Law Reports.
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U. C. L. J. .....Upper Canada Law Journal (1885-1865), (now Canada Law Journal).
U. C. Q. B. } .....Upper Canada Queen's Bench Reports.
U. C. R. }

W. L. R. .....Western Law Reporter.
W. W. R. .....Western Weekly Reports.
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of

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and

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DOMINION LAW REPORTS

Cited "D.L.R."

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I. Companies, officers and agents.

A. Right and manner of doing business.

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(§ I A—7)—Mutual company—Insuring property outside the province—Indorsement on policy.

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(§ I A—9)—License fee—Name of company—Fictitious name.

The name of a fictitious association under which a policy is issued by an insurance company is not "the name of any other insurance company or association," so as to make it liable to an additional fee within

the meaning of s. 2 (g), of the St John City Assessment Act (N.B.), 3 Geo. V. (1913), c. 55, as amended by 5 Geo. V. (1915), c. 94, requiring every insurance agent who issues a policy of any company and causes or permits it to be represented upon the name of any other insurance company or association, whether the same be connected with responsibility under the policy or not, to pay a fee of $100 for each company or association he represents.

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B. FOREIGN CORPORATIONS.

Regulation of foreign companies, license to carry on business, see Constitutional Law, II A—194.

(§ I B—11)—RIGHT TO SUE OR BE SUED.

The provisions of c. 7 of the Companies Act, 1910 (B.C.), will not permit an insurance company organized and having its head office and principal place of business in another province, although registered and having a registered office in British Columbia, to sue or be sued in the courts thereof, except in respect to business transacted therein.

Pearlman v. Great West Life Ass'ce Co., 4 D.L.R. 154, 17 B.C.R. 417, 21 W.L.R. 557, 2 W.W.R. 563.

The fact that a foreign mutual insurance company collects assessments from members residing in the Province of Quebec constitutes the possession of assets on its part in that Province; hence the company could be summoned to answer an action entered in that Province.

Hodges v. Commercial Travelers Mutual Benefit Society, 13 Que. P.R. 352.

C. DISSOLUTION; FORFEITURE; INSOLVENCY; RIGHTS OF MEMBERS OF MUTUAL COMPANIES.

(§ I C—17)—COMPULSORY LIQUIDATION OF MUTUAL COMPANY—RIGHTS AND LIABILITY OF MEMBERS.

When a policy of mutual insurance upon the premium note plan contains a stipulation that the company is to "return" a certain percentage of the premium for the unexpired time should the policy be "cancelled," the assured is liable upon the involuntary liquidation of the company to pay the whole of the premium note given in respect of the entire term for which the insurance was contemplated by the contract and not merely the proportion to the date of the liquidation when the insurance ceased by operation of law; any claim which the assured may have in respect of a return of a part of the premium is one to be advanced in the liquidation proceedings and not by way of defence to an action brought in the name of the company by the receiver in the liquidation. The amounts unpaid upon the premium notes of subscribers to a marine mutual insurance company organized under the laws of Massachusetts constitute an asset of the company applicable to the discharge of the company's obligations and recoverable as such in Nova Scotia by the receiver or liquidator appointed in involuntary liquidation proceedings taken against the company under the law of its domicile, although the insurance for which the notes were given had ceased by reason of the involuntary liquidations.

Pickles v. China Mutual Ins. Co.: China Mutual Ins. Co. v. Smith (No. 2), 10 D.L.R. 323, 47 Can. S.C.R. 429, 12 E.L.R. 300, affirming 3 D.L.R. 766, 11 E.L.R. 120.

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Liability for services of agent effecting reinsurance, see Principal and Agent, III—36.

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(§ I D—20)—BROKERS—FOREIGN COMPANIES—DUTIES AS TO REMITTING PREMIUMS.

An insurance broker who undertakes with his customer to place fire insurance in foreign companies not authorized to transact business in Ontario, and who is provided by the customer with the funds with which to pay the premium, is under an obligation to procure binding contracts of insurance, and to do all that was necessary on his part to procure them; his failure to pay the premium to one of the foreign companies whereby it was enabled to repudiate liability under the policy delivered will make him liable to the insured for the loss occasioned thereby.

Antiseptic Bedding Co. v. Gurofski, 21 D.L.R. 483, 33 O.L.R. 319.

BREACH OF AGENCY CONTRACT—OVERRIDING COMMISSIONS.

An agency contract between an insurance company and its district agent stipulating the forbearance of the company to take on subagents employed by him nor override his commissions paid them does not, upon the breach thereof by the company, entitle the agent to recover the commissions he would have earned on the applications secured by such subagents, where it appears that the agent subsequently agreed to accept from the company a smaller percentage in satisfaction of what he might have been originally entitled to.

Pearlman v. Great West Life, 22 D.L.R. 423, 32 W.L.R. 22.

BROKERS — COMMISSIONS—REPAYMENT UPON CANCELLATION OF POLICY.

A mandate given to an insurance broker is not gratuitous, and if the broker effects contracts with which he is charged by the insured he is entitled to his commission.

The insured, who under the name of premium pays to this agent a sum equal to the amount of the premium and his commission, and who later cancels the contract, has the right to be repaid by the agent the same proportion upon the commission as the agent can claim from the insurance company upon the premium.

Prévost v. Painchaud, 47 Que. S.C. 505.

(§ I D—21)—AGENTS—ALTERATION OF APPLICATION BLANK BY AGENT—LIMITED AUTHORITY—RESPONSIBILITY FOR ERROR.

Where the written application for insurance is altered by the insurance agent after it is signed and authenticated by the applicant, and, in so doing, the agent fills in the answer to one of the questions submitted to the applicant according to the agent's erroneous view of the appropriate answer, but not in conformity with the agent's personal knowledge of the facts (e.g., negativing the use of explosives, although blasting was essential to road-building operations in the locality), the agent is to be considered as acting for the company in that respect, and not for the assured.

Carlin v. Ry. Passenger Ass'ce Co., 14 D.L.R. 315, 18 B.C.R. 477, 25 W.L.R. 706, 5 W.W.R. 387.

(§ I D—22)—POWERS—LEASE—CORPORATE SEAL.

The provisions of the Companies Act (R.S.M. 1913, c. 35), do not apply to a company incorporated under the Mutual Fire Insurance Act, R.S.M. 1913, c. 101, and the powers of its officers and agents to bind the company must be gathered from the latter Act, or as they exist at common law; an agent's authority to make a lease of an office for the company's use or an agreement for such lease, is not within the term "regulations" mentioned in s. 27 of the Mutual Fire Insurance Act; to constitute a valid lease it must be under the corporate seal.

Richardson v. Urban Mutual Fire Ins. Co., 28 D.L.R. 12, 26 Man. L.R. 372, 34 W.L.R. 586, 10 W.W.R. 733.

UNAUTHORIZED ACCEPTANCE OF RISK—LIABILITY OF AGENT.

An insurance agent who exceeds his authority in underwriting a risk, at a lower rate than that authorized by the insurance company will, in the event of loss, be liable to the company to the extent of the loss it is made to pay.

Globe & Rutgers Fire Ins. Co. v. Wetmore, 23 D.L.R. 33, 49 N.S.R. 55.

RIGHT TO SUE FOR PREMIUMS.

An insurance agent charged by the insurance company for the premiums of all policies written by him, may sue, in his own name, for the recovery of premiums charged by him against his subagent.

Mowat v. Goodall, 24 D.L.R. 781, 21 B.C.R. 394, 31 W.L.R. 537, 9 W.W.R. 171. [See 24 D.L.R. 891, 22 B.C.R. 167, 33 W.L.R. 230.]

POWER TO BIND COMPANY.

When the application for insurance is prepared by the agent of the company, it should be considered to be the act of the company.

Lacombe v. La Protection, 48 Que. S.C. 531.

AGENT—WARRANT, MODIFICATION OF POLICIES—NULLITY—C.C. ARTS. 1703, 1704.

Unless a general authorization is given by an insurance company to an agent to consent to contracts of insurance, to issue policies and to cancel or alter them, an agent cannot make any change or alteration whatsoever. An insured who permits such unauthorized agent to alter his policy or to change its conditions, does so at his own risk, and in such case would have no redress from the insurance company; his contract of insurance thereby becoming void. The fact of an insurance company receiving from any person applications for insurance, and either refusing or accepting them, and in the latter case of sending to such person the policy for the purpose of being forwarded to the insured on payment of the premiums, is not sufficient to constitute such person an agent of the company with authority to cancel or alter the insurance policies issued.

Courville v. Central Canada Manufacturers Mutual Fire Ins. Co., 25 Rev. Leg. 225.

LIFE—FRIENDLY SOCIETY—DUES OF MEMBER—PAYMENT TO AGENT OF PROPER OFFICER — ESTABLISHED PRACTICE — AUTHORITY TO RECEIVE—MINISTERIAL ACT—FINDINGS OF JURY.

In an action by the beneficiary named in a life insurance certificate issued by the defendants, a freindly society, to recover insurance moneys and funeral benefits, the defendants pleaded that, by reason of the amount of a monthly assessment not having been paid, the assured was not in good standing as a member of the society at the time of his death, and that the certificate was not then in force. At the trial, the jury found that the amount alleged not to have been paid had been paid to K.; that K. had authority to receive it; and that it was so paid and received for the convenience of all parties concerned. W., the financial secretary, was the person designated by the society to receive payments; but for a great number of years members in a certain locality had made their monthly payments to K., who had a book in which the names of the members were entered, and when a payment was made gave a receipt signed by him (K.) as financial secretary. W. called regularly and received the moneys that had been paid to K.:—Held, that payment to K. was, in the circumstances, payment to W.; and, upon the findings of the jury, the plaintiff was entitled to recover. Although an agent may not appoint a subagent to do anything as to which the agent has to exercise a discretion, he may appoint a subagent to do mere

ministerial acts, such as the receipt of payments. [Rossiter v. Trafalgar Life Ass'ce Assn. 27 Beav. 377, 383, 384, applied and followed.]

Greenfield v. Canadian Order of Foresters, 45 O.L.R. 136.

AS TO PREMIUMS—SET-OFF.

The authority given to an insurance agent, to receive from the insured the payment of premiums for renewal, does not carry with it any legal presumption that he is authorized to set it off against his personal debt.

Létourneau v. Equitable Fire & Marine Ins. Co., 49 Que. S.C. 15.

(§ I D—23)—PERSONAL LIABILITY OF AGENT—PREMIUM NOTE.

An insurance agent who accepts from a person taking out a policy a note to his order representing the amount of the premium, and by endorsement transfers it to the insurance company which he represents and to whom he is indebted, is liable to the company for the amount of the note in the absence of proof that he had been authorized to accept it or that the company had accepted it in payment of the premium.

Sauvegarde v. Daoust, 48 Que. S.C. 394.

(§ I D—26)—ACTION BY INSURANCE AGENTS TO RECOVER MONEYS RETAINED BY SUB-AGENTS—COMMISSIONS.

Pace v. Peverett, 32 W.L.R. 715.

STATUTORY CONDITIONS—GASOLINE ON PREMISES—ILLUMINATING OILS INSURED—NOTICE OF LOSS.

Lewis v. Standard Mutual Fire Ins. Co., 44 Can. S.C.R. 40, reversing 19 Man. L.R. 720.

LIFE INSURANCE—POLICY FOR SIX MONTHS—HOMAN'S PLAN—RIGHT TO RENEWAL.

Eckersley v. Federal Life Ass'ce Co., 19 O.W.R. 507, 2 O.W.N. 1274.

II. Insurable interest.

A. IN PROPERTY.

(§ II A—30)—IN CHATTEL—REDUCTION BY SALE FOR LESS THAN INSURANCE—RETENTION OF LIEN—EFFECT OF.

Where an insurance policy for $3,000 insurance on a horse stipulated that in the event of death but two-thirds of the actual value of the animal should be paid, upon a subsequent sale of the horse for $1,500, the insured taking notes, with a lien on the horse for the deferred payments, his insurable interest was reduced to two-thirds of the amount of the notes, and the accruing interest thereon.

Gill v. Yorkshire Ins. Co., 12 D.L.R. 172, 23 Man. L.R. 368, 24 W.L.R. 389, 4 W.W.R. 692.

OWNER—PARTNERSHIP INSURING BUILDING OWNED BY MEMBER OF FIRM.

Condition 10 (a) of the Alberta statutory conditions (Ord. Alta. 1911, c. 113) applies only to cases in which the insured has an insurable interest less than that of an owner in the widest sense and where such lesser interest was intended by the insurer to be covered by th insurance; and the condition, therefore, does not apply where the insured had by right of occupancy and uses under an agreement with the owner an insurable interest to practically its full value.

Gainor v. Anchor Fire & Marine Ins. Co. (No. 2), 13 D.L.R. 206, 6 A.L.R. 95, 24 W.L.R. 656, 4 W.W.R. 900, reversing 9 D.L.R. 673.

"DIRECT LOSS"—HOUSEHOLD—PROOFS OF LOSS—TIME—60-DAY PERIOD—CONDITIONS.

Upon a fire insurance policy issued by the defendants, insuring household furniture, "the property of the assured or of any member of the assured's family," contained in a certain dwelling-house, the plaintiff was held, to have "an insurable interest" and to be entitled to recover the whole amount of a loss by fire, notwithstanding that he owned only a part of the property insured; the remainder being owned by his father, mother, brothers and sisters, all living in the house as one family. The words "direct loss," as used in an insurance contract, are not intended to exclude such a claim as the plaintiff's; they refer to the nature of the loss or damage—it must not be too remote. [Keefer v. Phœnix Ins. Co. of Hartford, 31 S.C.R. 144, followed.] Held, also, that the "proofs of loss" furnished by the plaintiff became the property of the defendants as soon as the letter containing them, addressed to the defendants, was posted (which was on January 8th); that was a sufficient delivery of the proofs within the meaning of the statutory condition 18; and, therefore, the period of 60 days, allowed by statutory condition 22 for payment of the loss had expired on the 10th March, when the action was begun, and the action was not prematurely brought; also, that, if the conditions as to proof had not been strictly complied with, the plaintiff was entitled to relief under s. 199, Ontario Insurance Act.

Maldover v. Norwich Union Fire Ins. Co., 40 O.L.R. 532.

FIRE INSURANCE — OWNERSHIP — SALE — RIGHT OF REDEMPTION—LEASE—CIV. C. ARTS. 2475, 2483, 2576, 2577, 1087, 1088—C. PROC. ART. 778.

When the owner of certain furniture sells them and immediately takes a lease of the same movable from the buyer, with a right of redemption at the expiry of the lease, he does not retain in them an insurable interest; and if he obtains a policy of insurance, declaring that he is the proprietor of these movables, the policy shall be declared null and void. The purchaser (adjudicataire) at a sheriff's sale, becomes proprietor of the lot sold at the moment it is adjudicated to him as the last and highest bidder, although the completion of the title is suspended for a time. And from that moment the last proprietor upon whom the sale was

made ceases to have any insurable interest in the building sold.

Bacon v. Insurance Co. of North America, 47 Que. S.C. 74.

IMPROVEMENTS BY LESSEE — PAYMENT OF TAXES AND INSURANCE—OPTION TO PURCHASE—INSURABLE INTEREST.

C. A. Paquet Co. v. Mutual Fire Ass'ce Co., 39 Que. S.C. 352.

DEATH OF A MEMBER OF THE FIRM OCCURRING BETWEEN THE APPLICATION AND THE ISSUE OF THE POLICY—UNDERTAKING TO PAY LOSS TO EXECUTORS OF DECEASED PARTNER.

Robert v. Equitable Mutual Ass'ce Co., 39 Que. S.C. 321.

INSURABLE INTEREST — STATUTORY CONDITION—AGREEMENT FOR SALE—CHANGE MATERIAL TO THE RISK—PROOF OF LOSS.

Trotter v. Calgary Fire Ins. Co., 3 A.L.R. 12.

III. The policy or contract.

A. In general.

(§ III A—40)—ANIMAL INSURANCE—APPLICATION AND POLICY — TENDER — ACCEPTANCE—CONTRACT—TIME.

Sharkey v. Yorkshire Ins. Co., 28 D.L.R. 191, 37 O.L.R. 344, reversing 10 O.W.N. 108. [For full judgment see 31 D.L.R. 435, affirmed in 32 D.L.R. 711, 54 Can. S.C.R. 92.]

MISDESCRIPTION OF PROPERTY—AGENT.

A wrong description of the property to be covered by a hail insurance policy, carelessly given by the application to an agent whose duty consists simply in soliciting and receiving applications and forwarding them to the company, voids the policy.

Doherty v. Canada National Ins. Co., 38 D.L.R. 494, 11 S.L.R. 32, [1918] 1 W.W.R. 366.

(§ III A—41)—VALIDITY GENERALLY.

Where one who is incapacitated by drink from knowing what he is doing signs an application for life insurance, filled in by the agent of the insurance company, which contains a material misrepresentation, and also a provision that, in the event of any such material misrepresentation in the application, the policy shall be void, and the untrue statement is never brought to the knowledge of, or ratified by the applicant, the application is a fraud by the agent upon both the insurance company and the applicant, and there is no valid contract of insurance.

Imperial Life Ass'ce Co. v. Audett, 5 D.L.R. 355, 4 A.L.R. 204, 20 W.L.R. 372, 1 W.W.R. 819.

HOUSE OF ILL-FAME—NOTICE OF CANCELLATION.

A policy of insurance on a house of ill-fame, which describes the risk as a "sporting house," is illegal on its face as facilitating the carrying out of an immoral and illegal purpose and unenforceable though notice of its cancellation had never reached the assured. [Clark v. Hagar, 22 Can. S.C.R. 510; Bruneau v. Laliberté, 19 Que. S.C. 425, followed; Morin v. Anglo-Can. Fire Ins. Co., 3 A.L.R. 121; Trites Wood Co. v. Western Assur. Co., 15 B.C.R. 405, overruled.]

Dominion Fire Ins. v. Nakata, 26 D.L.R. 722, 52 Can. S.C.R. 294, 9 W.W.R. 1084, reversing 21 D.L.R. 26, 9 A.L.R. 47, 8 W. W.R. 343, 31 W.L.R. 136.

(§ III A—42)—BENEFIT SOCIETY — BY-LAWS.

A benefit society which has never enforced a rule requiring dues to be promptly paid, but has made it a custom to accept payments from members in arrears whenever they were willing to pay, cannot invoke such rule in order to escape liability under the conditions of an insurance policy.

Belanger v. L'Union Mutuelle des Voyageurs de Commerce, 43 D.L.R. 90, 24 Rev. de Jur. 426.

PREMISES "OCCUPIED AS A SPORTING HOUSE" — PUBLIC POLICY — HIGHER RATE CHARGED — INCREASED RISK — CHANGE MATERIAL TO THE RISK.

Trites-Wood Co. v. Western Ass'ce Co., 15 B.C.R. 405.

(§ III A—44)—INTERIM RECEIPT—DURATION.

An interim receipt for a period of 30 days, issued on an application for a yearly policy, covers a loss occurring after the expiration of the receipt but within the term for which the policy applied for was accepted.

Beury v. Canada National Fire Ins. Co., 37 D.L.R. 105, 39 O.L.R. 343, affirming 35 D.L.R. 790, 38 O.L.R. 596.

INTERIM ORAL AGREEMENT PRELIMINARY TO POLICY—BINDING EFFECT.

A verbal interim agreement by the agent of an insurance company to protect the insured pending the issuance of the policy is binding upon the insurance company, although the agreement is for a smaller amount than contemplated on the entire risk.

Westminster Woodworking Co. v. Stuyvesant Ins. Co., 25 D.L.R. 284, 22 B.C.R. 197, 32 W.L.R. 802, 9 W.W.R. 418, affirming 8 W.W.R. 187.

(§ III A—46)—RENEWAL RECEIPT—INCORPORATION OF TERMS OF POLICY BY REFERENCE.

The words "according to the tenor" of a designated policy of accident insurance, used in a receipt for renewal of the insurance for another year, are sufficient to incorporate all of the terms and conditions of the policy in the new contract created by the renewal receipt, so as to comply with s. 144 (1) of the Insurance Act, R.S.O. 1897, c. 203, requiring that all the conditions or stipulations prejudicial to the insured or beneficiary shall be set out in full on the face or back of the instrument forming or evidencing the contract.

Youlden v. London Guarantee and Acci-

dent Co., 12 D.L.R. 433, 28 O.L.R. 161, affirming 4 D.L.R. 721, 26 O.L.R. 75, 21 O. W.R. 674.

FIRE INSURANCE—INTERIM RECEIPT—DURATION OF—EFFECT OF—ABSENCE OF WRITTEN APPLICATION WITH QUESTIONS AND ANSWERS—MATERIALITY.

Stoness v. Anglo-American Ins. Co., 20 O. W.R. 800.

(§ III A—47)—ACCEPTANCE OF RISK.

An application for insurance when duly accepted by an insurance company constitutes a valid contract to insure, and if the property covered by such application be destroyed by fire before the arrival of the policy itself, the insured will be entitled to recover the amount of the insurance.

Anglo-American Ins. Co. v. LeBaron, 2 D.L.R. 877.

(§ III A—48)—POLICY—DELIVERY OF, NECESSARY—INSURANCE ACT (CAN.)

Delivery of the policy or contract of fire insurance completed in other respects is necessary to its binding obligation on both parties, and the illegal issue in Canada of a policy of insurance by a foreign company not licensed under the Insurance Act (Can.) leaves it an incomplete and unenforceable contract, and not available by a licensed company as a breach of a condition of its concurrent policy with the assured that no other insurance should be effected without due notice to such licensed company.

Pacific Coast Fire Ins. Co. v. Hicks, 20 D.L.R. 298, 42 N.B.R. 294.

COMPLETION OF POLICY—TENDER—ACCEPTANCE.

A contract of insurance is complete only when the company has tendered a policy which has been accepted by the assured.

Robinson v. London Life Ins. Co., 42 D.L.R. 699, 42 O.L.R. 527.

HAIL INSURANCE—DELIVERY OF POLICY.

A policy sent to a company's local agent, countersigned by him, and ready for delivery, is in law delivered as an operative policy, and the parties thereto are bound thereby, the company for the risk assumed, and the insured for the premium.

Canada Hail Ins. Co. v. McIsaac, 39 D. L.R. 714, 11 S.L.R. 91, [1918] 1 W.W.R. 896.

DELIVERY—AGENT — WITHHOLDING DURING ILLNESS.

Returning a policy by the insurance company to its agent to be delivered to the assured, the application whereof having been approved and the premium thereon paid, but the policy being withheld by the agent, because of the illness of the assured, does not constitute a delivery of the policy as to render it effective within the meaning of a clause, "that the policy shall not take effect until the same has been delivered, the first premium paid thereon, and the official receipt surrendered by the company during the lifetime and continued good health of the assured." [Roberts v. Security Co., [1897] 1 Q.B. 111, distinguished.]

Donovan v. Excelsior Life Ins. Co., 26 D.L.R. 184, 43 N.B.R. 580, affirming 22 D.L.R. 307, 43 N.B.R. 325. [Affirmed in 31 D.L.R. 113, 53 Can. S.C.R. 539.]

(§ III A—49)—LOAN ON POLICY—CASH SURRENDER VALUE.

The "cash surrender value" clause of a life insurance policy, providing for nonforfeiture in the event of default in payment of any premium if the cash surrender value should exceed the amount of such premium, means the cash surrender value mentioned in the table of guaranteed loan and surrender values followed in another clause in the policy; that the insurer has the right to fix the surrender value for the purposes of the policy at the end of every year; and that the surrender value fixed at the end of any one year continues to be the surrender value until increased at the end of the next year, according to the table.

Devitt v. Mutual Life Ins. Co., 22 D. L.R. 183, 33 O.L.R. 473, reversing 33 O. L.R. 68.

B. REFORMATION; RESCISSION.

(§ III B—51)—RESCISSION.

Where an agent of a life insurance company, by an innocent error in calculation made at the time the policy issued, represented the surrender value of the policy to be greater than it really was, which correct amount could have been ascertained by insured by reference to a mortality table, in the absence of fraud or evidence shewing that this representation induced insured to take out the policy, rescission on the part of the insured will not be allowed, especially where many years elapsed before action is brought.

Shaw v. Mutual Life Ins. Co., 7 D.L.R. 637, 46 Can. S.C.R. 606, affirming 23 O.L.R. 559.

RESCISSION OF CONTRACT—TERM INSURANCE—"HOMANS" PLAN—FRAUD AND MISREPRESENTATION — CONSTRUCTION OF POLICY—ACTION FOR RESCISSION.

Eckersley v. Federal Life Ass'ce Co., 4 O. W.N. 1598.

C. CANCELLATION; SURRENDER; PAID-UP POLICY.

(§ III C—55)—SURRENDER VALUE—INTERPRETATION OF CLAUSE.

The clause "surrender value in cash" in a life insurance policy means the amount of money or its equivalent which the insurer could afford to pay to be rid of an existing policy, and is synonymous with "cash surrender value;" and the word "available" therein further used does not mean "existing," but contemplates a condition that can be taken advantage of.

Devitt v. Mutual Life Ins. Co., 22 D.L.R. 183, 33 O.L.R. 473, reversing 33 O.L.R. 68.

STATUTORY CONDITIONS AS TO CANCELLATION.

An insurance company seeking to utilize

the power of cancellation contained in condition 19 of the Alberta Statutory Conditions, must follow the terms of that condition.

Nakata v. Dominion Fire Ins. Co., 26 D.L.R. 722, 52 Can. S.C.R. 294, 9 W.W.R. 1084, reversing 21 D.L.R. 26, 9 A.L.R. 47, 31 W.L.R. 126, 8 W.W.R. 343.

SURRENDER OF POLICY—HUSBAND AND WIFE —INDEPENDENT ADVICE—LIFE INSURANCE POLICIES ACT.

The Life Insurance Policies Act, R.S.B.C. 1911, c. 115, does not require a wife to have independent advice before joining with her husband in the surrender of a policy of insurance taken out by him in her favour, especially where a fund is made of a portion of the premiums paid. Nor unless the circumstances of such surrender bring it within one of the exceptions referred to by Alverstone, C.J., in Howes v. Bishop, [1909] 2 K.B. 390, at 395, is there any rule of law casting upon an insurance company supporting the surrender an onus of showing that the document was adequately explained to the wife or that she had independent advice or sufficient protection.

Moore v. Confederation Life Ass'n., [1918] 2 W.W.R. 895.

(§ III C—36)—NOTICE OF—RETURN OF PREMIUM.

In order to validly cancel its policy of fire insurance under statutory condition No. 19, Con. Ord., N.W.T., c. 113, the insurance company must not only send notice to the assured, but tender him the unearned premium; even if the company's subagent had previously been authorized by the assured to hold the money for the purpose of procuring insurance elsewhere in the event of the company cancelling, the company would not be relieved from the necessity of making the tender or at least of causing him to be notified that the portion of the premium to which he was entitled was held at his disposal.

Nakata v. Dominion Fire Ins. Co., 21 D.L.R. 26, 9 A.L.R. 47, 31 W.L.R. 136, 8 W.W.R. 343. [Reversed in 26 D.L.R. 722, 52 Can. S.C.R. 294, 9 W.W.R. 1084.]

NOTICE OF CANCELLATION—AGENT.

An insurance broker, who is instructed in case of the cancellation of a policy to obtain insurance in some other company, is the agent of the insured for receiving such notice of cancellation.

Dominion Fire Ins. Co. v. Nakata, 26 D.L.R. 722, 52 Can. S.C.R. 294, 9 W.W.R. 1084, reversing 21 D.L.R. 26, 9 A.L.R. 47, 31 W.L.R. 136, 8 W.W.R. 343.

NOTICE OF CANCELLATION BY RECEIVER—EFFECT OF ON POLICY.

China Mutual Ins. Co. v. Smith (No. 2), 10 D.L.R. 323, 12 E.L.R. 300, 47 Can. S.C.R. 429, affirming 3 D.L.R. 766, 11 E.L.R. 120.

CANCELLATION OF POLICY—SUFFICIENCY OF.

A notice to insurance agents as follows: "I have just learned from Calgary that they have taken care of the insurance for the Allen, Moose Jaw, etc.," held to be under the circumstances sufficient notice of cancellation of the insurance under s. 11 of the Insurance Act (Sask., 1915, c. 15), although it did not request the cancellation of the insurance or cancel it by express words.

Cook-Henderson v. Allen Theatre, 47 D.L.R. 357.

NOTICE BY INSURER TERMINATING INSURANCE — SERVICE BY REGISTERED LETTER — TENDER OF UNEARNED PORTION OF PREMIUM BY ENCLOSING MONEY IN LETTER—LETTER NOT ACTUALLY RECEIVED BY ASSURED—INSURANCE ACT, R.S.O. 1914, c. 183, s. 194, CONDITIONS, 11, 15.

Veltre v. London & Lancashire Fire Ins. Co., 39 D.L.R. 221, 40 O.L.R. 619, reversing 12 O.W.N. 399.

D. CONSTRUCTION.

(§ III D—60)—CONSTRUCTION OF CONTRACT —RENEWAL RECEIPT—NEW AGREEMENT.

A receipt for a renewal for one year of a policy of insurance not contemplating an extension creates a new contract.

Youlden v. London Guarantee & Accident Co., 12 D.L.R. 433, 28 O.L.R. 161, affirming 4 D.L.R. 721, 26 O.L.R. 75, 21 O.W.R. 674.

A chime of bells in a church tower is included under the description "all church furnishings, furniture and fixtures" in a schedule of insurance in a policy.

Bishop of Fredericton v. Union Ass'ce Co., 4 N.B. Eq. 408.

ACCIDENT INSURANCE—"CONFINED TO THE HOUSE" AND UNABLE TO TRAVEL.

Guay v. Provident, etc., Ins. Co., 20 D.L.R. 978.

FIRE—APPLICATION FOR POLICY—SAME ISSUED ON CHANGED CONDITION—STATUTORY CONDITION GOVERNS.

McCutcheon v. Traders Fire Ins. Co., 19 O.W.R. 279, 2 O.W.N. 1136.

LIFE INSURANCE—RIGHT TO MONEY PAYABLE UNDER POLICY—BENEFICIARY AND EXECUTORS—POLICY REGARDED AS SECURITY FOR DEBT.

Robinson v. Imperial Life Ass'ce. Co., 9 E.L.R. 164.

(§ III D—65)—FIRE POLICY—MEANING OF "RAILWAY."

The word "railway" as used in a warranty by the insured in a policy of fire insurance covering lumber, that no railway ran within a specified distance of the insured property, is not limited to railways opened and used for general public traffic but also embraces railways in course of construction upon whose tracks construction trains and occasional freight trains are being operated to the knowledge of the insured.

Guimond v. Fidelity-Phœnix Fire Ins. Co., 9 D.L.R. 463, 47 Can. S.C.R. 216, 12 E.L.R. 350, affirming 2 D.L.R. 654, 10 E.L.R. 562.

FIRE—STATUTORY CONDITIONS — VARIATION —REDUCTION OF TIME FOR BRINGING ACTION—REASONABLENESS.

A variation of statutory condition No. 22 of the Ontario Insurance Act, (R.S.O. 1897, c. 203, 2 Geo. V. c. 33, R.S.O. 1914, c. 183), on a policy of fire insurance by reducing the time for bringing action on the policy to 6 months next after the occurrence of loss, is unreasonable and void. [Strong v. Crown Fire Ins. Co., 10 D.L.R. 42, 4 O. W.N. 584, affirmed; Eckhardt v. Lancashire Ins. Co., 27 A.R. 373, 31 Can. S.C.R. 72, followed.]

Strong v. Crown Fire Ins. Co.; Strong v. Rimouski Fire Ins. Co.; Strong v. Anglo-American Fire Ins. Co.; Strong v. Montreal-Canada Fire Ins. Co., 13 D.L.R. 686, 29 O.L.R. 33.

A provision in a policy of insurance that the insurer shall not be liable for loss where it shall be found that the material statements set forth in the application upon which acceptance of the risk was based where untrue or, if the insured misrepresented or omitted to communicate any circumstances which were material to be known to the company in order to enable it to judge of the risk withdraws the effect of a warranty by the insured in the application that his answers therein are true and introduces materiality as an essential of the misrepresentation, which shall relieve the company from liability. [Anderson v. Fitzgerald, 4 H.L. Cas. 484, and Fitzrandolph v. Mutual Relief Society, 17 Can. S.C.R. 333, distinguished.] A misrepresentation of the value of a stallion must be wilful or fraudulent to avoid the policy covering the same, value being a matter of opinion.

Clarke v. British Empire Ins. Co., 4 D. L.R. 444, 5 A.L.R. 99, 21 W.L.R. 774, 2 W.W.R. 682.

THE POLICY OR CONTRACT — CONSTRUCTION OF POLICIES ON PROPERTY—COLLATERAL INSURANCE—STATUTORY CONDITIONS.

Where a policy of fire insurance was issued to a bank on cotton warp in bales "their own or held by them in trust or on commission or sold but not delivered or in which they may have an interest or a liability" and such insurance was for an amount in excess of the bank's claim for advances to the owners of the goods, recovery cannot be had in respect of the excess over the bank's claim at the time of the loss by the parties beneficially entitled to the goods who held collateral policies of which no notice had been given to the insurance companies but who were not named in the policy as having an insurable interest.

British Columbia Hop Co. v. Fidelity Phœnix Fire Ins. Co., 20 D.L.R. 102, 20 B. C.R. 165, 29 W.L.R. 136, 6 W.W.R. 1539.

FIRE—STATUTORY CONDITIONS—VARIATION —REDUCTION OF TIME FOR BRINGING ACTION—REASONABLENESS.

A variation of statutory condition No. 22 of the Ontario Insurance Act (R.S.O. 1897, c. 203, 2 Geo. V. c. 33, R.S.O. 1914, c. 183), on a policy of fire insurance by reducing the time for bringing action on the policy to 6 months next after the occurrence of loss, is unreasonable and void. [Strong v. Crown Fire Ins. Co., 13 D.L.R. 686, 29 O.L.R. 33, affirmed on appeal; Eckhardt v. Lancashire Ins. Co., 27 A.R. 373, 31 Can. S.C.R. 72, followed.]

Anglo-American Fire Ins. Co. v. Hendry, 15 D.L.R. 832, 48 Can. S.C.R. 577, 50 C. L.J. 75.

CONTENTS OF BARN—SPECIAL CLAUSE.

An insurance company insured the plaintiff to the extent of $1,600 against fire in respect of the ordinary contents of a barn. The barn and contents were destroyed by fire, the loss being admitted to be $850. The company contended that, by reason of a term in the application for the insurance that "not more than two-thirds of the cash value of any building or personal property will be insured by this company," its liability was limited to two-thirds of the value of the property destroyed, the application forming part of the contract. The court held that it was unnecessary to consider whether the application was part of the contract or not. The policy insured against loss or damage to the extent of $1,600 to be estimated "according to the true and actual cash value of the property at the time the same shall happen." The assured having applied for $1,600 insurance and having by his application indicated his acceptance of the condition that the company would not insure more than two-thirds of the value, was entitled to rely on this condition and to treat the contract as based on the fact that the amount of insurance granted was within the two-thirds limit.

Forsyth v. Walpole Farmers Mutual Fire Ass'ce. Co., 43 D.L.R. 503, 43 O.L.R. 236, affirming 14 O.W.N. 114.

BODILY INJURIES—PROPERTY OF EVERY DESCRIPTION.

A clause added to a policy insuring against bodily injuries that "notwithstanding what is written within this policy is hereby extended to cover loss from liability for damage to property of every description" includes not only the physical injury to property but the loss incident to the inability of a building to perform its usual function while it is being repaired.

N.S. Tramways & Power Co. v. Employers Liability Ass'ce. Co., 40 D.L.R. 297, 52 N. S.R. 228.

MEANING OF WORDS "STORED OR KEPT" IN RELATION TO GASOLINE ON PREMISES—EXCESSIVE CLAIMS FOR LOSS AS A DEFENCE—ARBITRATION.

Patterson v. Central Canada Ins. Co., 20 Man. L.R. 295, 16 W.L.R. 647.

FIRE INSURANCE — CONSTRUCTION OF POLICIES—DIFFERENT CLASSES IN POLICIES.

Bishop of Fredericton v. Union Ass'ce Co., 10 E.L.R. 243.

STATUTORY CONDITIONS.

A policy of fire insurance, although purporting to be subject to statutory conditions endorsed thereon, where these have been replaced by later statutory conditions, is in law subject to such later conditions.

Boutry v. North British & Mercantile Ins. Co., 39 D.L.R. 414, 13 A.L.R. 43, [1918] 1 W.W.R. 704.

ASSIGNMENT OF INSURED PROPERTY—WRITTEN PERMISSION OF COMPANY NOT ENDORSED ON POLICY—VALIDITY—ONT. INSURANCE ACT.

Where insured property is assigned without the written permission of the insurance company being endorsed on the policy, the policy becomes void under statutory condition 3 of the Ontario Insurance Act, R.S.O. 1914, c. 183, s. 194.

Staddon v. Liverpool-Manitoba Ass'ce. Co., 47 D.L.R. 473, 44 O.L.R. 355.

SALE—DEFAULT OF PAYMENT—NULLITY OF SALE — INSURANCE — DEFAULT OF INSURANCE—LOSS OF TERM—C.C. ART. 1024, 1065, 1092.

An insurance policy taken on a house in favour of the vendor is a surety for the latter; and default of keeping it alive, is a diminution of sureties in the sense of art. 1092 C.C. The default of furnishing an agreed surety is equivalent to the diminution of surety mentioned in art. 1092 C.C. The stipulation in bill of sale, that in default of payment or in the fulfilling of other conditions of the sale, the sale shall become null, the sums paid shall be confiscated and the seller shall retake possession of the article sold, does not justify the application of art. 1092 C.C. which causes the debtor to lose the benefit of the term "if he has diminished the sureties which he had given by the contract to his creditors." The failure of the buyer to carry out the obligation which he has assumed towards his seller of insuring and keeping insured the house sold, for the benefit of the latter, does not cause the buyer to lose the benefit of the clause. A buyer of a vacant mill which he covenants to keep insured for the benefit of the seller cannot be considered to have diminished the sureties of the former and to have lost the benefit of the term if he fails in this obligation because no insurance company wished to accept the risk, seeing that the building was unoccupied.

Willems v. Fontaine, 25 Rev. Leg. 52.

FIRE POLICY — STATUTORY CONDITION 21 — FALSE STATEMENT IN DECLARATION — CLAIM DEFEATED.

Statement in statutory declaration of claimant under a fire insurance policy held to be false within statutory condition 21 of the Fire Insurance Policy Act (Man.) (as amended by c. 35, 1915).

Kibezy v. Home Ins. Co., [1919] 1 W.W.R. 423, affirming [1918] 2 W.W.R. 541.

(§ III D—66)—COMBINED STORE AND DWELLING—INSURED WHILE OCCUPIED AS A DWELLING — HOUSE UNOCCUPIED — LIABILITY OF COMPANY.

An insurance company issued separate policies insuring a number of houses, the policy in each case containing a clause insuring the building "while occupied by . . . as a dwelling." The houses were not completed or occupied at the time the insurance became operative. The court held that the word "by" should be deleted, and that while the insured may have been entitled to recover if loss had occurred before completion or occupation, that once the houses were occupied the condition attached and that subsequent vacancy suspended the insurance during the time of such vacancy, also that a building occupied as a combined store and dwelling was not occupied as a dwelling within the meaning of the above clause.

Ross v. Scottish Union & National Ins. Co., 46 D.L.R. 1, 58 Can. S.C.R. 169, affirming 39 D.L.R. 528, 41 O.L.R. 108.

(§ III D—68)—MARINE—POSITIVE REPRESENTATION — WARRANTY — PROMISSORY REPRESENTATION — NOT INCLUDED IN WRITTEN CONTRACT—EFFECT.

In marine insurance law a positive representation, which in another transaction would amount to a warranty, is regarded as a promissory representation which may be relied upon notwithstanding that it was made by word of mouth and is not included in the written contract.

Brooks-Scanlon O'Brien Co. v. Boston Ins. Co., 47 D.L.R. 93, [1919] 2 W.W.R. 129.

(§ III D—70)—OF POLICIES ON PERSONS.

In a policy of insurance stipulating for the payment to the insured's wife "should his death occur within the tontine period, thereof, otherwise to himself, his executors, administrators, or assigns, the sum of $1,000" and further providing that it was issued and accepted under the insurer's semi-tontine dividend plan upon special provisions incorporated in the policy and made a part thereof, one of which was that upon completion of the tontine period, if the policy had not been terminated previously by surrender, lapse or death, the legal holder thereof should have the option to withdraw in cash the accummulated reserve fixed by the policy at $465.70, and in addition thereto the surplus apportioned by the defendants to the policy, and the insured outliving the tontine period, he and his wife agreed to take such option and surrender the policy and accept its entire cash value of $642.70 and there was afterwards a disagreement as to the amount of the option, the insured and his wife were not entitled in an action on the policy to recover $1,000—the face value thereof—but their recovery would be limited to the amount of the option.

Labonté v. North Life Ass'ce Co., 3 D.L.R. 177, 3 O.W.N. 595, 21 O.W.R. 93.

CONSTRUCTION OF CERTIFICATE—ALTERATION OR AMENDMENT—EFFECT OF.

Cousins v. Brotherhood of Locomotive Engineers (No. 2), 14 D.L.R. 192, 22 Que. K.B. 307, affirming 6 D.L.R. 26.

LIFE POLICY—CONSTRUCTION—ELECTION BY POLICY HOLDER—ESTOPPEL EVEN IF BY MISTAKE.

Fountain v. Canadian Guardian Life Ins. Co., 19 O.W.R. 273, 2 O.W.N. 1120.

(§ III D—71)—ACCIDENT POLICY—CONSTRUCTION.

A clause in an accident insurance policy, insuring against loss sustained while "riding as a passenger within the enclosed part of any public passenger conveyance provided for the exclusive use of passengers and propelled by steam, compressed air, gasoline, cable or electricity, or while riding as a passenger on board a steam or gasoline vessel licensed for the regular transporation of passengers, and such injuries shall be due directly to or in consequence of the wreaking of such car or vessel," does not include an accident while attempting to leave a passenger elevator in a privately owned building. It is from the words and the context not from punctuation that the sense must be collected.

Robb v. Merchants Casualty Co., 44 D.L.R. 185, 29 Man. L.R. 113, [1918] 3 W.W.R. 322, reversing 41 D.L.R. 21.

CONSTRUCTION OF POLICIES—LIMITING LIABILITY.

Wadsworth v. Canadian Railway Accident Ins. Co., 13 D.L.R. 113, 28 O.L.R. 537, reversing 3 D.L.R. 668, 21 O.W.R. 601, 26 O.L.R. 55.

(§ III D—72)—POLICY—CONSTRUCTION—STATUTORY PROVISIONS AS TO CONDITIONS—VARIATION—EFFECT OF NON-COMPLIANCE WITH STATUTE—MEANING OF "RENEWED."

Cousins v. Moore, 6 D.L.R. 35, 42 Que. S.C. 156.

CONSTRUCTION OF POLICY—STATUTORY CONDITIONS—CERTIFICATE HOLDER CONTRACTING HIMSELF OUT OF THE STATUTE—R.S.Q. 1909, ART. 7028, SUBSS. (1) AND (3).

Cousins v. Brotherhood of Locomotive Engineers (No. 2), 14 D.L.R. 192, 22 Que. K.B. 307, affirming 6 D.L.R. 26.

(§ III D—73)—LIMITATION OF AGENT'S POWER TO MODIFY POLICY.

Where a policy of life insurance contains a provision to the effect that the agent has no power to modify the contract of insurance, or to bind the company by making any promises or by receiving any representation or information not contained in the application for the policy, a false representation by the agent to the insured made at the time of taking out the policy, even if it amounts to a promissory representation will not bind the insurance company.

Shaw v. Mutual Life Ins. Co., 7 D.L.R. 637, 46 Can. S.C.R. 606.

E. WARRANTIES; REPRESENTATIONS; CONDITIONS; DESCRIPTION.

(§ III E—75)—IN POLICIES ON PROPERTY.

A condition of an application for fire insurance to the effect that the applicant's covenant or agreement that certain statements were full and true expositions of all the facts and circumstances, so far as known to him, regarding the condition, situation, value and risk of the property to be insured, together with the diagram of the premises accompanying the application, should be held to constitute the basis of the company's liability, and form a part of and be a condition of the contract of insurance, is not binding on the applicant if not evidenced in the manner prescribed by ss. 169, 170, Ontario Insurance Act, R.S.O. 1897, c. 203. There is no misrepresentation or concealment by an applicant for a policy of fire insurance of the fact that the property was incumbered, where, without being aware that the application called for such disclosure, the applicant signed a blank application, which was filled out several days later by the agent of the insurance company, who, without the applicant's knowledge, wrote the word "none" after the clause relating to incumbrance, and placed a diagram of the premises on the application, since, under the circumstances, there was no intentional misstatement or concealment by the applicant.

Patterson v. Oxford Farmers Mutual Fire Ins. Co., 7 D.L.R. 369, 4 O.W.N. 140, 23 O.W.R. 122.

STATUTORY CONDITIONS—VARIATION—DESTRUCTION OF PROPERTY BY FOREST FIRES—REASONABLENESS.

A condition that a fire insurance company should not be answerable for loss occurring through forest fires, is a reasonable variation of the statutory conditions provided by the Uniform Conditions Act, R.S.B.C. 1911, c. 114.

Pratt v. Connecticut Fire Ins. Co., 16 D.L.R. 798, 19 B.C.R. 449, 27 W.L.R. 547, 6 W.W.R. 579, affirming 12 D.L.R. 645.

FALSE STATEMENT.

The language of an insurance policy must be read most strongly against the insurance company whose language it is; therefore, a stipulation in a policy of animal insurance that it shall be void if any circumstances shall not have been truly stated "by the assured" will be read as qualifying the statements contained in the application form to the effect that "any false statement annuls the policy," so that where the assured made full and true disclosure to the agent of everything about which he was asked, and signed the application form believing that the agent had correctly filled in his statement, he will not be bound by other statements which the agent had filled

in fraudulently, and the company will by reason of the limitation of the condition to statements "by the assured" be prevented from setting up that the policy was void because of an untrue statement contained in the application inserted therein by the insurance agent without the assured being aware of it.

Dowdy v. General Animals Ins. Co., 21 D.L.R. 492, 33 O.L.R. 258.

CONDITIONS—REASONABLENESS—NOTICE OF ILLNESS OF INSURED ANIMAL—TIME FOR GIVING.

A condition of a contract of insurance on an animal that notice of its illness should be given an insurance company within 24 hours, as applied to persons living in the country, is unreasonable, if the time for giving notice is stipulated to run from the moment the animal actually became ill, and not from the actual discovery of its illness.

Gill v. Yorkshire Ins. Co., 12 D.L.R. 173, 23 Man. L.R. 368, 24 W.L.R. 389.

FIRE INSURANCE—CONDITIONS—VALUE.

In the absence of fraud or of actual misrepresentation of value on the part of the insured, a policy of fire insurance to cover stock furniture and fixtures is not avoided for over-valuation of one of the items into which the risk was apportioned by the policy where the company knew the assured had signed the application in blank as regards the amounts to be placed upon each class of goods for the purpose of having the company make an inspection and itself apportion to each class the amount of risk to be carried, and where the company had apportioned the same upon their own agent's report and filled in the application accordingly.

Mahomed v. Anchor Fire & Marine Ins. Co., 15 D.L.R. 405, 48 Can. S.C.R. 546, 26 W.L.R. 695, 5 W.W.R. 1038, reversing 7 D.L.R. 619, 17 B.C.R. 517.

MISREPRESENTATION — HEALTH — TUBERCULOSIS.

It is not a misrepresentation or breach of warranty by an assured that he was in "sound condition mentally and physically," merely because he once suffered with a tubercular affection of the lung which has healed up, no disease being apparent which could not have passed him as sound under any medical examination.

Fidelity & Casualty Ins. Co. v. Mitchell, 36 D.L.R. 477, [1917] A.C. 592, 13 O.W.N. 181, affirming 28 D.L.R. 361, 37 O.L.R. 335; 26 D.L.R. 784, 35 O.L.R. 280.

INCENDIARISM — MATERIALITY — NOTICE TO AGENT.

Apprehension of incendiarism is a material fact, and should be made known to the insurer. Notice of such fact to insurers' general agent is notice to the insurer, and a condition to the contrary in the policy of insurance is unreasonable and noneffective.

Gabel v. Howick Farmers Mutual Fire Ins. Co., 38 D.L.R. 139, 40 O.L.R. 158.

FOREST FIRE CONDITION.

A condition of a policy of fire insurance that the insurer should not be liable for loss caused by forest fires is just and reasonable.

Hall Mining & Smelting Co. v. Connecticut Fire Ins. Co., 18 B.C.R. 113.

ANIMAL INSURANCE—MISREPRESENTATIONS—IMMATERIALITY—ONTARIO INSURANCE ACT, R.S.O. 1914, c. 183, s. 156 (6)—"CASH."

Good v. General Animals Ins. Co., 11 O.W.N. 314.

DUTY TO DISCLOSE KNOWN FACTS.

The insured is not bound to state facts which the insurer is supposed, on account of their public character and notoriety, to know.

Lacombe v. Protection, 48 Que. S.C. 531.

QUEBEC FIRE POLICIES.

Although arts. 6870 et seq. R.S.Q. 1909, for establishing mutual fire insurance companies in rural municipalities, do not provide for the issue of a policy or other written instrument to evidence the contracts of insurance, such companies are subject to the provisions of art. 7028, and conditions of insurance imposed by by-laws or otherwise, that are not set out on a written instrument delivered to the assured, are not binding upon him.

Chicoine v. Mutual Ins. Co. of Roxton, 44 Que. S.C. 100.

ENDOWMENT POLICIES — REPRESENTATION BY PERSON THROUGH WHOM CONTRACT EFFECTED — AMOUNTS OF RESERVE AND SURPLUS.

Shaw v. Mutual Life Ins. Co., 23 O.L.R. 559, 18 O.W.R. 925.

(§ III E—76)—CONCEALMENT.

The defence to an action on a policy of fire insurance of the concealment by and the failure of the applicant for the insurance to state in his application that he feared incendiarism fails where the only evidence on the question was that seven or eight years before a threat had been made to burn him out. The defence to an action on a policy of fire insurance of the nondisclosure by the plaintiff of the fact that the property to be insured was incumbered, rests upon the question whether the insurance company was prejudiced by such nondisclosure. The failure of an applicant for fire insurance to disclose to the insurance company all material circumstances pertaining to the property to be insured, even though the applicant is innocent of wrong intent, will vitiate the contract of insurance where the company has been prejudiced by such nondisclosure.

Patterson v. Oxford Farmers Mutual Fire Ins. Co., 7 D.L.R. 369, 4 O.W.N. 140, 23 O.W.R. 122.

A policy of insurance which contains a condition that the insurer shall not be

liable for loss when it shall be found that the material statements set forth in the application upon which acceptance of the risk was based were untrue or if the insured misrepresented or omitted to communicate any circumstances which are material to be known to the insurer to enable it to judge of the risk it undertakes, is invalidated where the insured in answer to questions in the application for insurance on a stallion, replied that he had owned the stallion 3 months and that he had paid $2,000 for it, and where in answer to the next following question he gave the name of the original vendor from whom he had purchased same 2 weeks prior to the application at a price not exceeding $500, although the assured may be shewn to have sold the stallion meanwhile for a large price and to have repurchased from the buyer (not mentioned in the application) at the price of $2,000. [Western Ass'ce Co. v. Harrison, 33 Can. S.C.R. 473, followed.] The length of time a person has owned a stallion and the price paid for same are material to the risk and any concealment or nondisclosure in connection therewith in an application for insurance on such stallion in which questions are put to the assured for the purpose of obtaining such information, will be sufficient to invalidate the policy. [Western Ins. Co. v. Harrison, 33 Can. S.C.R. 473, applied.]

Clarke v. British Empire Ins. Co. (No. 2), 6 D.L.R. 353, 5 A.L.R. 99, 22 W.L.R. 89, 2 W.W.R. 958, reversing 4 D.L.R. 444, 21 W.L.R. 774, 2 W.W.R. 682.

WARRANTY — CONCEALMENT — INSURING LIFE OF HORSE — REPRESENTATION OF PRICE PAID — EVASIVE AND INCORRECT ANSWER SUGGESTED BY AGENT.

Bastedo v. British Empire Ins. Co., 16 D.L.R. 244, 18 B.C.R. 377, 4 W.W.R. 905.

INSURANCE OF AN AUTOMOBILE — FALSE REPRESENTATION — FRAUDULENT CONCEALMENT — EXAGGERATED VALUE — PROOF — C.C., ARTS. 1203 2485, 2487, 2488.

There is no false representation or fraudulent concealment on the part of an owner who has insured his automobile in the following declaration: (a) the machine was kept in a private garage whereas at the time of the contract of insurance, it was temporarily in a public garage from whence it was brought some days later to the home of the insured; (b) the assured has declared that the automobile was paid for; whereas he had given, in buying it, 3 bills and had undertaken to pay off certain debts in connection with the auto. When the insurer alleges that the value of the thing has been exaggerated, he must prove it.

Desmarais v. London Guarantee & Accident Co., 25 Rev. Leg. 301.

(§ III E—78)—PREVIOUS FIRES — CONCEALMENT — MATERIALITY TO THE RISK —CONTINUANCE OF OLD RISK.

In a fire claim under a policy of fire insurance, where the insured in his application for the policy had answered in the negative, the question as to whether he had had a fire previously; and where it appeared that some years prior to the application he had a fire loss on other property, on which, however, the insurance was promptly adjusted and paid, and that the risk was continued by the insurer, such nondisclosure in the application was not, under the circumstances, material to the risk.

Anglo-American Fire Ins. Co. v. Hendry, 15 D.L.R. 832, 48 Can. S.C.R. 577, 50 C.L.J. 75, affirming, sub nom. Strong v. Crown Fire Ins. Co., 13 D.L.R. 686, 29 O.L.R. 33, at 45, which affirmed 10 D.L.R. 42, 29 O.L.R. 33, 23 O.W.R. 701.

(§ III E—79)—FIRE INSURANCE — OVERVALUATION.

A fire insurance policy, whereby the insurer undertakes to pay to the assured nothing but the amount of the loss which he may suffer, notwithstanding the amount of the valuation thereof by the assured, is an open policy. A stipulation in the policy that false declarations on the part of the assured in his application for insurance (such declarations being of a nature which might prejudice the insurer), have the effect of annuling the contract, does not apply to an over-valuation by the assured of the thing insured.

Robillard v. Springfield Fire Ins. Co., 46 Que. S.C. 148.

(§ III E—80) — TITLE AND INCUMBRANCES.

A mortgagor of insured property is the sole and unconditional owner thereof within the meaning of a provision of a policy of insurance avoiding the same if the insured is not such owner. [Western Ass'ce Co. v. Temple, 31 Can. S.C.R. 373, affirming 35 N.B.R. 171, followed.] A transfer of insured property as security for a debt is a violation of provisions in the policy avoiding it if the subject of the insurance be personal property and be or become encumbered by a chattel mortgage or if any change take place in the title or interest of the property otherwise than by the insured's death.

Guimond v. Fidelity Phoenix Fire Ins. Co., 2 D.L.R. 654, 10 E.L.R. 562. [Affirmed in 9 D.L.R. 463, 47 Can. S.C.R. 216, 12 E. L.R. 350.]

MISREPRESENTATION AS TO TITLE.

A lessor's covenant to convey does not give the lessee such an interest in the land as will warrant his representation that he is owner of the property when applying for insurance; his answer to that effect on the

application amounts to a material misrepresentation which voids the policy.

Daniels v. Acadia Fire Ins. Co., 35 D.L.R. 601, 51 N.S.R. 133.

CONDITION — TITLE TO PROPERTY — NOTICE BY INSURER — NECESSITY.

A condition avoiding a policy of insurance if the insured is not the owner of the insured property unless his interest is stated on or in the policy, will not invalidate an insurance placed by a partnership, under an oral application, without being called on to disclose its interest, on a building owned by a member of the firm who gave the use of the building to the copartnership in consideration of keeping it insured, at least where the insurer has not given notice pointing out the difference between the application and the policy in the manner required by condition 2 of c. 113, N.W.T. Ordinances, Alberta 1911.

Gainor v. Anchor Fire & Marine Ins. Co. (No. 2), 13 D.L.R. 206, 6 A.L.R. 95, 4 W.W. R. 900, 24 W.L.R. 656, reversing 9 D.L.R. 673.

AS TO OWNERSHIP—MATERIALITY.

Notwithstanding the condition in an insurance policy that "any fraud or false statement in a statutory declaration shall vitiate the claim," a representation or statutory declaration by the assured that he was the owner of the property, whereas, in fact, the property was purchased with the funds of the assured's brother but intended for the assured, does not materially affect the risk as vitiating the policy on that account.

Canadian Credit Men's Assn. v. Stuyvesant Ins. Co., 26 D.L.R. 314, 26 Man. L.R. 226.

LIVE STOCK INSURANCE — STATUTORY CONTRACT — STATUTORY CONDITIONS — AGENT — ANSWERS IN APPLICATION FOR POLICY — INSURANCE ACT, S. 193 — VARIATION OF CONDITIONS — "NOT JUST AND REASONABLE" — OWNERSHIP — PROOFS OF LOSS — VALUE OF ANIMAL INSURED — DEDUCTION FROM AMOUNT INSURED.

Scharf v. General Animals Ins. Co., 8 O.W.N. 420.

(§ III E—81) — PREMISES INSURED ADJUDGED TO SURVIVING PARTNER UNDER LICITATION PROCEEDINGS.

The adjudication of property under licitation proceedings is not an alienation that annuls the insurance of it under art. 5307, R.S.Q. 1888.

Robert v. Equitable Mutual Ass'ce Company, 39 Que. S.C. 321.

(§ III E—82)—MORTGAGES.

Where a defence had not been brought within the rule of art. 2487 C.C. (Que.) and that the judgment of the Superior Court against the insurer should not be reversed.

Phœnix Ass'ce Co. v. Morin, 18 Rev. de Jur. 94.

(§ III E—85)—CONDITIONS — "JUST AND REASONABLE"—OCCUPANCY.

A condition in a policy vitiating it if the insured premises becomes vacant or unoccupied, contemplates vacancy or desertion of the building in its ordinary undestroyed condition, and not after it had been rendered untenantable and unfit for occupation by fire; otherwise the condition is neither just nor reasonable under s. 72 of the Alberta Insurance Act.

Moran v. North Empire Fire Ins. Co., 33 D.L.R. 461, 10 A.L.R. 339, [1917] 1 W.W. R. 1192.

SUBJECT-MATTER OF INSURANCE — OCCUPIED HOUSES—FIRE OCCURRING WHILE SOME OF THE HOUSES UNOCCUPIED—POLICIES NOT EFFECTIVE AS TO UNOCCUPIED HOUSES — DEFENCE AS TO OCCUPIED HOUSES — VACANCY AS TO OTHERS — CHANGE MATERIAL TO THE RISK—ABSENCE OF NOTICE — STATUTORY CONDITION 2 (INSURANCE ACT, S. 194) — FINDING OF JURY — S. 156 (6) — EVIDENCE — APPEAL — COSTS — INTEREST.

Ross v. Scottish Union & National Ins. Co., 39 D.L.R. 528, 41 O.L.R. 108.

FIRE INSURANCE — GOODS DESTROYED ON PREMISES DESCRIBED IN POLICY—TRANSFER TO OTHER PREMISES — RETRANSFERRED TO ORIGINAL PREMISES.

Kline Bros. v. Dominion Fire Ins. Co., 2 O.W.N. 917, 18 O.W.R. 876.

FIRE POLICY — CHANGE MATERIAL TO THE RISK—POOL ROOM AND RESTAURANT.

Morton v. Anglo-American Fire Ins. Co., 19 O.W.R. 870, 2 O.W.N. 1470.

(§ III E—87)—In a contract of fire insurance on a building described in the policy as being "in the course of construction," where the work on the building has been suspended, and owing to financial embarrassment it remained in an incompleted state until destroyed by fire, the term "in course of construction" is ambiguous and must be interpreted not as a question of law but of fact in view of all the circumstances, including what passed between and was within the knowledge of the contracting parties. Under a contract of fire insurance on a building, described in the policy as being "in course of construction," where the work on the building had been suspended, and it remained in an incompleted state until destroyed by fire, the risk remains in force, it being clear that the term "in course of construction" does not mean that construction must be continued from day to day or month to month without interruption but is to be construed in the light of such contingencies as weather, conditions of trade and labour, and inevitable accident, and even financial embarrassment. [Dodge v. York Fire Ins. Co., 4 D.L.R. 465 (a), 2 O.W.N. 571, 18 O.W.R. 241, since affirmed by the Supreme Court of Canada, followed.]

Dodge v. Western Canada Fire Ins. Co. (No. 2), 6 D.L.R. 355, 5 A.L.R. 294, 2 W. W.R. 972, reversing 4 D.L.R. 465, 1 W.W. R. 916, 21 W.L.R. 558.

VACANCY.

An insurance policy contained a condition that "this policy will not cover vacant or unoccupied premises . . . and if the premises insured shall become vacant or unoccupied . . . this policy shall cease and be void unless the company shall by indorsement on the policy allow the policy to be continued":—Held, that these were just and reasonable conditions.

Hall Mining & Smelting Co. v. Connecticut Fire Ins. Co., 14 D.L.R. 400, 18 B.C.R. 113.

FIRE INSURANCE — POLICY DESCRIBING AS "OCCUPIED" — FAILURE TO NOTIFY OF VACANCY ON RENEWAL.

Cox v. Phœnix Ins. Co., 20 D.L.R. 980, 23 Que. K.B. 530.

FIRE — STATUTORY CONDITIONS — VACANCY CLAUSE — VARIATION.

That the fire insurance company shall not be answerable if insured premises should become vacant or unoccupied is a reasonable condition to be inserted in a policy as a variation of the statutory conditions under the Uniform Conditions Act, R.S.B.C. 1911, c. 114, and such condition is therefore valid if printed in conformity with that act.

Pratt v. Connecticut Fire Ins. Co., 16 D.L.R. 798, 19 B.C.R. 449, 27 W.L.R. 547, 6 W.W.R. 579, affirming 12 D.L.R. 645, 4 W.W.R. 1012.

VACANCY OF BUILDING — MATERIALITY — PROOF OF LOSS—DELAY.

The vacancy and nonoccupancy of a building insured against fire, without the consent or the knowledge of the insurer is material to the risk and renders the policy void. Where a policy requires that the insured must furnish proof of loss within 60 days after the fire, in the manner and form therein provided, the compliance with these provisions of the policy is a condition precedent to the right of action to recover the loss.

Anderson v. Norwich Fire Ins. Soc., 53 Que. S.C. 409.

(§ III E—91)—FIRE INSURANCE ON GOODS —CHANGE OF LOCATION.

Antedating a consent to a transfer, of a fire insurance policy covering a stock of goods on their removal from one warehouse to another, will not operate to bind the insurance company, when obtained after the fire, but without disclosing the fact, in the knowledge of the insured but not known to the insurance company, that the fire had already occurred.

Kline v. Dominion Fire Ins. Co., 9 D.L. R. 231, 47 Can. S.C.R. 252, affirming 1 D. L.R. 733, 25 O.L.R. 534, 21 O.W.R. 285.

CHANGE OF LOCATION — NOTICE — KNOWLEDGE OF AGENT—ESTOPPEL.

In an action to recover a loss on a stock of merchandise the defendant company refused to pay more than its pro rata proportion of the total insurance which had been effected on the property, including 4 policies effected by companies that refused to contribute on the ground that such policies had been avoided by a change of the location of the goods insured, to which change they had not assented, and of which they had had no notice. Held, that a change of the location of a stock of merchandise insured under policies which assume the risk only when contained in a specified building from the building specified to another avoids the policy absolutely. Such a stipulation is part of and of the essence of the contract, and is not a condition limiting the liability of the company assuring, which is not binding unless set forth in the policy in the manner required by the Insurance Act. The fact that the agent of the companies claiming their policies were avoided by the change of location was aware of the change of location, and that another agent, not having authority to consent to the change, took the policies from the assured with the intention of having the consent of the assurers to the change indorsed thereon, but neglected to do so, will not operate as an estoppel against the assurers claiming that the risk had been avoided.

Arnold v. British Colonial Fire Ins. Co., 45 N.B.R. 285.

(§ III E—92)—STATUTORY CONDITIONS.

Fire insurance is subject, in Quebec, to certain statutory conditions, and it is required that they shall be endorsed upon policies. Every application for insurance is, therefore, impliedly subject to such conditions, except as varied by the parties under conditions which permit such variation, and noted upon the policy. It is not necessary for the insurer to notify the insured of any particular in which the policy differs from the application.

Laforest v. Factories Ins. Co., 30 D.L.R. 265, 53 Can. S.C.R. 296, affirming 24 Que. K.B. 543.

PROHIBITED KEEPING OF GASOLINE—DISTANCE —MATERIALITY.

Keeping a barrel of gasoline, about 16 feet from the building, is not a breach of condition in a fire insurance policy that the policy shall become void if more than 5 gallons of gasoline were "kept and stored" at one time in the building containing the insured goods; nor is it a circumstance material to the risk, nondisclosure of which would avoid the policy, where the insurance company at the time of issuing the policy had knowledge of the circumstances and the gasoline so stored is required for daily use.

Evangeline Fruit Co. v. Provincial Fire Ins. Co., 24 D.L.R. 577, 51 Can. S.C.R. 474, reversing 17 D.L.R. 378, 48 N.S.R. 39.

(§ III E—100)—Concurrent insurance —Notice after placing second policy.

Notice that additional insurance has been placed on insured property is a sufficient compliance with a condition of another policy that notice should be given of the insured's intention or desire of effecting further insurance.

Worth v. Yorkshire Ins. Co., 12 D.L.R. 411, 13 E.L.R. 145.

Other insurance—Assent.

The insurer's assent to subsequent insurance may be inferred from knowledge and a course of conduct.

Moran v. North Empire Fire Ins. Co., 33 D.L.R. 461, 10 A.L.R. 339, [1917] 1 W.W.R. 1192.

Previous fires.

A question in an application for insurance as to whether the insured ever had any property destroyed by fire is material to the risk, misrepresentation of which vitiates the policy. [Western Ass'ce Co. v. Harrison, 33 Can. S.C.R. 473, reversing 35 N.S.R. 488, followed.]

Wilton v. Occidental Fire Ins. Co., 35 D.L.R. 267, 11 A.L.R. 581, [1917] 2 W.W.R. 787.

Additional insurance—Consolidation of stock.

Where goods contained in 2 separate buildings are insured in 2 different companies, the consolidation of the 2 stocks into one stock does not effect additional insurance within the meaning of the Ontario Insurance Act, R.S.O., 1914, c. 183, s. 194 (5).

Rogers v. General Accident Fire and Life Ass'ce Co.; Rogers v. Mercantile Fire Ins. Co., 42 D.L.R. 656, 42 O.L.R. 419, affirming 13 O.W.N. 175.

80 per cent clause — Compromise of claim.

A clause in a fire insurance policy permitting further concurrent insurance up to 80 per cent of the cash value, means that the insured is not entitled to recover upon all the policies together more than 80 per cent of the total value of the goods insured as that value stands at the time of the fire.

Taylor v. Equitable Fire & Marine Ins. Co., 13 A.L.R. 58, [1918] 1 W.W.R. 277, 676.

Other concurrent insurance — Additional insurance effected with foreign companies — Nondisclosure of such additional insurance to plaintiff—Amount of policy paid over by plaintiff — Action to recover money back.

Pacific Coast Ins. Co. v. Hicks, 13 E.L.R. 194.

Prior insurance — Statutory conditions.

The declaration made by the insured of prior insurance and its mention in the policy do not constitute a guarantee that the assured will maintain in force this first policy, and he may discontinue it without losing his rights against the second insurance company. Under R.S.Q. 1909, arts. 7034–8, a company which has already insured property is not liable for its loss by fire if subsequent assurance has been effected upon the property with another company, unless the former company has agreed thereto, or does not within 2 weeks from the receipt of a notice in writing of the wish of the insured to affect the subsequent insurance, refuse its consent in writing, or does not after the 2 weeks but before the subsequent insurance is effected refuse its consent in writing. Articles 7034–8, are deemed to form part of every insurance policy, and every derogation from these conditions is subject to the conditions of art. 7035, otherwise it is void as against the insured under art. 7036.

Siegler v. Provincial Fire Ins. Co., 47 Que. S.C. 497.

(§ III E—110)—Automobile accidents—Sand on road.

A pile of sand on the roadway is not part of the road-bed and is not within the exceptions contained in an accident insurance policy, insuring an automobile but excluding all loss or damage caused by "striking any portion of the road-bed or by striking the rails or ties of any street, steam or electric railway."

Collins v. Canadian Casualty Co., 40 D.L.R. 133, 25 B.C.R. 401, [1918] 2 W.W.R. 763.

Untrue statements by applicant — Materiality—Avoidance of policy.

Byrick v. Catholic Order of Foresters, 9 O.W.N. 334.

Medical report in life insurance.

Answers to questions on the back of an application for life insurance, under the heading, "Questions to be asked by the Medical Inspector," written by such inspector, and not signed by the applicant, are not answers by the latter, and cannot be set up against him by the insurer, as false representations, in avoidance of the insurance.

Fernand v. Metropolitan Life Ins. Co., 44 Que. S.C. 117.

(§ III E—111)—False answers or concealment.

A husband, beneficiary in a policy of insurance upon the life of his wife, is a party to and affected by her misrepresentation and concealment of the fact where he knew that at the time she made application for such insurance she was suffering from consumption, and had been informed by a physician that she could live but a short time, and in spite of such knowledge that she was so affected, he took her to the agent of the insurance company and himself paid the premium for the insurance which he knew was being made for his benefit and

omitted to disclose those facts to the company.

Strano v. Mutual Life Ass'ce Co., 5 D.L.R. 719, 3 O.W.N. 1372, 22 O.W.R. 311.

(§ III E—112) — UNDERTAKING TO HAVE POLICY READY AT A CERTAIN TIME — AGENT STAYING HAND OF COMPANY — POLICY NOT READY—LIABILITY FOR PREMIUM.

An insurance agent who undertakes to have an insurance policy ready at a certain date, and, by an unauthorized departure from the terms of the application, stays the hand of the insurance company so that the contract is not concluded or the policy issued until after the date agreed upon, cannot recover the insurance premium from the insured.

Brown's Traveling Bureau v. Taylor, 44 D.L.R. 204, 26 B.C.R. 82, [1918] 3 W.W.R. 468.

(§ III E—115)—HEALTH AND HABITS.

Where an applicant for insurance declared in his medical examination that each of his answers to the questions therein was, to the best of his knowledge, information and belief, complete and true, and was a continuation of and formed a part of his application for insurance, and the application itself contained the statement that the applicant was, to the best of his information, knowledge and belief, in good health and that such statements and the statements made or to be made to the insurer's examining physician should form the basis of the contract of insurance, and if there was therein any untruth or suppression of facts material to the contract, the policy should be void, such statements were no more than statements founded on knowledge, information and belief, and were not absolutely and unqualifiedly warranted to be true, and, unless it could be found that the applicant knowingly misstated the facts and induced the issue of the policy on such facts, as stated, the insurer should not be exonerated from liability under it. [Confederation Life v. Miller, 14 Can. S.C.R. 330, followed.] Where an applicant for insurance disclosed to the insurer's agent that he had been just prior to the making of the application under medical treatment and the agent communicated this to the insurer's medical examiner, and the latter admitted that he discussed that illness with the applicant at the time of his examination and that it was his own omission and not that of the applicant, that the answer to the question was not correctly written down, there was no intentional concealment or suppression of the fact of the recent medical treatment on the part of the applicant sufficient to avoid the policy. In the medical examination part of an application for a policy of life insurance, where it is the duty of the medical examiner to insert the applicant's answers properly and where he thought he had done so, the error (if any) of that officer is to be attributed to the insurer and not to the assured. [Biggar v. Rock Life, [1902] 1 K.B. 516, distinguished.] And where the applicant gave a negative answer to a question appearing therein, in the following form: "Have you now, or have you ever had any disease or disorder of the heart or blood vessels? Atheroma, palpitation of the heart, varicose veins, etc., aneurism," and the medical examiner failed to explain the meaning of the technical terms therein, and nothing appeared in the evidence to shew that the applicant knew that he had any of the diseases or disorders referred to in the question, such answer was an innocent misstatement not avoiding the policy, even though it was untrue at the time it was made.

Sawyer v. Mutual Life Ass'ce Co. of Canada (No. 2), 8 D.L.R. 2, 22 Man. L.R. 613, 3 W.W.R. 328, 22 W.L.R. 418, affirming 4 D.L.R. 295, 21 W.L.R. 493, 2 W.W.R. 508.

Answers by an applicant for insurance to questions on her medical examination, which the application declared to form the basis of the contract, so that any untruth or suppression of material facts therein would avoid the policy, in which answers the applicant stated that she had had pneumonia about a year before; that she had fully recovered therefrom, that she had had occasional mild attacks of bronchitis, and that she had recently consulted a physician because of a cold, when in fact she was aware that she was then suffering from tuberculosis, and had been informed by such physician that she could live but a short time, were sufficient misrepresentations and suppressions of material facts of which the company should have been informed, to avoid the policy.

Strano v. Mutual Life Ass'ce Co., 5 D.L.R. 719, 3 O.W.N. 1372, 22 O.W.R. 311.

HEALTH AND HABITS.

Concealment or false declarations in an application for a life insurance policy only avoids the contract resulting therefrom if they are of a character to materially affect the risk. The applicant who, to the question "what quantity do you drink, daily, of liquors, malt liquor, wine, spirits?" replies, "none, none, none," when he is not in the habit of taking any of them every day and sometimes takes nothing for 6 months is not guilty of concealment or of a false declaration. The answer "no" to the question, "Have you ever had any serious illness? Have you ever suffered from gonorrhea?" When the applicant had sustained an attack of the latter is not a concealment or a false declaration if the evidence shews (1) that the applicant did not know the meaning of the word gonorrhea, and (2) that the attack which he had had did not result in any serious consequences, and had in no way affected his health.

Prudential Ins. Co. v. Carrier, 43 Que. S.C. 97.

REPRESENTATIONS AS TO HEALTH—CONCEALMENT.

In a contract for life insurance, the expression "sound health" contained in the policy should not be interpreted as meaning "perfect health." If an applicant for insurance states that he has already undergone an operation on the throat for a malady "of the nature of which he is ignorant," he is not thereby guilty of concealment and his declaration is sufficient. A clause in the insurance contract, stipulating that the policy would be void if the insured had been previously treated by a physician for a serious malady, will not make the contract void in such case if there has been on the part of the insured neither false representations nor fraudulent concealment.

Fernand v. Metropolitan Life Ins. Co., 47 Que. S.C. 520.

LIFE INSURANCE — MISREPRESENTATION AS TO HEALTH—CONCEALMENT.

The insured, suffering from gout, which he does not declare when specially questioned, conceals a material fact of nature to diminish the appreciation of the risk; but if, after consulting his medical adviser, he has doubt about his disease, and answers: "Some rheumatism years ago," it is not fraudulent misrepresentation nor concealment; and the verdict by the jury declaring that the answers of the deceased insured were true and sincere should not be disturbed.

Security Life Ins. Co. v. Power, 24 Que. K.B. 181.

ACCIDENT INSURANCE — MISREPRESENTATION AS TO STATE OF HEALTH — KNOWLEDGE OF AGENT — VITIATION OF POLICY.

The plaintiff signed an application for accident insurance in the defendant company, and therein represented and warranted that he was never ruptured. As a matter of fact, he had been ruptured, and the matter was discussed between him and the company's soliciting agent at the time he signed the application, and the statement was deliberately made, by the agent's advice. The policy issued, and the claimant made a claim for indemnity in respect of an accident resulting in a rupture:—Held, upon the evidence, that the plaintiff had a congenital hernia, and that the accident simply manifested it. And:—held, that the plaintiff had made a material false representation which vitiated the policy, and he was not entitled to recover upon his claim for indemnity. The agent could not be regarded as the company's agent when joining with the plaintiff in concealing a material fact affecting the rate of insurance.

Burnett v. B.C. Accident & Employers' Liability Co., 28 W.L.R. 425.

LIFE INSURANCE — APPLICATION AND MEDICAL EXAMINER'S REPORT — ANSWERS OF DECEASED NEGATIVING DISEASE.

Miner v. Excelsior Life Ass'ce Co., 16 W.L.R. 698.

CONDITIONS AVOIDING POLICY — "SERIOUS DISEASE OR COMPLAINT."

Leonard v. Metropolitan Life Ins. Co., 44 N.S.R. 420.

(§ III E—120) — ACCIDENT — MISSTATEMENT OF OCCUPATION OF INSURED BY AGENT OF COMPANY — PREFERRED CLASS —TIMBER CRUISER OR SUPERINTENDENT.

A business manager of a lumber firm, whose duties involve occasional traveling to make inspection of logs about to be purchased, but whose duties in that regard are not of the continuous and practical nature of an experienced lumberman, is not a "timber cruiser" nor an "inspector in woods" nor a "proprietor or manager superintending in woods" within a clause of an accident insurance policy excluding the named occupations from the benefits of the preferred class of rating under which he took out his insurance on a selection made by the agent with full knowledge of the facts.

Kinman v. Ocean Accident & Guarantee Assn., 12 D.L.R. 364, 3 W.W.R. 630.

A condition of a contract of life insurance that it shall be void if, within 2 years from the date of the contract, the insured shall, without a permit, engage in the employment of a railway, is reasonable and valid.

Smith v. Excelsior Life Ins. Co., 4 D.L.R. 99, 3 O.W.N. 1521, 22 O.W.R. 863.

(§ III E—125) — OTHER INSURANCE—PREVIOUS APPLICATION.

Statements made by an insured that no proposal to insure her life has ever been declined and that she held no other assurances on her life, whereas, in point of fact, she had been refused a policy in a certain amount because she was a markswoman, but that instead, an industrial policy for a small amount had been informally issued to her without a medical examination, are not misrepresentations materially affecting the risk.

Donovan v. Excelsior Life Ins. Co., 26 D.L.R. 184, affirming 22 D.L.R. 307. [Affirmed in 31 D.L.R. 113, 53 Can. S.C.R. 539.]

F. FORFEITURE.

(§ III F—145)—LIFE — LAPSE OF POLICY BY NONPAYMENT OF PREMIUM — EVIDENCE OF REVIVAL — ACCEPTANCE BY AGENT OF PREMIUM AFTER LAPSE — TERMS OF POLICY.

Foxwell v. Policy Holders Mutual Ins. Co., 43 D.L.R. 720, 42 O.L.R. 347.

NONPAYMENT OF PREMIUM — PAYMASTER'S ORDER — NOTICE — ESTOPPEL.

Where a premium is made payable out of the wages of the insured, by an order on a paymaster, and there is sufficient wages earned to pay the premium, failure by the insurance company to give the usual notice that it held such order, or to present it for payment in due time, or to notify the insured of its intention to look directly to him for payment, if it had that right, will

estop it from insisting upon a forfeiture of the policy for nonpayment of the premium.

Moore v. Globe Indemnity Co., 36 D.L.R. 489, [1917] 2 W.W.R. 1207.

NONPAYMENT OF PREMIUMS OR ASSESSMENTS.

A policy of life insurance contained this condition: "This policy shall not take effect until same be delivered and the first premium shall have been paid thereon during the life and continued good health of the assured." It appeared that the policy was delivered during the lifetime and good health of the assured, but that with regard to the payment of premium the evidence was that during the assured's good health the money for the premium was in his bank and the assurance company's agents were instructed to make a draft for the amount of the premium and some expenses of a loan which the assured was obtaining, but the agents delayed making the draft and in the meantime the assured developed the disease of which he died:—Held, that, under the circumstances, the payment was in fact made and the company was liable.

Miner v. Excelsior Life Ass'ce Co., 3 A. L.R. 249.

A correspondence for the revival of life insurance lapsed for nonpayment of premiums, carried on between the insurers and the insured, in which the former make it clear that they will only agree to the revival upon a cash payment of a specified sum, this condition being accepted by the insured, cannot, of itself, operate as a revival. If, therefore, the insured dies before he has made the payment, his representatives cannot recover on the policies. Nor does it matter that, at the time of his death, he had applied for, and was in the expectation of receiving, assistance from the insurer, in the shape of a loan, to make the stipulated payment.

Canada Life Ass'ce Co. v. Taafe, 21 Que. K.B. 204.

LIFE INSURANCE — PREMIUM — FAILURE OF INSURED TO PAY — PAYMENT BY COMPANY'S AGENT ON INSURED'S BEHALF.

Zwicker v. Pearl, 9 E.L.R. 427.

(§ III F—148) — FORFEITURE — MUTUAL BENEFIT ASSESSMENTS — NOTICE.

Hewitt v. Grand Orange Lodge of British America, 16 D.L.R. 877, 6 O.W.N. 16, 25 O. W.R. 899.

MUTUAL ASSESSMENTS—NOTICE.

When the by-laws of a mutual assurance company provide that the contributions due from the members will be payable by means of written notices served on the members personally, or sent by mail to the address of each, and that a member in default 30 days from the transmission of the notice will be deprived of his benefits, the company cannot invoke this forfeiture nor procure a declaration of it by setting up a custom contrary to the provisions of the by-law in respect of the transmission of the notice, unless it establishes that the member in default has actually received notice of the contributions nonpayment of which is alleged against him.

Parent v. Federal Assn. of Letter Carriers, 51 Que. S.C. 426.

MUTUAL BENEFIT ASSESSMENTS — DELAY—ACCEPTANCE.

A mutual aid society accepting payments of assessments from its members after they have become due, contrary to its regulations, cannot invoke these regulations in order to escape payment of a deceased member's insurance on the pretext that the payment of the latter's assessment had been made too late.

Canada-American Assn. v. Turmel, 26 Que. K.B. 33.

Where the regulations of a mutual insurance society provide that a member in default in paying his assessments at maturity will be suspended and that such suspension will result in a forfeiture of all his benefits, a mere default in payment does not operate as a forfeiture, but it is necessary that the suspension of the member be formally decreed by the association or by an officer appointed for the purpose.

Union St. Joseph v. Houde, 26 Que. K.B. 147.

G. REINSTATEMENT.

(§ III G—150) — TERMS — "INSURABILITY."

A condition in a life insurance policy that the risk shall cease if any premiums after the first shall not be paid, but that it may be reinstated upon payment of arrears and proof of insurability, entitles the insured to reinstatement at the original rate, not on changed terms.

Sussex v. Ætna Life Ass'ce Co., 33 D.L.R. 549, 38 O.L.R. 365, affirming 11 O.W.N. 154.

FRIENDLY SOCIETY — INSURANCE CERTIFICATE — CONDITION — STATUS OF MEMBER OF SOCIETY AT TIME OF DEATH — SUSPENSION — APPLICATION FOR REINSTATEMENT — PAYMENT OF DUES — SUBMISSION TO MEDICAL EXAMINATION — REPORT OF MEDICAL EXAMINER NOT ACCEPTED BY MEDICAL BOARD UNTIL AFTER DEATH — "ACCEPTANCE" PREREQUISITE OF REINSTATEMENT — CONSTITUTION AND RULES OF SOCIETY.

Bright v. Canadian Order of Forresters, 16 O.W.N. 213.

BENEFIT SOCIETY — SUPERVISION OF MEMBER — FORFEITURE — REINSTATEMENT —WAIVER—ESTOPPEL.

Charbonneau v. Union St. Joseph, 17 O.W.N. 169.

BENEFICIARY CERTIFICATE — CONSTITUTION AND LAWS OF BENEFIT SOCIETY — MONTHLY ASSESSMENT UNPAID AT DEATH OF MEMBER — REINSTATEMENT NOT APPLIED FOR — ONTARIO INSURANCE ACT, R.S.O. 1914, c. 183, s. 188 (1)—

CUSTOM AS TO PAYMENT OF ASSESSMENTS — SUM COMING TO ASSURED UNDER SCHEME FOR DISTRIBUTION OF RESERVE FUND, BUT NOT PAYABLE AT TIME OF DEATH.

Baker v. Order of Canadian Home Circles, 14 O.W.N. 160.

H. PREMIUMS AND ASSESSMENTS.

(§ III H—155)—DELIVERY OF POLICY.

In an action by agents of an insurance company to recover a premium on a policy of accident insurance which the defendant had contracted for before embarking on an ocean steamer, held, that as the terms of the defendant's application had not been observed, he had stipulated, inter alia, that the policy should be delivered to him before he sailed; it was in fact not written until after he left; although then antedated, the defendant was not liable.

Brown's Travel Bureau v. Taylor, 44 D.L.R. 204, 26 B.C.R. 82, [1918] 3 W.W.R. 468.

Where by the terms of a policy of life insurance the balance of the whole year's premium was to be deducted on making settlement of the claim the deferred half-yearly payment of premium which had not accrued due during the lifetime of the assured is not a debt of his estate, and the loss through the deduction thereof from the face of the policy falls upon the beneficiary in whose favour a statutory appointment operating as a declaration of trust had been made in the lifetime of the assured.

Green v. Standard Trusts Co., 1 D.L.R. 609, 22 Man. L.R. 397, 20 W.L.R. 488, 1 W.W.R. 993.

(§ III H—156)—PREMIUM NOTES — LIABILITY OF MAKER — EFFECT OF FAILURE TO PAY — AVOIDANCE OF POLICY — CONDITION IN APPLICATION — INSURANCE ACT, R.S.C. 1906, c. 34, s. 71.

Great West Life Ins. Co. v. Lyttle, 7 D.L.R. 798, 2 W.W.R. 364.

NONPAYMENT OF—FORFEITURE OF POLICY.

The defence that a promissory note, made by the assured and not paid at maturity, was "given for any premium or part thereof" within the meaning of another clause in the policy, although it was in fact made in part renewal of an earlier note which was given in part payment of a premium, will bar recovery on the policy and need not be pleaded specially. [McGeachie v. North American Life Ass'ce Co., [1894] 23 Can. S.C.R. 148, followed.]

Devitt v. Mutual Life Ins. Co., 22 D.L.R. 183, 33 O.L.R. 473, reversing 33 O.L.R. 68.

MORTGAGE CLAUSE.

The Scottish Canadian Canning Co. took out an insurance policy on their plant in which a clause was inserted making it payable in case of loss to the defendant who held a mortgage on the plant. When issued the policy was delivered to the mortgagee. The insurance company took a note from the Scottish Canadian Canning Co. for the premium, and the note not being paid at maturity the insurance company cancelled the policy and sued the mortgagee for the earned premium. Held, appeal that as there was no privity of contract between the insurance company and the mortgagee, the mortgagee could not be held liable for the premium.

National Fire Ins. Co. v. Emerson, 22 B.C.R. 349.

LIABILITY ON PREMIUM NOTE.

When a person wishes to insure his property in a mutual insurance company at a fixed premium, and clearly states his wishes on the matter, but upon the false representations of an agent signs a note for the deposit and accepts the mutual policy without reading it, he is guilty of negligence; but there has been no contract between the parties, and he is not bound as against the company in such a way that the latter can impose upon him payment of any portion of his note. In a contract for mutual insurance the company cannot sue for payment on a note for a deposit except for losses and expenses incurred by it after the note was signed and after the maker became a member of the company. It is for the latter in the first place to establish these facts.

Meunier v. Laprès, 47 Que. S.C. 470.

Assessments on a deposit note given by a member of a mutual fire insurance company not being a promise to pay the sum for which it is made but only according a basis on which assessments may be declared and levied, as provided by arts. 7016, 7017, R.S.Q. 1909, it can only be declared and levied to meet losses or expenditure incurred during the currency of the policy for which it was given.

Clément v. Rhéaume, 44 Que. S.C. 233.

The forfeiture of the right to indemnity for default in payment of assessments made against deposit notes, pronounced against the insured in a mutual insurance company pursuant to the provisions of art. 7022 of R.S.Q. 1909, is absolute and the directors and officials of the company have no power to renounce it by a general by-law or by a special agreement in a particular case.

Jacob v. Mutual Industrial Ins. Co., 22 Que. K.B. 261.

FIRE INSURANCE—RENEWAL—AUTHORITY OF AGENT—STATUTORY VARIATIONS.

Marshall v. Western Canada Fire Ins. Co., 4 S.L.R. 181, 18 W.L.R. 68.

(§ III H—157)—The rule of law established in the Province of Quebec that notwithstanding a covenant in a policy of insurance whereby premiums were made payable at the insurer's office a practice of sending for them to the insured's domicile would constitute such a recognized mode of the contract as would import abandonment of the covenant to pay at the insurer's office, with the result that the insured

would not be in default to pay unless called upon at his domicile, applies to policies issued by benevolent societies as well as to those of old line insurance companies, though the insured in such society are themselves insurers and the debtors in a sense themselves the creditors.

Royal Guardians v. Clarke, 6 D.L.R. 12, 21 Que. K.B. 541.

PAYMENT OF DUES—MUTUAL BENEFIT ASSOCIATION—EXISTING CONTRACT.

Cousins v. Brotherhood of Locomotive Engineers, 14 D.L.R. 192, 22 Que. K.B. 307, affirming 6 D.L.R. 26, 42 Que. S.C. 110.

FRIENDLY SOCIETY — ONTARIO STATUTE 6 GEO. V., C. 106, SS. 5, 6, 9—REDUCTION OF AMOUNTS INSURED—OPTION OF CONTINUANCE UPON PAYMENT OF INCREASED PREMIUMS — ELECTION — TENDER — DEATH OF MEMBER BEFORE ASCERTAINMENT OF AMOUNT PAYABLE.

Anderson v. Ancient Order of United Workmen, 11 O.W.N. 174.

BENEFIT SOCIETY — ASSESSMENT RATES — POWER OF TRUSTEES—4 & 5 GEO. V., C. 136(D)—INCREASED RATES—PAID-UP POLICIES—CASH SURRENDER VALUE.

Drain v. Catholic Mutual Benefit Assn., 10 O.W.N. 104, 254.

BENEFICIARY CERTIFICATE — DEFAULT IN PAYMENT OF MEMBER'S DUES — RULES OF SOCIETY — WAIVER — DISMISSAL OF ACTION TO RECOVER AMOUNT OF INSURANCE—FORFEITED PREMIUM.

Marantette v. Union St. Joseph, 11 O. W.N. 218.

BENEFIT SOCIETY—SUSPENSION OF MEMBER FOR NONPAYMENT OF DUES—REFUSAL OF APPLICATION FOR REINSTATEMENT—NOTICE TO MEMBER—SUBSEQUENT PAYMENT AND RECEIPT OF DUES AND PAYMENT OF SICK BENEFITS—ERROR AND INADVERTENCE — ABSENCE OF INTENTION TO REINSTATE—FAILURE TO ESTABLISH WAIVER OF ESTOPPEL—BLAMABLE CARELESSNESS OF OFFICERS OF SOCIETY — REPAYMENT OF DUES — DISMISSAL OF ACTION BROUGHT BY BENEFICIARY AFTER DEATH OF ASSURED—COSTS.

St. Onge v. Union St. Joseph, 15 O.W.N. 358.

MUTUAL BENEFIT ASSESSMENTS—ACCEPTANCE AFTER DELAY.

A mutual benevolent society or an insurance company which, in violation of its regulations, accepts delayed payment of overdue contributions or of the insurance premium, cannot, on the happening of the death of the person insured, avoid payment of the amount of the endowment certificate on the ground that the insured had been suspended and became deprived of his rights.

Bolduc v. Canado-Americaine Assn., 50 Que. S.C. 108.

BENEFIT ASSOCIATION—BY-LAWS AND REGULATIONS — TRANSFERS BETWEEN LODGES—MEMBER IN GOOD STANDING—REGULARITY OF AFFILIATION.

Ancient Order of United Workmen v. Turner, 44 Can. S.C.R. 145.

(§ III H—158)—PAYMENT TO AGENT—LIABILITY.

Where the intention of all the parties was that the insurance broker through whom policies of fire insurance were issued was that he alone should be liable to the companies for the premiums, and that he should look to the insured for the payment of the premiums, with the right on default to have cancelled the insurance companies' debit of the same to such broker, and there was payment of such premiums as between the broker and the insured, the charge of the premiums by the companies to such broker operates as an absolute payment, although the money of the insured had not actually reached the companies. [London & Lancashire Life Ass'ce Co. v. Fleming, [1897] A.C. 499, distinguished.]

Antiseptic Bedding Co. v. Gurofski, 21 D.L.R. 483, 33 O.L.R. 319.

ACCUMULATIONS OF INTEREST — CHARGE AGAINST AMOUNT PAYABLE AT DEATH—USURY—EQUITABLE RELIEF — KNOWLEDGE AND ACQUIESCENCE OF ASSURED.

Pennefather v. Life Ass'ce of Scotland, 9 O.W.N. 331.

LIFE INSURANCE — ACTION FOR RETURN OF FIRST PREMIUM—RIGHTS OF BENEFICIARY.

Gill v. Great West Life Ass'ce Co., 2 O.W.N. 777, 18 O.W.R. 733.

IV. Transfer of policy or of interest therein.

A. ASSIGNMENT GENERALLY.

(§ IV A—160) — ASSIGNMENT — SALE OF INSURED CHATTEL—BENEFIT OF INSURANCE—RIGHT OF PURCHASER.

The consent of an insurance company to the continuance of a contract of insurance for $3,000 on a horse after its sale for $1,500, for the full amount of the policy, which provided that, on a loss only two-thirds of the animal's actual value would be paid, is not shewn by a letter from the general agent of the company to the purchaser to the effect that the latter's interest in the insurance was being held fully covered, subject to one-third deduction from the market value of the animal; where the agent supposed that the purchaser intended taking out a new policy for the sum properly insurable.

Gill v. Yorkshire Ins. Co., 12 D.L.R. 172, 23 Man. L.R. 368, 24 W.L.R. 389, 4 W.W.R. 692.

TRANSFER OF POLICY—MARRIAGE SETTLEMENT—COLLATERAL SECURITY.

An assignment of life insurance policies by way of a registered marriage settlement

unaccompanied by delivery and without any notice thereof to the insurance company, will not prevail over a subsequent valid transfer of the policies as collateral security to a bank.

Provincial Bank v. Beauchesne, 35 D.L.R. 753, 26 Que. K.B. 41, reversing 27 D.L.R. 188, 22 Rev. de Jur. 256, 22 Rev. Leg. 227.

TO MORTGAGEE—"ABSOLUTE ASSIGNMENT"—RIGHT TO SUE.

An assignment of a policy to a mortgagee of the insured property, absolute on its face, though in fact given by way of security for the mortgage debt, is an "absolute assignment," not a charge within the meaning of the Judicature Ordinance, and the assignor has no further right to sue thereon.

Wilton v. Rochester German Underwriters Agency, 35 D.L.R. 262, 11 A.L.R. 574, [1917] 2 W.W.R. 782.

LIFE INSURANCE—58 VICT. C. 25—DECLARATION BY HUSBAND OF ENDOWMENT POLICY IN WIFE'S FAVOR—EFFECT OF SUBSEQUENT INSOLVENCY—FRAUD.

Where the insured declares a policy of life insurance to be for the benefit of his wife under 58 Vict., c.. 25, the trust thereby created is not invalidated by the subsequent insolvency of the husband, and creditors of the insured have no rights which would interfere with the rights of such wife even though the endowment policy matures during the life of the insured. Semble:—Such a declaration is valid even though the insured be insolvent at the time of making it.

Bank of B.N.A. v. Edgecombe, 46 N.B.R. 105.

MUTUAL AID SOCIETY — BENEFICIARIES — RELATIONSHIP—BY-LAW AGAINST BENEFITS BY WILL.

When the constitution of a mutual aid society only admits blood relations to the benefit of its dotations, the conferring of a certificate of dotation on a nephew by marriage (whom the assured falsely declared to be his sister's son) is illegal and void. A member of a society cannot confer, by will, his dotation in a Mutual Aid Society if the society's by-laws expressly prohibit it. Such prohibition does not constitute a violation of the liberty of the testator, and is not at all contrary to public order.

Dalziel v. L'Ordre des Forestiers Catholiques, 53 Que. S.C. 308.

HUSBAND AND WIFE — FORMALITIES OF TRANSFER.

The transfer by a husband of a policy of insurance in favour of his wife, should be made by a declaration endorsed on the back of the policy itself or annexed to it, and a duplicate of the declaration should be delivered to the insurance company, and a memorandum thereof endorsed by the company on the policy or the declaration. If these formalities are not observed the transfer or application is without effect, and does not bind the company.

Banque d'Hochelaga v. Galibert, 24 Rev. Leg. 479.

DONATION BY MARRIAGE CONTRACT—REGISTRATION—SERVICE.

The registration of a deed of donation, made to the wife by marriage contract, does not replace the service required by art. 1571, C.C. (Que.), when the object of the donation is a claim. Thus, a creditor, to whom an insurance policy has been transferred for consideration and who has had his transfer served, may claim the amount of the insurance to the exclusion of the insured's widow, who had received the donation of that sum in her marriage contract, which was registered, without any service being made on the insurance company.

Banque Nationale v. Loiselle, 53 Que. S.C. 154.

STATUTORY CONDITION — "ASSIGN" — ASSIGNMENT FOR CREDITORS.

Wade v. Rochester German Fire Ins. Co., 23 O.L.R. 635, 19 O.W.R. 99.

(§ IV A—161)—ASSIGNMENT OF POLICY TO PURCHASER OF INSURED CHATTEL — VALIDITY.

The purchaser of an insured chattel acquires no rights against the insurance company, under an assignment to him by his vendor without the consent of the insurance company, of the contract of insurance thereon before the happening of the loss.

Gill v. Yorkshire Ins. Co., 12 D.L.R. 172, 23 Man. L.R. 368, 24 W.L.R. 389, 4 W.W.R. 692.

EFFECT OF GARNISHMENT.

Under arts. 7377, etc., R.S.Q. 1909, a husband may appropriate an insurance policy on his own life for the benefit of his wife, but he cannot do so if, previously, an attachment by garnishment has been made on the policy by his creditors.

Shorey v. Dolloff, 33 D.L.R. 118, 25 Que. K.B. 482, reversing 22 Rev. Leg. 7.

BY "WRITING"—WILL.

A will is a "writing" within the meaning of the Life Insurance Policies Act, R. S.B.C. c. 115, s. 7, for the purpose of declaring that a policy of life insurance shall enure for the benefit of one of the specified class.

Arnold v. Dominion Trust Co. (B.C.), 32 D.L.R. 301, [1917] 1 W.W.R. 643. [Affirmed by divided court in 35 D.L.R. 145, 24 B.C.R. 321, [1917] 3 W.W.R. 11.]

MUTUAL COMPANY—BY-LAW.

An insurance effected by a ratepayer with a mutual company established as above stated, is transferable to a third party who may not be a ratepayer himself.

Chicoine v. Mutual Ins. Co. of Roxton, 44 Que. S.C. 100.

(§ IV A—162)—Of wife—Interest.

Where the benefits of a life insurance policy have been settled upon the wife of the assured by a written appointment in her favour having the statutory effect of a declaration of trust for her separate use, a subsequent charge or mortgage of the policy made by the husband and wife jointly but solely for the husband's benefit is a debt of the assured which the wife is entitled to have satisfied out of his general estate so as to free the policy from such mortgage or charge. [Hall v. Hall, [1911] 1 Ch. 487, applied.] Where the insured in a life insurance policy assigned the same to secure the payment of his debt on the security of the policy, and his wife who had been named as the beneficiary in the policy joined with him in executing the assignment and in signing the charge or lien, such charge when made solely for the benefit of the insured is payable primarily out of his estate so as to free the insurance policy in favour of the wife as between herself and the estate where the designation of the wife as beneficiary on the face of the policy is by statute (R.S. M. 1902, c. 83 and R.S.O. 1897, c. 203), declared the creation of a trust for her separate use free from the debts of his estate.

Green v. Standard Trusts Co., 1 D.L.R. 609, 22 Man. L.R. 397, 20 W.L.R. 488, 1 W.W.R. 993.

(§ IV A—166)—Right of assignee.

The assignee for creditors of the assured is entitled to maintain a joint action with the beneficiary to whom the loss is made payable by the policy, for the moneys payable under a fire insurance policy placed by the insolvent debtor upon his goods, notwithstanding that the transfer of the policy has not been consented to by the insurers.

Strong v. Crown Fire Ins. Co., 1 D.L.R. 111, 3 O.W.N. 481, 20 O.W.R. 901. [See 4 D.L.R. 224, 3 O.W.N. 1534, 22 O.W.R. 734.]

B. Change of beneficiary.

(§ IV B—170)—Where an attempt is made to change the beneficiary of a policy of life insurance by a declaration in the will of the insured, which is ineffective to make such change under the law as it stands at the date of the death of the testator, an act which comes into force subsequent to his death cannot be invoked to validate the declaration. Where policies on the life of the assured are made payable to his widow, her interest becomes vested at the death of the assured, subject to any declaration in the will or elsewhere sufficient to effect a change.

Re Stewart Estate, 8 D.L.R. 165, 4 O.W.N. 293, 23 O.W.R. 343.

Endowment policy—Change of beneficiary—Ontario Insurance Act (R.S.O. 1914, c. 183).

An endowment policy differs from a policy payable at death. The assured after maturity but before actual payment has a right to change the beneficiary but not to alter or divert the benefit of any beneficiary for value, nor the benefit of a preferred beneficiary to a person not of that class. The naming of a beneficiary under such a policy, if it creates a trust in favour of that beneficiary, creates only a trust in the event of death; and is subject to the right of alteration by the assured as set out in the Ontario Insurance Act (R.S.O. 1914, c. 183, s. 171.)

Re Sun Life Ass'ce Co. & McLean, 48 D.L.R. 652.

In the absence of agreement to make one the beneficiary, the insured is in no sense a trustee for the beneficiary from time to time named in a policy of insurance containing a clause giving power to the assured to change the beneficiary named. Where an insured by virtue of the rights accruing to him under an insurance policy changes the beneficiary, this is a gift inter vivos and not a testamentary disposition. [Fulton v. Andrew, L.R. 7 H. L. 448, distinguished.] A daughter being neither trustee, guardian nor agent for her father, who lived with her, at and for some time prior to his death, whom the father, while so living with her, makes sole beneficiary of the moneys payable under a policy of insurance issued on his life, is not bound to supply her father with independent legal advice at the time he nominates her as sole beneficiary under the policy, the father being at the time compos mentis and there being an entire absence of fraud or undue influence.

Clark v. Loftus, 4 D.L.R. 39, 26 O.L.R. 204, 21 O.W.R. 705.

Where the insured, in a life insurance policy originally made payable to his personal representatives, endorses on the policy a declaration that the policy and the insurance thereunder should remain payable as in the policy mentioned, subject to alteration during his lifetime, but, if not "assigned or otherwise disposed of," that on his death, if his wife survived him, the policy should be for her benefit, such declaration is not sufficiently positive or unconditional to operate as a declaration of trust in favour of the wife or to confer upon her the benefits of the policy as her separate estate under the Manitoba Life Insurance Act, R.S.M. 1902, c. 83. [As to statutory appointments of beneficiaries of life insurance policies, see Mr. Labatt's article in 36 C.L.J. 249 and Cameron on Insurance, pp. 121, 214.] While the appointment of an insurance policy made in favour of the wife of the assured under the Manitoba Life Insurance Act may, by s. 15 thereof, be revoked and the benefits declared in favour of the wife may by a writing be diverted to the estate of the assured, the writing must indicate in clear and conclusive language the intention of

the assured to alter the appointment first made in her favour. In order to create a trust in favour of the wife of the assured, the statutory appointment of the benefits of a life insurance policy which under the Manitoba Insurance Act (similar to s. 159 (1) of the Ontario Insurance Act, R.S.O. 1897, c. 203) the assured may make in writing, must be in clear and unequivocal words taking effect immediately as upon an immediate declaration of trust and so as to divest the assured of all beneficial interest therein for the time being subject only to any future appointment, the making of which may be reserved to him by the statute.

Green v. Standard Trusts Co., 1 D.L.R. 609, 22 Man. L.R. 397, 20 W.L.R. 488, 1 W.W.R. 993.

Under s. 160 of c. 203 of the Insurance Act, R.S.O. 1897 (now 2 Geo. V., c. 33, s. 179), the beneficiaries named in a certificate of insurance issued by a mutual insurance association may be changed by a provision of a will which describes the certificate only by stating the amount thereof, and giving the name of the association that issued it.

Re Watson and Order of Canadian Home Circles, 4 D.L.R. 170, 3 O.W.N. 1605, 22 O.W.R. 834.

A sufficient declaration of beneficiary is created under the Insurance Act, R.S.O. 1897, c. 203, s. 151 (3), by a statement written by an insured person, after the death of the beneficiary named therein, on a certificate of insurance issued by a mutual benefit association, to the effect that the benefit thereunder should be paid to a person "who for many years had advanced money to [the insured] and kept up the premiums, and who [was] a holder for value," notwithstanding such change of beneficiary was void under the rules of the association, since such rules must yield to the statute. An adopted child or grandchild of an insured person is not within the preferred class of beneficiaries mentioned in s. 7 of c. 15 of 4 Edw. VII.

Fidelity Trust Co. v. Buchner, 5 D.L.R. 282, 26 O.L.R. 367, 22 O.W.R. 72.

CHANGE OF BENEFICIARY TO PAY INSURANCE MONEYS INTO COURT — PRINCIPLE ON WHICH SUCH ORDERS MADE.

Re Heitner and Manufacturers' Life Ins. Co., 6 D.L.R. 879, 4 O.W.N. 251, 23 O.W.R. 413.

BY WILL—CONFLICT OF LAWS.

The change of the beneficiaries of an insurance policy issued by an Ontario company, which may be made under the provisions of the Insurance Act, R.S.O. 1914, c. 183, ss. 171, 177, 179, can be validly made by the will of a testator domiciled in a foreign jurisdiction at the time of his death, despite the fact that by the law of that jurisdiction beneficiaries named in an insurance policy cannot be changed; such law does not, if it could, purport to have any such application.

Re Baeder and Can. Order of Chosen Friends, 28 D.L.R. 424, 36 O.L.R. 30.

CHANGE OF PREFERRED BENEFICIARY—BEQUEST—SUFFICIENCY OF.

General words of bequest, such as "all my property, including all my insurance policies at present in force and that I may hereafter have," are not a sufficient identification of a contract of insurance to make the will an appointment of a particular beneficiary of a policy of life insurance in which a beneficiary of the preferred class had been designated but had died in the lifetime of the assured so as to prevent the operation of ss. 151, 159 of the Insurance Act, R.S.O. 1897, c. 203 (as amended 1 Edw. VII. (Ont.) c. 21, s. 2 and 4 Edw. VII. (Ont.) c. 15, s. 7), which provides that, in default of any new appointment, the benefit shall go to the children of the assured; the insurance money had, by the first appointment of a beneficiary of the preferred class, become a trust fund and not transferable by the assured out of the preferred class of beneficiaries except in the statutory manner by an instrument in writing "identifying the policy by number or otherwise."

Re Jannison, 10 D.L.R. 608, 4 O.W.N. 1084, 24 O.W.R. 391.

CHANGE OF PREFERRED BENEFICIARY—STATUTORY WORDS IN PLURAL — APPLICATION TO SINGLE BENEFICIARY.

The words "one or more of all of the designated preferred beneficiaries" in s. 178 (7) of the Ontario Insurance Act (2 Geo. V. (Ont.) c. 33), apply to the case of a sole designated preferred beneficiary.

Re Caiger, 10 D.L.R. 649, 4 O.W.N. 1174, 24 O.W.R. 442.

DISTINCTION OF INSURANCE MONEYS.

Under the Ontario Insurance Act, R.S. O. 1897, c. 203, and amendments thereto, the words "surviving beneficiaries" and "surviving infant children" in the provisions for the appointment of the insurance money in the event of the death of preferred beneficiaries in the lifetime of the assured, refer to survivorship after his death and not to survivorship after the death of the beneficiary.

Re Jannison, 10 D.L.R. 608, 4 O.W.N. 1084, 24 O.W.R. 391.

A bequest of "all the life insurance due me" is a sufficient declaration under s. 171 (5) of the Insurance Act (R.S.O. 1914, c. 183) to change the beneficiary designated in the policy. [Judgment of Riddell, J., in Re Baeder and Canadian Order of Foresters, 28 D.L.R. 424, at 431, followed.]

Re Cole, 29 D.L.R. 492, 36 O.L.R. 173.

BENEFICIARY—ASSIGNMENT OF INTEREST—WIFE OF ASSURED—DIRECTION BY ASSURED AS TO PAYMENT—STATUTORY RIGHT—ESTOPPEL.

An assured who has by the terms of the policy made the insurance money payable to his father, who has in effect made an assignment of his interest to the wife of the assured, may under his statutory right by a second designation direct that the insurance money be paid to the father to the exclusion of the wife. The doctrine of estoppel does not apply to such a case.

Re Standard Life Ass'ce Co. & Kraft, 48 D.L.R. 649, 45 O.L.R. 323.

WILL—INEFFECTIVE—INSURANCE ACT, ONT.—IDENTIFICATION OF BENEFIT—RENEWAL STATEMENT—NEW DESIGNATION.

A document although ineffective as a will may be a sufficient instrument in writing under the Insurance Act (R.S.O. 1914, c. 183, s. 171), to constitute the persons named therein beneficiaries of a mortuary benefit payable by a benefit association if it sufficiently identifies the mortuary benefit and is within the powers given by the Act, but a subsequent application for renewal in the benefit association which states that the benefit is "payable to my estate" is sufficient to annul the previous designation. [Re Jansen, 12 O.L.R. 63, distinguished.]

Leavitt v. Spaidal, 49 D.L.R. 245, 45 O.L.R. 611.

PROVINCIAL ACT—RESTRICTIONS IN DOMINION COMPANY'S CHARTER.

A provincial Insurance Act, which purports to enable an insured to revoke the benefit of insurance on his life made or appropriated in favour of any person whomsoever and invert the insurance to new beneficiaries or to himself or his estate, does not override or destroy the special provisions contained in a policy issued by a Dominion company, in conformance with its charter and which limits such powers.

Re Richardson Estate, 49 D.L.R. 59, [1919] 3 W.W.R. 666.

WRITING IDENTIFYING POLICIES.

A bequest to the testator's wife of "the first $75,000 collected on account of policies of life insurance," is ineffective for not "identifying the policies by number or otherwise" as required by the Life Insurance Act, R.S.B.C. 1911, c. 115, s. 7.

Arnold v. The Dominion Trust Co., 41 D.L.R. 107, 56 Can. S.C.R. 433, [1918] 2 W.W.R. 25, affirming 35 D.L.R. 145, 24 B.C.R. 321, [1917] 3 W.W.R. 11; 32 D.L.R. 301, [1917] 1 W.W.R. 643. [See 32 D.L.R. 33, [1917] 1 W.W.R. 672; 44 D.L.R. 12, [1919] A.C. 254, [1918] 3 W.W.R. 850.]

"INFANTS"—CHILDREN—GRANDCHILDREN.

By the law of Quebec the word "infants" used in a life insurance policy issued in 1873, whereby insurance money is assigned to the wife and children, includes also the grandchildren.

Lee v. Ætna Life Ins. Co., 39 D.L.R. 294, 53 Que. S.C. 162, 24 Rev. de Jur. 63.

WIFE—FOREIGN DIVORCE—INVALIDITY—CHANGE OF BENEFICIARY BY WILL—PREFERRED CLASS.

B. obtained a policy of insurance on his life, payable to his wife by name. Some time after the date of the policy she obtained a divorce in a foreign state. By his will, B. gave one-third of the insurance money to his son and one-third each to his brother and sister:—Held, that it was not open to the wife, after the death of B., to maintain that the divorce was invalid. [Swaizie v. Swaizie, 31 O.R. 324; Re Williams and Ancient Order of United Workmen, 14 O.L.R. 482, followed.] Held, also, that when she obtained the divorce she ceased to be in law B.'s wife, and so ceased to be within the preferred class; and B. might, at his will, divert to one not of the preferred class, and so effectively exclude the wife, although the divorce alone would not exclude her.

Re Banks, 42 O.L.R. 64.

ENDOWMENT POLICY—MONEYS PAYABLE TO ASSURED AT END OF FIXED PERIOD—POLICY IN FORCE AND ASSURED ALIVE AT END OF PERIOD—DESIGNATION OF WIFE AS BENEFICIARY—REVOCATION OF, AND DESIGNATION OF MOTHER AFTER END OF PERIOD—ONTARIO INSURANCE ACT, S. 171—OPTIONAL BENEFITS—RIGHT OF ASSURED TO SELECT BENEFIT OTHER THAN PAYMENT IN CASH—REFUSAL OF LEAVE TO COMPANY TO PAY AMOUNT OF CASH BENEFIT INTO COURT.

By an endowment policy issued in 1898, the company assured the life of M. for $1,000, and contracted to pay that sum to M. on 1st Oct. 1918, or, should M. die before that day, to his mother; and it was provided that, should the policy be in force on Oct. 1, 1918, M. should be entitled to certain optional benefits—e.g., the right to convert the sum assured and profits into a paid-up policy payable at the death of M. In 1906, M., by an instrument in writing, declared that the policy and assurance should be for the benefit of his wife. When the policy matured on Oct. 1, 1918, M. was still alive, and had made no further or other designation of a beneficiary. After Oct. 1, the company drew a cheque in favour of M.'s wife for a sum said to be the amount of the policy with profits, less the amount of a loan, and sent the cheque to M. for delivery to his wife. M. returned the cheque, and filed with the company a new designation making his mother the beneficiary. The company then applied for leave to pay the amount of the cheque into court and to be discharged from liability upon the policy. The application was supported by M.'s wife, but opposed by M. and his mother, M. alleging that he de-

sired to exercise the option of taking a paid-up policy payable at his death:—Held, by Rose, J., that the policy was a subsisting policy, and the company's contract with M. had not been discharged, when, after Oct. 1, 1918, he attempted to revoke the benefits theretofore conferred upon his wife and to substitute his mother as beneficiary. (2) That the attempt was successful, and whatever rights the wife had theretofore possessed passed to the mother: see the Ontario Insurance Act, R.S.O. 1914, c. 183, s. 171. (3) That M. or his mother had a right to select some benefit other than the payment of the cash which the company desired to pay into court, and the order asked for could not be made without defeating that right. Held, by a Divisional Court, on appeal from the order of Rose, J., that the application for leave to pay the money into court was rightly dismissed; but the order should have been confined to that; any adjudication as to the rights of the wife and mother was premature.

Re Sun Life Ass'ce Co. and McLean, 45 O.L.R. 131.

WILL—IDENTIFICATION OF POLICY—PREFERRED CLASS—STEPMOTHER.

R., whose life was insured for $1,000 by the Metropolitan Life Ins. Co. under a policy which provided that, in the event of his death before November 19, 1933, the insurance moneys were to be paid to Ruth E. R., "stepmother of the insured," was killed in action in September, 1916. After the issue of the policy he made a will in which he referred to other insurance, which he called "city insurance," meaning another policy for $1,000 on his life, procured by a city corporation on his enlistment for service in the war. By the will he disposed of $2,000 of insurance, in various sums, amongst eight persons; he directed that $1,000 of the $2,000 should go to "my mother R. E. R.;" and there was a later direction that, "in case I do not receive city insurance the above will be void and the Metropolitan Life will go to my mother:"—Held, that the will sufficiently identified the insurance which was payable to Ruth E. R. to make a change of the beneficiary effective: Insurance Act, R.S.O. 1914, c. 183, s. 171 (5). [Re Baeder and Canadian Order of Chosen Friends, 36 O.L.R. 30, 28 D.L.R. 424, followed.] A "stepmother" does not come within the preferred class referred to in s. 178 of the Act. [McHugh v. G.T.R. Co., 2 O.L.R. 609, applied.] The condition of the will on which the disposition of the $2,000 insurance moneys was to become void did not become operative, the "city insurance" having been paid to Ruth E. R.

Re Rutherford, 40 O.L.R. 266.

FRIENDLY SOCIETY—ISSUE OF NEW CERTIFICATE—ASSIGNMENT OR SURRENDER—UNDERTAKING TO PAY PREMIUMS—INSURANCE ACT, R.S.O. 1914, C. 183, S. 181 (2)—COSTS.

Re Knibbs and Royal Templars of Temperance, 17 O.W.N. 272.

FOREIGN FRIENDLY SOCIETY—CHANGE OF BENEFICIARY BY WILL OF INSURED—INVALIDITY UNDER LAWS OF SOCIETY—PREFERRED BENEFICIARIES—INAPPLICABILITY OF LAWS OF ONTARIO—PAYMENT OF MONEY OUT OF COURT—COSTS.

Re Cayley, 11 O.W.N. 286.

CONTRACT TO PAY WIFE OF INSURED—SEPARATION DEED—WILL—SUBSTITUTION OF BENEFICIARY NOT IN PREFERRED CLASS—INEFFECTIVENESS—INSURANCE ACT, R.S.O. 1914, c. 183, s. 178.

Re Canadian Order of Foresters and Ellis, 12 O.W.N. 348.

CONTEST BETWEEN BENEFICIARY UNDER POLICY AND BENEFICIARY UNDER WILL OF DECEASED ASSURED—INSURANCE COMPANY ALLOWED TO PAY INSURANCE MONEYS INTO COURT—ISSUE DIRECTED.

Re Bowen and Canadian Order of Foresters, 17 O.W.N. 112.

DESIGNATION OF BENEFICIARY—ALTERATION BY WILL—EXECUTORS—PAYMENT OF DEBTS—INSURANCE ACT, R.S.O. 1914, c. 183, ss. 171 (3), 179 (1).

Re Honsberger, 11 O.W.N. 187.

DESIGNATION OF MOTHER AS BENEFICIARY—PREDECEASE OF MOTHER—INTENTION TO ASSIGN TO FATHER FOR VALUE—PAYMENT OF PREMIUMS BY FATHER—EQUITABLE ASSIGNMENT NOT ESTABLISHED—LIEN OF FATHER FOR PREMIUMS PAID—BENEFIT PASSING TO PREFERRED BENEFICIARIES UNDER INSURANCE ACT.

Re Treadwell, 10 O.W.N. 74.

PAROL EVIDENCE OF ASSIGNMENT.

The abandonment by assured of his policy cannot be proved by oral evidence especially if the by-laws of the company require a written declaration for the purpose.

Parent v. Federal Assn. of Letter Carriers, 51 Que. S.C. 426.

CHANGE OF BENEFICIARIES—WILL—VARIATION OF POLICIES BY LETTER.

Potts v. Potts, [1919] 1 W.W.R. 906.

WIFE NAMED AS BENEFICIARY IN POLICY—SUBSEQUENT TRUST DEED DIRECTING MONEYS TO BE PAID TO SON, AND TO OTHERS IN CASE OF SON'S DEATH—BENEFIT TO OTHERS BEYOND POWER OF INSURED WITHOUT WIFE'S CONSENT—VALIDITY OF APPOINTMENT TO SON—LIFE INSURANCE POLICIES ACT (B.C.).

A life insurance policy named the wife of insured as beneficiary. Subsequently by trust deed insured appointed trustees to collect upon his death the proceeds of said policy and others and pay such proceeds to his son on his attaining 25 years of age with provisions for investment and main-

tenance for such son until he attained 25; if such son should die before the insured or before attaining 25 the moneys to go to the wife or issue of such son and if none then the moneys to go to the insured's residuary legatees. The residuary legatees were said son and certain others whom it was not within the power of the insured to benefit under the policy without consent of the wife under the terms of the Life Insurance Policies Act. Held, that so far as the trust deed appointed the son a beneficiary of the insurance moneys under said policy it was a valid appointment under s. 8 of the Life Insurance Policies Act; that the bona fide intention was to benefit the son at all events and that such intention and its effect could and should be separated from the further and nugatory intent to benefit persons not proper objects of the power.

Powell v. Imperial Life Ins. Co., [1919] 2 W.W.R. 285.

LIFE POLICY—DESIGNATION IN FAVOUR OF WIFE ENDORSED ON POLICY—EXPRESSION OF INTENTION—TRUST CREATED BY OPERATION OF INSURANCE ACT—INCOMPLETE INSTRUMENT.

Cunningham v. Canadian Home Circles, 3 O.W.N. 118, 20 O.W.R. 205.

(§ IV B—171)—STATUTORY DESIGNATION—CHANGE OF BENEFICIARY—SURVIVORSHIP—"WIFE"—MEANING OF.

Subsection 7 of s. 178 of the Insurance Act, 2 Geo. V., c. 33, R.S.O. 1914, c. 183, providing for a right by survivorship where one or more of the preferred beneficiaries die in the lifetime of the assured, is applicable as to the insurance moneys designated in favour of the wife, only when there is no wife of the assured living at the maturity of the contract. The words "the insurance" in subs. 3 of s. 178 of the Insurance Act, 2 Geo. V., c. 33, R.S.O. 1914, c. 183, providing that "where it is stated in the contract . . . that the insurance is for the benefit of the wife of the assured only . . . the word 'wife' shall mean the wife living at the maturity of the contract," applies equally to a portion of the insurance money under a policy payable one-half only to a wife by name; and, since subs. 4 makes subs. 3 applicable irrespective of whether the wife is designated by name, such portion is payable to the wife living at maturity of the contract, although not the one designated in the policy.

Re Lloyd and Ancient Order of United Workmen, 14 D.L.R. 625, 29 O.L.R. 312, reversing 10 D.L.R. 611, 24 O.W.R. 546.

STATUTORY BENEFICIARIES—RIGHT OF WIFE—ENCUMBRANCES.

Insurance policies effected by a wife upon the life of her husband, or by the husband for the benefit of his wife, wherein the wife is designated as the "assured" are contracts with the wife, and therefore her absolute property, which cannot be affected by the declaration or will of the husband; but policies effected by the husband for the benefit of his wife create a trust in favour of the wife, though the husband may by his will alter the trust, by cutting her interest down to a life estate and may direct the insurance in favour of any of the class of preferred beneficiaries mentioned in the Insurance Act (Ont.), s. 178 (1). He cannot, however, charge the insurance funds with the payment of encumbrances on his real estate. [R.S.O. 1914, c. 183, ss. 169, 171, 178, applied.]

Re Cole, 29 D.L.R. 492, 36 O.L.R. 173.

STATUTORY DESIGNATION—WIFE MADE BENEFICIARY BY NAME—DEATH OF WIFE—REMARRIAGE OF INSURED — RIGHT OF SECOND WIFE SURVIVING INSURED, IN ABSENCE OF FURTHER DESIGNATION.

Lambertus v. Lambertus, 5 O.W.N. 420.

(§ IV B—172)—PREFERRED CLASS — DECLARATION IN WRITING — INSURANCE ACT, R.S.O. 1914, c. 183, s. 171—WILL—PRINTED FORM—PERSONAL ESTATE—INCLUSION OF INSURANCE MONEYS.

Re Monkman and Canadian Order of Chosen Friends, 46 D.L.R. 701, 42 O.L.R. 363.

PREFERRED CLASS—DECLARATION IN WRITING — SUFFICIENCY — SOLDIER'S WILL — INSURANCE ACT—POLICY PAYABLE IN ONTARIO — DOMICILE BRITISH COLUMBIA.

Re Hewitt and Hewitt, 43 D.L.R. 716, 43 O.L.R. 286.

BENEFIT CERTIFICATE — CHANGE OF APPORTIONMENT — BENEFICIARY FOR VALUE.

Clark v. Loftus, 24 O.L.R. 174, 19 O.W.R. 606, 2 O.W.N. 280.

POLICY—ASSIGNMENT "AS INTEREST MAY APPEAR"—DEBT BARRED BY STATUTE.

Robinson v. Imperial Life Ass'ce Co., 44 N.S.R. 527, 9 E.L.R. 164.

BENEFIT CERTIFICATE — MONEYS PAYABLE TO "WIFE"—DEATH OF WIFE—REMARRIAGE OF ASSURED—CLAIM BY WIDOW.

Re Sons of Scotland Benevolent Asso. and Davidson, 2 O.W.N. 200.

LIFE INSURANCE — WILL — CHANGE OF BENEFICIARY.

Green v. Standard Trusts Co., 19 W.L.R. 40.

V. Waiver; estoppel.

A. Of insured beneficiary.

(§ V A—175)—ESTOPPEL OF INSURED—FIRE INSURANCE—OMISSION TO STATE EXTENT OF INTEREST—NEGLIGENCE OF AGENT.

Where an agent of an insurance company, who was also the insurance broker of the assured, omitted to ascertain and inform the company of the nature and extent of the interest of the assured who was in fact only a lessee of the property insured, it was held, that the neglect of the agent was the neglect of the assured and that,

therefore, the policy, in which the property was described as that of the assured, was void:—Held, that, even if the policy was not void for the above reason, the assured was not entitled to recover thereon since he had already received, under policies taken out by the owner of the premises, the full amount of the insurable value thereof.

Brown v. London Mutual Fire Ins. Co., 29 W.L.R. 711.

B. Of insurer.

(§ V B—180)—Damages to automobile—Conditions of insurance policy—Offer made to owner—Election by company to repair car—Refused by owner.

The owner of an automobile cannot succeed in an action on a policy of insurance when his car has been damaged if the Insurance Company has already made an offer to repair the damages according to the contract, and such offer has been refused by him.

Sare v. U. S. Fidelity & Guaranty Co., 30 D.L.R. 573.

Proofs of loss—Waiver—Denial of liability—"Insurance contract"—Interium receipt — Insurance Act, R.S.O. 1914, c. 183, s. 2 (14), s. 194, condition 8—Estoppel—Notice of cancellation.

Beury v. Canada National Fire Ins. Co., 35 D.L.R. 790, 38 O.L.R. 596. [Affirmed in 37 D.L.R. 105.]

Disputing award after arbitration.

The submission to arbitration by agreement between a fire insurance company and the insured to value the property insured and the loss by fire is a waiver of a clause contained in the policy whereby the company could have elected to repair and rebuild the insured property.

Lalande v. Phœnix Ins. Co., 24 Rev. de Jur. 571.

(§ V B—185)—Knowledge of insured—Class of building — "Dwelling-house" or "lodging-house."

The knowledge of the insurance company's agent sent to inspect the risk, that the building containing the goods insured and described in the application as a dwelling-house was also used as a lodging-house, is the knowledge of the company so as to disentitle the latter to complain of any alleged misdescription of the risk for non-disclosure, in the application, of the fact that lodgers were kept. [Rowden v. London, Edinburgh & Glasgow Ins. Co., [1892] 2 Q.B. 534; and Holdsworth v. Lancashire & Yorkshire Ins. Co., 23 Times L.R. 521, applied.]

Mahomed v. Anchor Fire & Marine Ins. Co., 15 D.L.R. 405, 48 Can. S.C.R. 546, 26 W.L.R. 695.

Waiver of notice — Acquiescence — Ascertaining loss.

In matter of fire insurance a formal notice may be waived. Where a notice of the fire was given, but not technically in accordance with the terms of the policy and of the law, nevertheless if the company received the notice, acts upon it, makes a survey of the damage done, and ascertained that the loss to the insured is a total one, it cannot refuse to pay the loss.

Carbray v. Stratheona Fire Ins. Co., 47 Que. S.C. 212.

Fire insurance — Unoccupied house — Knowledge of the insurer — False representations — Notice — Proof — Term — Repudiation —C. C. Que. art. 2478.

If an application for insurance was made for a house described as an inhabited dwelling, when it is unoccupied, there was no false representation rendering the policy void, if the insurer knew that the building was unoccupied at the time of issuing the policy, and was not occupied up to the time of its destruction by fire.

The insurer cannot, in order to evade paying the loss, take advantage of the fact that the conditions in the policy were not fulfilled, such as giving notice, making proof of loss or the time allowed for settlement, when he positively refuses to pay and repudiates all liability.

British Colonial Fire Ins. Co. v. Rahal, 28 Que. K.B. 227.

(§ V B—190)—Knowledge of agent — Keeping oil—Waiver.

Knowledge by the insurer's soliciting agent that coal oil in large quantities was kept on the premises, contrary to a condition of the policy, does not constitute notice of that fact to the insurer; nor does knowledge of that fact prior to the insurance imply knowledge that it would be so kept afterwards, and is not equivalent to a waiver of the condition. An offer of settlement of an insurance claim by the adjusting agent does not, in the absence of proof of authority to that end, operate as a waiver of any objections which might be urged against the claim by the insurer.

Laforest v. Factories Ins. Co., 30 D.L.R. 265, 53 Can. S.C.R. 296, affirming 24 Que. K.B. 543.

Contract of marine insurance — Agent authorized to close contract.

An insurance contract, made by a Montreal company, through its agent, at Quebec, is completed in Quebec City if such agent is authorized to close the risk, the policy being delivered to defendant at Quebec and paid by a cheque to the order of said agent.

Tanguay v. Dale, 12 Que. P.R. 245.

(§ V B—195)—Application filled in by company's agent — Misrepresentation — Acceptance by company — Estoppel.

An insurance agent who negligently fills in an application for insurance without asking necessary and material questions, and induces the applicant to sign the application without reading it, assuring him that "it is all right," is bound to communi-

cate the facts and circumstances to his principal, and his knowledge will be imparted to it; by issuing the policy and retaining the premium the principal is estopped from setting up misrepresentation on the application.

Great North Ins. Co. v. Whitney, 44 D.L.R. 433, 57 Can. S.C.R. 543, [1918] 2 W.W.R. 167, affirming 32 D.L.R. 756, 10 A.L.R. 292, [1917] 1 W.W.R. 1159.

HAIL INSURANCE — APPLICATION STATING AGENT TO BE AGENT OF APPLICANT—MUTUAL MISTAKE AS TO DESCRIPTION —NOTICE—LIABILITY OF COMPANY.

An application form for hail insurance contained a clause that the agent filling it in was the agent of the applicant and not of the company. By the mutual mistake of the agent and the applicant, the application contained a wrong description of the property:—Held, that insurance company was not liable on the policy issued upon the said application on the ground that, since the agent was the agent of the applicant, the company had no actual notice of the mistake. [Bleakley v. Niagara District Mutual Ins. Co., 16 Gr. 198; Biggar v. Rock Life Ass. Co., [1902] 1 K. B. 516; Lamothe v. North American Life Ins. Co., 39 Can. S.C.R. 323, followed; New York Life Ins. Co. v. Fletcher, 117 U. S. Reports, 519, approved.]

Laird v. Canada Weather Ins. Co., 29 W.L.R. 570, 7 W.W.R. 231.

(§ V B—212)—ASSENT TO REMOVAL.

An insurance company in giving a formal assent to a transfer already made of the insured goods to another building will not be held to have waived their right to afterwards claim on learning that a fire had already destroyed the goods that the rights of the parties became fixed at the time of the fire, and that it was an implied term of the consent that no loss had occurred whereof prompt notice had not been given to the insurance company as required by the terms of the policy.

Kline v. Dominion Fire Ins. Co., 1 D.L.R. 733, 21 O.W.R. 285, 25 O.L.R. 534. [Affirmed, 9 D.L.R. 231, 47 Can. S.C.R. 252.]

(§ V B—216)—ACCEPTING PREMIUM NOTE—LAPSE OF POLICY CAUSED BY CONDUCT OF INSURER.

The acceptance of a note in payment of a premium on a life policy manifests an election on the part of the insurance company to treat the policy as in force and not to take advantage of the default of the insured; and if before maturity of the note the insured is led to believe by the representations of the company that the policy had lapsed, and in reliance of such representations he ceases to meet the subsequent premiums, the company by its conduct will be estopped from denying liability on the ground that the policy had lapsed for non-payment of premiums.

Capital Life Ass'ce Co. v. Parker, 25 D.L.R. 363, 51 Can. S.C.R. 462, affirming 22 D.L.R. 325, 48 N.S.R. 404.

PREMIUM PAYABLE BY NOTE TO AGENT—RULES OF INSURANCE COMPANY—DEATH OF ASSURED—POLICY IN FORCE—LIABILITY.

An insurance company, whose authorized agent takes a note payable to him for the premium of a policy he has written and remits said premium less his commission to the company out of his own pocket, must regard this premium as paid, and the policy in question as in force.

Steinbrecker v. Mutual Life Ins. Co., 49 D.L.R. 340, 46 O.L.R. 36.

(§ V B—230)—WAIVER BY INSURER—FAILURE TO BRING ACTION IN TIME—SUBSEQUENT REQUEST FOR PROOF OF LOSS.

The waiver of the failure to bring action on a policy of insurance within the stipulated time is not shewn by letters thereafter written by the insurer requesting proofs of loss without referring to the fact that the time for bringing action had expired, where there was no consideration for a waiver, and the insured did nothing to his detriment in reliance on a waiver.

McDermott v. Western Canada Fire Ins. Co. 13 D.L.R. 217, 24 W.L.R. 375.

NOTICE OR PROOFS OF LOSS.

The failure of an insured to give written notice of loss is waived by an insurance company, since it did not appear that it was thereby prejudiced where, on the day after the destruction of the insured property the president and two of the directors of the company, in response to a message from the insured, came and inspected the ruins, and told him that they would return the next day, which they did, when they obtained detailed particulars of the loss, which they reduced to writing, and pursuant to their instructions, the insured attended the next meeting of the board of directors of the company and gave them all the information they desired, and the secretary of the company prepared and the insured signed a statutory declaration of loss, which, together with the policy, were retained by the company, and where the insured subsequently paid an assessment on his premium note, and, after the insured and the company were at arm's length, the former gave the latter a further statutory declaration of loss, after which the company returned the premium note and declared the policy of insurance cancelled.

Patterson v. Oxford Farmers Mutual Fire Ins. Co., 7 D.L.R. 369, 4 O.W.N. 140, 23 O.W.R. 122.

(§ V B—235)—PARTICIPATION IN ADJUSTMENT.

No waiver of a breach of policy of insurance can arise on the part of an insurer from a fact that it sent the insured proofs of claim which were filled out by him and returned to the company where the blanks themselves expressly stipulated that by furnishing them and investigating the claim

the insurer should not be held to waive a breach of any condition of the policy.

Evans v. Railway Passengers' Ass'ce Co., 3 D.L.R. 61, 3 O.W.N. 881, 21 O.W.R. 442.

CONDITION OF POLICY — NOTICE — TENDER BEFORE ACTION — WAIVER.

Can. R. Accident Ins. Co. v. Haines, 44 Can. S.C.R. 386.

FIRE — BUILDERS' RISK — BUILDING IN "COURSE OF CONSTRUCTION" — KNOWLEDGE OF COMPANY — ESTOPPEL.

Dodge v. York Fire Ins. Co., 1 O.W.N. 1038, 2 O.W.N. 571, 18 O.W.R. 241.

VI. The loss; remedies of the assured.

A. NOTICE; PROOFS; ARBITRATION. —

(§ VI A—245)—PROOF OF LOSS—SCOPE OF LIABILITY.

A claim against an insurance company under a policy of fire insurance is not a debt due or accruing due until the amount of the loss is fixed; it is a claim of indemnity for loss, and until the loss is ascertained, by the admission of the company or otherwise, the claim under the policy is one of damages rather than of debt. [Hartt v. Edmonton Steam Laundry Co., 2 A.L.R. 130, applied.]

Shierman v. Harris and Craske, 22 D.L.R. 694, 8 S.L.R. 165, 8 W.W.R. 514.

FALSE PROOF OF LOSS—WAIVER—PARTICIPATION IN ADJUSTMENT.

A false statement by the insured in his statutory declaration as to the loss, by which the actual loss is greatly exaggerated, vitiates the claim under a condition to that effect in the policy; an appraisement of loss, or an endeavor to arbitrate the claim by an adjuster for the insurance company, does not operate as a waiver of, nor could he so waive, the condition.

Maple Leaf Milling Co. v. Colonial Ass'ce Co., 36 D.L.R. 202, 27 Man. L.R. 621, [1917] 2 W.W.R. 1091, reversing 22 D.L.R. 822.

CHATTEL PROPERTY OWNED BY DIFFERENT MEMBERS OF ONE FAMILY—INSURANCE IN NAME OF ONE MEMBER—RIGHT TO RECOVER—"DIRECT LOSS"—PROOFS OF LOSS — ACCEPTANCE — WAIVER — INSURANCE ACT, R.S.O. 1914, c. 183, ss. 194 (CONDITION 18), 199.

Maldover v. Norwich Union Fire Ins. Co., 40 O.L.R. 532.

PROOFS OF LOSS — FRAUD — FINDINGS OF FACT OF TRIAL JUDGE—"SECOND INSURANCE"—EFFECT OF REMOVAL OF GOODS FROM TWO SEPARATE BUILDINGS INTO ONE—KNOWLEDGE AND ASSENT OF INSURERS — SALVAGE — OVERVALUATION —SUSPICION AS TO CAUSE OF FIRE—INSURANCE ACT, R.S.O. 1914, c. 183, s. 194, CONDITION 5—WAIVER OF OBJECTIONS — KNOWLEDGE OF AGENT — BONA FIDES OF ASSURED.

Rodgers v. General Accident Fire & Life Ins. Corp.; Rodgers v. Mercantile Fire Ins. Co., 42 O.L.R. 419.

STOCK OF JEWELRY — "PRECIOUS STONES" —REASONABLE CARE — EVIDENCE OF VALUE — EXAGGERATED CLAIM — EXAGGERATION NOT AMOUNTING TO FRAUD —"IMPLEMENTS" — MODELS — ASSESSMENT OF LOSS—COSTS—TEST ACTION.

Brymer v. Wellington Mutual Fire Ins. Co., 13 O.W.N. 361.

PROOF OF LOSS—ON BLANKS FURNISHED BY INSURER—WAIVER OF CONDITION.

A provision of an insurance policy that full particulars of loss should be supplied the company on forms furnished by it, is waived by the company's instructions to its general agent to the effect that it did not think it desirable to furnish the insured persons with such forms, as it preferred to have separate statements from them.

Gill v. Yorkshire Ins. Co. 12 D.L.R. 172, 23 Man. L.R. 368, 24 W.L.R. 389, 4 W.W. R. 692.

PROOFS OF LOSS—OVERESTIMATION OF VALUE OF STOCK OF GOODS DESTROYED OR DAMAGED — FALSE STATEMENTS NOT AMOUNTING TO FRAUD OR DISHONESTY— ACTIONS ON POLICIES—TIME FOR COMMENCEMENT — LAPSE OF 60 DAYS AFTER COMPLETION OF PROOFS — FAILURE TO SEPARATE DAMAGED FROM UNDAMAGED GOODS—ASSESSMENT OF LOSS—REDUCED ESTIMATE—COSTS OF ACTIONS.

Babayan v. Phœnix Insurance Co., 14 O.W.N. 17.

RELIEF FROM—PLEADING.

In an action upon a policy of fire insurance the plaintiff may be relieved, on the ground of mistake, under the Fire Insurance Policy Act, R.S.S. 1909, c. 80, from the effects of his failure to give notice and proofs of loss, although he has not pleaded the Act. [Bell Bros. v. Hudson's Bay Ins. Co., 44 Can. S.C.R. 419; Shepard v. British Dom. Gen. Ins. Co., [1918] 1 W.W.R. 85, followed.]

Pachal v. Germania Fire Ins. Co., [1918] 1 W.W.R. 502.

CONDITIONS — ACCOUNTS AND INVOICES — PRODUCTION — PROOF OF LOSS — FALSITY.

A statutory condition of a fire insurance policy that the insured shall in support of his claim, if required and if practicable, produce books of account and furnish invoices and other vouchers, does not make the procuring and production of copies of invoices a condition precedent to his right of action. [Strong v. Crown Fire Insurance Co., 13 D.L.R. 686, followed.] To justify holding an assured guilty of having made a false or fraudulent statement in his proof of loss the evidence ought to be clear and satisfactory, and leave no room for any reasonable inference but that of guilt, and where evidence that the assured had made an excessive estimate of his loss is relied upon as proof of his fraudulent intent, the estimate should be so extravagant as to lead necessarily to the conclusion that the excess was due, not to an error of judgment,

but to an intention to defraud. [Adams v. Glen Falls Ins. Co., 31 D.L.R. 166, followed.] A wilfully false statement of value in the statutory declaration of loss under a fire insurance policy vitiates the claim. [Maple Leaf Milling Co. v. Colonial Ass'ce Co., 36 D.L.R. 202, followed.] And where a building and a stock of goods therein are insured under one policy, such a statement with respect only to the value of the building defeats the entire claim. [Harris v. Waterloo Mutual Fire Ins. Co., 10 O.R. 718, followed.]

Kibzey v. Home Ins. Co., [1918] 2 W.W.R. 541.

COMPENSATION — ARBITRATION — AWARD —ACQUIESCENCE—REPAIRS—MANDATE.

A fire insurance company, acting by its agent, which agrees to an arbitration to determine the compensation an assured is entitled to on the burning of his building, and names its arbitrator and furnishes him with all the necessary signatures in blank and other papers, gives the assured sufficient reason for believing that its agent and its arbitrator are authorized to allow him to begin urgent repairs to the property burned, before the award is made. An award bearing the signatures of the arbitrators is, under such circumstances, not void because it has not been received by a notary, seeing that this obligation is incumbent as much on the defendant as on the plaintiff, and that the representative of the latter had taken possession of it and sent it to the company's agent. When a company has agreed to have arbitrators determine the compensation due to an assured, it cannot afterwards revoke the submission to arbitration, or invoke the right which the conditions of the policy give the company to make the repairs on the insured building which the fire has rendered necessary.

Lalande v. Phœnix Ins. Co., 54 Que. S. C. 461. [See 28 Que. K.B. 287.]

PROOFS OF LOSS.

A false statement by an insured person in a statutory proof of loss as to a fact not required by the Ontario Insurance Act, R.S.O. 1897, c. 203, to be stated, will not vitiate a claim for loss under subs. (c) of condition 15 of the Act.

Patterson v. Oxford Farmers Mutual Fire Ins. Co., 7 D.L.R. 369, 4 O.W.N. 140, 23 O.W.R. 122.

(§ VI A—246)—ACCIDENT—CONDITION IN POLICY — IMMEDIATE NOTICE—DELAY—RECOVERY.

Where an accident insurance policy requires immediate notice of the accident to be given, the insured may be allowed a reasonable time in which to give the required notice according to the circumstances of the case. Held, that a delay of 52 days in giving the notice was, under the circumstances, a want of compliance with the condition which prevented recovery under the policy.

Merchants & Employers Guarantee & Accident Co. v. Parent, 48 D.L.R. 96, 28 Que. K.B. 310.

FIRE INSURANCE ACT (N.B. 1913, 3 GEO. V., C. 26)—NOTICE OF LOSS—VERBAL NOTICE TO AGENT—AGENT NOTIFYING COMPANY IN WRITING—SUFFICIENCY OF.

The statutory provisions in the N.B. Fire Insurance Act (1913, 3 Geo. V., c. 26) requiring the assured to give notice in writing forthwith after the loss has occurred is substantially complied with, where the assured verbally notifies the agent who solicited the insurance, and such agent notifies the company in writing, especially when the giving of such verbal notice may be ascribed to a mistake on the part of the assured resulting from the acts and statements of such agent. [Prairie City Oil Co. v. Standard Mutual Fire Ins. Co., 44 Can. S.C.R. 40, followed.]

Wetmore v. British & Canadian Underwriters of Norwich, England, 45 D.L.R. 666, 46 N.B.R. 304.

NOTICE OF LOSS—SUFFICIENCY OF—CONDITION AS TO—SERVICE ON AGENT OF FOREIGN COMPANY.

Notice of the illness and death of an insured animal given in Manitoba to an agent appointed to represent a company according to the Manitoba Insurance Act, who gave immediate telegraphic notice to the head office in Montreal, is a sufficient compliance with a condition of a policy of insurance that notice of the illness or death of an insured animal should be given direct to the company, where notice, if given by the insured direct to the head office of the company, either in person or by letter, would not have arrived in advance of the notice given by the agent.

Gill v. Yorkshire Ins. Co., 12 D.L.R. 173, 23 Man. L.R. 368, 24 W.L.R. 389, 4 W.W.R. 692.

NOTICE.

Where the policy of guarantee insurance calls for immediate notice of any shortage and the insured fails to notify the insurer until a month after the discovery of loss, this notice is tardy and the insured cannot recover, even though the unfaithful employee be apprehended and convicted as a result of his (the insured's) efforts.

Lachine School Commissioners v. London Guarantee & Accident Co., 3 D.L.R. 335.

Under a policy insuring against accident and other causes of disablement and providing that written notice of the happening of an accident or event giving rise to a claim must be given an insurer within a specified time, there can be no recovery in the absence of such notice, even though the insured was incapacitated from complying with the requirement as to notice by the event which gave rise to his claim.

Evans v. Ry. Passengers' Ass'ce Co., 3 D.L.R. 61, 3 O.W.N. 881, 21 O.W.R. 442.

Notice to a fire insurance company by the person to whom, by the terms of the

policy, the loss is by direction of the assured made payable is a valid notice on behalf of the assured.

Strong v. Crown Fire Ins., 1 D.L.R. 111, 3 O.W.N. 481, 20 O.W.R. 901.

Where an insurance company receives a notice of loss under a policy issued by it and after an investigation rejects the claim on the ground of misrepresentation in the insured's application, there is a waiver of any irregularity in the giving of the notice of loss.

Clarke v. British Empire Ins. Co., 4 D.L.R. 444, 21 W.L.R. 774, 2 W.W.R. 682. [Reversed on another point 6 D.L.R. 353, 5 A.L.R. 99, 22 W.L.R. 89, 2 W.W.R. 958.]

The court may, under s. 172 of the Ontario Insurance Act, R.S.O. 1897, c. 203, if deemed equitable, relieve an insured person from an omission to give an insurance company written notice of loss.

Patterson v. Oxford Farmers Mutual Fire Ins. Co., 7 D.L.R. 369, 4 O.W.N. 140, 23 O.W.R. 122.

ACCIDENT INSURANCE—NOTICE OF INJURY—CONDITION AS TO GIVING—BINDING EFFECT OF BENEFICIARY.

The beneficiary named in a contract of accident insurance, although not a party thereto, is bound by the conditions of the policy as to the method of giving notice of an injury to the assured.

Youlden v. London Guarantee & Accident Co., 12 D.L.R. 433, 28 O.L.R. 161, affirming 4 D.L.R. 721, 26 O.L.R. 75.

(§ VI A—247)—LOSS—PROOF OF—NON-COMPLIANCE WITH STATUTORY CONDITION—OBJECTION BY INSURER ON OTHER GROUNDS—WAIVER.

If a person in good faith furnishes proof of loss of insured property, to which the insurer objects on grounds other than non-compliance with statutory condition 13 of the Ontario Insurance Act, R.S.O. 1897, c. 203, 2 Geo. V. c. 33, R.S.O. 1914, c. 183, the insured will be relieved from such non-compliance under the provisions of s. 172 of such Act, where it would be "inequitable that the insurance should be deemed void or forfeited by reason of imperfect compliance with the condition." Statutory condition 13 of the Ontario Insurance Act, R.S. O. 1897, c. 203, 2 Geo. V. c. 33, R.S.O. 1914, c. 183, relative to furnishing proofs of loss, does not require the owner of a stock of goods which were destroyed by fire to furnish an insurer duplicate invoices from those from whom the goods were purchased.

Strong v. Crown Fire Ins. Co.; Strong v. Rimouski Fire Ins. Co.; Strong v. Anglo-American Fire Ins. Co.; Strong v. Montreal-Canada Fire Ins. Co., 13 D.L.R. 686, 29 O.L.R. 33.

A condition in a policy of insurance that the proofs of loss must be delivered within 30 days to the secretary of the insurer on blanks furnished by it means within 30 days after the insurer supplied the blanks. Where an insurance company receives proofs of loss under a policy issued by it and after an investigation rejects the claim on the ground of misrepresentation in the insured's application, there is a waiver of the condition in the policy that the proofs of loss must be sent to the insurer within a certain time.

Clarke v. British Empire Ins. Co., 4 D. L.R. 444, 21 W.L.R. 774, 2 W.W.R. 682. [Reversed on another point 6 D.L.R. 353, 5 A.L.R. 99, 22 W.L.R. 89, 2 W.W.R. 958.]

A statement by the insured in the proofs of loss furnished the insurer that the insured property at the time of its destruction belonged to the insured, and that no other person had any interest in it except a specified bank for advances, but the statement failed to state the nature of the bank's interest or the amount of the advances, and made no mention of a transfer given the bank as security, is not a compliance with the provision of the policy that the proofs of loss shall state the interest of the insured and all others in the insured property. A mere statement by the insured in the proofs of loss furnished the insurer that the origin of the fire was unknown to him is not a compliance with the requirement of the policy that the insured in his proofs of loss "shall render a statement to this company signed and sworn to by the said insured, stating the knowledge and belief of the insured as to the time and origin of the fire." No waiver by the insurer of the provisions of a policy as to what the proofs of loss must contain is shewn by the fact that its adjuster went to the place of fire to ascertain its cause and the amount of loss caused by it and that while there he made enquiries of the insured as to his knowledge of the origin of the fire, the quantity of the goods destroyed, what books or paper he still had and other insurance, and had measurements made for the purpose of estimating the quantity of the goods destroyed. The mere fact that an insurer retained the proofs of loss furnished by the insured for a long time without objection cannot be held to constitute a waiver of fuller or further proof. [McManus v. Ætna Ins. Co., 11 N.B.R. 314, followed; Imperial Fire Ins. Co. v. Bull, 18 Can. S.C.R. 697, 1 S.C. Cas. 1, affirming 15 Ont. App. 421, distinguished.]

Guimond v. Fidelity Phœnix Fire Ins. Co., 2 D.L.R. 654, 41 N.B.R. 145, 10 E.L.R. 562. [Affirmed, 9 D.L.R. 463, 12 E.L.R. 350.]

Section 2 of the Fire Insurance Policy Ordinance, N.W.T. (Alta.), 1911, c. 113, giving power to the court to hold the insurance company liable notwithstanding trifling defects in the proofs of loss occurring by necessity, accident or mistake, or where it appears inequitable to hold the insurance void by reason of imperfect compliance with the conditions of the policy, should not be applied to dispense with reasonable formal proofs called for by the insurance company which the insured delib-

erately refused to furnish without assigning any reason for the refusal. Where one of the statutory conditions of a fire insurance policy requires the assured to supply, with his proofs of loss, a certificate of a justice or other officer resident in the vicinity of the fire certifying, in effect, that the circumstances have been investigated by such official and do not indicate the perpetration of any fraud by the assured, the refusal of the assured to furnish such certificate within the statutory time, although demanded by the company, is a bar to the action.

Forest v. Home Ins. Co., 8 D.L.R. 764, 5 A.L.R. 223, 22 W.L.R. 773, 3 W.W.R. 575.

PROOFS OF LOSS—DUPLICATE INVOICES PRIOR TO STOCK-TAKING.

Where the insured claiming under a fire policy has furnished ample proofs of a proper stock-taking which took place 5 months before the fire and has supplied subsequent invoices and statements of sales, a further demand by the insurance company for duplicate invoices of the goods bought prior to the stock-taking and which was not complied with by the insurer, will not be upheld on objection that the proofs of loss had not been completed. [Strong v. Crown Fire Ins. Co., 13 D.L.R. 686, 29 O.L.R. 33, affirmed on appeal.]

Anglo-American Fire Ins. Co. v. Hendry, 15 D.L.R. 832, 48 Can. S.C.R. 577.

IRREGULARITIES—RELIEF—TIME.

Section 2 of the Fire Insurance Policy Act, R.S.M. 1913, c. 103, giving the court the power to relieve the assured in case the proofs of the loss furnished by him are defective in any way, have no relation to the furnishing of the certificate of a magistrate, notary public or commissioner referred to in s. 13 (e) of the statutory conditions appended to the Act, since such certificate need not be procured at all unless required by the insurance company. [Forest v. Home Ins. Co., 8 D.L.R. 764, followed.] When no term is fixed by the policy or the conditions within which the company may demand the production of such a certificate, the law requires it to be done within a reasonable time, and such a demand will be too late if not made until 78 days after completion of the proofs of loss required by the policy and 48 days after the plaintiff's right of action upon the policy had accrued under its conditions. Semble, such a demand would be too late unless made before the accrual of the right of action. [Hammond v. Citizens, 26 N.B.R. 371; McIntyre v. National Ins. Co., 7 U.C.C.P. 555, followed.]

Robinson v. Midland Fire Ins. Co., 26 Man. L.R. 398, 34 W.L.R. 577.

PROOF OF LOSS—PROOF OF DEATH OF ASSURED—DISAPPEARANCE—EFFORTS TO TRACE—LACK OF TIDINGS FOR 9 YEARS—PRESUMPTION OF DEATH.

Wright v. Ancient Order of United Workmen, 5 O.W.N. 445.

(§ VI A—248)—ARBITRATION—WAIVER AS TO INSURED.

An express waiver by an insurance company as to the plaintiff in an action on a policy, of a condition for arbitration of loss, is available to one who purchased an insured chattel before loss, so as to extend to a counterclaim made by him against the company, with whom he was joined as a defendant in the action.

Gill v. Yorkshire Ins. Co., 12 D.L.R. 172, 23 Man. L.R. 368, 24 W.L.R. 389, 4 W.W.R. 692.

(§ VI A—249)—ASSIGNMENT TO MORTGAGEE—NOTICE TO AGENT.

Notice of the standing of the mortgagee as assignee of the surplus insurance moneys was held sufficient when given to the local agents of the insurance companies concerned.

Laidlaw v. Hartford Fire Ins. Co., 29 D.L.R. 229, 10 A.L.R. 7, 34 W.L.R. 993, 10 W.W.R. 1063, reversing 24 D.L.R. 884, 32 W.L.R. 697, 9 W.W.R. 385.

B. RISKS AND CAUSES OF LOSS, INJURY OR DEATH.

(§ VI B—255)—GOODS IN HOUSE.

Where there is no affirmative evidence from which it may reasonably be inferred that goods insured were actually in the house at the time of the fire, it cannot be assumed that the fire caused a loss under the policy.

Anderson v. German American Ins. Co., 35 D.L.R. 522, 24 B.C.R. 95, [1917] 2 W.W.R. 632.

"DIRECT LOSS OR DAMAGE BY FIRE"—FREEZING—"PROPERTY OF ASSURED."

In an action upon a policy insuring against fire the furniture and fittings of an "ice-cream parlour," it appeared that the fire in respect of which loss was alleged occurred in winter, and did not spread above the floor of the "parlour." In order to confine it below, the pipe and door of the furnace were taken off, with the result that the water froze in the pipes and plumbing fixtures of the fountain and carbonator.—Held, that the damage was the immediate consequence of the fire and the method adopted of dealing with it, and so was recoverable as 'direct loss or damage by fire." (2) By statutory condition 6 (a) Ontario Insurance Act, s. 194, an insurance company is not liable for the loss of property owned by any other person than the assured, unless the interest of the assured is stated in or upon the policy. The policy insured the fountain and attachments, "the property of the assured," and these were injured in consequence of the fire: Held, that the plaintiff was entitled to recover for this portion of the loss, notwithstanding that these articles were not paid for in full, and that by the sale-agreement the ownership was not to pass to the plaintiff until payment in full—that agreement also providing that the goods were to be at his risk, and that he was to keep them insured

"with loss payable to the vendors as their interest may appear." The articles were his "property" in the popular sense; and "owner" is not synonymous with "holder of an exclusive title." (3) The plaintiff had given an order upon the defendants to pay M. a sum of money out of the amount due upon the policy: Held, that whether the order divested the plaintiff of the right to sue for that sum and vested it in M. could not be decided in the absence of M.; and, so far as appeared, the plaintiff's right to sue was not affected. It was ordered that the whole amount found due by the defendants should be paid into court, and should not be paid out except on notice to M. and also to the vendors of the fountain and accessories.

Drumbolus v. Home Ins. Co., 37 O.L.R. 465.

ACTION ON POLICY—ANSWERS IN APPLICATION OF ASSURED AS TO OWNERSHIP AND INCUMBRANCES — "OWNER" — PERSON HAVING INTEREST IN PROPERTY INSURED —MORTGAGE ON PROPERTY NOT KNOWN TO ASSURED — ABSENCE OF PREJUDICE FROM NONDISCLOSURE—SUBSEQUENT INSURANCE NOT DISCLOSED—ABSENCE OF ASSENT OR KNOWLEDGE ON PART OF INSURERS—NECESSITY FOR NOTICE—STATUTORY CONDITION 5—FRAUDULENT PURPOSE—FINDING OF FACT OF TRIAL JUDGE —PREVIOUS ACQUITTAL OF ASSURED ON CRIMINAL CHARGE.

Dawson v. Caledonian Ins. Co. Edinburgh, 15 O.W.N. 450.

(§ VI B—257)—FIRE AND LIGHTNING—BARN STRUCK BY LIGHTNING—FURTHER INJURY BY WIND—DAMAGE TO CONTENTS —NEGLIGENCE—RECOVERY UNDER POLICY.

Roth v. South Easthope Farmers Mutual Fire Ins. Co., 45 D.L.R. 765, 44 O.L.R. 186, varying 41 O.L.R. 52.

(§ VI B—259a)—MARINE—"PERIL OF THE SEA."

Damage to a cargo from sea water that apparently had forced through the hatches of the ship during a storm is sufficient prima facie proof of injury from a "peril of the sea" within the meaning of an insurance policy covering a risk of that kind.

Creeden v. North China Ins. Co., 36 D.L.R. 339, 24 B.C.R. 335, [1917] 3 W.W.R. 33.

MARINE INSURANCE.

In a contract of marine insurance it was provided that the insured should not have a right to claim for total loss, either of vessel or freight, on account of the estimated amount of repairs exceeding the value of the vessel, nor a right under any circumstances to abandon either vessel or freight, provided the vessel remained in specie, unless the amount which the insurers would be liable to pay (exclusive of all general average charges, and charges for getting off or raising and bringing into port a vessel stranded or submerged, and of all repairs consequent upon decay) under an adjustment, as of partial loss, after making all the usual deductions, would exceed half the value of the vessel as declared in the policy. It was further provided that the highest valuation under which the vessel is insured in any policy should be the basis for ascertaining a technical loss of freight under the policy:—Held, that under such a contract so long as the vessel remained in specie no claim for total loss either of vessel or freight could be made except on the basis of calculation as to values set out in the policy.

Slaughenwhite v. Western Ass'ce Co., 11 E.L.R. 310.

MARINE POLICIES—ACTION BY RECEIVER OF COMPANY IN LIQUIDATION FOR PREMIUMS — PROMISSORY NOTES — DEFENDANT'S LIABILITY FOR UNEARNED PORTION OF PREMIUMS.

China Mutual Ins. Co. v. Pickles, 9 E.L.R. 269, 46 N.S.R. J.

(§ VI B—260)—PRESUMPTION OF DEATH—SEVEN-YEAR PERIOD—ACTION—COSTS.

Where there was no proof of the death of a person whose life was insured by the defendants, but he had been absent and unheard of for more than 7 years, his death was presumed, and judgment given for his wife in an action upon the insurance policy, although no inquiry was made by her at the time of his disappearance, except from friends of her husband and lake captains—he having been one of that class. Absence and silence are to be taken as indicating death as their cause, when there is nothing in the circumstances to indicate any other reason for the absence or silence. The presumption arises only when the absence and silence continue for 7 years. The presumption is not conclusive; and it was open to the defendants in this case to make any inquiry or institute any search they saw fit. The plaintiff, having made out a prima facie case, which had not been answered by the defendants, was entitled to recover. "The seven years" means the 7 years immediately following the disappearance, not the 7 years next before the commencement of the action. [Dicta of Clute and Riddell, JJ., in Duffield v. Mutual Life Ins. Co. of New York, 20 D.L.R. 467, 32 O.L.R. 299, dissented from; Nepean v. Doe d. Knight, 2 M. & W. 894, followed.] No costs of the action were allowed, as the sufficiency of the proof of death might have been determined in a summary way under s. 165 (5) of the Insurance Act, R.S.O. 1914, c. 183.

Olsson v. Ancient Order of United Workmen, 38 O.L.R. 268.

PRESUMPTION OF DEATH.

A claim for life insurance on the ground that the insured must be presumed to be dead because he had not been heard of for 7 years must be supported by all reasonably available evidence of friends of the insured who might be expected to have heard from him were he alive.

Linke v. Canadian Order of Foresters, 21

D.L.R. 741, 33 O.L.R. 159. [See 8 O.W.N. 399.]

LIFE INSURANCE—PRESUMPTION OF DEATH OF INSURED — 7 YEARS' ABSENCE — PROOFS OF DEATH—WAIVER—RIGHT OF BENEFICIARY.

Linke v. Canadian Order of Foresters, 7 O.W.N. 516.

PRESUMPTION OF DEATH OF INSURED—ORDER DECLARING — PAYMENT OF INSURANCE MONEY TO BENEFICIARY—COSTS.

Re Traynor and Catholic Mutual Benefit Assn., 14 O.W.N. 90.

UNDER LIFE POLICIES—CAUSE OR MANNER OF DEATH—PROOF.

Dominion of Canada Guarantee & Accident Co. v. McKercher, 18 Rev. de Jur. 136.

(§ VI B—270)—DEFENCE OF SUICIDE—EVIDENCE.

In an action upon life insurance policies wherein the defence of suicide was set up, held, contrary to the view of the Trial Judge, that the evidence proved such defence.

Dominion Trust v. N.Y. Life Ins. Co., 44 D.L.R. 12, [1919] A.C. 254, [1918] 3 W.W.R. 850, affirming 32 D.L.R. 33, 23 B.C.R. 343, [1917] 1 W.W.R. 672.

(§ VI B—275)—TERMS OF POLICY AND APPLICATION.

The term of insurance must, as against the insured, be found in the policy, unaided by anything in the application or proposal.

Sharkey v. Yorkshire Ins. Co., 32 D.L.R. 711, 54 Can. S.C.R. 92, affirming 31 D.L.R. 435, 37 O.L.R. 344.

ANIMALS—COMMENCEMENT OF LIABILITY—DISEASE CONTRACTED BEFORE.

An application for insurance is not an offer but a request; the policy is an offer and its acceptance completes the contract; unless otherwise stipulated, it usually comes into force on the acceptance of the policy and the payment of the premium; under such a contract, where it was provided that insurance on a horse should apply in case of death from disease originating after commencement of liability, no insurance was payable when the horse died after the liability commenced of a disease which originated previously to the acceptance of the policy but subsequently to the application, no protection note having been taken.

Sharkey v. Yorkshire Ins. Co., 31 D.L.R. 435, 37 O.L.R. 344, reversing 10 O.W.N. 108. [Affirmed in 32 D.L.R. 711, 54 Can. S.C.R. 92.]

LIVE STOCK INSURANCE—ANIMAL NOT IN GOOD HEALTH WHEN CONTRACT MADE.

Demal v. British American Live Stock Assn., 17 W.L.R. 485, affirming 14 W.L.R. 250.

(§ VI B—280)—ACCIDENT POLICY—CAUSE OF DEATH — FITS — ACCIDENT OCCASIONED AS A RESULT OF.

Where death is caused by an accident which was occasioned as the result of a person having a fit, and not as the result of the fit itself, it is within a condition of a policy of accident insurance reducing the insurer's liability for accidents occasioned by fits; since such condition deals not with the immediate cause of death, but with the cause of the accident producing it.

Wadsworth v. Can. Railway Accident Ins. Co., 13 D.L.R. 113, 28 O.L.R. 537, reversing 3 D.L.R. 668, 26 O.L.R. 55. [Affirmed, 16 D.L.R. 670, 49 Can. S.C.R. 115.]

ACCIDENT POLICY — DIRECT CAUSE — TOTAL DISABILITY—SPRAINED WRIST — TUBERCULOSIS.

A sprained wrist incapacitating one from performing his work as an eye, ear, nose and throat specialist, is a "total disability that prevents him from performing any and every kind of duty pertaining to his occupation," within the meaning of an accident policy; the disability is "immediate and continuous," resulting from accidental means, "directly, independently and exclusively from all other causes," though recovery had been prevented by a latent tuberculous condition becoming active.

Fidelity & Casualty Ins. Co. v. Mitchell, 36 D.L.R. 477, [1917] A.C. 592, 13 O.W.N. 181, affirming 28 D.L.R. 361, 37 O.L.R. 335; 26 D.L.R. 784, 35 O.L.R. 280.

ACCIDENT—TERM OF CONTRACT—ACCIDENTAL INJURY—FAILURE TO NOTIFY COMPANY OF CHANGE OF OCCUPATION—LIABILITY OF COMPANY.

The plaintiff was insured against "loss resulting from bodily injuries effected directly and independently of all other causes through accidental means and as the direct result of some cause not attributable to the assured's state of health." The plaintiff suffered permanent injuries, causing "auricular fibrillation" of the heart, in a fight, in which he was not the aggressor, and the court held the company liable under the above clause; the disability being the direct cause of the fight even if the plaintiff's heart had been slightly affected, without his knowledge before that time, also that the plaintiff's change of occupation to a more hazardous one without disclosure to the company did not, under the circumstances, avoid the policy. [Fidelity & Casualty Co. v. Mitchell, 36 D.L.R. 477, [1917] A.C. 592, applied and followed.]

Morran v. Railway Passengers Ass'ce Co., 44 D.L.R. 647, 43 O.L.R. 561.

ACCIDENTAL INJURY—HERNIA — IMMEDIATE CAUSE.

Hernia resulting from playing golf, and not due to any pre-existing disease, is an "accidental injury," "immediately" caused by accident, within the meaning of an accident policy, though the assured be predisposed thereto owing to his physical condition.

Claxton v. Travelers Ins. Co., 36 D.L.R. 481, 52 Que. S.C. 239.

ACCIDENT INSURANCE — DEATH CLAIM — DEATH FROM HEMORRHAGE—EVIDENCE AS TO CAUSE OF HEMORRHAGE—WHETHER "ACCIDENT" OR DISEASE—FINDING OF DOMESTIC TRIBUNAL.

Davis v. Brotherhood of Locomotive Engineers, 5 O.W.N. 279, 25 O.W.R. 239.

(§ VI B—285)—ACCIDENT POLICY—INTENTIONAL ACT—JUMPING FROM TRAIN.

Injuries received while jumping from a moving train in order to stop at a station which the train passed are the indirect result of an "intentional act" amounting to a "voluntary negligent exposure to unnecessary danger" within the meaning of s. 172 (1) of the Insurance Act, R.S.O. 1914, c. 183, and precludes recovery therefor on a policy of accidental insurance.

Martin v. Protective Assn., 28 D.L.R. 418, 36 O.L.R. 19.

(§ VI B—310)—ACCIDENT—INJURY TO EYE IN COURSE OF WORK—NOTICE OF CLAIM—WAIVER.

Displacement of the retina causing the loss of an eye occasioned by a violent muscular exertion in the course of work, is an accidental injury for which an insurance company is liable under an accident policy. The insurance company employing an expert on verbal notice, to ascertain the claim, waives the right to demand a notice in writing.

Tessier v. Prevoyance, 49 Que. S.C. 385.

C. EXTENT OF INJURY OR LOSS; OF RECOVERY.

(§ VI C—350)—70 PER CENT CLAUSE—AUTOMOBILE.

Fretts v. Lennox, etc., Mutual Fire Ins. Co., 16 D.L.R. 863, 6 O.W.N. 13.

ON PROPERTY.

When 3 or 4 institutes intending to insure their interest in buildings part of the substituted property, taken out a policy in the name of the estate (la succession parent), the amount of which is paid them after loss by fire and used by them to rebuild, they do not thereby acquire a right of action against the fourth institute to recover from him a fourth share of the amount.

Parent v. Parent, 22 Que. K.B. 552.

(§ VI C—355)—PROOF OF LOSS—FRAUD—ONUS.

The onus of proving fraud or false statements in the statutory declaration by the assured proving loss by fire, required by the Insurance Act (R.S.O. 1914, c. 183, s. 194), is upon the insurance company. Mere suspicion, or even grave suspicion, is not enough. There must be clear and satisfactory proof by the company, not such as would warrant a conviction for fraud and perjury, but strong enough at least to leave no reasonable inference but that of guilt.

Adams v. Glen Falls Ins. Co., 31 D.L.R. 166, 37 O.L.R. 1, reversing 9 O.W.N. 446. [Appeal quashed 32 D.L.R. 399, 54 Can. S.C.R. 88.]

DAMAGE TO STOCK OF GOODS AND FIXTURES—EXTENT OF—EVIDENCE.

Livingstone v. British American Ass'ce Co.; Livingstone v. Acadia Fire Ins. Co.; Livingstone v. Firemen's Fund Ins. Co.; 12 O.W.N. 330.

(§ VI C—357) — DRY-DOCK — LEASE OF — COVENANT TO INSURE—INSURANCE NOT OBTAINED BECAUSE OF METHOD OF USE—DESTRUCTION—MEASURE OF COMPENSATION—FRAUD.

By the terms of the lease of a dry-dock the lessee agreed to use it in its construction work on caissons and other similar work; and also to have it insured for the benefit of the lessor against both marine and fire risks and to deliver it in good condition at the end of the term. The dry-dock was used in connection with the construction of a breakwater and ocean pier, and such use was largely one of experiment, and owing to the method of user no insurance could be obtained, although its seaworthiness was demonstrated by its weathering a gale while being taken to the place where it was to be used. The dock, during the work, collapsed and became a total wreck. It was admitted that the dock was lost past recovery, that the rent due under the lease had not been paid and that the insurance had not been effected. Held that these breaches gave the lessors the right to retake possession of the dock and terminate the lease, and the institution of proceedings with a clause for rent, up to the writ, and subsequent damages was sufficient evidence of the lessor's intentions in this respect, and the lessor was justified in bringing the action although the term of the lease had not expired. The substance however to which their lordships looked was a claim for the value of something that had been lost in circumstances rendering the lessee contractually responsible for its value and this could be maintained. The covenant to insure "against both marine and fire risks" was construed to mean against the "hazards of the sea" during the term of the lease and not merely against risk in its journeys by sea, but if it had been effected it could not have covered a loss inevitable in the circumstances due to the unfitness of the structure and entirely dissociated from any peril by wind or water. [Sassoon v. Western Ass'ce Co., [1912] A.C. 561; Wilson v. The "Xantho," 12 App. Cas. 503, applied.]

Grant Smith Co. v. Seattle Construction & Dry-dock Co.; Seattle Construction & Dry-dock Co. v. Grant Smith, 48 D.L.R. 172, [1919] 3 W.W.R. 33, affirming 44 D.L.R. 90, 26 B.C.R. 397, [1918] 3 W.W.R. 703. [See also 45 D.L.R. 476, [1919] 1 W.W.R. 783.]

(§ VI C—358)—INDEMNITY AGAINST LOSS OR DAMAGE BY FIRE OR LIGHTNING—BUILDING PARTLY DESTROYED BY LIGHTNING-STROKE WITHOUT FIRE—FURTHER INJURY BY WIND FOLLOWING IMMEDIATELY — EVIDENCE — THEORETICAL TESTIMONY AS TO IMPOSSIBILITY OF LIGHTNING CAUSING DAMAGE TO METAL-COVERED

BUILDING—TESTIMONY OF EYE-WITNESSES—LIABILITY OF INSURERS FOR DAMAGE CAUSED BY WIND—WHOLE DAMAGE PROXIMATELY CAUSED BY LIGHTNING.

Roth v. South Easthope Farmers' Mutual Fire Ins. Co., 41 O.L.R. 52. [Varied 45 D.L.R. 765.]

(§ VI C—360)—PROOF OF AGE—ADMISSION—CERTIFICATE.

The admission of age of the insured in the endowment certificate issued by a fraternal society dispenses with the necessity for further proof of age, having regard to the contract and the society's constitution. [Insurance Act, R.S.O. 1914, c. 183, ss. 7-11, 166, as amended by 6 Geo. V. c. 36, considered.]

Willoughby v. Can. Order of Foresters, 31 D.L.R. 398, 37 O.L.R. 290, affirming 31 D. L.R. 267, 36 O.L.R. 507.

(§ VI C—363)—ILLNESS CONFINING TO HOUSE — NEURASTHENIA — TOTAL DISABILITY.

A nervous breakdown, or neurasthenia, for which a person is ordered by a physician to abstain from any kind of work, is an illness that "necessarily confines to house," and "totally disables" from work within the meaning of a sick benefit policy.

Guay v. Provident Accident & Guarantee Co., 34 D.L.R. 72, 51 Que. S.C. 328, reversing 46 Que. S.C. 187.

(§ VI C—364)—DOUBLE LIABILITY.

A passenger on a street car who had arrived at his destination and descended to the street, when the car stopped for the purpose on his signal, but seeing an approaching motor car likely to run him down, unsuccessfully attempted to get back on the car then in motion and was injured in so doing cannot claim under the double indemnity clause of an accident insurance policy limited to accidents while "riding as a passenger in or upon a public conveyance." [Anable v. Fidelity & Casualty Co., 63 Atl. Rep. 92, 73 N.J.L. 320, and 74 N.J.L. 686, approved.]

Wallace v. Employers' Liability Ass'ce Corp., 2 D.L.R. 854, 26 O.L.R. 10, 21 O. W.R. 249.

ACCIDENT — DOUBLE LIABILITY — INJURY WHILE ON LICENSED PASSENGER VESSEL.

Evidence that an insured person received an injury while traveling as a passenger on a steamship belonging to a passenger fleet plying between certain ports, on which he had frequently traveled, is prima facie sufficient to shew that he was a passenger on a vessel "licensed for the regular transportation of passengers," within the meaning of a double indemnity clause of a policy of accident insurance.

Kinman v. Ocean Accident & Guarantee Assn. 12 D.L.R. 364, 3 W.W.R. 630.

D. INTEREST IN PROCEEDS.

(§ VI D—365)—CARGO—RIGHT OF ACTION AGAINST WRONGDOER.

The owner of a cargo lost in transit who has received from an insurance company the full value of the cargo, covered by the insurance policy, has a sufficient interest to maintain an action against the person whose negligence caused the loss, such owner being under obligation to account to the insurance company for whatever can be recovered from the wrongdoer.

McFee v. Montreal Transportation Co., 42 D.L.R. 714, 27 Que. K.B. 421.

ACCIDENT INSURANCE—DOUBLE LIABILITY—ASSURED BURNED—DEATH RESULTING.

Wadsworth v. Can. Railway Accident Ins. Co., 13 D.L.R. 113, 28 O.L.R. 537, reversing 3 D.L.R. 668. [Affirmed 16 D.L.R. 670, 49 Can. S.C.R. 115.]

ATTACHMENT OF DEBTS—MONEYS ALLEGED TO BE DUE TO JUDGMENT DEBTOR BY INSURANCE COMPANY, GARNISHEE — DESTRUCTION BY FIRE OF BUILDING ON MORTGAGED PREMISES—CLAIM BY MORTGAGEE (JUDGMENT CREDITOR) TO INSURANCE MONEYS—ADVERSE CLAIM OF BANK UNDER ASSIGNMENT FROM JUDGMENT DEBTOR — CLAIMS BASED UPON AGREEMENTS WITH OR REPRESENTATIONS BY INSURANCE COMPANY — ATTACHING ORDER AND SUBSEQUENT ORDER DIRECTING PAYMENT INTO COURT AND TRIAL OF ISSUE SET ASIDE—RULE 590.

Blind River v. White Falls Lumber Co., 16 O.W.N. 189.

FIRE POLICY—PARTNERSHIP NAME—INTEREST IN PROCEEDS.

A contract of insurance against fire entered into pursuant to an application by a partnership firm, one of whose members died before the policy issued and the other continued the business under the same name is valid and binding on the insurers. A decree for sale at auction of the insured immovable is declarative of the rights of the purchaser (the surviving partner) and the sale is not an alienation which puts an end to the policy.

Robert v. Equitable Fire Ins. Co., 44 Que. S.C. 205, affirming 39 Que. S.C. 321.

(§ VI D—371)—MORTGAGEE—JOINDER OF PARTIES.

A mortgagee named as the beneficiary in a policy of fire insurance, to the extent of his interest in the property insured, has a locus standi to take suit against the insurance company in case of loss by fire. In most cases the court will insist upon the mortgagor being made a party to the proceedings, but under certain circumstances, as for instance, where the mortgagor assigns to the mortgagee the balance of the insurance moneys over and above the amount of the mortgage, the court will not insist upon the assured being joined.

Laidlaw v. Hartford Fire Ins. Co., 29 D.L.R. 229, 10 A.L.R. 7, 34 W.L.R. 993, 10 W.W.R. 1063, reversing 24 D.L.R. 884, 32 W.L.R. 697, 9 W.W.R. 385.

(§ VI D—375)—INTEREST IN PROCEEDS—MUTUAL POLICIES—RESULTING TRUST—INSURABLE INTEREST.

Gravelle v. Rudolph, 28 D.L.R. 742, 34 W.L.R. 424.

STATUTORY REGULATION.

Life insurance policies effected in 1850 and 1851, the insured dying in 1915, are subject to the provisions of the Insurance Act, R.S.O. 1914, c. 183.

Re Standard Life Ass'ce Co. and Keefer, 24 D.L.R. 570, 34 O.L.R. 235, 427.

BENEFICIARY CONFINED IN HOSPITAL FOR INSANE—ORDER FOR PAYMENT OF INSURANCE MONEYS BY INSURERS TO INSPECTOR OF PRISONS AND PUBLIC CHARITIES—HOSPITALS FOR THE INSANE ACT, R.S.O. 1914, c. 295, s. 36—INSURANCE ACT, R.S.O. 1914, c. 183, s. 176—4 GEO. V. c. 30, s. 10.

Re Nash and Can. Order of Chosen Friends, 40 O.L.R. 530.

BENEFICIARIES — GRANDCHILDREN — STATUTORY DESIGNATION.

Where life insurance policies had been declared by the insured to be for the benefit of his wife and children under s. 178 (7) of the Insurance Act, R.S.O. 1914, c. 183, the children of deceased children are entitled to share, and not merely the survivor of the original class, who would be alone entitled under s. 171 (9).

Re Standard Life Ass'ce Co. & Keefer, 24 D.L.R. 570, 34 O.L.R. 235, 427.

INSURANCE MONEYS PAYABLE TO "WIFE" OF INSURED—DEATH OF WIFE—REMARRIAGE OF INSURED—CLAIM OF SECOND WIFE ON DEATH OF INSURED.

Re Bottomley and Ancient Order of United Workmen, 5 O.W.N. 83, 25 O.W.R. 26.

BENEFICIARY—WIFE OR SURVIVING CHILDREN—MENTION OF WIFE BY NAME—DEATH OF WIFE—REMARRIAGE OF INSURED—RIGHTS OF SECOND WIFE SURVIVING INSURED.

Re Kloepfer, 5 O.W.N. 133, 25 O.W.R. 101.

ADVERSE CLAIMS—PAYMENT OF INSURANCE MONEYS INTO COURT—TRIAL OF ISSUE BETWEEN CLAIMANTS—PAYMENT OF PREMIUMS BY ONE CLAIMANT—SALVAGE.

Re Freeman and Royal Templars, 12 O.W.N. 349.

PROCEEDS OF POLICIES MADE PAYABLE TO NAMED WIFE OF INSURED—PREDECEASE OF WIFE—REMARRIAGE OF INSURED—ONTARIO INSURANCE ACT, S. 178 (6 GEO. V. c. 36, s. 5)—DIVISION BETWEEN SURVIVING WIFE AND CHILDREN—"IN EQUAL SHARES."

Re Dickenson and North American Life Ass'ce Co., 17 O.W.N. 213.

CONTRACT MADE AND PARTIES DOMICILED IN PROVINCE OF QUEBEC—AGREEMENT OF ALL THOSE INTERESTED THAT CONTEST AS TO DISPOSITION OF POLICY MONEYS BE DECIDED ACCORDING TO LAW OF ONTARIO—VALIDITY—CLAIM OF CREDITORS—CLAIM OF WIDOW AS BENEFICIARY—ONTARIO INSURANCE ACT, S. 178 (4)—AMENDING ACT, 6 GEO. V. c. 36, s. 5—DESIGNATION BY WILL—COSTS.

Re Naubert, 17 O.W.N. 120.

(§ VI D—382)—DISAPPEARANCE OF BENEFICIARY — PRESUMPTION OF DEATH — TRUST — PAYMENT OF PROCEEDS INTO COURT FOR DISTRIBUTION.

Re Pinsonneault, 25 D.L.R. 790, 34 O.L.R. 388.

DEATH OF SOLE PREFERRED DESIGNATED BENEFICIARY IN LIFETIME OF INSURED—RIGHT OF WIDOW WHERE NO CHILDREN—INSURANCE ACT, R.S.O. 1914, c. 183, s. 178 (7)—OPPOSITION OF EXECUTOR OF DECEASED BENEFICIARY—COSTS.

Re Edwards, 8 O.W.N. 438.

DEATH OF INSURED AND WIFE (BENEFICIARY) AND CHILD IN SAME DISASTER—EVIDENCE—PRESUMPTION OF SURVIVORSHIP—PAYMENT OF INSURANCE MONEYS TO ADMINISTRATORS OF INSURED.

Re Woodard, 8 O.W.N. 608.

DESIGNATION OF BENEFICIARY—IDENTIFICATION OF POLICY—LETTER WRITTEN BY INSURED—INSURANCE ACT, R.S.O. 1914, c. 183, s. 171 (3)—PAYMENT OF INSURANCE MONEY INTO COURT BY INSURANCE SOCIETY — APPLICATION FOR PAYMENT OUT TO TRUSTEE FOR DESIGNATED BENEFICIARY—PROOF OF DEATH OF INSURED—PROOF OF CIRCUMSTANCES WARRANTING ORDER FOR PAYMENT OF PRINCIPAL TO TRUSTEE.

Re Counter, 9 O.W.N. 165.

INSURANCE MONEYS WHERE PAYABLE—POLICY ISSUED IN ALBERTA WHERE ASSURED DOMICILED — CLAIM OF BENEFICIARY NAMED IN POLICY—ADVERSE CLAIM UNDER WILL OF ASSURED—EFFECT OF ALBERTA STATUTE — FORUM — PAYMENT INTO COURT.

Rudolph v. Continental Life Ins. Co., 9 O.W.N. 327.

(§ VI D—385)—TRUSTEES—APPOINTMENT OF — INSURANCE MONEYS PAYABLE TO INFANTS.

Under s. 175 of the Ontario Insurance Act, 1912, as amended by s. 10 of the Ontario Insurance Amendment Act, 1913, R.S.O. 1914, c. 33, shares of infant children, where no trustee of the insurance money has been appointed by the assured, will be payable only to a trustee appointed by the High Court sitting as a court of equity, the intention of the legislature being to keep under the best possible protection moneys intended for the benefit of infants, so that the corpus will be forthcoming when the beneficiary is entitled to call for it; where, however, the fund does not exceed $3,000 and is payable to the wife and children of the deceased, the widow, also being the mother of the children, the court may appoint the widow a trustee to receive the fund.

Re Havey, 14 D.L.R. 668, 29 O.L.R. 336.

INTEREST IN PROCEEDS OF LIFE INSURANCE—CHILDREN—TO WHOM PAYABLE—GUARDIAN—ONTARIO INSURANCE ACT—TRUSTEES.

If infants are entitled to the proceeds of

a policy of life insurance by virtue of s. 178 of the Ontario Insurance Act, 2 Geo. V. c. 33, as amended by 3-4 Geo. V. c. 35, R. S.O. 1914, c. 183, and not by the terms of the policy, a trustee will not be appointed by the Supreme Court (Ont.) under s. 10 of the Act, to receive the money except on notice to the official guardian and to all parties interested, and, where practicable, the consent of the infants should be obtained. Under s. 10 of the Ontario Insurance Amendment Act, 1913, R.S.O. 1914, c. 183, money to which infants are entitled under a policy of life insurance, is payable only to a trustee appointed by the assured or by the Supreme Court (Ont.), and not to a guardian appointed by a Surrogate Court.

Re Rennie Infants, 15 D.L.R. 838, 30 O. L.R. 6.

FOR BENEFIT OF SOLDIERS—"RESIDENT."

Where insurance policies are effected by a municipal corporation upon the lives of soldiers who were bona fide residents of the city at the time of declaration of war, a policy issued in the name of a soldier, who prior to the war has lived outside of the city though worked within it, does not entitle his widow to recovery thereon.

Lancaster v. Toronto, 34 D.L.R. 714, 38 O.L.R. 374.

(§ VI D—390)—CONTRACT — ASSIGNMENT TO MORTGAGEE OF INSURANCE POLICY AS COLLATERAL SECURITY FOR A MORTGAGE —AGREEMENT WITH CERTAIN PURCHASERS OF THE LAND—PROVISION TO BUY BACK POLICY—FAILURE OF PURCHASERS TO KEEP AGREEMENT—DEATH OF ASSURED—ERROR OF ASSURED IN STATING AGE IN POLICY—RIGHTS OF ESTATE.

Standard Trusts Co. v. Canada Life Ass'ce Co., 48 D.L.R. 685, [1919] 3 W.W.R. 387. [Reversed 51 D.L.R. 275, [1920] 1 W.W.R. 516.]

ONTARIO INSURANCE ACT—FRAUD ON CREDITORS—LIMITATION OF CLAIM.

A life insurance policy effected in pursuance of the Insurance Act (R.S.O. 1914, c. 183), may be attacked as being a fraud on creditors, but even where it is proved to have been made with intent to defraud the creditors, their claim is limited to the amount of the premiums fraudulently paid.

Re New York Life Ins. Co. and Fullerton, 48 D.L.R. 674, 45 O.L.R. 606.

(§ VI D—395)—MUTUAL BENEFIT INSURANCE.

Where the beneficiary named in a certificate of insurance issued by a mutual benefit association incorporated under the laws of Massachusetts did not survive the insured, upon the death of the insured without having named a new beneficiary, the proceeds of such insurance become a part of his estate under R.S.O. 1897, c. 203, ss. 147, 151 (3), and are not payable according to the rules and regulations of the association, as prescribed by R.S.O. 1897, c. 211, s. 12, since the latter Act is applicable only to associations incorporated under its provisions.

Fidelity Trust Co. v. Buchner, 5 D.L.R. 282, 26 O.L.R. 367, 22 O.W.R. 72.

BENEVOLENT SOCIETY—MONEYS PAYABLE TO WIDOW BY RULES OF SOCIETY — PREFERRED BENEFICIARY — TRUST—INSURANCE ACT, R.S.O. 1914, c. 183, ss. 171 (3), 178 (2), 179 (1)—EFFECT OF WILL OF DECEASED—COSTS.

Re Clarke, 8 O.W.N. 613.

BENEFIT CERTIFICATE ISSUED BY ONTARIO SOCIETY — DESIGNATION OF PREFERRED BENEFICIARIES—CHANGE OF DOMICILE OF INSURED—ALTERATION OF DESIGNATION BY CHANGE TO BENEFICIARY OF SAME CLASS—WILL EXECUTED IN PLACE OF NEW DOMICILE—EFFECT OF LAW OF DOMICILE—TRUST—INSURANCE ACT, R.S.O. 1914, c. 183, ss. 178 (2), 179—EFFECT OF JUDICIAL DECISIONS — MOTION REFERRED TO APPELLATE DIVISION.

Re Baeder and Canadian Order of Chosen Friends, 9 O.W.N. 88.

BENEFIT CERTIFICATE — DESIGNATION OF BENEFICIARY—ALTERATION AFTER MARRIAGE — MENTAL COMPETENCY OF ASSURED—TRIAL OF ISSUE—FINDING OF FACT.

Re Brotherhood of Railway Trainmen and Moore, 8 O.W.N. 192.

MUNICIPAL INSURANCE—RIGHTS OF INSURED —DIVISION OF MUNICIPALITY.

A person who insures his buildings in a municipal mutual insurance company established by a by-law of a municipal council, does not lose his rights and his recourse against the company in case of fire from the fact that the municipality had been divided into two distinct municipalities. Such division does not affect the rights and obligations of the insurance company nor of its members, nor the powers and duties of the municipal council and of its officials the taxable property in the new territory erected in the municipality remaining charged with payment of all the debts and obligations contracted for before the division. It is the council of the municipality from which the new territory is detached which alone is authorized to procure from the immoveables of the two municipalities the funds necessary to pay the insurance losses.

Champigny v. Mutual Ins. Co., 48 Que. S.C. 189.

FRIENDLY SOCIETY — UNDERTAKING TO DISTRIBUTE FUND AMONG CLASS OF MEMBERS—PERIOD OF DISTRIBUTION—AMENDMENT TO CONSTITUTION OF SOCIETY—EFFECT OF — IMMEDIATE PAYMENT — CLASS ACTION—DECLARATION—COSTS.

Rushbrook v. Order of Canadian Home Circles, 12 O.W.N. 21.

ASSOCIATION — MEMBERSHIP BENEFITS — CLAIMANTS—UNIVERSAL LEGATEE.

Where the by-laws of an association and certificate of membership showed that the association was bound to pay a member a

certain sum, on his death, either to his widow or his beneficiary or his heir, but did not state which of the three should have the preference, it was held that such right formed, at his death, part of his estate, in the absence of any by-law to the contrary, and that such right and the debt belonged to the universal legatee of the member.

Piche v. Union St. Joseph de Lachine, 24 Rev. de Jur. 307.

E. Defences; release.

(§ VI E—400)—Defences—Release.

In the absence of evidence, it cannot be said that a change in the use of premises from a billiard and pool room to a restaurant is such a material change as will make the risk under a fire insurance policy more hazardous, even where gasoline is used on the premises.

Anglo-American Fire Ins. Co. v. Morton, 8 D.L.R. 802, 23 O.W.R. 316, 46 Can. S.C.R. 653, affirming 2 O.W.N. 1470.

Defence of illegality—Bawdy-house.

A fire insurance company cannot set up public morals as a defence to a claim under its policy issued upon premises described therein as a "sporting-house," and used as a bawdy-house. [Morin v. Anglo-American, 3 A.L.R. 121, applied.]

Nakata v. Dominion Fire Ins. Co., 21 D.L.R. 26, 9 A.L.R. 47, 31 W.L.R. 136, 8 W.W.R. 343. [Reversed in 26 D.L.R. 722, 52 Can. S.C.R. 294, 9 W.W.R. 1084.]

F. Subrogation.

(§ VI F—405)—Indemnity insurance—Liability for sprinkler leakage—Payment of loss to tenant—Liability of landlord—Negligence.

Under arts. 1614, 1065, 1067 C.C. (Que.), the owner of a building must indemnify an insurance company that is compelled to pay damages to a tenant for loss sustained by the breaking of a fire sprinkler pipe as the result of the settling of a beam where the settling might easily have been prevented.

St. Lawrence Realty Co. v. Maryland Casualty Co., 12 D.L.R. 693, 22 Que. K.B. 451.

Loss — Payment after sale of insured chattels—Subrogation of insurer to lien notes.

Where lien notes were taken on the sale of an insured animal for the deferred payments, on paying a loss under its policy the insurance company becomes subrogated to the insurer's rights on the lien notes to the amount paid him.

Gill v. Yorkshire Ins. Co., 12 D.L.R. 173, 23 Man. L.R. 368, 24 W.L.R. 389, 4 W.W.R. 602.

Loss.

Where the fire insurance company is entitled to be subrogated to the rights of the assured against parties whose negligence caused the fire, it may sue the latter in its own name, under the Laws Declaratory Act, R.S.B.C. c. 133, if it has taken a formal assignment of the assured's claim on settling with him. [King v. Victoria Ins. Co., [1896] A.C. 250, applied.]

Union Ass'ce Co. v. B.C. Electric R. Co., 20 D.L.R. 153, 7 W.W.R. 119, 29 W.L.R. 433.

Demolition of building to prevent fire—Payment of loss by municipality.

Upon an assignment of fire insurance policies to a municipality after the latter has indemnified the owner for all damages sustained from the demolition of a building under art. 4426, R.S.Q. (1888) to arrest the progress of a fire, the municipality is entitled to be subrogated to all the rights of the owner and recover from the insurance company the loss payable under the policies.

Guardian Ass'ce Co. v. Chicoutimi, 25 D.L.R 322, 51 Can. S.C.R. 562.

Loss caused by tramway — Reimbursement—Proportion.

A horse of the value of $300, insured for $200, was killed by a car of the defendants. The insurance company paid to the owner the full amount of the policy, and sued the tramways company for the $200. It was held that although the court found that the owner of the horse had contributed to the accident in the proportion of one-third, the tramways company was nevertheless bound to reimburse the insurance, not only the two-thirds of the $200 paid by it, but the two-thirds of the full value of the horse, to wit, $200.

General Animals Ins. Co. v. Montreal Tramways Co., 48 Que. S.C. 425.

Right against electric company causing loss.

An insurance company, which pays the amount of the policy after a fire caused by electric wires used to light a house, has no cause of action against the lighting company on the ground that its installation was defective when it knew or was in a position to know of the conditions of the electric system of the company.

Quebec R.L.H. & P. Co. v. Vandry, 24 Que. K.B. 214. [Reversed, 29 D.L.R. 530, 53 Can. S.C.R. 72, which was reversed 52 D.L.R. 136.]

Accident — Damages—Subrogation—Recourse of the insurer who has paid—C.C. art. 1053, 1155, 2584.

When an insurance company pays to the assured the damages he has suffered as the result of an accident, it is not subrogated by agreement to the rights of the assured unless it shews that the conditions of art. 1155 C.C. (Que.) have been fulfilled. It has a remedy in damages under art. 1053 and it can, moreover, obtain from the assured, under art. 2584, an assignment of his rights against the one who caused the damages.

Merchants & Employees' Guarantee & Accident Co. v. Blanchard, 56 Que. S.C. 278.

ACCIDENT INSURANCE COMPANY'S RIGHT TO CLAIM DAMAGES, BY DIRECT ACTION FROM THE AUTHOR OF THE DAMAGES — C.C. 1053, 1155.

Where certain glass insured by the plaintiffs was broken through the negligence of the defendant, the plaintiff, upon paying the loss or replacing the glass may recover the amount from the tort feasor under art. 1053, C.C. (Que.).

Merchants & Employees Guarantee & Accident Co. v. Brunette, 25 Rev. de Jur. 191.

EMPLOYER'S LIABILITY.

An insurer who reimburses an employer what he has paid to the injured person cannot obtain legal subrogation, but he may stipulate a conventional subrogation in his insurance contract.

Maryland Casualty Co. v. Dominion Flour Mills Co., 49 Que. S.C. 262.

G. APPORTIONMENT OR CONTRIBUTION.

(§ VI G—410)—FIRE INSURANCE—SEVERAL POLICIES ISSUED BY DIFFERENT COMPANIES — APPORTIONMENT OF LOSS — MISTAKE—PAYMENT ACCORDING TO APPORTIONMENT MADE—ACTION FOR BALANCE —SUMMARY DISMISSAL AS AGAINST 2 OUT OF 5 COMPANIES—COSTS.

Adams v. Hudson Bay Ins. Co., 8 O.W.N. 435.

H. ACTIONS; ENFORCING PAYMENT.

(§ VI H—415)—ACTION—MARINE POLICY — CONSTRUCTIVE TOTAL LOSS — ABANDONMENT.

An action under a marine policy of insurance for a constructive total loss cannot be sustained where the underwriters have consistently refused to accept the abandonment, and have instead repaired the vessel within a reasonable time at a cost less than the value of the boat.

Cunningham v. St. Paul Fire & Marine Ins. Co., 16 D.L.R. 39, 19 B.C.R. 33, 26 W.L.R. 870, 5 W.W.R. 1098.

INSANE BENEFICIARY — ORDER FOR PAYMENT —HOSPITALS FOR INSANE ACT.

The provision of s. 36 of the Hospitals for the Insane Act override pro tanto those of s. 176 (2) of the Ontario Insurance Act, as enacted by 4 Geo. V., c. 30, s. 10. An order was made for payment to the Inspector of Prisons and Public Charities, instead of into court, of insurance moneys to which an insane person, confined in a public hospital for the insane, was entitled.

Re Nash and Canadian Order of Chosen Friends, 40 O.L.R. 530.

LOSS PAYABLE TO MORTGAGEE.

Rand v. Otter Mutual Fire Ins. Co., 5 O.W.N. 653.

MOTION BY INSURANCE SOCIETY FOR LEAVE TO PAY MONEYS INTO COURT—INSURANCE ACT, R.S.O. 1914, c. 183, s. 176.

Re Francisco and Can. Order of Chosen Friends, 10 O.W.N. 251.

ACTION FOR MONEY HAD AND RECEIVED—VOID POLICY.

Money paid by the assured upon an insurance policy which a company has no power to make can be recovered in an action for money had and received. [Re Phoenix Life Ass'ce Co., 2 J. & H. 411, applied.]

Hooper Grain Co. v. Colonial Ass'ce Co., [1917] 1 W.W.R. 1226.

(§ VI H—420)—ACTION AGAINST MUTUAL BENEFIT ASSOCIATION — CHARTER REQUIREMENTS.

If a member of a mutual benefit association sues the association without complying with the preliminary formalities required by its charter, that ground may be invoked in the plea to the merits and not in an exception to the form.

Marquis v Montreal Fireman's Benefit Assn., 19 Que. P.R. 222.

(§ VI H—425)—LIFE INSURANCE—LIMITATION OF ACTIONS—R.S.O. 1914, c. 183, s. 165 (2) — PRESUMPTION OF DEATH — BURDEN OF PROOF AFTER UNHEARD OF FOR 7 YEARS.

Where there is an absolute promise to pay in a life insurance policy and it is expressly provided therein that the payment of the sum insured shall not be disputed, s. 165 (2) of R.S.O. 1914, cc. 183, specifying 18 months as a period of limitation does not apply; s. 165 was enacted for the benefit of the representatives of the assured to override restrictions as to time of action contained in the policy and where there is no such restriction it has no application. The life insurance company which pleads the bar of the action brought on the policy where the assured had not been heard of for 7 years and was to be presumed dead, has cast upon it the onus of shewing that the death occurred more than one year and 6 months before the writ was issued, that being the period of limitation provided by R.S.O. 1914, c. 183, s. 165.

Duffield v. Mutual Life Ins. Co., 20 D.L.R. 467, 32 O.L.R. 299.

CLAIMS—LIMITATION OF TIME.

Where a fire insurance company, on paying the loss of the assured alleged to have been caused by the neglect of an electric company, does not bring its action against the latter in the name of the assured, under the subrogation clause of its policy, but instead sues in its own name after taking a written assignment from the assured of his rights against the electric company, it can maintain the action only if it has given the latter notice in writing of the assignment under the Laws Declaratory Act, R.S.B.C., c. 133; and the defect is not cured by an order adding the assured as a co-plaintiff made without prejudice to defendants' rights after the period of limitation had expired within which the added party would have had to sue.

Union Ass'ce Co. v. B.C. Electric R. Co.

21 D.L.R. 62, 21 B.C.R. 71, 30 W.L.R. 717, 8 W.W.R. 327.

REFUSAL TO FURNISH CLAIM PAPERS—INSURED UNHEARD OF FOR SEVEN YEARS—PRESUMPTIONS.

A condition in a life insurance policy that formal proofs of death shall be furnished by the beneficiary is waived by the written refusal of the insurer to furnish claim papers until the court should decide that the insured should be presumed to be dead because he had not been heard of for 7 years.

Linke v. Canadian Order of Foresters, 21 D.L.R. 741, 33 O.L.R. 159. [See 8 O.W.N. 399.]

PROOFS OF LOSS—RELIEF AGAINST STRICT COMPLIANCE IN FURNISHING—EFFECT OF—SASKATCHEWAN INSURANCE ACT.

The effect of granting relief under s. 2 of the Insurance Act (R.S.S. c. 80, now s. 86 of 1915 Stats., c. 15), which permits relief to be granted from strict compliance with a condition in the policy requiring proof of loss to be furnished as soon as practicable after the loss has occurred, is to put the insured in the same position as if proofs of loss had been furnished as required, with the result that other conditions of the policy requiring a certain delay before action can be brought, and which would otherwise make the bringing of the action premature, should be deemed to have lapsed.

Shepard v. British Dominions General Ins. Co.; Shepard v. Glens Falls Ins. Co., 47 D.L.R. 133, 58 Can. S.C.R. 551, [1919] 2 W.W.R. 440, reversing 42 D.L.R. 746, 11 S.L.R. 259, [1918] 2 W.W.R. 985, which reversed 10 S.L.R. 421, [1918] 1 W. W.R. 85.

CONTRACTUAL LIMITATION OF TIME.

Where the insurers have made a demand upon the insured for proofs of loss, the right of action under Ontario statutory condition 17 relating to fire insurance policies, does not accrue until 60 days after the proofs of loss have been furnished, and where incomplete proofs of loss were first supplied and invoices and a statutory certificate were then promptly demanded by the insurers by way of further proof, the 6 day period is to be computed from the completion of the proofs upon the latter being supplied. [Rice v. Provincial Ins. Co., 7 U.C.C.P. 548, distinguished.]

Strong v. Crown Fire Ins. Co., 1 D.L.R. 111, 3 O.W.N. 481, 20 O.W.R. 901. [See 4 D.L.R. 224, 3 O.W.N. 1534.]

LIMITATION OF ACTION.

If the payment of an insurance policy has been delayed by reason of claims made by various persons claiming to be transferees of the policy, a beneficiary may bring his action after the year from the death.

Dufresne v. Crown Life Ins. Co., 19 Que. P.R. 46.

LIFE INSURANCE—ACTION TO RECOVER ON POLICY—DECEASED ENGAGING IN MORE DANGEROUS SERVICE THAN WHEN INSURED—NOTICE.

Smith v. Excelsior Life Ins. Co., 3 O. W.N. 261.

NOTICE OF LOSS—IMPERFECT PROOFS—NON-PAYMENT OF PREMIUM—WAIVER—APPLICATION OF STATUTE — REMEDIAL CLAUSE.

Bell v. Hudson Bay Ins. Co., 44 Can. S. C.R. 419.

NOTICE OF LOSS—PROOFS OF LOSS—TIME.

Lewis v. Standard Mutual Ins. Co., 44 Can. S.C.R. 40, reversing 19 Man. L.R. 729.

VII. Reinsurance.

Liability for effecting, see Principal and Agent, III—36.

(§ VII—430)—WHERE ACTION SHOULD BE TAKEN—QUE. C.P. 95, QUE. C.C. 2468, 2477.

Reinsurance, based on art. 2477, C.C.P., is assimilated to the insurance and is governed by the same rules and principles as the insurance itself. An insurance company in Montreal may sue a company carrying on business in another district, at Fraserville, in the District of Kamouraska, when the goods reinsured are situated at St. Joseph de Chambly, District of Montreal.

Provincial Fire Ins. Co. v. Protection, 16 Que. P.R. 107.

VIII. Guaranty policies.

See also Bonds.

(§ VIII—435)—Where the employer represents in an application for guarantee insurance that an audit of the employee's (a bookkeeper) books made regularly once a year at a fixed period and the audit is delayed for some months and loss occurs by theft in the meantime, the Insurer will be relieved of all liability. The employer, who is the beneficiary under a policy guaranteeing him against loss by embezzlement or theft of money by his employee, must comply strictly with all conditions, stipulations and undertakings contained in the policy.

Lachine School Commissioners v. London Guarantee & Accident Co., 3 D.L.R. 335.

NOTICE OF DEFAULT.

A condition, in a policy guaranteeing the proper execution of a contract by a partnership for the insured, that the latter would give notice to the insurers of any default by the contractor in the execution of the work, does not oblige him to give notice of the dissolution of the partnership, the liability of its individual members always remaining the same.

Commission of Catholic Schools of Montreal v. Provident Accident & Guarantee Co., 44 Que. S.C. 97.

(§ VIII—436)—EMPLOYER'S LIABILITY—ERROR IN APPLICATION BLANK.

A applicant for an employer's liability insurance, does not, by leaving unanswered

one of the questions in the application blank and telling the agent to fill it up in accordance with the facts in regard thereto, then stated by him to such agent, and of which, moreover, the agent had personal knowledge, become responsible for the erroneous answer so as to disentitle him to recover on the policy.

Carlin v. Railway Passengers Ass'ce Co., 14 D.L.R. 315, 18 B.C.R. 477, 25 W.L.R. 706, 5 W.W.R. 387.

CONTRACTOR'S AND CITY EMPLOYEES—EXTRA PREMIUMS.

A stipulation in an employers' liability policy issued to a municipality that it shall not cover loss from liability for injuries or death caused to a person unless his compensation is included in the scheduled estimate on which the insurance was based, will exclude liability by the insurance company in respect of employees of the city completing works which had been let to contractors at the time the policy was taken out, but which afterwards were taken over by the city on the contractor's default; consequently no action lies against the city for an excess premium on the basis of the additional wages on such work not contemplated in the insurance contract paid to city workmen completing the contract work as to whom no claim was made nor could be substantiated on the city's behalf.

Ocean Accident & Guarantee Corp. v. Moose Jaw, 21 D.L.R. 16.

INDEMNITY—ENFORCEMENT—ASSIGNEE FOR CREDITORS.

The right of indemnity under an employer's liability insurance policy, for liability incurred for an injury to an employee, will pass, upon the employer's insolvency, to his assignee for the benefit of creditors and is enforceable by him; the insurer's liability is not limited by what the insolvent's estate is able to pay, but extends to the full amount of the judgment against the employer, regardless of the source from which the money came to make payment thereof. Nor is it essential that the payment should have been made before the assignment for creditors; it is sufficient when paid by the assignee with funds advanced by a third party.

North American Accident Ins. Co. v. Newton, 45 D.L.R. 247, 57 Can. S.C.R. 577, [1919] 1 W.W.R. 317.

"DAMAGES"—WORKMEN'S COMPENSATION—SETTLEMENTS.

The word "damages" has the universal meaning of recompense for wrong done; an insurance policy, purporting to indemnify an employer against "liability imposed by law for damages" on account of injuries to employees, covers not only claims for damages at common law, but also those under the Workmen's Compensation Acts, and contemplates the reasonable and prudent settlement of such claims by the assured. [St. Louis Dressed Beef & Provision Co. v. Maryland Casualty Co., 201 U.S. 173, followed.]

Chamberlain v. North American Accident Ins. Co., 28 D.L.R. 298, 9 A.L.R. 538, 34 W.L.R. 556, 10 W.W.R. 686.

AGAINST EMPLOYER'S LIABILITY.

A contract of insurance by which the insurer assumes the risk of accidents that may happen to workmen engaged in placing electric wires on the inside and outside of buildings, covers also accidents to which a workmen is exposed in placing electric wires on, or removing them from a pole placed near a building as accessory to the work of installation on the outside.

Goulet v. Merchants' & Employers' Guarantee & Accident Co., 51 Que. S.C. 256, reversing 50 Que. S.C. 473.

CONDITIONS PRECEDENT—DAMAGES—NOTICE.

Where a contract between an employer and an insurance company, under the Act respecting accident to workmen, stipulates that the insured cannot institute an action on the policy until he has been condemned to pay damages to one of his employees and has paid such damages, the employer against whom an action is brought cannot make therein a demand in warranty against the company, even when, by another clause of the contract, it is provided that if the insured is sued for damages on account of an accident the company must defend the action at its own cost, making use of the name of the insured. Where the policy provides that the insured shall, without delay, give notice to the company of every accident happening on his works, as well as of every claim made in respect thereof, such notice is a condition precedent to the bringing of an action by the insured against the company. Where the insurance company refused to defend the principle action itself, as it had the right to do, and denied its liability under the policy, it cannot ask for the dismissal of the action in warranty on the ground that it is premature.

Moineau v. Antonessa; Employers Liability Ass'ce Corp. v. Moineau, 25 Que. K.B. 334.

PROCEDURE — DILATORY EXCEPTION — WARRANTY.

A provision in an insurance policy against work accidents, by which the insured is required, in case of an action before the courts, to turn the case over to the insurer so that the latter may contest it on behalf of the insured, amounts to an agreement not to call in the insurer in incidental warranty. Under such conditions the insured cannot exercise the recourse of an action in incidental warranty, nor suspend for that purpose the main action by way of dilatory exception.

Dufresne v. Parent, 53 Que. S.C. 223.

INTERPRETATION OF POLICY—MEDICAL ATTENDANCE.

A clause in a policy of insurance against accidents to workmen, issued in favour of an employer, and providing that the insured

shall not incur any expense nor make any settlement with an employee, except that at the time of the accident the insured may provide for imperative medical assistance, should be interpreted as putting the cost of medical assistance upon the insurance company which should guarantee the insured against it.

Dupont v. Dupont, 47 Que. S.C. 50.

(§ VIII—441)—FIDELITY INSURANCE—ARRAIGNMENT — ACCOUNTS — COMPROMISE.

A clause in a policy of fidelity insurance stating that "the employee is obliged, if the company so requires, to arraign the employee before the courts," without declaring whether it should be before civil or criminal courts, is vague and must be construed against the insurance company by which the condition was stipulated. A delay in requiring the rendering of accounts is not negligence which will imperil recourse under the policy; nor when the mandator seeks to recover a portion of his claim against his mandatory by making a compromise settlement with him.

Quebec Fire Ins. Co. v. Prévoyance, 50 Que. S.C. 300.

INTENT.

See Contracts; Criminal Law; Wills; Statutes.

INTERDICTION.

CURATOR TO INTERDICT—ACCOUNT OF ADMINISTRATION.

The curator of the property of an interdict for drunkenness, on being superseded acquits himself of the obligation to render an account by doing so to his successor only. An interdict has a right to an account of the administration of his property by a curator only on being discharged from the interdiction. Against a curator who has already rendered an account to his successor his sole remedy is for reformation of such account.

Goyette v. Goyette, 39 Que. S.C. 124.

INTEREST.

I. WHEN RECOVERABLE.
A. In general, on contracts.
B. On debts, loans and advances.
C. As damages; on amount recovered as damages.
D. On judgments; verdicts; awards.
E. On legacies and annuities; claims of distributees.
F. Liability of officer, receiver, trustee or personal representative.
G. Liability of province, county or municipality.
H. Necessity and effect of demand.
II. COMPUTATIONS; AMOUNT; RATE; FREQUENCY OF PAYMENT.
A. In general.
B. Rate.
III. COMPOUND INTEREST.

Annotations.

Statement of rate of interest in land mortgage: 32 D.L.R. 60.

Rate of interest that may be charged by banks: 42 D.L.R. 134.

I. WHEN RECOVERABLE.

A. IN GENERAL; ON CONTRACTS.

See Mortgage; Usury.

(§ I A—1)—ESTOPPEL.

Where a real estate agent stipulates with the owner for a percentage commission on the selling price of the lands as and when paid in, this does not necessarily import interest, and the agent may estop himself from claiming interest as to specific tracts sold where he has accepted cheques for the commission covering principal only.

Kennerley v. Hextall, 18 D.L.R. 375, 7 A.L.R. 469.

MORTGAGES — FUND IN COURT REPRESENTING MORTGAGED PROPERTY.

On taking mortgage accounts consequent upon the opening of a foreclosure decree to permit a mortgagor to redeem, the mortgagee should not be compelled to accept a smaller rate of interest which the fund representing the land in question was actually earning by reason of the land having been taken for railway purposes and the price thereof having been paid into court; the mortgagee should in such case receive the full contract rate for which his mortgage provided.

Williams v. Box, 15 D.L.R. 261, 24 Man. L.R. 31, 26 W.L.R. 461, 5 W.W.R. 912, reversing 12 D.L.R. 90, 24 W.L.R. 93, 4 W.W.R. 244.

In all cases where, in the opinion of the court, the payment of a just debt has been improperly withheld, and it seems to be fair and equitable that the party in default should make compensation by payment of interest, it is incumbent upon the court to allow interest for such time and such rate as the court may think right. [Toronto R. Co. v. Toronto, [1906] A.C. 117, applied.]

Last West Lumber Co. v. Haddad, 25 D.L.R. 529, 8 S.L.R. 407, 33 W.L.R. 15, 9 W.W.R. 578.

WHEN GENERALLY ALLOWED.

Interest may be allowed when authorized by statute, when payable by contract, or when a contract to pay can be inferred from trade or mercantile usage or from the course of dealing between the parties.

Duffy v. Duffy, 26 D.L.R. 479, 48 N.B.R. 555.

MONEY CLAIM — DISCRETION OF TRIAL JUDGE — UNSUCCESSFUL APPEAL — COSTS — APPEAL "AS TO COSTS ONLY" — JUDICATURE ACT, S. 24 — COUNTY COURTS ACT, S. 32.

Buckley v. Vair, 39 D.L.R. 796, 40 O.L.R. 465.

THRESHING CONTRACT — DEMAND FOR PAYMENT—TIME.

Interest on the amount claimed under a

threshing contract allowed from the date of the delivery of defence, there being an absence of clear evidence as to when demand for payment was made or as to when full particulars of the plaintiff's claim were delivered.

Dusbabek v. Bjornstad, [1918] 3 W.W.R. 79.

SALE OF GOODS — PLEADINGS — AMENDMENT—PAYMENT—COSTS.

A judgment for the price of goods sold and delivered and interest thereon sustained on the ground that, although the plaintiff could succeed as to interest only by an amendment to the statement of claim showing facts entitling her to interest under the statute and no such amendment was made, yet the Trial Judge must have intended to allow interest only by virtue of some such amendment, and therefore his discretion in allowing interest should not be interfered with; but, the defendant having paid into court an amount sufficient to satisfy the claim on the issues raised by the pleadings as they were at the time of payment in, it was held that the plaintiff was entitled to costs only up to and including such payment into court.

Styles v. Henderson, [1918] 2 W.W.R. 394.

(§ I A—6)—INSURANCE — TIME OF PROOF OF LOSS.

Under s. 194, subs. 22, of the Ontario Insurance Act, 1912, 2 Geo. V. c. 23, the loss under a policy of fire insurance being payable in 60 days after the completion of the proofs of loss unless a shorter time is provided by the contract of insurance, interest from the time of such completion of the proof of loss should be allowed. [Toronto R. Co. v. Toronto, [1906] A.C. 117, followed.]

Strong v. Crown Fire Ins. Co., 10 D.L.R. 43, 28 O.L.R. 33, 23 O.W.R. 701. [Affirmed, 13 D.L.R. 686.]

INSURANCE.

An insured is entitled to interest at the legal rate, upon the amount of the loss, from the date when the right of action on the policy first accrued according to its conditions. [Green v. Manitoba Ass'ce Co., 13 Man. L.R. 403, followed.]

Robinson v. Midland Fire Ins. Co., 26 Man. L.R. 398, 34 W.L.R. 577.

(§ I A—8)—NOTE—MATURITY.

Under ss. 134, 186 of the Bills of Exchange Act, R.S.C. 1906, c. 119, interest on a dishonoured note is recoverable as part of liquidated damages from the time of the maturity of the note.

Hayden, Clinton National Bank v. Dixon, 26 D.L.R. 694, 9 A.L.R. 303, 33 W.L.R. 838, 9 W.W.R. 1269.

B. ON DEBTS, LOANS AND ADVANCES.

(§ I B—20)—ON LOANS — INTEREST RATE UNDER BANK ACT — STIPULATION ULTRA VIRES AND INOPERATIVE.

Where a bank has charged on loans more than seven per cent the maximum rate of interest or discount allowed by s. 91 of the Bank Act, R.S.C. 1906, c. 29, the stipulation is ultra vires and inoperative. [McHugh v. Union Bank, 10 D.L.R. 562, applied.]

Northern Crown Bank v. Great West Lumber Co., 11 D.L.R. 395, 7 A.L.R. 183, 24 W.L.R. 477, 4 W.W.R. 720.

ON LOANS — SETTLEMENT OR PAYMENT, EFFECT — INTEREST RATE UNDER BANK ACT.

Where a bank's customer for about six years ran accounts with his bank, by which he was charged interest in excess of that permitted by the Bank Act R.S.C., 1906, c. 29, and where these accounts were then ascertained between the parties and covered by a chattel mortgage at excessive interest, and where 3 years later this chattel mortgage and concurrent additional accounts at excessive interest were all ascertained between the parties and covered by a new chattel mortgage stipulating for excessive interest, the latter mortgage amounted to a settlement of accounts between the bank and its customer having the same effect as payment would have had with regard to the question of excessive interest on the accounts and earlier mortgage and estopping the customer from disturbing such settlement, as he must have known that the bank had no right to stipulate for or exact the excessive interest and he voluntarily assented to such settlement and thereby gave up his right to recover back any excess.

McHugh v. Union Bank, 10 D.L.R. 562, 23 W.L.R. 409, [1913] A.C. 299, 3 W.W.R. 1052, affirming 2 A.L.R. 319, reversing in part 3 A.L.R. 166, 44 Can. S.C.R. 473.

JUDICATURE ACT—JUST DEBT—SURETY.

The interest allowable upon any just debt under s. 10 (15) of the Judicature Act applies also as against sureties.

Standard Bank v. Alberta Engineering Co., 33 D.L.R. 542, 11 A.L.R. 96, [1917] 1 W.W.R. 1177, varying 27 D.L.R. 707, 9 W.W.R. 982.

TESTS AS TO WHEN RECOVERABLE — "DEMAND" IN STATEMENT OF CLAIM ONLY —EFFECT OF.

Where there is no agreement, express or implied, to pay interest on an indebtedness nor any writing whereby the debt was payable at any certain time, the statement of claim in an action for recovery of both debt and interest, is not a sufficient demand under 3 & 4 Wm. & M., c. 42, s. 28, of interest thereafter. [Rhymney v. Rhymney, 25 Q.B.D. 146; Sheba Gold Mining Co. v. Trubshawe, [1892] 1 Q.B. 674, and McKenzie v. Champion, 4 Man. L.R. 158, followed.]

Northern Trust Co. v. Coldwell, 18 D.L.R. 512, 28 W.L.R. 625, 6 W.W.R. 1165.

ON PRICE OF GOODS—IMPLIED AGREEMENT TO PAY.

In the absence of some special usage of trade, or of some stipulation express or

implied, a trader is not entitled to interest on the price of goods sold and delivered. An agreement to pay interest may be reasonably inferred from the previous dealings of the parties coupled with a printed notification of intention to charge interest on the vendors' statement of account. [Re Anglesey, 70 L.J. Ch. 810, followed.]

Marshall-Wells Co. v. Eaton, 8 W.W.R. 787.

(§ I B—22)—On accounts.

Under ss. 36, 37 (2), R.S.S. c. 52, interest upon a stated account may be allowed from the time when a demand for payment thereof is made.

East West Lumber Co. v. Haddad, 25 D.L.R. 529, 8 S.L.R. 407, 33 W.L.R. 15, 9 W.W.R. 578.

On accounts — Arithmetical errors — Surcharging and falsifying — Statutory limitation.

On the surcharging and falsifying of an account with respect to arithmetical errors in the calculation of interest, the parties should not be limited to a period of 6 years before the action was commenced, where the Statute of Limitations was not pleaded, such errors being of a character which common honesty would demand should be rectified whenever they are discovered.

McHugh v. Union Bank, 10 D.L.R. 562, 23 W.L.R. 409, 108 L.T. 273, [1913] A.C. 299, 3 W.W.R. 1052, affirming 2 A.L.R. 319, reversing in part 3 A.L.R. 166, 44 Can. S.C.R. 473.

(§ I B—24)—On bank account.

Where the proceeds of the sale of the bonds of a railway company incorporated by a Provincial Legislature for the purpose of building a railway wholly within the province were deposited with a bank to the special account of the treasurer of the province in accordance with the terms of an Act guaranteeing the payment of the bonds by the Provincial Government, which special account was to carry interest at such rate as the bank and the railway company might agree upon and the bank agreed with the railway company to pay 3½ per cent interest on the deposit, the Crown is entitled to the interest at such rate thereon accrued up to the time of its demand in an action to recover the proceeds under a subsequent Act passed for the purpose of protecting the province in its guarantee of the bonds, in which such proceeds are declared to be a part of the general revenue fund of the province and are ordered to be paid forthwith to the provincial treasurer.

The King v. Royal Bank, 2 D.L.R. 762, 4 A.L.R. 249, 20 W.L.R. 929, 1 W.W.R. 1159. [Reversed on other points 9 D.L.R. 337, [1913] A.C. 283, 23 W.L.R. 315, 3 W.W.R. 994.]

C. As damages; on amount recovered as damages.

In expropriation matters, see Damages, III L—240.

(§ I C—25)—Contribution withheld by cotenant.

Interest by way of damages will not be allowed on moneys justly withheld by a joint owner from his share of contribution towards the expense and upkeep of the premises, where such course was brought about by the conduct of the other owner in refusing to execute a conveyance settling the former's interest in the property. [Raymond v. Hay, 3 N.B.R. 99, distinguished.]

Duffy v. Duffy, 26 D.L.R. 479, 43 N.B.R. 555.

Recovery — Money acquired under void testamentary gift.

One who withdraws money from a bank during the lifetime of and at the request of and for the use of a depositor, notwithstanding the deposit was made in their joint names for the purpose of creating a testamentary gift, which, however, was ineffectual, on accounting to the estate of the depositor for what remains in his hands at the former's death, he will be charged with interest thereon from the passing of accounts by the Surrogate Court.

Vogler v. Campbell, 11 D.L.R. 605, 4 O.W.N. 1389, 24 O.W.R. 680. [Reversed, on other grounds, 14 D.L.R. 480, 5 O.W.N. 169, 25 O.W.R. 137.]

Agreement of sale of land.

In fixing the amount to be paid by the purchaser for a conveyance in a vendor's action to enforce an agreement of sale on the purchaser's default in payment, interest after default should be allowed under the Judicature Ord. (Alta.) s. 10, clause 15, unless there is in the facts some equitable ground for withholding it in cases where the contract does not expressly provide for interest post diem; for although the word "may" is used in that enactment in declaring the power on the court to award interest on money "improperly withheld" if it seems to the court fair and equitable to allow it, it becomes the duty of the court to award interest when of that opinion and to fix the rate.

Walker v. Card, 23 D.L.R. 349, 30 W.L.R. 402, 7 W.W.R. 1145.

On expropriation award — From when chargeable.

In awarding compensation for lands compulsorily taken and others injuriously affected, in an expropriation under the Railway Act, 1906, interest is to be allowed on the whole amount awarded, and is chargeable from the time the notice of expropriation is served or possession taken.

Green v. C.N.R. Co., 33 D.L.R. 608, 10 S.L.R. 108, [1917] 2 W.W.R. 273.

(§ I C—33) — Expropriation award — Time of entry.

The effect of s. 347 of the Municipal Act,

R.S.O. 1914, c. 192, incorporated in the Public Parks Act, R.S.O. 1914, c. 203, by s. 17 of that Act, is, that where the arbitration is only as to the amount of compensation, and the expropriating by-law does not authorize permanent entry on the land, the award as to amount does not become binding on the Parks Board unless adopted by by-law within three months after the making of the award; and where possession of the land has not been taken by the Board, and no provision is made in the by-law for entry upon the land under the award, interest should not be allowed to the claimant land-owner upon the sum awarded for the value of the land. [Re Macpherson and Toronto, 26 O.R. 558, distinguished.]

Re Hislop & Stratford Park Board, 23 D.L.R. 753, 34 O.L.R. 97.

D. On judgments; verdicts; awards.

(§ I D—35)—On judgments — Rate — B.N.A. Act — Federal and provincial powers.

Section 714 of the King's Bench Act (Man.) purporting to provide for interest upon the amount of a judgment recovered is ultra vires of the Manitoba Legislature, the subject of interest being assigned under the B.N.A. Act to the Dominion Parliament. Section 13 of the Interest Act, R.S.C. 1906, c. 120, providing for interest at the rate of 5 per cent per annum upon judgments, does not apply to Manitoba; in that province the rate remains 4 per cent, under the English Judgment Act, 1838.

Case v. Godin, 20 D.L.R. 19, 24 Man. L.R. 788, 29 W.L.R. 763.

Judgment for damages for trespass to mining claim — Appeal from — Payable from date of judgment.

Deisler v. Spruce Creek Power Co., 25 D.L.R. 763, 22 B.C.R. 318, 9 W.W.R. 548, [See 17 D.L.R. 506, 28 W.L.R. 329.]

Judgment — Prescription — Registration.

Interest upon judgment is only prescribed by 30 years as capital; and, notwithstanding art. 2124 C.C. (Que.), the registration of a judgment preserves the right of preference attached to the title for interest accrued since the judgment without other limitation than the period of prescription.

Campeau v. Roy, 54 Que. S.C. 237.

(§ I D—36)—On award — In condemnation proceedings — When begins to run.

Where a railway company takes possession of land before proceeding to expropriate it, on an award of damages being subsequently made, interest attaches, not from the date of the award, but from the time of taking possession. [Re Clark and Toronto, Grey & Bruce R. Co., 18 O.L.R. 628, 9 Can. Ry. Cas. 290; Rhys v. Dare Valley R. Co., L.R. 19 Eq. 93; and Re Shaw and Birmingham Corp., L.R. 27 Ch.D. 614, 54 L.J. Ch. 51, followed.]

Gauthier v. C.N.R. Co., 14 D.L.R. 490, 7 A.L.R. 229, 25 W.L.R. 955, 5 W.W.R. 537.

When begins to run.

To the amount of an award for land expropriated for railway purposes interest attaches not from the date of the award but from a previous taking possession by the railway company. [Gauthier v. C.N.R. Co., 14 D.L.R. 490, followed.]

Dagenais v. C.N.R. Co., 14 D.L.R. 494, 16 Can. Ry. Cas. 353, 25 W.L.R. 960, 5 W.W.R. 543.

Railway Act (Can.).

Interest on the sum awarded as compensation as of the date of the deposit of the plan and profile, should not be given by arbitrators as a part of their award for land expropriated for railway purposes, and will be struck out as beyond their jurisdiction; the right to interest from that date is conferred under the Railway Act (Can.) and not left to be determined by the arbitrators.

Re Ketcheson and Can. Northern Ontario R. Co., 13 D.L.R. 854, 29 O.L.R. 339, 25 O.W.R. 20.

On award — In expropriation proceeding — Allowance by arbitrators.

Arbitrators cannot add interest to the amount awarded for land taken by expropriation under the Railway Act (Can.) [Re Ketcheson and Can. Northern Ontario R. Co., 13 D.L.R. 854, 29 O.L.R. 339, applied.]

Re National Trust Co. and C.P.R. Co., 15 D.L.R. 320, 29 O.L.R. 462, 16 Can. Ry. Cas. 291.

Expropriation proceedings — Abandonment.

There can be no allowance of interest under subs. 4 of s. 23 of the Expropriation Act, R.S.C. 1906, c. 143, either upon the estimated value of the lands or upon the amount tendered therefor by the government, where before the ascertainment of the indemnity the proceedings were abandoned and no special damages sustained.

Quebec, Jacques-Cartier Electric Co. v. The King, 24 D.L.R. 424, 51 Can. S.C.R. 594.

Expropriation awards — Computation of amount.

Section 7, c. 56, of the False Creek Reclamation Act, 1911, vests the right to take possession of expropriated lands immediately upon the payment or legal tender of the amount awarded; hence, interest on the amount awarded for land taken thereunder runs from the date of the award, and not from the date of notice fixed by the arbitrator.

Re False Creek Reclamation Act, 22 D.L.R. 117, 31 W.L.R. 678, 8 W.W.R. 1191, affirming 22 D.L.R. 103.

E. On legacies and annuities; claims of distributees.

(§ I E—40) — Claim against decedents' estate — Agreement to pay sum for past maintenance — Time for payment.

Re English, 10 O.W.N. 139.

(§ I E—41)—Legacy.

A legatee is entitled to interest at 6 per cent per annum from a date one year after that of the death of the testator. [Re Logan Trusts, 3 Man. L.R. 49, 4 Man. L.R. 19, followed.]

Re Estate of Robert Muir, [1917] 2 W.W.R. 801.

(§ I E—44)—When recoverable — On legacies and annuities — Absence of improper delay — Annuities.

In the case of an annuity arising under a will, the general rule is that interest is not allowed on arrears, in the absence of misconduct or improper delay on the part of those chargeable with the payment of the annuity.

Chisholm v. Journeay, 15 D.L.R. 495, 13 E.L.R. 575.

F. Liability of officer, receiver, trustee or personal representative.

(§ I F—47) — Interest on misapplied trust funds.

A cestui que trust is entitled to interest on a fund in the hands of his trustee, which fund has been misappropriated by the trustee so that the cestui que trust has been improperly kept out of its use and the enjoyment of its profits.

Rogers Hardware Co. v. Rogers, 10 D.L.R. 541.

H. Necessity and effect of demand.

(§ I H—55)—Absence of agreement to pay.

Where a debtor does not agree to pay interest and the debt is payable otherwise than by virtue of a written instrument at a certain time, interest should not be allowed except where a demand for payment is made and the debtor is informed that interest will be claimed from the date of the demand.

Winterburn v. Boon, 10 D.L.R. 621, 6 S.L.R. 177, 23 W.L.R. 556, 3 W.W.R. 1068.

Sufficiency of demand — Printed words on bill.

Printed words on an account, "Interest at 10 per cent per annum chargeable after 30 days," together with verbal references to these words and notification that interest is being charged, constitute a demand in writing sufficient to support a claim for interest from the expiry of the 30 days.

Hart v. Greer (No. 1), 9 W.W.R. 709, 23 W.L.R. 39.

(§ I H—56)—On deposit in bank.

On the wrongful refusal of a bank to honour a demand for the withdrawal of a special deposit, the depositor may be allowed interest thereon in an action for its recovery at the legal rate from the date of the demand even though the legal rate is in excess of the rate of interest at which the special deposit was to be carried.

The King v. Royal Bank, 2 D.L.R. 762, 20 W.L.R. 929, 4 A.L.R. 249, 1 W.W.R. 1159. [Reversed on other points, 9 D.L.R. 337, [1913] A.C. 283, 23 W.L.R. 315, 3 W.W.R. 994.]

II. Computations; amount; rate; frequency of payment.

A. In general.

(§ II A—60)—Annual payment — "Per annum"—Meaning of.

The words "at 6 per cent per annum," as applied to a payment of interest, simply indicate the method of computation and the rate allowable by way of interest, but do not imply a contract to pay yearly or each year, merely signifying that the interest becomes payable at the time of the maturity of the principal obligation. [Atherstone v. Bostock, 2 Man. & G. 511, 719, applied.]

Finkbeiner v. Yeo, 25 D.L.R. 673, 26 Man. L.R. 22, 33 W.L.R. 195, 9 W.W.R. 891.

From date of action.

When a claim is uncertain and contested, and can only be determined by a judgment, the interests run only from the date of the institution of the action.

Great Northern Construction Co. v. Ross, 25 Que. K.B. 385, 404.

B. Rate.

(§ II B—65)—Rate under Bank Act — Ultra vires stipulation for excess.

Notwithstanding prior dealings between the bank and its customer by which he had for a number of years acquiesced in the payment to the bank of interest on advances at a higher rate than 7 per cent, the rate limited by the Bank Act, R.S.C. 1906, c. 29, s. 91, his subsequent mortgage to the bank settling the balance of indebtedness and containing a stipulation for the like excessive interest contravenes the said s. 91, and the insertion by the bank of such a stipulation was ultra vires on its part and the stipulation itself was inoperative; the interest collectable in respect of such mortgage must be calculated at the rate of 5 per cent, as being the legal rate where no special rate has been legally fixed and not the intermediate rate of 7 per cent, for which the bank was entitled to contract.

McHugh v. Union Bank, 10 D.L.R. 502, 23 W.L.R. 409, 108 L.T. 273, [1913] A.C. 299, 3 W.W.R. 1052, affirming dictum of Beck J. in 2 A.L.R. 319, and reversing in part 3 A.L.R. 166, 44 Can. S.C.R. 473.

Statement of rate—Mortgage.

A clause in a mortgage of real estate that "It is further agreed . . . that the principal is $700 and the rate of interest chargeable thereon is 10 per cent per annum as well after as before default" is a sufficient statement of the amount of the

principal and interest to satisfy the requirements of s. 6 of the Interest Act (R.S.C. 1906, c. 120).

Standard Reliance Mortgage Co. v. Stubbs, 38 D.L.R. 435, 55 Can. S.C.R. 422, [1917] 3 W.W.R. 402, reversing 32 D.L.R. 57, 27 Man. L.R. 276, [1917] 1 W.W.R. 850.

A special statement in a mortgage on real estate complete in itself, of the amount of the principal and rate of interest calculated, is not required by s. 6 of the Interest Act (R.S.C. (1906), c. 120); it is sufficient if the facts stated in the mortgage show the principal amount and the rate of interest chargeable thereon.

Canadian Mortgage Investment Co. v. Cameron, 38 D.L.R. 428, 55 Can. S.C.R. 409, [1917] 3 W.W.R. 521, reversing 33 D.L.R. 792, 11 A.L.R. 441, [1917] 2 W.W.R. 18.

LOANS — STIPULATED RATE — VOLUNTARY PAYMENTS—RECOVERY BACK.

A stipulation for interest at a certain rate on a loan "until paid" imports a contract to pay interest at the specified rate only until the maturity of the loan. To carry the contract for the stipulated rate beyond the maturity of the loan, explicit terms so providing must be made. Payments at the higher rate voluntarily made can not be recovered back.

Hossack v. Shaw, 42 D.L.R. 130, 56 Can. S.C.R. 581, reversing, in part, 39 D.L.R. 797, 40 O.L.R. 475, reversing 36 D.L.R. 760, 39 O.L.R. 440.

AGREEMENT TO REPAY LARGER SUM—DIFFERENCE AS INTEREST — "BLENDED" PAYMENT.

Where in consideration of a present advance of money the borrower agrees to pay the lender a certain larger amount at a future date, the difference between the amount lent and the amount to be paid by the borrower is interest, but the transaction is not one which comes under s. 6 of the Interest Act, R.S.C. 1906, c. 120, for the payment of a sum made up by the mere addition of interest to principal, the amounts due in respect of principal and interest respectively being clearly distinguishable, is not a "blended" payment within the meaning of said section.

Cummings v. Silverwood, 11 S.L.R. 407, [1918] 3 W.W.R. 620.

USURIOUS RATE—MONEY-LENDERS ACT—RECOVERY.

One who carries on the business of money-lending in connection with another business is a "money-lender," within the meaning of the Ontario Money-lenders Act, R.S.O. 1914, c. 175, though not registered as such, and also the Dominion Money-lenders Act (R.S.C. 1906, c. 122); an exaction of interest in excess of the statutory rate does not invalidate the transaction as a whole, but prevents recovery of the excess. [Bellamy v. Timbers, 19 D.L.R. 488, 31 O.L.R. 618, followed.]

Shaw v. Hossack, 36 D.L.R. 760, 39 O.L.R. 440. [Reversed, 39 D.L.R. 797, 40 O.L.R. 475, which is reversed in part in 42 D.L.R. 130.]

EXCESSIVE RATE — BANK ACT — INTEREST ACT.

An excessive charge of interest in violation of the Bank Act merely renders void the stipulation as to the prohibited rate, but does not affect the liability for the legal rate under the provisions of the Interest Act.

Standard Bank v. Alberta Engineering Co., 33 D.L.R. 542, 11 A.L.R. 96, [1917] 1 W.W.R. 1177, varying 27 D.L.R. 707, 9 W.W.R. 982.

Reference directed to determine whether in making up the amounts of notes, the last of a series of renewals, the makers thereof had been improperly charged with a larger amount than was legally owing by reason of an excessive rate charged with respect to an earlier indebtedness, which they were not estopped from taking exception to on the principle laid down in McHugh v. Union Bank, 10 D.L.R. 562, [1913] A.C. 299. Where a bank stipulates for the payment of interest at an ultra vires rate under a security, that merely affects the rate of interest, and not the entire stipulation to pay interest.

Union Bank v. Farmer, [1917] 1 W.W.R. 1361.

Section 6 of the Interest Act, R.S.C. c. 120, is sufficiently complied with by a mortgage which provides for repayment as follows: "That we will pay to the said company the above sum of $1,000 . . . as follows: The sum of $11.50 on the first Monday of each month for the period of 165 months next ensuing. The first of such monthly instalments to become due and payable on the first Monday of May, 1910. It is declared and agreed between the parties hereto that the principal is $1,000, the rate of interest chargeable thereon is 10 per cent per annum as well after as before default, and that chapter 120 of the Revised Statutes of Canada shall not apply to this mortgage."

Standard Reliance Mtge. Corp. v. Cowie, 10 S.L.R. 263, [1917] 3 W.W.R. 238.

LOAN AT INTEREST—USURY—INTEREST ACT—CALCULATION—CONTRARY AGREEMENT—POWER OF JUDGE—C.C. ART. 1149—S. REV., [1906] C. 120 (INTEREST ACT).

The Interest Act is founded on public welfare and does not allow any convention or judicial contract contrary to its provisions. When there is a question of such a contract, the court should set aside the agreement in order to do justice to the parties. In a case where the amount of the judgment is based on some calculations, the Court of Appeal, which arrives at a result approximately the same as that of the Superior Court, will not modify the judgment on this point.

Choquette v. Lalonde, 56 Que. S.C. 252.

(§ II B—72)—INTEREST ACT—BILLS OF EXCHANGE ACT—RATE AFTER MATURITY—"LIABILITIES"—CONSTRUED.

The interest after maturity by way of liquidated damages upon a promissory note maturing prior to July 7, 1900, not made with interest, which is to be allowed under the Bills of Exchange Act and the Interest Act, 1900, R.S.C. 1906, c. 120, s. 2, is 6 per cent from the date of maturity to the entry of judgment, although the latter took place subsequent to the passing of the Interest Act, 1900, on July 7, 1900, whereby the legal rate was reduced from 6 to 5 per cent; the exception by that act, as to "liabilities" existing at the time of its passing has reference to the debt and not to the accrued interest to that date, and the interest rate on then existing debts on which 6 per cent would be allowed therefore, was not reduced to 5 per cent, even as to interest to be computed from and after July 7, 1900. [British Canadian v. Farmer, 15 Man. L.R. 593, and Plenderleith v. Parsons, 14 O.L.R. 619, disapproved.]

McKinnon v. Lewthwaite, 20 D.L.R. 220, 20 B.C.R. 55, 7 W.W.R. 25.

MORTGAGE—INTEREST AFTER MATURITY—NO AGREEMENT TO PAY—PAYMENTS MADE UNDER MISTAKE OF LAW—RECOVERY BACK—ABSENCE OF FRAUD OF FIDUCIARY RELATIONSHIP.

Kerr v. Colquhoun, 18 O.W.R. 374.

III. Compound interest.

See Mortgage; Usury.

(§ III A—75) — COMPOUND INTEREST — BANK — AGREEMENT FROM COURSE OF DEALING ACQUIESCED IN.

Where a bank takes to a trustee for itself a mortgage from its customer as collateral to his indebtedness then past due, as represented by the customer's bills and notes, a series of statements of account by the bank to the customer in which the latter is charged with interest compounded from time to time on his debit balances and to which the customer, with full knowledge of the mode of computation, gave his written assent (although marked "E. & O. E."), must be taken as constituting a stated account in respect of such interest claim and as evidence of an agreement to allow compound interest, although the original authorization of interest merely fixed the rate and was silent as to compounding, where the bank might have closed the account had the customer declined to assent to the compound interest charge.

Thomson v. Stikeman, 17 D.L.R. 205, 30 O.L.R. 123, affirming 14 D.L.R. 97, 29 O.L.R. 146.

BANK—CUSTOMER'S ACCOUNT.

Standard Bank v. Brodrecht, 5 O.W.N. 142, 25 O.W.R. 78.

INTERIM INJUNCTION.

See Injunction, II.

INTERLOCUTORY ORDERS.

See Judgment; Appeal; Injunction.

INTERNAL REVENUE.

WAR REVENUE ACT—PENALTIES—SALES—"CONSUMER."

A sale made at a retail store of an article subject to stamp duties under the Special War Revenue Act (Can.) 1915, ss. 14-18, is not shewn to be a sale to a "consumer" as defined by s. 14 so as to warrant a summary conviction for neglect to affix a tax stamp to the package, if the purchase was made by a revenue officer on behalf of the Department of Inland Revenue.

Patenaude v. Paquet Co., 31 D.L.R. 229, 26 Can. Cr. Cas. 204.

SALES TO "CONSUMERS"—WAR REVENUE ACT.

If drug preparations required by the War Revenue Act, 1915, to be stamped on being sold to consumers are sold unstamped to a revenue officer buying only for the purpose of prosecuting the seller, such retail sale may be the subject of prosecution under the Act, as by its terms all sales at retail are to be considered as included in the term "selling to a consumer." [Patenaude v. Paquet Co., 31 D.L.R. 229, 26 Can. Cr. Cas. 204, disapproved.]

Ethier v. Minister of Inland Revenue, 32 D.L.R. 320, 27 Can. Cr. Cas. 12.

A sale by retail to a revenue inspector buying for the purpose of finding whether or not the seller was complying with the requirements of the War Revenue Act, 1915, Can., in affixing revenue stamps on goods sold, is a sale "to a consumer" within the provisions of that act. [Ethier v. Minister of Inland Revenue, 27 Can. Cr. Cas. 12, 32 D.L.R. 320, followed.]

Minister of Inland Revenue v. Nairn, 35 D.L.R. 224, 28 Can. Cr. Cas. 1, 11 O.W.N. 422.

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Minister of Inland Revenue v. Thornton, 28 Can. Cr. Cas. 3, 12 O.W.N. 30.

SPECIAL WAR REVENUE ACT, 1915—ADHESIVE STAMP TO BE AFFIXED—WHEN THE OBJECT OF THE ACT IS FULFILLED—5 GEO. V. CAN. C. 9.

When the Special War Revenue Act, 1915, requires that every person selling any of the articles mentioned in the Act shall affix

an adhesive stamp upon such articles, the object of the law is practically if not literally fulfilled if, instead of affixing one cent upon one of the articles and two cents upon the other, the person selling has affixed a 3-cent stamp upon one of the 2 articles, thus covering all the tax to be paid on both. A conviction under such circumstances will be quashed but without costs.

Cadotte v. Lazarovitcz, 31 Can. Cr. Cas. 43.

TOBACCO—"POSSESSION."

A mere handling, or temporary physical control, of tobacco, belonging to another, does not constitute a "possession" of it within the meaning of that word in s. 356 of the Inland Revenue Act, R.S.C. 1906, c. 51.

R. v. Young, 30 Can. Cr. Cas. 137, 24 B.C.R. 482, [1917] 3 W.W.R. 1066.

SALES OF PLAYING CARDS — SPECIAL WAR REVENUE ACT, CANADA.

There is no duty imposed on wholesale or retail dealers in playing cards (not being manufacturers or importers) to stamp packages of cards bought after July 1, 1918, under the provisions of the Special War Revenue Act, 1915, as amended 8-9 Geo. V. 1918, c. 46; but the importer is under obligation to see that stamps are affixed if imported after April 30, 1918.

R. v. Bruser, 31 Can. Cr. Cas. 201, 12 S.L.R. 288.

UNLICENSED POSSESSION OF WASH SUITABLE FOR MAKING SPIRITS—INLAND REVENUE ACT, CAN.—LIMITED JURISDICTION OF POLICE MAGISTRATES.

A police magistrate has jurisdiction to summarily try under Part XV. of the Cr. Code and s. 132 of the Inland Revenue Act, a prosecution for a penalty or forfeiture under the latter act if the amount or value of such penalty or forfeiture does not exceed $500. This has reference to the amount which the statute authorizes as a punishment for the offence rather than to the amount which the magistrate actually imposes, and where accused would be liable in the same proceeding, under ss. 180, 181 of the Act, to an additional penalty of $500 for double the amount of excise duty and license duty as well as the penalty of from $100 to $500 for unlawful possession of a wash suitable for the manufacture of spirits, a police magistrate has no jurisdiction under s. 132 to hear the case.

R. v. Schmolke, 31 Can. Cr. Cas. 395, [1919] 2 W.W.R. 595. [Reversed in [1919] 3 W.W.R. 409.]

WAR TAX—PATENT MEDICINE—CONSUMER.

A merchant who sells and delivers a package of patent medicine without placing thereon the war stamp required by the Revenue Act, 5 Geo. V. c. 8, only incurs the penalty imposed by the Act if he makes the sale to a consumer. A public officer who buys these remedies not for use, but to lay a trap for the seller, is not a consumer.

Patenaude v. Dubé, 26 Que. K.B. 431.

ACTION FOR—DEFENDANT ALLEGING SEIZURE BY CUSTOMS OFFICERS—EXTENT OF DEFENDANT'S ONUS OF PROOF.

Where, in an action for return of goods and damages for detention, it was alleged in defence that the goods had been seized by the collector of customs for alleged infraction by plaintiff of the customs laws, it was held that defendants were bound to show not only that the goods were held under that seizure at the time the action was commenced but also that the customs authorities were entitled to make the seizure. Counterclaim for storage was dismissed, as by agreement the goods were to be displayed in defendant's store window and they had been stored in the basement after the seizure by the customs officers, and because they were supposed to be under seizure, and defendant's claim for storage was therefore against customs authorities only.

Lomax v. Bower, [1919] 3 W.W.R. 385.

INTERNATIONAL LAW.

See Conflict of Laws.
Foreign judgments, see Judgments.
Status of aliens, see Aliens.
Foreign executors, see Executors and Administrators.
Foreign corporations, see Companies; Insurance; Constitutional Law.

Annotation.

Status of aliens during war: 23 D.L.R. 375.

FISHING RIGHTS—BOUNDARIES—3 MILE LIMIT—"COAST"—ISLAND.

The term "coast" in the treaty of 1818, by which the United States renounced the right to fish within 3 marine miles of the coast of any British territory, is not confined to the coast of the mainland, and a United States vessel is therefore liable to seizure for illegal fishing or preparing to fish within 3 marine miles from the shore of an island of Canada situated 15 miles from the mainland. [See also Re Quebec Fisheries, annotated, 35 D.L.R. 1, 26 Que. K.B. 289.]

"John J. Fallon" v. The King, 37 D.L.R. 659, 55 Can. S.C.R. 348, affirming 16 Can. Ex. 332.

INTERPLEADER.

Issue between liquidator and assignee of book debts as to moneys collected, see Assignment, III—25.

Annotation.

Summary review of the law of interpleader: 32 D.L.R. 263.

I. By sheriff.

(§ I—5)—COMMENT ON PROPER FORM OF INTERPLEADER ISSUE.

Elves v. Pratt, 32 D.L.R. 670, 11 A.L.R. 134.

PRACTICE—INTERPLEADER ORDER—IRREGULAR SERVICE UPON PERSON MADE PLAINTIFF IN ISSUE—PERSON SERVED NOT APPEARING UPON MOTION — APPLICATION TO SET ASIDE ORDER—POWERS OF COURT—EX PARTE ORDER—RULE 217.

Willard v. Bloom, 41 O.L.R. 1.

NOTICE TO PARTIES.

In interpleader proceedings other than by the sheriff it is not necessary for the applicant for relief by way of interpleader to notify the parties claiming before applying for relief.

Re State Elevator Co., [1917] 2 W.W.R. 572.

(§ I—10)—STOCK CERTIFICATES NOT HELD BY SHERIFF — ALLEGED PRIOR ASSIGNMENT—RIGHT TO INTERPLEAD.

A sheriff, on making seizure of shares of a company in the statutory manner by service of notice upon the company, is entitled to interplead, though he has not actual possession of the share certificates, where a claim is made under an alleged prior assignment of the shares which is denied by the execution creditor. Where there is a contest in interpleader between an execution creditor and several persons who set up alleged assignments as prior to the execution, there should be only one issue directed between them for the guidance of the sheriff and for the adjustment of the rights of the several claimants. [Merchants Bank v. Herson, 10 P.R. 117, applied.]

Pallandt v. Flynn, 9 D.L.R. 460, 4 O.W.N. 821, 837, 24 O.W.R. 95, 254, varying 4 O.W.N. 681.

CLAIMANT DISPUTING THAT SEIZURE MADE.

Where a seizure of a crop of grain cut and in stook in the field was made by the sheriff's officer going to the debtor's farm and serving a notice of seizure of such grain describing it as "about 100 acres of wheat in stook," what was done is at least tantamount to an effective seizure under the writ of execution, and an adverse claimant who has intervened upon an interpleader application brought by the sheriff, and who has asked therein that his right under the adverse claim shall be determined, will not be allowed to set up that there was in fact no valid seizure.

Dodd v. Vail, 10 D.L.R. 694, 23 W.L.R. 903, 4 W.W.R. 291, affirming 9 D.L.R. 534, 23 W.L.R. 62, 3 W.W.R. 796.

ORDER DIRECTING ISSUE — PARTIES — WHO SHOULD BE PLAINTIFF.

Laidlaw Lumber Co. v. Cawson, 12 D.L.R. 841, 4 O.W.N. 1595, 24 O.W.R. 978.

ORDER DISPOSING OF GOODS SEIZED—CLAIMANTS—SHERIFF'S STATUS.

In an interpleader proceeding with an issue pending as between the claimants and the execution creditors, and with goods under seizure in the sheriff's hands, the sheriff has the right (although not a party to the pending issue) to apply for an order disposing of the goods under seizure upon failure of the claimant to comply with the terms of the interpleader order, but only upon proper grounds being shewn, e.g., where it is inconvenient or expensive for him to retain them. Where, by an interpleader order in respect of goods seized by a sheriff, it has been directed that an issue be tried between the claimants and the execution creditors, the sheriff not being a party to the issue is not entitled to apply for an order to bar the claimants as against the execution creditor for noncompliance with the terms of the interpleader order.

Kent v. Brenton, 15 D.L.R. 92, 6 S.L.R. 277, 26 W.L.R. 161, 5 W.W.R. 558.

RIGHT OF APPEAL.

An interpleader by a sheriff who has seized goods in an action is to be considered a proceeding in such action, not a separate action, and no appeal lies from a District Court if the amount in controversy in such action is less than the amount in respect of which the District Courts Act (Sask.), grants a right of appeal, though the value of the goods seized may exceed such amount.

Royal Bank v. Banque D'Hochelaga, 40 D.L.R. 4, 11 S.L.R. 101, [1918] 1 W.W.R. 880.

EXECUTION CREDITOR—PRACTICE.

In interpleader proceedings the execution creditor should be made the plaintiff regardless of where the possession of the goods is.

Dickson v. Podersky, 39 D.L.R. 584, 13 A.L.R. 110, [1918] 1 W.W.R. 636.

EXECUTION—WIFE'S PROPERTY—PARTIES.

Until the presumption of ownership implied from possession is properly displaced, property in the possession of a married woman prima facie belongs to her. In an interpleader issue between an execution creditor and the debtor's wife, as to property claimed by her, the former may be made plaintiff to the issue; the form of the issue is immaterial.

Young v. Spofford, 32 D.L.R. 262, 37 O.L.R. 663. [See also 11 O.W.N. 232, 253.]

EXECUTION—TITLE TO PROPERTY—PARTNERSHIP.

In an interpleader issue as to goods seized under execution, it is not incumbent upon the claimant to prove that the goods are his absolute property, but he may shew that they are the joint or partnership property of himself and the judgment debtor, not exigible under the writ. [Peake v. Carter, [1916] 1 K.B. 652, followed.]

Witt v. Stocks, 33 D.L.R. 519, 10 A.L.R. 512, 11 A.L.R. 154, [1917] 1 W.W.R. 1451.

CREDITORS' RELIEF ACT—VALIDITY OF ASSIGNMENT OF "FUTURE BOOK-DEBTS"—ATTACHMENT OF DEBTS—PRIORITIES—THRESHERS' LIEN ORDINANCE.

Case (J. I.) Thresher Machine Co. v. Sing, 7 D.L.R. 814, 21 W.L.R. 278.

CROP OF GRAIN—SEED OF EXECUTION DEBTOR —LAND BELONGING TO CLAIMANT.

Lachance v. Price, 22 D.L.R. 918, 32 W. L.R. 60.

PRACTICE—SHERIFF'S INTERPLEADER—CARRIAGE OF PROCEEDINGS BY ONE CREDITOR ON BEHALF OF ALL—NECESSITY OF OBTAINING SUCH DIRECTION—COSTS.

Execution creditors who are parties to interpleader proceedings by a sheriff should take advantage of s. 3 (e) of the Creditors' Relief Act, R.S.S., 1909, c. 63, and apply to the district court judge for a direction that one creditor shall bear the carriage of the proceedings on behalf of all, and their omission so to do is a matter that the court may properly take into consideration in determining the question of costs. Such application should be made promptly at an early stage of the proceedings. Where, therefore, execution creditors acted through separate solicitors and counsel in the court below, the Court of Appeal refused to make such a direction.

Bank of Hamilton v. Hodges, 12 S.L.R. 72, [1919] 1 W.W.R. 342.

PRACTICE—ISSUE BETWEEN CLAIMANT AND EXECUTION CREDITORS—PROPER PLAINTIFF.

In an interpleader issue between an execution creditor and claimant, the proper practice is to make the execution creditor the plaintiff. [Dickson v. Podersky, 39 D.L.R. 584, 13 A.L.R. 110.]

Herr v. Craigmyle Trading Co., 14 A.L. R. 331.

SEIZURE UNDER EXECUTION — CLAIM UNDER PRIOR SALE—BILLS OF SALE AND CHATTEL MORTGAGE ACT—CHANGE OF POSSESSION.

Dom. Bank v. Salmon, 4 O.W.N. 460, 23 O.W.R. 608.

In an application on behalf of a sheriff for an interpleader order in a proceeding whereby certain attaching creditors claimed that the goods and chattels of an absent debtor, seized by the sheriff under an execution in a judgment alleged to be void as against them, really became subject to their attachments:—Held, that under s. 5 of 20 Vict. (P.E.I.), c. 11, the sheriff was not entitled to an order as the claims of the attaching creditors did not fall within the nature of the claims contemplated by that enactment.

Toombs v. Block, 12 E.L.R. 76.

SHERIFF'S NOTICE — DUTY OF EXECUTION CREDITOR—COSTS.

The proper course for an execution creditor on receipt of notice from the sheriff that a claim has been made to goods seized under his execution, is to make enquiries and satisfy himself as to the title of the claimant and within 4 days after receiving the notice to give notice in writing to the sheriff that he admits or disputes the claim, and in the event of admitting the claim, he will only be liable for the fees and expenses incurred prior to the receipt of the notice by the sheriff. It is not the duty of the sheriff to obtain further information in regard to the claimant's title and serve the same on the execution creditors. If rr. 490 or 491 (Alta.) are not complied with, the execution creditor who subsequently admits the title of the claimant may be ordered to pay all costs of the sheriff and claimant.

Edwards v. Sewell, 33 W.L.R. 271.

SUMMARY PROCEEDINGS.

Where a sheriff seeks relief against a claimant to goods seized, a Local Master may dispose of the case summarily, if the claimant does not ask for an issue.

Wright v. Bennett, 10 W.W.R. 957.

II. By custodian or claimant of money or goods.

(§ II—20)—MORTGAGE MONEY—TRUSTEE—PAYMENT TO LIQUIDATOR.

In an interpleader issue as to the right to mortgage money which has been assigned to one as trustee for the purpose of adjusting certain claims of a corporation, if it appears that none of the parties are entitled to it, the court, in order to ensure a proper disposition of the fund for the benefit of all creditors, will of its own motion order the fund paid to the liquidator of the corporation.

Bailey v. Imperial Bank, 27 D.L.R. 484, 9 A.L.R. 315, 34 W.L.R. 141, 10 W.W.R. 317, varying 33 W.L.R. 387, 9 W.W.R. 945.

EXAMINATION FOR DISCOVERY—QUESTIONS AND ANSWERS OFFERED IN EVIDENCE—RULE 303 SASK.—GOODS SEIZED—APPARENT POSSESSION—ONUS OF PROOF.

In an interpleader action, after certain evidence had been given, counsel for the claimant offered in evidence questions and answers from his own clients' examination for discovery; these were objected to but were received. The court held that under r. 303 (Sask.), counsel for the claimant had no right to put in this evidence. Where goods seized are, at the time of the seizure, in the actual or apparent possession of the judgment debtor, the presumption is that the goods are his and the onus is upon the claimant to establish title thereto; where, however, the goods at the time of seizure are not in the actual or apparent possession of the execution debtor, the onus is upon the execution creditor to establish his right to seize them. The party upon whom the substantial onus of proof rests should be made plaintiff in the issue.

Massey-Harris Co. v. Dell, 45 D.L.R. 734, 12 S.L.R. 136, [1919] 1 W.W.R. 1032.

GOODS SEIZED — PARTNERSHIP PROPERTY — PARTNERSHIP ACT (R.S. SASK. 1909, c. 143).

An execution creditor must prove in an interpleader action that the goods seized are the property of the execution debtor, and if that debtor be a partner of the claimant, and the goods seized under the execution partnership property, the Part-

nership Act R.S.S. 1909, c. 143, s. 25, forbids their seizure.

Wright v. Jones, 49 D.L.R. 512, [1919] 3 W.W.R. 582.

ORDER DIRECTING AN ISSUE—NECESSARY REQUIREMENTS OF — JUDGE SHOULD SETTLE ISSUES BETWEEN PARTIES.

In an interpleader matter the judge, by order, directed an issue "whether the stock transfer in question in this action (Montgomery v. Hunter, administratrix) is the property of the said Montgomery as against the said Hunter." Held that this form of issue was wrong for two reasons: (1) It was the traditional form adopted in the case of a contest between an execution creditor and a claimant to goods seized under execution. It was not appropriate to a contest between 2 claimants to goods, where neither of their respective titles depended upon some title overriding the title of a third person. (2) There was nothing on the face of it to shew the nature of the claim of either party or the grounds upon which either sought to invalidate the claim of the other. The Master or judge should, in cases of interpleader, settle the issues between the parties, being careful to make them specific and so as to cover all the points really in question. If he finds that he cannot conveniently settle the issues himself at the time the application is before him, he may direct that the parties should exchange pleadings, and thereby settle the issues.

Montgomery v. Hunter, 46 D.L.R. 493, [1919] 2 W.W.R. 461.

PAYMENT INTO COURT — RIVAL CLAIMS TO MONEY DUE FROM SALE OF CHATTELS.

Crabbe v. Crabbe, 2 D.L.R. 921, 3 O.W.N. 604, 20 O.W.R. 65.

BENEFIT CERTIFICATE IN FAVOUR OF GRANDDAUGHTER—CHANGE TO BROTHER—PREFERRED CLASS.

Re Ancient Order of United Workmen and Riddell, 1 D.L.R. 925, 3 O.W.N. 891.

FORM OF ISSUE AS TO OWNERSHIP.

Re Smith, 6 D.L.R. 849, 4 O.W.N. 188 and 457, 23 O.W.R. 186.

WANT OF NEUTRALITY—ARCHITECTS' COMMISSION.

Barber v. Royal Loan & Savings Co., 5 D.L.R. 885, 4 O.W.N. 91, 23 O.W.R. 31.

RIGHT TO—RULE 489—ADMISSION BY FIRE INSURANCE COMPANY AS TO PART — MORTGAGEE — LIENHOLDERS — PRIORITIES BETWEEN — MECHANICS' LIEN ACT.

Liverpool & London & Globe Ins. Co. v. Kadlec, 41 D.L.R. 700, 13 A.L.R. 498, [1918] 2 W.W.R. 727, affirming [1918] 2 W.W.R. 429.

APPLICATION BY STAKEHOLDER — RIVAL CLAIMANTS FOR COMMISSION ON SALE OF LAND—WANT OF NEUTRALITY.

Re Lankin, 4 O.W.N. 772, 24 O.W.R. 63.

APPEAL—CLAIMANT ASKING APPOINTMENT OF REPRESENTATIVE FOR CREDITORS — APPLICATION TOO LATE—CREDITORS' RELIEF ACT, S. 3 (C).

An application by appellant, claimant in an interpleader issue, to the Court of Appeal for the appointment of a representative of respondent creditors on appeal, was refused. Claimant should have applied at the proper time to the District Court Judge under s. 3 (c) of The Creditors' Relief Act.

Bank of Hamilton v. Hodges, [1919] 1 W.W.R. 342. [See 46 D.L.R. 72.]

OWNERSHIP OF HORSES—BILL OF SALE—FOREIGN JUDGMENT — INTERPLEADER—SECONDARY EVIDENCE — PAROL TESTIMONY.

Evans v. Evans, 50 Can. S.C.R. 262.

OPPOSITION TO WITHDRAW—ALLEGATIONS—EVIDENCE—C.C. (QUE.) ART. 1203.

An opposition to withdraw, upon the seizure of certain goods, in which the opposant alleges that he is the owner of such goods and that he bought them through the agency of his son, the defendant, cannot be maintained if the only evidence for the opposant is that he acquired the goods himself on his own behalf in view of an intended marriage, and that subsequently he gave them to his son—a version altogether different from that alleged in the opposition.

Homier v. Mason, 25 Rev. Leg. 223.

III. Judgment creditor and claimants.

(§ III — 30) — CREDITORS RELIEF ACT (SASK.)—APPEAL FROM LOCAL MASTER.

The decision of a local Master in an interpleader between the judgment creditor and claimants upon the fund under the Creditors Relief Act, R.S.S. 1909, c. 63, is subject to appeal to a Judge in Chambers.

Douglas v. Carrington, 20 D.L.R. 919, 7 S.L.R. 80, 29 W.L.R. 90, 7 W.W.R. 59.

EXECUTION CREDITORS — FRAUD — TRANSACTIONS BETWEEN HUSBAND AND WIFE.

In interpleader proceedings, a transfer from a husband to a wife is fraudulent. Fraud may be charged in an interpleader issue. [West v. Ames-Holden, 3 Terr. L.R. 17, followed]: Donohoe v. Hull, 24 Can. S.C.R. 683, distinguished, as not being applicable to cases where, as in an interpleader issue, the question is whether or not a sale or transfer of the goods is a mere sham or device to defeat execution creditors.

John Deere Plow Co. v. Knudston, 9 W.W.R. 574.

GOODS SEIZED AT INSTANCE OF ATTACHING CREDITOR—CLAIM BY VIRTUE OF TRANSACTION BETWEEN DEBTOR AND CLAIMANTS—STATUS OF CREDITOR—NECESSITY FOR PROOF OF.

Palmer v. Ross, 18 W.L.R. 204.

INTERPRETATION.

See Contracts; Insurance; Wills; Deeds; Statutes.

Annotation.

Statutes in pari materia, 49 D.L.R. 50.

INTERPRETER.

WRITTEN STATEMENT OF ACCUSED—CHALLENGING ACCURACY OF TRANSLATION.

A statement made by the accused upon a preliminary enquiry and reduced to writing and signed by the accused under s. 684 (3) Cr. Code, is none the less admissible under s. 1001, at the subsequent trial because the Crown tenders the evidence of the magistrate that it was taken through an interpreter, nor is the onus cast upon the Crown to prove that the interpreter correctly interpreted to the accused the statutory warning and the written statement as translated into the language spoken by the accused upon his signing it in English.

The King v. Walebek, 10 D.L.R. 522, 21 Can. Cr. Cas. 130, 6 S.L.R. 225, 23 W.L.R. 931, 4 W.W.R. 501.

CRIMINAL TRIAL—IMMATERIAL OMISSIONS—EFFECT.

It is sufficient that an interpreter fairly and faithfully gives the substance of the testimony, omitting any irrelevant details.

R. v. Bogh Singh, 12 D.L.R. 626, 18 B.C.R. 144, 21 Can. Cr. Cas. 323, 24 W.L.R. 941.

INTERROGATORIES.

See Witnesses; Depositions; Discovery.

INTERVENTION.

See Parties.

INTESTACY.

See Descent and Distribution; Wills; Executors and Administrators.

INTOXICATING LIQUORS.

I. PROHIBITION AND REGULATION; STATUTES, BY-LAWS AND ORDINANCES.
- A. In general.
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IV. CIVIL REMEDIES.
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As to evidence of previous conviction, see also Evidence.

As to jurisdiction of magistrate, see Justice of the Peace, III.

I. Prohibition and regulation; statutes, by-laws and ordinances.

A. IN GENERAL.

Abolition of liquor licenses as affecting lease, see Landlord and Tenant, II D—30.

(§ I A—1)—CANADA TEMPERANCE ACT—VOTING ON—BALLOT—RETURNING OFFICER—INJUNCTION.

Murdock v. Kilgour, 19 D.L.R. 878, 7 O.W.N. 165.

ORDER IN COUNCIL PROHIBITING MAKING OR MANUFACTURE OF INTOXICATING LIQUOR—MAGISTRATE'S CONVICTION FOR VIOLATION OF—COMBINATION OF HIGH WINES WITH CHERRIES OR SUGAR—"MANUFACTURE"—MOTION TO QUASH CONVICTION—QUESTION OF FACT FOR MAGISTRATE—EVIDENCE TO SUPPORT CONVICTION.

R. v. Abrams, 17 O.W.N. 156.

PENAL LAW—SALE OF ALCOHOLIC LIQUORS—QUEBEC LICENSE ACT—TEMPERANCE ACT OF CANADA—CONFLICT OF LAWS—ABROGATION BY INFERENCE—S. REF. [1909], ART. 903 ET SEQ.—S. REV. [1906], C. 152.

The bringing into force of the Canada Temperance Act in a locality in the Province of Quebec has the effect of suspending the operation of the Provincial License Act, in the same territory. In matters subjected by the B.N.A. Act to the potential jurisdiction of the Parliament of Canada and provincial legislatures, no provincial legislation has any force, except in the absence of a Dominion Act, on the same subject.

Collector of Revenue of the District of Quebec v. Gosselin, 55 Que. S.C. 224.

CRIMINAL LAW—INLAND REVENUE ACT—HAVING STILL SUITABLE FOR MANUFACTURE OF SPIRITS—TRIAL BY MAGISTRATE IN A SUMMARY MANNER.

R. v. Carmito, [1919] 2 W.W.R. 548.

(§ 1 A—5)—SASK. TEMPERANCE ACT—CONSTRUCTION—DISMISSAL OF CHARGE—APPEAL.

The word "order" as used in s. 58 of the Saskatchewan Temperance Act (1917), c. 23, (first sess.) as amended by c. 64 (2nd sess.) is broad enough to cover a dismissal and an appeal lies from an order of a justice dismissing a complaint under the Act. Notice of intention to appeal must be filed in the office of the local registrar of the court appealed to within 10 days after the conviction or order, but it is not necessary to serve the justice and the respondent

within such 10 days. [R. v. McDermott, 19 D.L.R. 321, 23 Can. Cr. Cas. 252; Gallagher v. Vennesland, 32 D.L.R. 435, 27 Can. Cr. Cas. 360, followed.]

Dunnett v. Williams, 45 D.L.R. 514, 12 S.L.R. 117, [1919] 1 W.W.R. 1028.

TEMPERANCE ACT—SUSPENSION.

The Nova Scotia Temperance Act, 1910, is to be considered as having come into force in its entirety on the passing thereof subject to the suspension of certain provisions in particular localities in terms of the statute; and as to the city of Halifax, the suspension ceased as to the operation of Part II., dealing with penalties for the infraction of Part I., when the legislature in 1916 amended s. 3 of the Act by declaring that Part I. should apply to every part of Nova Scotia in which the Canada Temperance Act is not in force.

Ex parte Bradbury; R. v. Chief Constable of Halifax, 30 D.L.R. 756, 27 Can. Cr. Cas. 68, 50 N.S.R. 298.

PROHIBITING EXPORTS—ULTRA VIRES.

The Act to Prevent Sales of Liquor for Export (Sask. 1917, c. 24), is ultra vires of the Provincial Legislature.

Hudson's Bay Co. v. Heffernan, 39 D.L.R. 124, 29 Can. Cr. Cas. 38, 10 S.L.R. 322, [1917] 3 W.W.R. 167.

PROVINCIAL POWERS AS TO—INTERPROVINCIAL TRADE—CARRIERS—LIABILITY FOR REFUSAL TO CARRY LAWFUL SHIPMENT OF LIQUOR.

Gold Seal v. Dominion Express Co., 37 D.L.R. 769, [1917] 3 W.W.R. 649.

CONSTITUTIONAL LAW—ONTARIO TEMPERANCE ACT, 6 GEO. V. C. 50, S. 41, (1)—"HAVING AND GIVING" INTOXICATING LIQUOR—CONVICTION FOR—CANADA TEMPERANCE ACT IN FORCE IN DISTRICT WHERE OFFENCE COMMITTED—INOPERATIVE PROHIBITION OF PROVINCIAL STATUTE.

R. v. Thorburn, 39 D.L.R. 300, 41 O.L.R. 39, 29 Can. Cr. Cas. 329.

FEDERAL LAW — ORDERS-IN-COUNCIL — PROVINCIAL LAWS.

The prohibitory liquor regulations under order-in-council No. 589 (Can.) passed under the War Measures Act, 1914 (Can.), do not apply where the offence could be prosecuted under a provincial liquor law, as the order-in-council itself declares the regulations are to be construed as supplementary to the prohibitory laws in force in the provinces.

R. v. Stone, 30 Can. Cr. Cas. 11, [1918] 3 W.W.R. 1.

CANADA TEMPERANCE ACT—PROCLAMATION—JUDICIAL NOTICE.

A proclamation putting into force Part II. of the Canada Temperance Act need not be proved in a prosecution thereunder, for the court is bound to take judicial notice of it.

Forgues v. Gauvin, 30 Can. Cr. Cas. 302.

POWER OF PROVINCE TO PROHIBIT ORDERS FOR LIQUOR.

The taking or receipt of an order by a resident of a province from another person within such province for the supplying of liquor for beverage purposes within the same province, is a transaction that has its beginning and end within the province, and constitutes a subject upon which a provincial legislature has power to legislate by way of restriction or prohibition, since it is a matter of a purely local or private nature within the province.

R. v. Shaw, 29 Can. Cr. Cas. 130, 28 Man. L.R. 325, [1917] 3 W.W.R. 798.

DRUNKENNESS AS OFFENCE—CONSTITUTIONALITY OF STATUTE.

Section 141 of the Liquor License Act, R.S.O. 1914, c. 215 (as amended by 4 Geo. V. c. 37, s. 5, and 5 Geo. V. c. 39, s. 33), declaring that a person found drunk in a public place in a municipality in which a local option by-law is in force or in which no travern or shop license is issued is guilty of an offence, is intra vires of the Ontario Legislature. [Hodge v. The Queen, 9 App. Cas. 117, and Att'y-Gen'l for Ontario v. Att'y-Gen'l for Dominion, [1896] A.C. 348, followed.] The section is applicable to the case of a person found in such a condition in a municipality where Part II. of the Canada Temperance Act is in force. Section 141 is grouped in R.S.O. 1914, c. 215, with the sections immediately preceding and following it, under the heading "Local Option;" but the heading forms no part of the statute: Act respecting the Revision and Consolidation of the Statutes of Ontario, 3 & 4 Geo. V. c. 2.

Re R. v. Scott, 37 O.L.R. 453, 28 Can. Cr. Cas. 346. [Appeal quashed, 11 O.W.N. 132.]

LIQUOR LICENSE ACT—SECTION 111 AS AMENDED BY 2 GEO. V., C. 55, S. 9—PLEA OF GUILTY—RETURN OF MAGISTRATE.

R. v. Dorr, 4 O.W.N. 429, 23 O.W.R. 663.

CRIMINAL LAW—SALE OF INTOXICATING LIQUOR—CONVICTION BY MAGISTRATE—APPEAL—BRITISH COLUMBIA PROHIBITION ACT—REGULATIONS UNDER WAR MEASURES ACT SUPPLEMENTARY TO PROVINCIAL ACT—B. C. STATS. 1916, C. 49, SS. 10 AND 18—CAN. STATS. 1915, C. 2.

Section 10 of the British Columbia Act prohibits the sale of intoxicating liquor, and s. 28 provides for a penalty of imprisonment with hard labour for a term of not less than 6 months and not more than 12 months for violation of any of the provisions thereof. An O. C. under the War Measures Act, 1914, (Can.) passed March 11, 1918, provides inter alia, that no person shall either directly or indirectly sell or contract or agree to sell any intoxicating liquor which is in or which is to be delivered within any province wherein the sale of intoxicating liquor is by provincial law prohibited. It provided a penalty for the first offence of not less than $200 or

more than $1,000, and in default of immediate payment, to imprisonment for not less than 3 or more than 6 months for violation of any of the provisions of the regulations, and it further provided that the regulations be construed as supplementary to other prohibitory laws then in force or that may be thereafter in force in any province. The accused was convicted by a magistrate and sentenced to 6 months in prison under the Provincial Act. Held, on appeal, that from the difference in the penalty clauses in the two pieces of legislation a conflict is apparent, and notwithstanding the provision that the regulations be construed as supplementary to the prohibitory laws in force in the province, the O. C. must be construed as superseding s. 10 of the Provincial Act, and the conviction is quashed. [R. v. Thorburn, 41 O.L.R. 39 followed].

R. v. Edwards, 25 B.C.R. 492.

CANADA TEMPERANCE ACT—BY-LAW.

A by-law of a County Council for adopting the Temperance Act only comes into force on the first of the month of May which comes after its adoption and the delays for contesting it only run from that date.

Tournel v. Ottawa, 14 Que. P.R. 261.

CRIMINAL LAW—THE INLAND REVENUE ACT, S. 180—APPARATUS "SUITABLE FOR THE MANUFACTURE OF SPIRITS."

The fact of liquor having been mixed and allowed to ferment in a crock found in possession of defendant held not to be proof that the crock was "suitable for the manufacture of spirits" so as to justify a conviction under s. 180 of the Inland Revenue Act, R.S.C., 1906, c. 34.

R. v. Bellmont, [1919] 3 W.W.R. 895.

BRITISH COLUMBIA PROHIBITION ACT—REGULATIONS MARCH 11, 1918, UNDER THE PROVISIONS OF THE WAR MEASURES ACT 1914 (DOM.)—SUPPLEMENTARY ONLY.

Paragraphs 5 and 11 of the regulations made March 11, 1918, under the War Measures Act, 1914 (Can.), read in the light of the object aimed at as shown by the preamble and para. 13 of said regulations, do not operate to abrogate or supersede the provisions of the British Columbia Prohibition Act, c. 49, 1916, but apply only to cases with respect to which the province would have no jurisdiction to legislate.

Re B.C. Prohibition Act, [1919] 2 W.W. R. 27.

(§ 1 A—8)—AS TO AMENDING INFORMATION CHARGING OFFENCE.

Section 95 of the Liquor License Act (Ont.) requiring all information or complaints for the prosecution of any offence under the Act to be laid within 30 days after the commission of the offence, and s. 102 of the Act permitting a trial magistrate to amend or alter an information under the Act and to substitute for the offence charged therein any other offence under the Act, must be read together and thus read do not permit a substitution in an information charging the accused with selling liquor without a license on a certain date, of a different charge on a different date at a time more than 30 days after the alleged commission of such different and substituted offence.

R. v. O'Connor, 3 D.L.R. 23, 20 Can. Cr. Cas. 75, 3 O.W.N. 840, 21 O.W.R. 691.

LIMITATIONS—AMENDING INFORMATION.

By reason of the time limitation of the Nova Scotia Temperance Act, N.S. Acts 1910, c. 2, it is not permissible to amend an information so as to include in the period of illegally keeping liquor for sale to be covered thereby, any portion of time more than three months prior to the amendment. A charge cannot be brought in by amendment to an untried information as to which a new information would be too late. [R. v. Ayr, 14 Can. Cr. Cas. 210; Ex parte Tompkins, 12 Can. Cr. Cas. 552, distinguished.]

Ex parte Stewart, 29 Can. Cr. Cas. 301.

KEEPING FOR SALE WITHOUT LICENSE—AMENDMENT OF INFORMATION—NO EVIDENCE THAT LIQUOR WAS INTENDED FOR SALE.

R. v. Milkins, 2 O.W.N. 659, 18 O.W.R. 137.

(§ 1 A—9)—NEW BRUNSWICK INTOXICATING LIQUOR ACT—SALE OF ESSENCES, TINCTURES AND EXTRACTS—PROVISIONS FOR.

There is nothing in the Intoxicating Liquor Act (N. B.) making an exception in the case of the sale of essences, extracts or tinctures which contain the quantity of alcohol which is prohibited by the Act.

The King v. Vroom; Ex parte Crawford, 47 D.L.R. 578, 31 Can. Cr. Cas. 304.

BY-LAWS—WHAT CONSTITUTES A BY-LAW.

Section 143a of the Liquor License Act, R.S.O. 1897, c. 245, R.S.O. 1914, c. 215, inhibiting the issue of licenses where a local option "by-law" after submission to the electors is quashed or set aside or declared invalid, have no application to anything but a by-law properly so-called, that is, one that has been finally passed by the council under s. 141 of the Act, the vote and its incidents being merely steps on the way to the passing of the by-law; if the proposed by-law was never given its final reading because it was found on a scrutiny that it had not received the necessary number of votes on submission to the electors, s. 143a does not apply.

Re Liquor License Act, 15 D.L.R. 473, 29 O.L.R. 475.

PLEBISCITE ORDINANCE—YUKON TERRITORY—RECOUNT.

Re Prohibition Plebiscite Ordinance, 31 D.L.R. 797, [1917] 1 W.W.R. 303.

(§ 1 A—11)—RESOLUTION—BY-LAW—VALIDITY.

The resolution adopted by a county council repealing a by-law prohibiting the sale

of intoxicating liquor and the issuing of licenses therefor within the county limits, and a new by-law for prohibition adopted at the same session, may both be declared illegal and void; where the notice calling the meeting was not served on one of the members of the county council, and did not state the hours at which the meeting should take place, and the repeal of the first by-law could not be made by mere resolution but only by by-law; by virtue of art. 1325, R.S.Q. 1909, "no such by-law shall be repealed during the year commencing from the day on which notice thereof was given to the Collector of Inland Revenue."

Loiselle v. Temiscaming, 33 D.L.R. 686, 50 Que. S.C. 387.

CANADA TEMPERANCE ACT — SCRUTINY — FORM OF BALLOTS.

It is not necessary that the words, "Voting on the petition to the Governor-General for the bringing into force of Part II. of the Canada Temperance Act," which appear on the Form E of that statute, should be printed on the voting ballots produced at a scrutiny held in virtue of the "Canada Temperance Act," the decision on the scrutiny should not be set aside—because such words have been omitted; the words "for the petition" and "against the petition" printed upon the ballots are sufficient, provided that all other essential formalities have been observed.

Beaudin v. McIntosh, 25 Que. K.B. 343.

B. CONDITIONS OF BUSINESS.

(§ I B—20)—LICENSED PREMISES—EXITS FROM BAR-ROOM.

The prohibition of the Quebec Licensing Law, art. 1040, R.S.Q. 1909 against a restaurant with a liquor license having any door communicating with the street unless it opens directly into the bar, is not infringed by the mere fact that a door has been allowed to remain in the structure of the building if it is kept permanently locked.

R. v. Lambert, 22 Can. Cr. Cas. 156.

(§ I B—28)—PROHIBITION AS TO BREWERS.

The effect of the Nova Scotia Temperance Act is to prohibit a brewer in Nova Scotia from keeping for sale or selling in Nova Scotia intoxicating liquors which have been manufactured by such brewer who holds a brewer's license granted under the Inland Revenue Act; and such prohibitory provisions are intra vires. [Atty. Gen. of Manitoba v. Manitoba License Holders, [1902] A.C. 73, followed.]

Re Nova Scotia Temperance Act, 36 D. L.R. 690, 28 Can. Cr. Cas. 176, 51 N.S.R. 405.

C. LOCAL OPTION.

(§ I C—30)—CITY AND COUNTY.

Part II of the Nova Scotia Temperance Act is in force both in the city of Halifax and in the county of Halifax. [Re Bradbury, 30 D.L.R. 756, 27 Can. Cr. Cas. 68, 50 N.S.R. 298, followed.]

Re Nova Scotia Temperance Act (N.S.), 36 D.L.R. 690, 28 Can. Cr. Cas. 176, 51 N. S.R. 405.

MUNICIPAL REGULATION—LEGISLATIVE ACT —VALIDITY OF BY-LAW.

The act of a municipal council in passing a local option by-law is a legislative Act and so would be its repeal by the council; and the court has no jurisdiction to compel the repeal of the third reading of a by-law by mandatory order to the council, whether or no an interim injunction against the third reading remained effective pending an appeal from the trial judgment.

Hair v. Meadford, 20 D.L.R. 475, 31 O.L.R. 124.

VALIDITY OF BY-LAWS—POWER OF COURT TO QUASH.

The power of the court as to quashing local option by-laws is, since the addition in 1908 by Act 8 Edw. VII. c. 54, s. 11 of s. 143a to the Liquor License Act, R.S.O. 1897, c. 245 (R.S.O. 1914, c. 215), practically vested in the executive of the province; and while the court is still bound to decide according to law and may yet quash a by-law, the effect of its decision is dependent upon the assent of the Minister.

Re Sharp & Holland Landing, 24 D.L.R. 160, 34 O.L.R. 186.

(§ I C—32)—LOCAL OPTION BY-LAW.

A by-law prohibiting the sale of liquor in the municipalities of a county excludes from its operation the territories not organized into municipalities and is, therefore, illegal; it should apply to all the territory comprised within the limits of the county.

Tournel v. Ottawa, 14 Que. P. R. 261.

(§ I C—33)—BY-LAWS—PROCEDURE—AFFIDAVIT PROVING SIGNATURES—ESSENTIALS AS TO FORM—RESTRAINING MUNICIPALITY FROM ACTING THEREUNDER.

The amendments to the Liquor License Act in Man. 1914, c. 58 s. 10, apply only to local option by-laws already voted upon and passed when such 1914 statute took effect; as to later local option by-laws it remains obligatory under the Liquor License Act, Amendment 1910, s. 74B, that the affidavit or declaration proving signatures to the petition should set forth in the affidavit the names of the petitioners whose signatures it purports to verify: a general reference in the affidavits to all the signatures in the petition is insufficient, and the municipality may be restrained by injunction from acting under it.

Brock v. Robson, 19 D.L.R. 197, 25 Man. L.R. 64, 29 W.L.R. 897, 7 W.W.R. 544.

PROCEDURE AND ELECTION—REMOVAL—LIMITATIONS.

A municipal council cannot by its consent interfere with the statutory prohibition of renewal of a local option contest for 3 years after a vote properly taken, nor with the right of the electors to compel the submission of the question by a properly signed petition where the 3 year limita-

tion does not apply; nor can the council's admission on the pleadings in an action against the municipality for a declaration that a by-law had not been legally submitted, give jurisdiction to the court to bind other ratepayers not before it by a judgment which is nothing more than a private bargain between the municipality and the suing ratepayer that the statutory provisions shall not be effective against him and other ratepayers in the like interest.

Hair v. Meaford, 20 D.L.R. 475, 31 O.L.R. 124.

BY-LAW — ELECTION — COMPULSORY — DEMAND FOR—THIRTY ELECTORS—EACH MUNICIPALITY—R.S.Q. 1909, s. 1319.

A local option by-law passed by a county council may be compulsorily submitted to public vote on demand of 30 or more electors in each municipality in the county under art. 1319 R.S.Q. 1909; it is not enough that the number lacking to such petition in one municipality is exceeded by the signers in another municipality.

Duhaine v. Yamaska, 20 D.L.R. 393, 45 Que. S.C. 275.

SETTLING VOTER'S LIST.

Re Brampton Local Option By-law, 16 D.L.R. 855, 5 O.W.N. 644.

PROCEDURE—ELECTION.

Where a local option by-law is voted upon at the same time as other by-laws, the fact that the ballot used bore the words "For the By-law" and "Against the By-law" respectively instead of the words "For Local Option" and "Against Local Option," respectively in respect of which the voter was to signify his vote is a departure from the statutory form which is not cured by the provisions of s. 204 of the Con. Municipal Act, Ont., 1903, and by s. 7 (35) of the Interpretation Act, 1907, which provide that deviations not affecting the substance or calculated to mislead or which appear not to have affected the result are not to be grounds for annulling the vote.

Re Milne and Thorold, 1 D.L.R. 540, 25 O.L.R. 420, reversing 2 O.W.N. 1009.

Where a petition, to a rural municipal council, is presented for submission to the electors of the municipality, for the repeal of a local option by-law, and the petition complies with the requirements of s. 74 of the Liquor License Act, c. 101, R.S.M. 1902, the petitioners have a legal right to have the by-law submitted as directed by the statute, and mandamus will issue to compel such submission. Where a petition is filed to submit such by-law and the petitioner's name also appears upon the voters' list, it is to be presumed that the municipal officer, in preparing said list, properly performed his official duty, and that every name thereon is that of a duly qualified voter, and the burden is upon the opponents of the petition to shew the contrary.

R. ex rel. Sovereen v. Edward, 8 D.L.R. 450, 22 Man. L.R. 790, 22 W.L.R. 723, 3 W.W.R. 581.

ELECTION — REQUISITION TO COMMISSIONER —BASIS IN ESTIMATING NUMBER OF ELECTORS.

Under the provisions of s. 124 of the Liquor License Ordinance, Con. Ord. 1898 (N.W.T.), c. 89 as amended by 2 & 3 Geo. V. (Alta.) c. 8, s. 26, requiring a member of the Board of License Commissioners to order the taking of a poll under such local option provisions, to ascertain whether or not licenses for the sale of intoxicating liquors should be granted within a certain license district of the province on the presentation to him of a requisition signed by at least one-fifth of the total number of electors of the district, such number must necessarily be estimated by the commissioner; and although, under subs. 2 of s. 124, the estimate is based on the number of persons who voted in the last provincial election, it should be made by taking, merely as a starting point, the number of votes so polled, and then building up or cutting down from that as the case may be, according to the information available, and thus ascertaining as nearly as possible the number now entitled to vote, the votes so polled being merely the basis of the estimate, and not, of itself, determining the number of electors for the proposed poll; in other words, being the foundation upon which the superstructure is to be built, and not both foundation and superstructure; hence the estimate considers the enumerators' lists, the influx of population and other relevant factors, as well as the number of votes cast at the preceding provincial election. The presentation to a license commissioner of the requisition provided in s. 124 of the Liquor License Ordinance, Con. Ord. 1898 (N.W.T., c. 89, as amended by 2 & 3 Geo. V. (Alta.) c. 8, s. 26, is a condition precedent to the right of such commissioner to order the taking of a poll to ascertain whether or not licenses for the sale of intoxicating liquors should be granted within his district, and such requisition must strictly comply with provisions of that section. A list of voters prepared by an enumerator, while not conclusive as to the right of the persons therein named to vote, is prima facie evidence of that fact, in an action against a license commissioner for a declaration that he is not justified in holding a poll under the local option provisions of the Liquor License Ordinance, Con. Ord. 1898 (N.W.T.), c. 89, as amended by 2 & 3 Geo. V. (Alta.) c. 8, s. 26, where the question as to the numerical sufficiency of the number of electors on the requisition for such poll arises. Under the local option provisions of the Liquor License Ordinance, Con. Ord. 1898 (N.W.T.), c. 89, as amended by 2 & 3 Geo. V. (Alta.) c. 8 (comprised in s. 124), the presentation of the requisition for the proposed poll is the foundation of the jurisdiction of the license commissioner, and where it is proved that the license commissioner proposed to command

the taking of the poll on a requisition signed only by one-fifth of the number of electors who voted at the last provincial election, this establishes an attempt, on the commissioner's part, to act without jurisdiction and shifts upon him the onus of shewing numerical sufficiency strictly.

Gross v. Strong; Pinchebeck v. Strong, 10 D.L.R. 392, 5 A.L.R. 49, 23 W.L.R. 340, 362, 3 W.W.R. 879.

BY-LAW—VALIDITY—PUBLICATION OF NOTICE—QUASHING—EFFECT OF JUDICIAL CERTIFICATE.

A local option by-law which has received the approval of three-fifths of the electors voting upon it will not be quashed on the ground that it was finally passed by the council within a month of the first publication of the notice required by subs. 3 of s. 338 of the Con. Municipal Act 1903 (3 Edw. VII. (Ont.) c. 19), R.S.O. 1914, c. 192, where a scrutiny has taken place before the County Court Judge, and the rights of electors or other persons having an interest in the result of the voting have not been interfered with or prejudiced. Upon an application to quash a by-law submitted to the electors on the ground that unauthorized names were entered upon the list of voters used in voting upon the by-law, the court will not go behind the certificate of the County Court Judge affixed to the revised list under provisions of s. 21 of the Con. Municipal Act, as amended by 3 & 4 Geo. V. c. 43, R.S.O. 1914, c. 192.

Re North Gower Local Option By-law, 14 D.L.R. 443, 5 O.W.N. 249, 25 O.W.R. 224, affirming 10 D.L.R. 662, 4 O.W.N. 1177.

BY-LAW—PRIOR PUBLICATION OF NOTICE.

The provision of s. 66 of the Liquor License Act, R.S.M. 1902, c. 101, as amended by 1 Geo. V. (Man.) c. 25, s. 1, requiring the publication of a notice of a proposed local option by-law within 2 weeks from the second reading of the by-law is mandatory and a failure to substantially comply with this provision is fatal to the validity of the by-law and the curative provisions of s. 76 (a) of that Act do not apply. [Hatch v. Oakland, 19 Man. L.R. 692, and Shaw v. Portage LaPrairie, 20 Man. L.R. 469, followed.]

Smith v. North Cypress, 12 D.L.R. 269, 23 Man. L.R. 508, 24 W.L.R. 141, 4 W.W.R. 549. [Affirmed, 14 D.L.R. 397, 23 Man. L.R. 508.]

BY-LAWS—ADOPTION—LEGALITY OF VOTES.

In passing upon the validity of a local option by-law, votes of electors who procured certificates from the clerk of the municipality and voted thereon in a subdivision in which they were not rated, are not to be deemed illegal or void, where the clerk gave out the certificates without discrimination as between the parties interested, both of whom obtained and used them, and where the electors' names were on the last revised voters' lists for the municipality, and they were entitled to vote on the by-law, though the deputy returning officers should not have given the ballot papers out to voters producing certificates unless they were acting in an official capacity in the election; and such election proceeding will be upheld if such noncompliance or irregularity did not affect the result of the voting and the proceedings were conducted substantially in accordance with the requirements of the act. [Brown v. East Flamborough, 23 O.L.R. 533; Re Cleary v. Nepean, 14 O.L.R. 394, and Regina v. Tewkesbury, L.R. 3 Q.B. 629, 636, distinguished.]

Re Thompson Local Option By-law (No. 2), 11 D.L.R. 247, 23 Man. L.R. 361, 24 W.L.R. 199, 4 W.W.R. 551.

BY-LAWS—ADOPTION—NOTICE TO ELECTORS—STATUTORY REQUIREMENTS.

Where the Liquor License Act, s. 66 (R.S.M. c. 101), requires that after the first and second readings of a local option by-law a municipal council shall publish notice stating the object of the by-law and that a vote will be taken thereon at the time and places fixed under the Act, and s. 68 requires that at such time and places a poll shall be taken and all proceedings thereat shall be conducted in the same manner as voting upon any by-law required by the Municipal Act to be voted upon, etc.; these sections do not make applicable to the adoption of local option by-laws all the provisions of Municipal Act, s. 376, as to giving of notice, s. 66 being complete in itself on that subject. A local option by-law was not vitiated by omission of the clerk of the municipality to comply with Municipal Electors Act, s. 9, in failing to distribute copies of the alphabetical list prepared by him, preparatory to a revision of the same, amongst the school teachers of the municipality, where the list was duly revised by the County Court Judge in accordance with the Act.

Re Thompson Local Option By-law (No. 2), 11 D.L.R. 247, 23 Man. L.R. 361, 24 W.L.R. 199, 4 W.W.R. 551.

QUALIFICATIONS OF VOTERS — RESIDENCE — PARLIAMENTARY IRREGULARITIES — VOTERS' LIST.

A voter whose house is in the municipality, but part of the house being rented and part containing his furniture, must be regarded as a resident in the municipality, and he will not be disqualified from voting at a local option election. A local option by-law will not be quashed because the voters' list used was not that required by the statute, but which had no effect upon the result of the vote, or for omitting the description of a voter on the list, or for trivial parliamentary irregularities at the municipal council. [Re Ryan, etc., 21 O.L.R. 582, 22 O.L.R. 200; Re Sinclair, etc., 13 O.L.R. 447, applied.]

Re Sharp & Holland Landing, 24 D.L.R. 160, 34 O.L.R. 186.

TEMPERANCE ELECTION — VALIDITY — JURISDICTION TO DETERMINE.

The Supreme Court of Ontario has no jurisdiction to determine the validity of an election held under the Canada Temperance Act, R.S.C. 1909, c. 152, respecting the regulation of traffic in intoxicating liquors, the scrutiny of which is by ss. 67 (c), 69, 70 conferred in Ontario, on the Judge of the County Court, whose decision is declared final.

Murdock v. Kilgour, 22 D.L.R. 752, 32 O.L.R. 412.

PROHIBITION BY-LAW—NOTICE—SUFFICIENCY —INJUNCTION.

The notice calling the municipal electors to a public meeting for the purpose of approving or disapproving by their votes of prohibition by-law should only state the day, place and hour for the meeting; but the fact of adding to it that the voting would continue one day for each 400 voters, has not the effect of fixing the duration of the voting—which is fixed by the act—nor to annul the notice, and an injunction will not be issued on account of it prohibiting the holding of the poll.

Gastonguay v. Levis, 48 Que. S.C. 264.

LOCAL OPTION BY-LAW—MOTION TO QUASH—IRREGULARITY OF SERVICE — FAILURE TO FILE AFFIDAVIT IN TIME.

Re Arthur and Meaford, 24 D.L.R. 878, 34 O.L.R. 231.

LOCAL OPTION BY-LAW—SUBMISSION TO ELECTORS—SUFFICIENCY OF NUMBER OF PETITIONERS — ASCERTAINMENT — MANDAMUS—COSTS.

Re Stratford Local Option By-law, 25 D.L.R. 774, 35 O.L.R. 26.

LOCAL OPTION BY-LAW—VOTING ON—INSPECTION AND PRESERVATION OF BALLOTS—APPLICANT FOR ORDER—STATUS —MUNICIPAL ACT, R.S.C. 1914, c. 192, ss. 146, 147, 279.

Re Jarvis Local Option By-law, 7 O.W.N. 751.

SUFFICIENCY OF PETITION — ASCERTAINING NUMBER OF QUALIFIED VOTERS.

Section 137 (4) of the Liquor License Act, R.S.O. 1914, c. 215, provides for the submission by the council to the municipal electors of a local option by-law or (see subs. (8)) a repealing by-law, if a petition "signed by at least 25 per cent of the total number of persons appearing by the last revised voters' list of the municipality to be qualified to vote at municipal elections" is filed with the Clerk:—Held, that in order to ascertain whether a petition duly filed is sufficiently signed, the number of persons who appear by the voters' list to be qualified to vote is to be taken into consideration; if one-fourth of these persons have signed the petition, the statutory requirement is answered. The name of a person may be repeated once or oftener on the list, but that does not increase the number of persons. The unimpeached affidavit of the applicant, upon a motion for a mandamus to the council to submit a repealing by-law, the number of persons on the voters' list was only 3,625, while there were in name 4,337, was accepted; and a mandamus was granted. That the applicant was an officer or servant (auditor) of the municipal corporation was considered unobjectionable.

Re Owen Sound Local Option By-law, 35 O.L.R. 48.

LOCAL OPTION BY-LAW—ELECTION.

Re Brampton Local Option by-law, 15 D.L.R. 855, 5 O.W.N. 644.

TEMPERANCE LAW OF QUEBEC—BY-LAW—VOTING — MUNICIPAL ELECTOR — R.S.Q. 1909, 1316, 1321, 5373, QUE. M.C. 291.

Under the Temperance Law of Quebec only municipal electors in cities and towns who pay their taxes before Nov. 1, in each year, have the right to vote upon a by-law prohibiting the sale of spirituous liquors within the municipal limits, notwithstanding art. 1321 of that law. It would be otherwise if the voting took place under the Municipal Code which only requires that a municipal elector be qualified by the payment of taxes before the date fixed by a municipal by-law to this effect, or, in default, before the voting day. The president of a meeting called to take the vote has a right to vote upon such by-law.

Bernard v. Fraserville, 23 Que. K.B. 445.

LOCAL OPTION BY-LAW—COMING INTO FORCE OF — CONTEMPORANEOUS RESOLUTION — SURPLUSAGE—USELESS.

A local option by-law passed in December, under a statute which provides that as regards the prohibition to sell liquors it shall come into force on the following May 1st, when existing licenses would expire, is not invalidated by a contemporaneous resolution that the by-law should come into force 15 days after public notice thereof; the resolution was mere surplusage and was useless.

Duhaime v. Yamaska, 20 D.L.R. 393, 45 Que. S.C. 275.

PETITION FOR SUBMISSION—RIGHT OF PETITIONERS TO WITHDRAW NAMES.

Re Keeling and Brant, 25 O.L.R. 181, 20 O.W.R. 551.

VOTE OF MUNICIPAL CLERK—RESIDENCE OF VOTERS—DETERMINATION — REMISSION OF VOTER'S TAXES—INSTRUCTIONS AS TO MARKING OF BALLOTS—BALLOT PLACED IN WRONG BOX—DEPUTY RETURNING OFFICER AIDING PERSONS IN MARKING BALLOTS—BY-LAW ALTERING POLLING SUBDIVISIONS.

Re Sturmer and Beaverton, 24 O.L.R. 65, 19 O.W.R. 430.

SCRUTINY—VOTES OF TENANTS.

Re Portage la Prairie; Shaw v. Portage la Prairie, 20 Man. L.R. 469.

POSTING UP NOTICES OF VOTING—SUMMING UP OF VOTES.

Re South Cypress, 20 Man. L.R. 142.

PROVISIONS FOR VOTE.

Re Carman, 20 Man. L. R. 500.

APPROVAL BY ELECTORS—THREE-FIFTHS MAJORITY—COMPUTATION.

Re Brown and East Flamborough, 23 O. L.R. 533, 19 O.W.R. 35.

VOTING—SCRUTINY BY COUNTY COURT JUDGE—MOTION TO QUASH BY-LAW.

Re Ellis and Renfrew, 23 O.L.R. 427, 18 O.W.R. 703.

MOTION TO QUASH — VOTING — IRREGULARITIES.

Re Quigley and Bastard, 24 O.L.R. 622.

FIXING DAY FOR VOTING—MORE THAN FIVE WEEKS AFTER FIRST PUBLICATION—POSTING BY-LAW.

Wilson v. Wardsville, 2 O.W.N. 914, 18 O.W.R. 647.

RIGHT OF PERSONS TO VOTE—TEMPORARY ABSENCE.

Re Fitzmartin and Newburgh, 24 O.L.R. 102, 19 O.W.R. 367.

VOTING ON—DE FACTO CERTIFIED VOTERS' LIST.

Ryan v. Alliston, 2 O.W.N. 841, 18 O.W.R. 731.

LOCAL OPTION—CONVEYANCE OF LIQUOR BETWEEN POINTS IN TERRITORY UNDER LOCAL OPTION.

R. v. Ritchie, 21 Man. L.R. 255, 18 W.L.R. 140.

LOCAL IMPROVEMENT DISTRICT — LIQUOR LICENSE ACT, S. 133—NOTICE OF PROPOSED BY-LAW—PUBLICATION IN NEWSPAPER—SUFFICIENCY.

Re Little and Local Improvement District, No. 189, 18 W.L.R. 648.

VOTES ILLEGALLY CAST—DEDUCTION FROM MAJORITY.

Re O'Flynn and Davidson, 17 W.L.R. 153.

VOTING ON BY-LAW—VOTE BY BALLOT—SUBSTANTIAL COMPLIANCE WITH STATUTORY REQUIREMENTS.

Re Salter and Local Improvement District, 17 W.L.R. 692.

LOCAL OPTION BY-LAW OF RURAL MUNICIPALITY—MOTION TO QUASH—PROCEDURE—LIQUOR LICENSE ACT.

Re Devitt and Usborne, 18 W.L.R. 662.

DEFECTIVE BY-LAW — PUBLICATION IN GAZETTE.

Re Ryall and Carman, 16 W.L.R. 380.

PETITION—ALTERATIONS IN—DEFECTS.

Re Mead and Moose Jaw, 17 W.L.R. 14.

RIGHT OF PETITIONERS TO WITHDRAW THEIR NAMES FROM PETITION AFTER PRESENTED TO MUNICIPAL COUNCIL.

Keeling v. Brant, 3 O.W.N. 324, 20 O.W.R. 551.

PETITION FOR BY-LAW FOR LICENSE REDUCTION — MOTION FOR INJUNCTION RESTRAINING SUBMISSION OF BY-LAW TO ELECTORS—QUESTION OF SIGNATURES.

Casson v. Stratford, 3 O.W.N. 443, 20 O. W.R. 786.

STATUTES—OVERLAPPING PROVISIONS—SALE OF LIQUOR BY LICENSED RESTAURANT-KEEPERS.

R. v. Levy, 19 W.L.R. 305.

(§ I C—34)—FOUND DRUNK—PUBLIC PLACE.

A "public place," within the meaning of the Liquor License Act, R.S.O. 1914, c. 215, as amended 1915, Ont. Stat. c. 39, s. 33, includes a place to which the public habitually resort, although they may have no legal right to do so; and a conviction for being found drunk in a blacksmith shop in a village where a local option by-law was in force will not be quashed on the ground that the shop was not a "public place," if the evidence shews that people congregated there. [R. v. Cook, 20 Can. Cr. Cas. 201, 8 D.L.R. 217, 27 O.L.R. 406, distinguished.]

R. v. Leitch, 31 D.L.R. 93, 26 Can. Cr. Cas. 149, 36 O.L.R. 1.

II. Licenses.

A. IN GENERAL.

(§ II A—35)—GRANT OF "REGISTERED TOWNSITE"—WHAT CONSTITUTES.

A subdivision of land into lots of ordinary town size, duly registered in the land titles office, constitutes a "registered townsite" within the meaning of s. 355 of the Municipal Act, R.S.B.C. 1911, c. 170, relating to granting licenses for the sale of liquor in "registered townsites." Although license commissioners are directed by statute to take evidence "on oath" upon determining an application for license, they may, nevertheless, proceed upon admissions made by the parties and their counsel at the hearing, and so take cognizance of tacit acquiescence of both parties in a proposal to obtain the report of the license inspector and in the subsequent consideration of his report by the commissioners without objection from counsel. [R. v. Farnham, 18 Times L.R. 614, applied.]

R. v. License Commissioners of Point Grey, 14 D.L.R. 721, 18 B.C.R. 648, 26 W. L.R. 46, 5 W.W.R. 572.

CUSTOMS — ILLEGAL TAX — RECOVERY — YUKON.

Under the statutes relating to the Yukon Territory the Dominion Government has the power to exact a fee for the granting of a permit for the importation or bringing in of intoxicating liquors in the Territory; such exaction is a mere charge for the granting of the permit and not in the nature of customs duties or tax within the provision of the Customs Act (R.S.C. 1906, c. 48, s. 130). Where such a charge has been illegally imposed but paid voluntarily it cannot be recovered back.

Lowe v. The King, 40 D.L.R. 686, 17 Can. Ex. 126.

BEER LICENSE—PREMISES.

A beer license issued under the Intoxicating Liquor Act (N.B. 1916, c. 20, s. 180) authorizes the holder to sell beer or non-intoxicating drinks only on the premises described in it. The holder of such license

has no right of appeal as a licensee against a conviction for permitting drunkenness on separate premises owned and occupied by him as a moving picture theatre.

The King v. Cady, 41 D.L.R. 630, 45 N.B. R. 474, 30 Can. Cr. Cas. 168.

RENEWAL—CONFIRMATION OF CERTIFICATE —MANDAMUS.

McClure v. Lennoxville, 32 D.L.R. 784, 50 Que. S.C. 446.

DESCRIPTION BY STREET NUMBER.

Where licensed premises are on the corner of 2 streets with street numbers on each street, a license as for one of such numbers is a license for the whole of the premises.

R. v. Lambert, 22 Can. Cr. Cas. 156.

WRIT OF PROHIBITION—INFRACTION OF THE LICENSE LAW—PRELIMINARY DEPOSIT OF $50 — NEGLECT TO MAKE — ABSOLUTE NULLITY—C.C.P. ART. 175 S. REF., [1909] ART. 1166.

Omission to make the deposit required by art. 1166, R.S.Q. 1909, preliminary to the obtaining of a writ of prohibition after suspending a criminal action for breach of the license law, is a cause of absolute voidance of the writ, which cannot be corrected by a later deposit of the sum fixed.

Carignan v. Court of Sessions of the Peace, 28 Que. K.B. 225.

INTOXICANTS — BEER CONTAINING 2.02 PER CENT OF ALCOHOL HELD TO BE INTOXICATING.

R. v. Willis, 9 W.W.R. 919, 25 Can. Cr. Cas. 297.

ASSIGNABILITY—ABANDONMENT OF LICENSE IN FAVOUR OF ANOTHER.

The license for the sale of intoxicating liquors granted by the collector of revenue is not a commercial matter. It is only a permission and a privilege granted by the State, the issue and delivery of which is subject to the approbation of the license commissioners. In consequence, the holder of such license can neither sell nor transfer, nor absolutely guarantee its confirmation. But the holder can, for good consideration, abandon his license and its renewal in favour of an assignee, who assumes the risk of the approbation or refusal to confirm by the commissioners, but it should be done in express terms.

Henry v. Beaulieu, 47 Que. S.C. 458.

(§ II A—36)—SELECTION OF LICENSEES—QUEBEC.

The License Act of the City of Quebec gives the Commissioners the right to choose the 60 persons who shall be entitled to license, but they should make their choice from the applicants against whom there is no opposition.

Laberge v. Langelier, 14 Que. P.R. 186.

(§ II A—37)—PETITIONS AND OBJECTIONS —NOTICE OF HEARING PETITION FOR LICENSE.

License Commissioners have no jurisdiction to grant a certificate for a license under the Liquor License Act (N.B.), unless the inspector has reported favourably upon the applicant. [Ex parte Demmings, 37 N.B.R. 586, followed.] To bring up for reconsideration a liquor license application at a special meeting of the license commissioners under the Liquor License Act (N.B.), after the refusal of same at a regular meeting, the same notices must again be given as were necessary for the first hearing. [Miles v. Rogers, 36 N.B.R. 345, followed.]

Ex parte Desrosiers; Re Board of License Commissioners of Madawaska, 10 D.L.R. 287, 41 N.B.R. 395, 12 E.L.R. 395.

PETITION—OBJECTIONS.

The question of the validity of requisitions for a poll under s. 124 of the Liquor License Ordinance, Con. Ord. (N.W.T.), 1898, c. 89, as amended by 2 & 3 Geo. V. (Alta.) c. 8, s. 26, should be decided before, rather than after, the poll, and the court will, therefore, grant an interim injunction restraining the taking of the poll until after the trial of an action brought to determine the validity of the requisitions.

Gross v. Strong, 6 D.L.R. 843, 2 W.W.R. 1063. [See also Pinchebeck v. Strong, 6 D.L.R. 847.]

Where a petition to submit a liquor by-law is presented to a municipal council, and objection is made to such petition for any reason which requires proof by evidence aliunde the petition, the council cannot go back of the petition, except for the one purpose of ascertaining if the petition and affidavit, on their face, comply with the statute.

R. ex rel. Sovereen v. Edwards, 8 D.L.R. 450, 22 Man. L.R. 790, 22 W.L.R. 723, 3 W.W.R. 581.

REDUCTION OF LICENSES—VALIDITY OF PETITION.

Where a petition for liquor license reduction under the Liquor License Act, R.S. O. 1914, c. 215, s. 16, was not in fact duly signed and the municipal council knew that it was not, and acted in defiance of the statutory provision or without appreciating the fact that the power of the council itself to initiate a reduction by-law which once existed had been taken from it, the by-law based on such petition must be quashed.

Re Grieg & London, 22 D.L.R. 595, 8 O.W. N. 177.

(§ II A—39)—LIQUOR LICENSE HELD IN NAME OF ANOTHER.

It is inconsistent with the policy of the Quebec License Law (R.S.Q. 1909), that the ownership of a license to sell intoxicating liquors should be vested in one person while the license is held in the name of another; and an agreement having that effect is void inasmuch as it establishes conditions contrary to the policy of the statute.

Turgeon v. St. Charles, 15 D.L.R. 298, 48 Can. S.C.R. 473, 13 E.L.R. 521, reversing 7 D.L.R. 445, 22 Que. K.B. 58.

A hotel or restaurant license is a right personal to the original licensee, and such

license cannot be effectively sold and transferred to a third party without the approval of the License Commissioners.

Lepage v. Bouchard, 8 D.L.R. 395, 43 Que. S.C. 181, 19 Rev. de Jur. 217.

B. DISCRETION AS TO GRANTING.

(§ II B—40)—INSPECTOR.

The Intoxicating Liquor Act, N.B., 1916, as amended by 8 Geo. V., c. 22 (9), gives the chief inspector power to investigate the merits of applications for beer licenses, and to grant or refuse them in his discretion.

Ex parte McFarlane, 39 D.L.R. 187, 45 N.B.R. 518.

REVIEW BY COURT.

Under s. 50 of the Municipal Act (B.C.), 1915, the Board of License Commissioners has the absolute discretion to grant the renewal of licenses, and where no bad faith is shewn the court will not interfere with the Board's discretion in refusing to grant a renewal of hotel licenses, even where such refusal would result in a total denial of liquor licenses in the municipality.

R. v. License Commissioners of Point Grey; Ex parte Grauer and Robinson, 26 D.L.R. 75, 32 W.L.R. 360, 8 W.W.R. 1072.

PROHIBITION BY-LAW—CONTEST.

A collector of provincial revenue cannot refuse to grant a license for the sale of spirituous liquors, upon the production of a certificate approved by the municipal council, on the ground that the by-law prohibiting the sale of such liquors, in the county, had been sent to him by the secretary-treasurer when the by-law had been quashed by the Superior Court and had not been promulgated, and could not, on that account, be put into force. Art. 564, Mun. Code, which forbids the collector of provincial revenue from issuing a license within two months from the date of a judgment annuling a prohibitory by-law, for the territory affected by such by-law, unless such judgment be a final judgment, applies only to a by-law emanating from the local council and not to one enacted by the county council. Article 978 of the Liquor License Act, which is to the same effect as art. 564, Mun. Code, applies only to a prohibitory by-law ratified by vote of the electors. The fact that a prohibition by-law has been contested in the Superior Court is no obstacle to the promulgation of such by-law.

Ethier v. Boulet, 50 Que. S.C. 40.

LICENSE COMMISSIONERS—MONTREAL—CONFIRMATION OF CERTIFICATE—RENEWAL OF LICENSE — DISCRETION OF COMMISSIONERS — COLLECTION OF REVENUE — CERTIORARI — WRIT OF PROHIBITION — MANDAMUS—QUEBEC C.P. 50—LICENSE ACT, 63 VICT. C. 13—5 EDW. VII. C. 13, S. 21, R.S.Q. SS. 925, 926, 939, 940, 942, 1002.

Since 5 Edw. VII. c. 13, s. 21, the discretion of the license commissioners of Montreal as to the confirmation of the certificate is no longer absolute; it is limited by ss. 925, 926, of the License Act; this confirmation ought not to be granted, except when the act expressly declares that it should be refused. When the act does not expressly prescribe a remedy, the court should apply the one which is most appropriate, no one having rights without having power to exercise them. Ubi jus ibi remedium. On principle, if the commissioners unlawfully refuse to confirm a certificate, and there is no other remedy but that of directing the collector of provincial revenue to issue the license without confirmation of the certificate, the court should direct him to do so, although the act does not permit him to grant a license when the certificate has not been confirmed by the commissioners. But, in this case there was a remedy, the judgment should have refused the application of the defendant for a renewal of his license, before the license commissioners, instead of requiring the collector of provincial revenue to give him a license without confirmation of his certificate. When the act replaces the license commissioners by a new commission, the former commissioners have jurisdiction to decide cases pending before them, even after the expiration of their term of office. When a decision of the license commissioners refusing to confirm a certificate has been reversed by certiorari, the judgment being without appeal, they can, by a writ of mandamus, receive an order to render a new decision, observing the requirements of the law as laid down by the judgment of the court of first instance.

Boisseau v. Parker, 23 Que. K.B. 450.

CONFIRMATION OF CERTIFICATE—OPPOSITION.

The confirmation of a license is left by the act entirely to the discretion of the municipal council to which it is presented. When the majority of the municipal electors of an electoral district oppose the confirmation of a certificate of a license of sale for intoxicating liquors, they should prove to the municipal council that their opposition contains the signatures of such majority, and see that all the formalities required by the act are observed; if they do not, the council may, in its discretion, disregard them and confirm the certificate.

Pilon v. Lachine, 47 Que. S.C. 193.

RENEWAL OF LICENSE—DISCRETION.

When a municipal council has adopted a by-law limiting the number of licenses, and refuses to confirm a certificate for the renewal of a license for the sale of liquor, without giving its reason for its refusal, the municipality is not liable for the damages suffered by the petitioner although the license granted under such circumstances to another person is void.

Latour v. Montreal, 48 Que. S.C. 61.

(§ II B—41)—LICENSING BOARD—JUDICIAL SCOPE OF—ADMINISTRATIVE FUNCTIONS.

A board of license commissioners exercising jurisdiction under the Municipal Act, R.S.B.C. 1911, c. 170, in connection with the granting transfer or renewal of liquor

licenses, is, in effect, a court and as such is bound by and subject to rules as to judicial notice and competent evidence. That the proceedings of a Board of License Commissioners in granting a license for the sale of intoxicating liquors may be reviewed on certiorari, is inherent to the judicial as distinct from the purely administrative functions of the board. [R. v. License Commissioners of Point Grey, 14 D.L.R. 721, applied.] The duties of the Board of License Commissioners sitting as a licensing court under s. 330 of the Municipal Act, R.S.B.C. 1911, c. 170, are, as set out in that statute, judicial in character, the administrative functions connected therewith being with the municipal council.

Re McEwen v. Hesson, 17 D.L.R. 99, 28 W.L.R. 137, 6 W.W.R. 977. [Affirmed in 20 B.C.R. 94.]

LICENSE COMMISSIONERS — POWERS — EXCESS.

Demers v. Choquet, 12 Que. P.R. 411.

C. CONTEST; REMONSTRANCE; AS TO RENEWAL OF LICENSE.

(§ II C—45)—CONTEST.

Under the Quebec License Act of License Commissioners of Montreal, in adjudicating upon the rights and the qualification of a person asking for the confirmation of a certificate for a license for a restaurant, exercise judicial functions, and there is no distinction to be made between an application to which an opposition has been filed and one which is unopposed. The commissioners must give notice to the applicant of whether or not an opposition is made to his application for confirmation of the certificate before deciding it on the facts within their knowledge of which he is ignorant but which justify a refusal of the application.

Blouin v. Choquet, 13 Que. P.R. 317.

Art. 937 R.S.Q., 1909, providing for quashing of a resolution confirming a certificate for a license is not restrictive. Thus, when the resolution confirming a certificate has been adopted by the council of a city or town it can be contested in the manner set out in the Cities and Towns Act.

Pilon v. Lachine, 14 Que. P.R. 392.

(§ II C—46)—OPPOSITION TO RENEWAL.

The holder of a liquor license, the renewal of which is opposed, has the right to be heard in support of his claim for a renewal and to submit evidence in respect thereof, and a judgment rendered by License Commissioners refusing a renewal to the license holder, but without his having been called upon to defend himself is radically null and will be quashed on certiorari. The License Commissioners for the Province of Quebec although endowed with ministerial functions, yet, in cases of oppositions to renewals of license certificates, exercise judicial duties, and such contestations must be heard and tried as any other case brought into court.

Nurnberger v. Choquet, 1 D.L.R. 512.

Petition or opposition to the confirmation of certificates for licenses for the sale of liquor in a municipality, filed with the municipal council, must contain the signatures of the majority of the municipal electors residing or having their place of business in the polling subdivision in which is situated the house for which the license in question is to apply. Such petition or opposition must be filed with the clerk of said council previous to the date fixed for the taking into consideration of said certificate. It must be established that proof was duly submitted to said council to prove to the satisfaction of the council that the demand for license is opposed by the majority of all the electors resident as aforesaid in the polling subdivision.

Mousseau v. Litchfield, 18 Rev. de Jur. 1.

D. CANCELLATION; REVOCATION; FORFEITURE.

(§ II D—50)—CONSTITUTIONALITY.

So much of s. 3 of c. 22 of the Nova Scotia Acts of 1916 as purports to annul liquor licenses is intra vires. Liquor licenses granted in Nova Scotia, which had not expired by lapse of time when s. 3 of N.S. Acts 1916, c. 22, came into force, were annulled by that legislation.

Re Nova Scotia Temperance Act, 36 D.L.R. 690, 28 Can. Cr. Cas. 176, 51 N.S.R. 405.

BREWERS' LICENSE — CANCELLATION — INLAND REVENUE ACT, CAN.

The provision of the Inland Revenue Act (Can.), 1916, c. 19, s. 2 for the forfeiture of a brewery license under that Act on conviction under provincial law for a "third offence" against the provincial liquor laws, refers to a third offence charged as such if the provincial law in question provides for such a charge with an increased penalty as does the Ontario Temperance Act, 1916.

R. v. Berlin Lion Brewery, 31 Can. Cr. Cas. 155.

The holder of a license which has been cancelled is only subject to the penalties imposed by law if he continues to occupy the licensed premises and sell intoxicating liquors therein after having received from the collector of revenue of the Province of Quebec notice that his license has been so cancelled, and until such notice has been given his continuing to occupy the said premises and sale of liquors therein is not an offence under the Licensing Act.

Metropole Co. v. Recorder's Court, 18 Can. Cr. Cas. 492.

CANCELLATION OF LICENSE — QUEBEC LICENSE ACT.

If the license commissioners of Montreal have cancelled a license certificate on the ground that the petitioner has been twice condemned before the Recorder's Court, although the second offence was committed before conviction on the first one, a demand for a certiorari will be refused.

Thibault v. Choquette, 16 Que. P.R. 258.

MUNICIPAL CORPORATION — BY-LAWS REDUCING NUMBER OF SHOP AND TAVERN LICENSES IN CITY—LIQUOR LICENSE ACT, R.S.O. 1914, c. 215, s. 16—SUBMISSION TO ELECTORS—FORM OF BALLOT—NON-COMPLIANCE WITH FORM AUTHORIZED BY MUNICIPAL ACT — ENTIRELY DIFFERENT FORM CALCULATED TO MISLEAD ELECTORS —ORDER QUASHING BY-LAWS.

Re Wall and Ottawa; Re Couillard and Ottawa, 6 O.W.N. 291, 26 O.W.R. 299.

LICENSES—REVOCATION—SALE TO MINOR—AGENCY OF WIFE.

Any certificate confirming a license to sell liquor can be revoked between the date of confirmation and the first day of May in the year for which it is given on account of acts committed between the said dates by the person for whose benefit it was confirmed. The sale of intoxicating liquor to a minor by a man in charge of licensed premises belonging to his wife makes the latter responsible.

Rheaume v. Choquet, 15 Que. P.R. 80.

CANCELLATION OF LICENSE — JURISDICTION OF JUDGE.

Finseth v. Ryley Hotel Co., 44 Can. S.C. R. 321.

RENEWAL OF LICENSE—DISCRETION OF COMMISSIONERS—MANDAMUS.

Re Prudhomme and Prince Rupert Commissioners, 19 W.L.R. 289, 16 B.C.R. 487.

"JUDICIAL PROCEEDING"—DISCRETIONARY ORDER—MATTER OF PUBLIC INTEREST.

Finseth v. Ryley Hotel Co., 43 Can. S.C.R. 646.

TOWNSHIP BY-LAW — TAVERN LICENSES LIMITED TO ONE—BONA FIDES—MONOPOLY.

Re McCracken and Sherborne, 23 O.L.R. 81, 18 O.W.R. 24.

CANCELLATION OF LICENSE — PREMISES WITHIN 200 YARDS OF CHURCH—SALVATION ARMY BARRACKS.

Re Barnhouse and Evans, 3 A.L.R. 434, 19 W.L.R. 233.

LIQUOR LICENSES—REGULATION OF BY BY-LAW.

Re Levy, 16 B.C.R. 354.

LICENSE IN LOCALITY OF PUBLIC SCHOOL.

Commissioners of Catholic Schools of Montreal v. Chouquet, 12 Que. P.R. 408.

KEEPING LIQUOR FOR SALE AFTER CANCELLATION OF LICENSE—NOTICE OF CANCELLATION REQUIRED — FAILURE TO PROVE NOTICE.

Metropole Co. v. Recorder's Court, 13 Que. P.R. 18.

CONFIRMATION OF CERTIFICATE—OPPOSITION —DECISION OF COMMISSIONERS.

Marquis v. Frechette, 40 Que. S.C. 175.

III. Unlawful sales; offences and proceedings.

A. IN GENERAL.

Jurisdiction of justice of the peace as to Can. Dig.—81.

prosecution under Temperance Act, see Justice of the Peace, III—10.

Statutory limitation for prosecution, see Limitation of Actions, III J—151.

(§ III A — 55) — CONVICTION UNDER REPEALED STATUTE—SUBSTITUTION OF DIFFERENT PENALTIES BY LATER STATUTE.

A conviction based upon a repealed statute cannot be upheld and where the defendant is convicted and imprisoned for an alleged unlawful liquor sale under certain sections of the Nova Scotia Temperance Act, 1910, without any reference to a later statute with a different class of penalties which took the place of the repealed statute, the conviction cannot be amended on habeas corpus.

R. v. Knulbach, 15 D.L.R. 524, 22 Can. Cr. Cas. 219.

KEEPING FOR SALE—EVIDENCE—SUFFICIENCY.

That the keeper of a boarding-house had liquors on his premises for sale in violation of law is not established by evidence of a sale of liquor for delivery at his address, where it does not appear that it was purchaser by or for him, or that it was delivered at his house.

R. v. Borin, 15 D.L.R. 737, 29 O.L.R. 584, 22 Can. Cr. Cas. 248.

PROVINCIAL CRIMINAL LAW—CRIMINAL OFFENCE.

The unlawful sale of intoxicating liquor in contravention of the Nova Scotia Temperance Act, 1900, is a "criminal offence" against a provincial criminal law. [Re McNutt, 21 Can. Cr. Cas. 157, 10 D.L.R. 834, 47 Can. S.C.R. 259, applied.]

R. v. Cody, 18 D.L.R. 773, 23 Can. Cr. Cas. 211, 48 N.S.R. 255.

PROHIBITED DISTRICT—QUEBEC LICENSE LAW.

A district collector of provincial revenue in Quebec may prosecute for illegal sales of liquor without a license in a municipality having a local option by-law without first giving a notice to the municipality requiring them to prosecute under art. 1108, R.S. Q. 1909; but he is to give that notice if he wishes to charge the municipality with the costs of a prosecution instituted by him in case of its default.

Gelinas v. Jolin, 34 D.L.R. 700, 51 Que. S.C. 26, 27 Can. Cr. Cas. 392.

An information for selling liquor without a license authorizing such sale under the Liquor License Act, c. 142, R.S.B.C. 1911, s. 66, need not describe the offence in the exact words of the statute, if the defendant, from the form of the information, receives particulars of the charge such as he himself might ask for if the information had been in the words of the statute.

R. v. Campbell, 8 D.L.R. 321, 20 Can. Cr. Cas. 490, 3 W.W.R. 192.

A summary conviction for selling intoxicating liquor without a license will be quashed for want of jurisdiction in the magistrate, if the only evidence before him was that the defendant purchased the liquor

for the use of himself and others upon a hunting expedition and received from the treasurer of the common fund reimbursement only for the purchase made by the defendant at the treasurer's request, and where there is nothing to discredit the evidence so given.

The King v. Lawless, 2 D.L.R. 105, 3 O.W.N. 669, 21 O.W.R. 247.

Upon a conviction for selling liquor without a license when the defence has been that only nonintoxicating liquor has been sold, it is a good ground for quashing the conviction that the magistrate refused to allow the liquor found on the premises to be analyzed.

R. v. Stephensen, 8 D.L.R. 104, 4 O.W.N. 272, 20 Can. Cr. Cas. 297, 23 O.W.R. 269.

PROOF OF OFFENCE.

The fact that a person charged with unlawfully keeping liquor for sale contrary to the Liquor Act, c. 4, 1916 (Alta.), and in whose house liquor has been found, swears definitely that he is innocent and calls witnesses to corroborate his testimony, does not necessarily satisfy the onus placed upon him by s. 54 of the Act of proving that he did not commit the offence. The principle of R. v. Covert, 34 D.L.R. 662, 10 A.L.R. 349, must be strictly limited and the cases to which it applies must be of very rare occurrence. On an appeal from the dismissal, by Ives, J., of an application to quash a conviction for unlawfully keeping liquor for sale contrary to the Liquor Act, c. 4, 1916, held, distinguishing R. v. Covert, supra, that there being not only evidence sufficient under the Act to constitute prima facie proof of the offence, but also circumstances of a suspicious character pointing to the guilt of the accused, the conviction should be sustained.

R. v. Morin, 38 D.L.R. 617, 28 Can. Cr. Cas. 414, 12 A.L.R. 101, [1917] 3 W.W.R. 693.

TEMPERANCE ACT — SEARCH-WARRANT — CAUSES OF SUSPICION—SUFFICIENCY—NAMES OF PERSONS GIVING INFORMATION—JURISDICTION OF POLICE MAGISTRATE.

R. v. Swarts, 32 D.L.R. 786, 37 O.L.R. 103, 27 Can. Cr. Cas. 90.

TEMPERANCE ACT — SEARCH WARRANT — GROUNDS FOR SUSPICION—CONVICTION.

R. v. Bedford, 32 D.L.R. 781, 27 Can. Cr. Cas. 107, 37 O.L.R. 108.

CONVICTION — EVIDENCE — ACTING AS MESSENGER IN PURCHASE OF INTOXICATING LIQUOR.

R. v. Davis, 8 D.L.R. 1046, 4 O.W.N. 358, 22 Can. Cr. Cas. 187, 23 O.W.R. 412.

SALES IN PROHIBITED QUANTITIES.

R. v. Campbell (No. 2), 13 D.L.R. 941, 18 B.C.R. 32, 22 Can. Cr. Cas. 72, affirming 8 D.L.R. 321, 20 Can. Cr. Cas. 490, 3 W.W.R. 192.

SUFFICIENCY OF CONVICTIONS—TIME OF OFFENCE—PRELIMINARY PROCESS—WAIVER—NOVA SCOTIA TEMPERANCE ACT, 1910, C. 2, AS AMENDED BY ACTS 1911, C. 33—1913, C. 46.

The King v. Smith, 28 D.L.R. 795, 50 N.S.R. 198, 27 Can. Cr. Cas. 340.

UNLAWFUL SALES—MEMBERSHIP FEE—CONTRIBUTIONS GATHERED FROM MEMBERS—SASKATCHEWAN SALES OF LIQUOR ACT (1915, C. 39).

The King v. Cordray, 30 D.L.R. 541, 10 W.W.R. 1292, 26 Can. Cr. Cas. 377, 9 S.L.R. 284, 34 W.L.R. 1169.

CANADA TEMPERANCE ACT — INFORMATION FAILING TO DISCLOSE FACTS SHEWING CAUSES OF SUSPICION—ORDER QUASHING—CONDITIONS.

R. v. Bender, 30 D.L.R. 520, 26 Can. Cr. Cas. 393, 36 O.L.R. 378.

SALE WITHOUT LICENSE—LOCAL OPTION DISTRICT—AMENDING CONVICTION—STATUTORY PRESUMPTION FROM FINDING LIQUOR IN QUANTITY.

Under the Liquor License Act (Man.), the onus of proving a license to sell is placed upon the accused (s. 203), and where such onus is not rebutted, a conviction for unlawfully selling without license is justified under s. 159 on the finding of more liquor than the accused would reasonably require upon his premises if he fails to rebut the statutory presumption of selling which arises thereupon; and the court may make the necessary amendments to a conviction purporting to be for selling in a local option district so as to make it merely a conviction for selling without a license without entering into a consideration of the validity of the local option by-law, the provision for sale without license being equally applicable whether or no there was a valid local option by-law. A statutory presumption of illegal sale of liquor is raised under s. 204 of the Liquor License Act (Man.), against the person on whose premises is found more intoxicating liquor than is reasonably required for the use of a person not licensed to sell; and by virtue of s. 215 such presumption will support a conviction for illegal sale without license as being an offence under the same statute, although the information was only for unlawful possession of liquors in a local option district and did not allege a sale by the accused.

R. v. Palmer, 22 D.L.R. 300, 24 Can. Cr. Cas. 20, 25 Man. L.R. 359.

SEVERAL OFFENCES ON SAME DAY.

Each separate sale of intoxicating liquor in contravention of the Canada Temperance Act R.S.C. 1906, c. 152, constitutes a distinct offence even if committed on the same day.

Ex parte Richard: R. v. Steeves, 24 Can. Cr. Cas. 183, 42 N.B.R. 596.

LIQUOR LICENSE ACT—MAGISTRATE'S CONVICTION FOR KEEPING INTOXICATING LIQUOR FOR SALE WITHOUT LICENSE — EVIDENCE — SEARCH WARRANT — PRIOR CONVICTION—IDENTITY OF ACCUSED.

R. v. Colton, 9 O.W.N. 233.

"HAVING" LIQUOR NOT IN DWELLING HOUSE.

A conviction under s. 49 of the Manitoba Temperance Act, 6 Geo. V., Man., c. 112, for "having" liquor in a place other than a dwelling house cannot be supported against the proprietor of a licensed pool room because of the possession and use of liquor by another person, not being his servant or agent, who was lawfully on the premises for the purpose of playing pool and who had brought the liquor there in his pocket and used the same without the connivance or consent of the proprietor. [R. v. Borin, 22 Can. Cr. Cas. 248, 15 D.L.R. 737, 29 O.L.R. 584, applied.]

R. v. Hoffman, 38 D.L.R. 289, 28 Man. L.R. 7, 28 Can. Cr. Cas. 355, [1917] 2 W. W.R. 839.

POSSESSION OF LIQUOR FOR PURPOSE OF EXPORTATION—ENABLING STATUTE—ULTRA VIRES.

R. v. Western Wine & Liquor Co., 39 D.L.R. 397, 29 Can. Cr. Cas. 307, [1918] 1 W.W.R. 55.

UNLAWFUL POSSESSION—POSSESSION ELSEWHERE THAN AS CHARGED.

R. v. Laderoute, 29 Can. Cr. Cas. 299.

ONTARIO TEMPERANCE ACT—HAVING LIQUOR IN PLACE OTHER THAN PRIVATE DWELLING HOUSE—EVIDENCE—QUESTION FOR MAGISTRATE — MOTION TO QUASH CONVICTION.

R. v. Rosarri, 29 Can. Cr. Cas. 297, 14 O.W.N. 117.

STATUTORY PRESUMPTION—EXCESSIVE QUANTITY.

The keeper of a boarding house who permits a boarder to bring an excessive quantity of intoxicants upon the premises for unlawful consumption is properly convicted of "having" intoxicating liquor for sale in a local option district because of the statutory presumption of s. 102 (2) of the Liquor License Act, R.S.O. 1914, c. 215, making possession of an excessive quantity of liquor "conclusive evidence" that it was kept for sale in contravention of the Act.

R. v. Kurtemi, 27 Can. Cr. Cas. 223, 11 O.W.N. 231.

INLAND REVENUE ACT—UNLICENSED DISTILLING—MAGISTRATE'S CONVICTION FOR OFFENCE AGAINST ACT—SUMMARY PROSECUTION AUTHORIZED BY ACT, R.S.C. 1906 c. 51, ss. 32, 33—DEFENDANT HAVING IN HIS POSSESSION "MASH OF WASH" CONTRARY TO PROVISIONS OF ACT—EVIDENCE — SACCHARINE MATTER PRODUCING "WASH" SUITABLE FOR MANUFACTURE OF SPIRITS—SECTIONS 3 (E), (H), 180 (E), 199, 204—ONUS.

R. v. Banni, 31 Can. Cr. Cas. 55, 16 O.W. N. 161.

UNLAWFUL POSSESSION — STATUTORY PRESUMPTION FROM DRINKING LIQUOR IN PLACE WHERE POSSESSION UNLAWFUL—PLACE OF POSSESSION DIFFERING IN INFORMATION AND DEPOSITIONS.

A charge of having liquor in a boarding house is not sustained by evidence that the accused drank liquor on the street. Such evidence would, under 1917 (Ont.), c. 50, s. 10, have shifted the onus of proof to the defendant on a charge of unlawful possession in the street and the magistrate might have amended the information under 1916 (Ont.), c. 78, but not having done so the court, on a certiorari motion, must quash the conviction.

R. v. Kallas, 31 Can. Cr. Cas. 57.

ONTARIO TEMPERANCE ACT — CONVICTIONS FOR OFFENCES AGAINST S. 41—HAVING INTOXICATING LIQUOR IN PLACE OTHER THAN PRIVATE DWELLING HOUSE—EVIDENCE.

R. v. Pownell, 31 Can. Cr. Cas. 62.

AMENDING DEFECTIVE CONVICTION IF ANY OFFENCE PROVED — ONTARIO TEMPERANCE ACT, S. 101.

A summary conviction under the Ontario Temperance Act, which is defective because it does not sufficiently describe an offence, will be amended on certiorari under the curative provisions of s. 101 of that Act (compare s. 1124, Cr. Code), if the court, hearing the certiorari on a review of the depositions de novo, finds proof of an offence under the Act.

R. v. Leduc, 30 Can. Cr. Cas. 246, 43 O.L.R. 290.

UNLAWFUL SALE BY LICENSED VENDOR IN A DISTRICT TO WHICH HIS LICENSE DID NOT EXTEND.

A liquor vendor's license under the Nova Scotia Temperance Act affords no defence in respect of a sale made outside of the district for which he is appointed a vendor. If he sells intoxicating liquor outside the bounds of the municipality for which he is appointed he is as liable to prosecution as any private individual and it was not necessary to charge him with one of the offences of which a licensed vendor may be guilty in that capacity under the Act.

R. v. Mitchell (No. 1), 31 Can. Cr. Cas. 221.

HAVING LIQUOR ELSEWHERE THAN IN PRIVATE DWELLING HOUSE — APARTMENTS AS PRIVATE DWELLING HOUSE.

A suite of rooms in an apartment house may constitute a "private dwelling house" within the exception of places in which intoxicating liquor may legally be kept under the Ontario Temperance Act, although it had only one occupant residing and taking his meals there. (6 Geo. V., Ont. c. 50, s. 2.)

R. v. Baird, 31 Can. Cr. Cas. 266.

ILLEGAL PRESCRIPTION OR REQUISITION BY PHYSICIAN—PROVING MOTIVE BY OTHER REQUISITIONS.

Under the Ontario Temperance Act, 1916,

c. 50, s. 51, and 1917, c. 50, s. 18, it is necessary to determine whether a physician charged with illegally issuing requisition for liquor in evasion of the Act acted in good faith in granting the requisition; and this involves a question of motive upon which evidence of other requisitions issued in large numbers by him in a short time may be admitted in proof of mala fides. [Makin v. Att'y-Gen'l of N.S.W. [1894] A.C. 57, applied.]

R. v. Welford, 30 Can. Cr. Cas. 156.

ILLEGAL SOLICITATION OF ORDERS—DISTRIBUTION OF PRINTED ORDER BLANKS ADDRESSED TO PERSON OUT OF JURISDICTION.

The systematic distribution in Ontario of printed order blanks for intoxicating liquor along with envelopes addressed for mailing to a place out of Ontario is a "canvassing" or "soliciting" of orders for liquor in contravention of the Ontario Temperance Act, 6 Geo. V., c. 50.

R. v. Lynch-Staunton, 30 Can. Cr. Cas. 209, 41 O.L.R. 317.

UNLAWFUL TRANSPORTATION — PROHIBITED AREAS UNDER PROVINCIAL LAW—O.C. CAN., 589.

Order in Council No. 589 (Can.), s. 4, making it an offence to transport into or deliver in any prohibited area any intoxicating liquor does not apply to transportation beginning and ending in the same prohibited area. As to the latter the provincial law must be referred to.

R. v. Tunnheim, 30 Can. Cr. Cas. 413, 12 S.L.R. 77, [1919] 1 W.W.R. 480.

ILLEGAL PRESCRIPTION BY PHYSICIAN—SUPPLYING AN INFORMER—INTENT—LIQUOR ACT, 1916, ALTA., c. 4.

The fact that an offence against the Liquor Act (Alta.) was induced by an informer acting in conjunction with the government department charged with the enforcement of the Act, goes only to the credibility of the informer. A conviction of a physician whom the informer had induced to illegally give him a prescription for liquor (Liquor Act, 1916, Alta., s. 32) is not bad because the informer had no purpose or intention to use the liquor as a beverage. It is enough that the physician's purpose was to enable the informer to obtain liquor for use as a beverage.

R. v. Rose, 30 Can. Cr. Cas. 405, 14 A.L.R. 118.

"WINE" CONTAINING LARGE PERCENTAGE OF PROOF SPIRITS FOUND IN WAREHOUSE OF WHOLESALE GROCER — EVIDENCE OF INTOXICATION—ADMISSIBILITY—PROPRIETARY OR PATENT MEDICINE ACT.

The defendant, a wholesale grocer, upon prosecution before a magistrate for keeping intoxicating liquor for sale contrary to the Ontario Temperance Act, 6 Geo. V. c. 50, was proved to have had in his possession, at his warehouse, a quantity of "Hall's wine," which, on analysis, was found to contain 31.33 per cent of proof spirits. The defendant was convicted:—Held, upon a motion to quash the conviction, that the wine must be "conclusively deemed to be intoxicating" (s. 2 (f) of the Act); and the defendant was liable to be convicted unless he proved that he did not commit the offence charged (s. 88); but evidence given on behalf of the prosecutor to shew that the wine was capable of being used and was in some boarding houses used as a beverage, and that its use resulted in intoxication, was not inadmissible; it went to confirm the statutory presumption that the wine was intoxicating and to negative the suggestion that the wine was so medicated as to prevent its use as an alcoholic beverage. Held, also, that the wine did not come within the requirements of s. 125, which stipulates that the Act shall not prevent the sale of certain fluids containing alcohol; and the defendant himself did not come within that section, not being a druggist, or the manufacturer of the wine, or a merchant who dealt in drugs and medicines. Held, also, that the Dominion Proprietary or Patent Medicine Act, 7 & 8 Edw. VII. c. 56, is not to be taken to be in pari materiâ with the Ontario Temperance Act; nor, by the importation of s. 7 of the Dominion Act, is the Ontario Act to be read as exempting from its operation all proprietary medicines duly registered. Differences between the 2 Acts pointed out and their meaning and scope defined. Reference to the Dominion statute 7 & 8 Geo. V. c. 30, s. 4d, enacting that the provisions of the Proprietary or Patent Medicine Act, "shall not be deemed to in any way effect any provincial law."

R. v. Axler, 40 O.L.R. 304.

MAGISTRATE'S CONVICTION—EVIDENCE—TESTIMONY OF POLICE OFFICERS — TESTIMONY NOT INTERPRETED—LIQUOR FOUND ON PREMISES—PRESUMPTION—ABSENCE OF SEARCH WARRANT.

Upon a motion to quash a magistrate's conviction of the defendant for selling intoxicating liquor, contrary to s. 40 of the Ontario Temperance Act, 6 Geo. V. c. 50:—Held, that there was evidence before the magistrate sufficient to justify the conviction. (2) That, although evidence that complaints were made to the police to the effect that intoxicating liquor was being sold in the defendant's house was improperly admitted, it would not be fair to say that the inadmissible statements might have had some influence upon the magistrate's decision; for the evidence as to the alleged sale was conclusive, if believed, and no credible explanation was given of the presence in the defendant's house of a large quantity of intoxicating liquor. (3) That there is no rigid rule that in every case all the evidence shall be made intelligible to the accused; and the objection that the evidence of a Polish witness, while translated into English, was not translated into Italian, which was said to be the only language that the accused understood, was overruled, it

not being shewn that the accused suffered any prejudice in that regard. (4) That the magistrate in convicting did not act upon any statutory or other presumption, but simply drew his conclusions from the facts proved; and, therefore, there was no ground for the objection that the finding of liquor upon the premises raised no presumption against the accused because the police officers who found it had no search warrant and no authority to enter the house.

R. v. Grassi, 40 O.L.R. 359.

APARTMENT HOUSE—KEEPING LIQUOR IN CELLAR—"PRIVATE DWELLING HOUSE."

The defendant, the occupant of a suite of rooms in an apartment house, kept in a compartment of the cellar under the house, of which compartment he had the sole use and occupation, but which did not form part of the suite in which he lived, a stock of intoxicating liquors:—Held, that the compartment in the cellar should be regarded as part of "the private dwelling house" in which the defendant resided; and a magistrate's conviction for an offence against s. 41 (1), of the Ontario Temperance Act, 6 Geo. V. c. 50, was quashed.

R. v. Obernesser, 40 O.L.R. 264.

HAVING LIQUOR IN RAILWAY CAR BY SERVANTS—"PRIVATE DWELLING HOUSE"—"EXCLUSIVELY USED."

A motion to quash a magistrate's conviction of the defendant for having intoxicating liquor in a place not his private dwelling house, contrary to s. 41 of the Ontario Temperance Act, 6 Geo. V. c. 50, was dismissed; and it was held, that a railway car in which the defendant and three other men, all employed by the railway company, lived, which car was sometimes used as a means of transportation, was not the "private dwelling house" in which the defendant resided, within the meaning of s. 41 and the interpretation clause of the Act, s. 2 (i). The car was a dwelling, but it was not "private," nor was it "exclusively used" as a place of residence. The magistrate, having found that the car was not a private dwelling house, had made a finding of fact which could not be reviewed on a motion to quash.

R. v. Gulex, 39 O.L.R. 539, 28 Can. Cr. Cas. 261.

HAVING LIQUOR IN MOTOR CAR—DEPOSITIONS NOT READ OR SIGNED—CARRYING LIQUOR FROM ONE LAWFUL PLACE TO ANOTHER.

Upon a motion to quash a conviction of the defendant, by a magistrate, for unlawfully having intoxicating liquor in her possession, elsewhere than in her private dwelling house—she had a bottle of gin in her motor car—contrary to s. 41 of the Ontario Temperance Act, 6 Geo. V. c. 50:—Held, that failure on the part of the magistrate to comply with s. 74 of the Act, by causing the depositions of the witnesses to be read over to and signed by them, did not invalidate the conviction, at all events unless it was shewn that the defendant was in some way prejudiced thereby. [R. v. Leach, 17 O.L.R. 643; R. v. McDevitt, 39 O.L.R. 138, and Montreal Street R.W. Co. v. Normandin, 33 D.L.R. 195, [1917] A.C. 170, followed.] (2) It was objected that no offence was proved. But the defendant had in her possession the liquor in respect of which she was prosecuted, and it was for her to prove that she did not commit the offence with which she was charged: s. 88. The defence was that the defendant was carrying the liquor from one place where she might lawfully have it to another such place, and that no use had been made of it en route: s. 43 (amended by 7 Geo. V. c. 50, s. 14). If the magistrate did not believe the defendant's statement (which was not shewn), that was the end of the case [R. v. Le Clair, 39 O.L.R. 436]; it could not be assumed that he did believe the statement but proceeded upon a view of the effect of s. 43 different from that put forward by the defendant. The motion was dismissed.

R. v. Tugman, 40 O.L.R. 349.

ONTARIO TEMPERANCE ACT—MAGISTRATE'S CONVICTION OF LICENSED BREWER FOR UNLAWFUL SALE OF INTOXICATING LIQUOR—ORDER FOR FORFEITURE OF LICENSE—DOMINION ACT IN AID OF PROVINCIAL PROHIBITORY LEGISLATION, 6 & 7 GEO. V. C. 19, S. 2—"THIRD OFFENCE"—PREVIOUS CONVICTIONS—METHOD OF PROOF—SECTIONS 58, 59, 96, 97, AND SCHED. F., 6 GEO. V. C. 50 (O.).

By s. 2 of an Act in aid of provincial legislation prohibiting or restricting the sale or use of intoxicating liquors, 6 & 7 Geo. V. c. 19 (Can.), any person holding a license to carry on the business of a brewer who sells intoxicating liquor in violation of the law in force in any province shall be liable in any prosecution under such provincial law, on conviction for a third offence, to forfeit his license:—Held, that the expression "third offence" must be given the meaning which it bears in the province under the law of which the prosecution takes place: In Ontario "a conviction for a third offence" means a conviction for an offence which is charged as a third offence. Sections 58, 59, 96, 97, and forms in sched. F. Ontario Temperance Act, 6 Geo. V. c. 50. The defendants, licensed brewers, were charged with having committed an offence against the Ontario Temperance Act by the unlawful sale of intoxicating liquor, but were not prosecuted for a third offence. Upon their trial before a police magistrate, writings signed by two other police magistrates certifying to three convictions of the defendants for selling intoxicating liquor in violation of the Ontario Act were put in. The magistrate convicted the defendants of the offence directly charged, found that the prior convictions had been duly proved, declared that the defendants had become liable to have their license forfeited, and ordered that it should be forfeited:—Held, that there was no such convection or valid conviction for a third offence as conferred upon the magistrate jurisdiction to forfeit the license; and

the declaration and order should be quashed. Held, also, that there was no proper evidence before the magistrate that the defendants had been three times convicted.

R. v. Berlin Lion Brewery, 45 O.L.R. 340.

ONTARIO TEMPERANCE ACT—MAGISTRATE'S CONVICTION FOR OFFENCE AGAINST S. 40—KEEPING INTOXICATION LIQUOR FOR SALE—MOTION TO QUASH—SECTION 102—EVIDENCE—PROOF OF GUILT—SECTION 84—BENEFIT OF DOUBT—"SALE."

Upon a charge of an offence against the Ontario Temperance Act, guilt must be proved just as much as under any other enactment. Although the Act aids the accuser much in some respects, in his proof, it has not taken away from the accused and given to the accuser "the benefit of the doubt." A conviction of the defendant by a Police Magistrate for keeping intoxicating liquor for sale without a license, in violation of s. 40 of the Act, was quashed where the only evidence before the magistrate was that the defendant's son had been asked by a person, in the defendant's (unlicensed) house, for some liquor, and had afterwards sold to that person, in a lane, not owned and not used by the defendant, but near his house, a bottle of whisky: It was held, that there was no evidence to support the conviction—no evidence upon which reasonable men could find that there was no reasonable doubt of the defendant's guilt. Sections 84, 102 of the Act considered. An unlawful sale may be made without an unlawful keeping for sale—A sale of that which is kept for a lawful purpose.

R. v. McKay, 46 O.L.R. 125.

Defendant's wife sold liquor for the defendant and was convicted of selling liquor in violation of the Canada Temperance Act. Later, on the same evidence, defendant was convicted of keeping liquor for sale:—Held, the defendant's conviction was good.

Ex parte Campbell, 40 N.B.R. 350.

A parish court commissioner has jurisdiction to try offences under the Canada Temperance Act. The Act 62 Vict., c. 37, does not make the Village of St. Mary's an incorporated town, and does not deprive a parish court commissioner of his jurisdiction in that village. A conviction made upon evidence obtained by means of an illegal search warrant, held good.

The King v. Clarkson; Ex parte Hayes, 40 N.B.R. 363.

The Act 7 & 8 Edw. VII. (Can.), c. 71, re-enacts s. 117 of the Canada Temperance Act with amendments and, therefore, a conviction for a third offence under s. 117 as amended is good, although the first two convictions were made before the passing of the amending act.

Ex parte Staples, 40 N.B.R. 378.

A conviction under the Canada Temperance Act, R.S.C. 1906, c. 152, was set aside where no place of trial was mentioned in the summons and defendant did not appear.

The King v. Wilson; Ex parte Harrington, 40 N.B.R. 383.

In a prosecution for a violation of the Nova Scotia Temperance Act 1910, the burden is upon the party wishing to set up a defence under it of proving that the Canada Temperance Act is in force in the county where the offence is alleged to have been committed. Section 6, subs. 1 of the Act enacts that "Any person who shall procure for or offer for sale to any other person or persons any intoxicating liquor shall be deemed to have made an unlawful sale of liquor. Provided that this section shall not apply to the procuring of liquor on a valid prescription or certificate." The true meaning to be given to the word "deemed" as here used is that the fact of the procuring or offering for sale shall be treated as prima facie evidence of an unlawful sale leaving it open to the party accused to shew that there was no sale, or that the sale or procuring was within the exceptions permitted by the statute.

The King v. Fraser, 45 N.S.R. 218.

APPOINTMENT OF VENDOR FOR MUNICIPALITY—NO AUTHORITY FOR SELLING OUTSIDE—INFORMATION CHARGING UNLAWFUL SALE—PROHIBITION TO STIPENDIARY MAGISTRATE REFUSED.

A vendor of intoxicating liquors appointed for a municipality in Nova Scotia has no authority to sell in a city or town the boundaries of which are not included within the boundaries of the municipality. The court will not entertain an application for a writ of prohibition to restrain the stipendiary magistrate of the city from proceeding with an information charging an unlawful sale by the vendor for the municipality in violation of the provisions of the Nova Scotia Temperance Act, part I.

The King v. Fielding, 52 N.S.R. 412.

KEEPING FOR SALE—FORM OF CONVICTION AND COMMITMENT—SURPLUSAGE.

A conviction and commitment for keeping intoxicating liquor "for the purpose of sale, barter and traffic therein" is a conviction and commitment for "keeping for sale." The rest is mere surplusage.

The King v. Land, 52 N.S.R. 257.

ONTARIO TEMPERANCE ACT—MAGISTRATE'S CONVICTION FOR OFFENCE AGAINST S. 40—EVIDENCE OF INTOXICATING QUALITY OF LIQUOR SOLD.

R. v. Soo Tong, 16 O.W.N. 146.

ONTARIO TEMPERANCE ACT—SALE OF INTOXICATING LIQUOR BY BREWER TO PERSON NOT ENTITLED TO SELL—RECEIVING FOR PURPOSE OF RESELLING—SECTIONS 41, 49—"UNLAWFULLY."

R. v. Reinhardt Salvador Brewery Co.: R. v. McFarline, 11 O.W.N. 346, 27 Can. Cr. Cas. 445.

ONTARIO TEMPERANCE ACT — OFFENCE AGAINST — HAVING INTOXICATING LIQUOR IN POSSESSION—MAGISTRATE'S CONVICTION—MOTION TO QUASH—EVIDENCE.

R. v. Yak Keta, 13 O.W.N. 28.

ONTARIO TEMPERANCE ACT—MAGISTRATE'S CONVICTION FOR DELIVERING INTOXICATING LIQUOR TO PERSON NOT ENTITLED TO SELL WHO SELLS OR BUYS TO RESELL—6 GEO. V. C. 50, S. 49—APPLICATION TO CARRIERS — PROOF THAT PERSON TO WHOM LIQUOR DELIVERED SUCH A PERSON AS DESCRIBED — ABSENCE OF DIRECT PROOF—INFERENCE FROM FACTS PROVED —QUESTION FOR MAGISTRATE.

R. v. McEwan, 41 O.L.R. 324.

SELLING WITHOUT LICENSE — MAGISTRATE'S CONVICTION.

R. v. McLean, 5 O.W.N. 53, 25 O.W.R. 24.

LIQUOR LICENSE ACT—SELLING WITHOUT LICENSE—MAGISTRATE'S CONVICTION—MOTION TO QUASH — CONVICTION IN ABSENCE OF DEFENDANT—ADJOURNMENT.

R. v. Gilmour, 5 O.W.N. 14, 24 O.W.R. 977.

SELLING WITHOUT LICENSE—MAGISTRATE'S CONVICTION—MOTION TO QUASH — EVIDENCE OF SALE—AGENCY OF DEFENDANT FOR PURCHASER.

R. v. McElroy, 5 O.W.N. 284.

PROHIBITION—TRANSPORT OF INTOXICATING LIQUORS—TEMPERANCE ACT—JURISDICTION—C.C.P., ART. 1003—SECTION REF., [1909] ART. 1317.

Article 1317 of the Temperance Act, R.S. Q. 1909, prohibits not only the issuing of licenses for the sale of intoxicating liquors when the prohibition law is adopted but it also forbids the sale of these liquors. The prohibition of sale of intoxicating drinks established in a municipality by a municipal by-law passed in accordance with the temperance law of Quebec makes the territory of this municipality a "prohibited zone" in the sense of the rules set up by the Governor-General in Council.

Fraser, Viger & Co. v. Lachine, 28 Que. K.B. 181.

The provisions of the Liquor License Act respecting prosecutions for the sale of intoxicating liquor without license authorize the Recorder to condemn the offender not only to a fine but also to the costs of prosecution and to imprisonment if such costs are not paid. Under this Act the offender may be ordered to pay the expense of conveying him to jail. But the order to pay these costs should be entered in the minute of the proceedings and not merely in the warrant of commitment. If it is not the conviction will be quashed.

Antaya v. Montreal, 13 Que. P.R. 273.

CRIMINAL LAW—DOMINION ORDER IN COUNCIL 589 — "PROHIBITED AREA" — "DELIVER IN" — CIRCUMSTANCES SHOWING KNOWLEDGE OF ACCUSED AS TO IMPROPER TRANSPORTATION OF LIQUOR AND THAT HE CAUSED IT TO BE "DELIVERED" —DEFECTS IN ISSUE OF SEARCH WARRANT NOT AFFECTING CONVICTION.

British Columbia is a "prohibited area" within the meaning of the Dominion O.C. No. 589. Accused was convicted "for that he on or about Dec. 1, 1918, at Fernie, . . . unlawfully did . . . cause intoxicating liquor to be delivered at his residence . . . near Fernie, British Columbia, to wit: Five barrels of intoxicating liquor addressed to The Rexford Hotel, Rexford, Montana, and dated Nov. 1918, contrary to O.C. No. 589." The five barrels so addressed were found on Dec. 1, 1918, on the defendants premises bearing upon them the internal revenue stamps of the United States. The date of the cancellation mark was Nov., 1918. There was no evidence that accused sent or took or transported or caused to be sent or transported the liquor into the province. It was held that the words of the order in council "deliver in" any prohibited area or "cause to be so delivered" mean that any person who knowing that the liquor has been improperly transported into British Columbia delivers it or causes it to be delivered is guilty of an infraction of the order in council; that the circumstances of this case (the marks on the barrels, quantity, etc.) formed strong evidence both that the accused knew that the liquor was improperly brought in and that he caused it to be delivered at his house and (accused producing no evidence) the conviction was sustained. The search warrant under which accused's premises were searched was improperly issued because the information was not signed, and no grounds of information and belief were disclosed, therefore the liquor was improperly seized; but the illegality did not affect the conviction.

Roux v. Hewat, [1919] 1 W.W.R. 530.

CRIMINAL LAW — B.C. PROHIBITION ACT — SELLING LIQUOR—CONVICTION FOR SECOND OFFENCE — MOTION TO QUASH — AMENDING CONVICTION AND IMPOSING PUNISHMENT FOR FIRST OFFENCE.

Upon an application to quash a conviction for a second offence of selling liquor in violation of the British Columbia Prohibition Act, the conviction and warrant of commitment may be amended and the requisite punishment for a first offence imposed. [R. v. Van Fleet, 38 D.L.R. 592, approved.] To allege in the information that there has been a previous conviction for the same offence is not improper but is not necessary.

R. v. Maliska, [1919] 2 W.W.R. 378, affirming [1919] 1 W.W.R. 567.

CRIMINAL LAW—BRITISH COLUMBIA ACT—ACCUSED PLEADING GUILTY TO HAVING LIQUOR IN POSSESSION—MAXIMUM FINE IMPOSED THROUGH MISAPPREHENSION OF MAGISTRATE—APPEAL BARRED BY S. 54 —APPLICATION OF SECTION TO BODIES CORPORATE — INTERPRETATION ACT, S. 45—"PARTY" IN SAID S. 54.

Appellant, an incorporated company, through its manager, pleaded guilty to having liquor in its possession, etc., and the magistrate inflicted the maximum fine of $1,000 under a misapprehension of the meaning of the Act, believing he had no power to inflict a lesser fine. On appeal it was held: (1) That the fact that the appellant had

pleaded guilty need not prevent the judge from allowing the appeal and reviewing the sentence; (2) the requirements of an affidavit of merits, under s. 54 of the British Columbia Prohibition Act (which, having pleaded guilty, the appellant could not make) was a fatal objection against appellant. By reason of s. 45 of the Interpretation Act, this requirement applies to bodies corporate. In any case, the word "party" in said s. 54 was, with doubt, held to include a body corporate.

Flathead Hotel Co. v. Hewat, [1919] 1 W.W.R. 466.

SELLING WITHOUT LICENSE—CONVICTION BY MAGISTRATE — FINDING OF FACT BY MAGISTRATE.

R. v. Rossi, 3 O.W.N. 121, 20 O.W.R. 226.

CONVICTION FOR SELLING UNLAWFULLY—LIQUOR LICENSE ACT—SUMMONS AND FORM OF CONVICTION.

[R. v. Mitchell, 19 O.W.R. 588, 2 O.W.N. 1408, followed.]

R. v. Whitney, 2 O.W.N. 1491, 19 O.W.R. 888.

OFFENCE OF SELLING—GENERAL SALE OR SEPARATE SALES.

R. v. Sutherland, 2 O.W.N. 595, 18 O.W.R. 280.

REFUSAL TO OPEN BAR TO INSPECTOR BY PERSON IN CHARGE OF HOTEL—PROPRIETOR AWAY FROM TOWN — LIQUOR LICENSE ACT, S. 130.

Pacaud v. Perkins, 20 O.W.R. 893.

CONTRACT OF SALE—ILLEGALITY—PRINCIPAL AND AGENT.

St. Charles v. Vasallo, 9 E.L.R. 355.

(§ III A—56)—UNLAWFUL SALES—LIQUOR NOT CONTAINING SUFFICIENT ALCOHOL TO PRODUCE INTOXICATION.

The sale of liquor called "temperance beer" containing so small a quantity of alcohol as not to be capable of producing intoxication when drunk in large quantities, does not violate the Quebec License Law.

Collector of Revenue v. Demers, 13 D.L.R. 738, 22 Can. Cr. Cas. 55.

WHAT IS A "DISPOSAL."

The word "disposal" in s. 54, of the Liquor License Act, is used in a liberal sense and may or may not be associated with selling, and any transaction respecting the physical change of possession of whiskey is included under the term "disposal" and is prohibited by the Act, if accomplished during forbidden hours, and particularly if resorted to for the purpose of defeating the purposes of the statute.

R. v. Clarke, 9 D.L.R. 517, 27 O.L.R. 525, 20 Can. Cr. Cas. 486.

PROOF THAT INTOXICATING—ALCOHOLIC PERCENTAGE.

The Sales of Liquor Act (Sask.) specifically declares by s. 2, subs. 1, that every spiritous and every fermented and every malt liquor is within the prohibition of the act, and it is therefore unnecessary as to such spiritous, fermented or malted liquors to prove that they are intoxicating or that they contain more than 1 per cent of alcohol and should therefore be conclusively deemed to be intoxicating under that subsection.

R. v. McPherson, 26 D.L.R. 503, 25 Can. Cr. Cas. 62, 8 S.L.R. 412, 33 W.L.R. 21, 9 W.W.R. 613.

UNLAWFUL SALES—OF WHAT LIQUORS—2½ PER CENT PROOF.

Where a wholesale bottler and seller of table waters sells a bottled beverage to a restaurant keeper in a local option town with warranty that they can be resold by the buyer in the course of his business without thereby contravening the law, and where the buyer relying on such warranty keeps for sale in his business the commodity in question and is in consequence prosecuted and convicted and fined for "unlawfully keeping liquor for the purpose of sale, barter and traffic therein without the license therefore by law provided;" breach of the warranty is established upon proof that the beverage contained more than 2½ per cent of proof spirits and was within the prohibition of the local option law.

Stephenson v. Sanitaris, 16 D.L.R. 695, 30 O.L.R. 60.

UNLAWFUL SALES — SHOP LICENSE — MINIMUM QUANTITY IN UNBROKEN PACKAGES.

The holder of a shop license under the Liquor License Act (Ont.) is improperly convicted of selling a less quantity than 3 half-pints of liquor in a broken package on filling the buyer's order for a half-pint of rum and a half-pint of gin to be mixed together where there was no appropriation of the goods to the sale or passing of the property therein to the buyer until the bottle, supplied by the seller as a container of the liquor ordered, had been securely corked and handed to the buyer; such bottle is an "unbroken package" under s. 2 (n) of the Act, sale of which by a shop licensee is authorized to a minimum of one-half pint.

Smith v. Galpin, 23 Can. Cr. Cas. 318.

UNLAWFUL SALES—TEMPERANCE DRINKS—INTOXICATING PRINCIPLE — QUEBEC LICENSE LAW.

The selling of so-called temperance drinks is within the prohibition of the Quebec License Law if they contain any intoxicating principle; evidence that the liquor in question contained from 3 to 5 per cent of proof alcohol and that this would intoxicate is sufficient upon which to base a conviction without proof that intoxication had resulted from the sales made.

Corriveau v. Simard, 18 D.L.R. 703, 23 Can. Cr. Cas. 156, 20 Rev. de Jur. 178.

"TEMPERANCE" BEER.

On an appeal by way of rehearing, from a magistrate's dismissal of a charge of selling intoxicating liquor on the ground that the temperance beer in question was not shown to be intoxicating and that it contained less than 2½ per cent of proof spir-

its, in consequence of which there was no statutory presumption that it was intoxicating, the judge rehearing the case by consent upon the same depositions as were before the magistrate, may find the alleged temperance beer, which contained over 2 per cent of proof spirits to have been intoxicating, if he credits the unanswered testimony of a prosecution witness who had consumed a quantity of the same brand, bought from the accused, to the effect that it was intoxicating.

R. v. Willis, 25 Can. Cr. Cas. 297, 9 W.W.R. 919.

To support a conviction for keeping intoxicating liquor for sale based on the seizure in defendant's restaurant of a quantity of hard cider, it must be shewn that the cider sent for analysis and found to be intoxicating within the Liquor License Act was a sample of the identical cider so seized, where there is no other evidence that what was seized was intoxicating.

R. v. Hewson, 26 Can. Cr. Cas. 38, 9 O.W.N. 449.

"SPIRITOUS OR MALT LIQUORS."

In a prosecution under Ontario Liquor License Act for illegally keeping liquor for sale, and proof in support thereof that lager beer was sold by the defendant and not merely purchased by him as the agent of those who consumed it, the magistrate is to take judicial notice that beer is both a spiritous and a malt liquor, and consequently included in the definition of "liquor" given by the Act; and it was unnecessary to take evidence as to whether or not it contained more than 2½ per cent of proof spirits.

R. v. Scaynetti, 24 Can. Cr. Cas. 40, 34 O.L.R. 373.

CERTIORARI—JUDICIAL NOTICE THAT WHISKEY INTOXICATING.

In considering an appeal by way of certiorari from a magisterial conviction (made under s. 91 of c. 39, 1915, the Sales of Liquor Act), the question for the judge is: "Is there any evidence whatever to warrant the conviction?" Judicial notice taken of the fact that Scotch whiskey is an intoxicating liquor.

McPherson v. Morrison, 25 Can. Cr. Cas. 60, 9 W.W.R. 164, 32 W.L.R. 385.

SALE BY LICENSEE IN PROHIBITED QUANTITY.

An information under the Liquor License Act (Man.) charging a wholesale licensee with selling bottled whiskey in a quantity less than one reputed quart bottle discloses at least an offence under s. 17 of that Act punishable under the general penalty imposed by s. 178, if it is not within the penalty of s. 159 for illegal sales without the required license; consequently, prohibition will not lie in respect of summary proceedings upon such information where the case has been remanded from time to time and the magistrate has not yet concluded the hearing.

White v. Cavanagh, 25 Can. Cr. Cas. 38, 25 Man. L.R. 624, 32 W.L.R. 432, 9 W.W.R. 132.

(§ III A—57)—OBTAINING FROM CARRIER —PROHIBITED DISTRICT.

It is not an offence under the Nova Scotia Temperance Act, 1910, as amended 1911, for the purchaser of liquor bought in a county under license to personally receive it from the express company on its arrival by railway at the town in which he resides where the prohibition clauses of that Act are in effect; s. 30 of the Act, which prohibits sending liquor or bringing or causing it to be sent or brought applies to the person or agent sending the liquor by a common carrier to the person in the municipality which is not under license and to the person carrying liquor for another at either end of the transit, but not to the purchaser personally taking delivery from the carrier as the consignee of liquor bought in a licensed district.

R. v. Publicover, 21 D.L.R. 203, 24 Can. Cr. Cas. 1, 49 N.S.R. 85.

(§ III A—58)—LIABILITY OF CARRIERS—EXPRESS AGENT DELIVERING.

The effect of s. 25 of the Liquor Act, Alta., is that only the consignee himself is entitled to take delivery of liquor during its transit by express from a place outside of Alberta to an address in Alberta where the law permits it to be received and kept; and where the express agent had attempted to make delivery at the street address to which the consignment was billed, but, finding that the consignee was no longer there, sent an advice note by mail addressed to him, and, on the advice note being brought in by a person representing himself to be the consignee, delivered the liquor to him at the express office, the express agent is liable to conviction for an infringement of the Act, if it be shewn at the trial that the person to whom delivery was made was not the consignee himself, but someone else whom he had sent to get the liquor. The delivery not being at the street address, which was the destination of the package, the accused would be liable whether or not he took reasonable precaution in having the person producing the advice note and receiving the goods identified as the consignee.

R. v. Benford, 34 D.L.R. 706, 28 Can. Cr. Cas. 41.

TEMPERANCE ACT—LIQUOR FOR PERSONAL USE.

The exception created by subs. (2) of s. 117 as to intoxicating liquor "sent, shipped, brought or carried to any person" for his personal use does not apply to a person who personally brings liquor for his own use into a county where Part II. of the Canada Temperance Act is in force; consequently a conviction is properly made under s. 117 (c) where the accused brought the liquor in by railway

as his personal baggage although intending it solely for his own use.

R. v. Swarts, 27 Can. Cr. Cas. 90, 37 O.L.R. 103.

CRIMINAL LAW — BRITISH COLUMBIA PROHIBITION ACT, S. 11—"HAVING" LIQUOR OWNER AND ACCOMPANIED BY OWNER—NO "POSSESSION"—CONVICTION BAD.

Appellant was charged with "having liquor in a place other than the dwellinghouse in which he resided." One, B., had some liquor in an unlawful place. He engaged appellant to move it, apparently with some other stuff, to another place. Appellant knew he was moving liquor. B. accompanied him during the removal. Held appellant was improperly convicted. The word "have" as used in the Act, denotes possession and it must be an actual physical possession; which appellant did not have. B. had possession and never parted with it.

Bigattini v. DIXON, [1919] 1 W.W.R. 464.

(§ III A—59)—UNLAWFUL SALES—LIABILITY OF PROPRIETOR OR OCCUPANT—EMPLOYEE ACTING AS CUSTOMER'S AGENT TO BUY.

Illegal sale of intoxicating liquors on unlicensed premises is not made out against a restaurant proprietor where his employee merely acts as the agent of the customer in going out at the latter's request to buy liquors to be consumed in the restaurant and receives for that purpose the exact amount disbursed or to be disbursed, where the consumption of liquor in restaurants not having liquor licenses was not in itself illegal nor did the circumstances disclose any attempt at evasion of the liquor laws. [R. v. Begeotas, 22 Can. Cr. Cas. 113, 8 D.L.R. 1032, approved.]

O'Sullivan v. Michus, 18 D.L.R. 701, 23 Can. Cr. Cas. 169.

LIABILITY OF OCCUPANTS—ACTS OF EMPLOYEES.

The summary conviction of the occupant for the illegal sale of liquors made by the employee in contravention of the Liquor License Ordinance, Alta., 1915, c. 89, because of the statutory liabilities of the occupant under s. 95 of that Act, is a bar to the subsequent prosecution of the employee in respect of such sale; it is open to the prosecution to proceed with one charge against all responsible for the sale, or against any of them, for the one penalty, but not against each for a separate penalty. [R. v. Williams, 42 U.C.Q.B. 462, and Ex parte Kelly, 32 N.B.R. 271, applied.]

R. v. Martin, 28 D.L.R. 578, 26 Can. Cr. Cas. 42, 9 A.L.R. 265, 33 W.L.R. 809, 9 W. W.R. 1317.

UNLAWFUL SALES—LIABILITY OF RESTAURANT WAITER—PURCHASE FROM LICENSED PREMISES—AGENT OF CUSTOMER—B.C. MUNICIPAL ACT, R.S.B.C. 1911, c. 170, s. 318, SUBS. 5.

R. v. Begeotas, 8 D.L.R. 1032, 22 Can. Cr. Cas. 113, 18 B.C.R. 123, 2 W.W.R. 323.

CONTRIBUTION BY SEVERAL TO BUY LIQUORS—LIABILITY OF OCCUPANT WHERE LIQUORS CONSUMED.

On a charge under the Liquor License Ordinance, Alta., of selling intoxicating liquor without a license, the effect of s. 115, subs. 3, of the ordinance is that proof of consumption of the liquor on the premises of the accused by a group of people gathered together merely for the purpose of drinking, is made conclusive evidence of selling, and testimony that the persons so assembled had each contributed to the cost of the liquor and sent for it by messenger is not admissible to displace the statutory presumption. [R. v. Lightburne, 4 Can. Cr. Cas. 358, followed.]

R. v. Simuluk, 24 Can. Cr. Cas. 136, 31 W.L.R. 577.

LIABILITY OF OCCUPANT OF PREMISES—ILLEGAL SALE BY STRANGER THEREON FOR FUTURE DELIVERY—ONUS AS TO AUTHORIZATION—PERSON "SUFFERED" TO BE OR REMAIN ON THE PREMISES.

Where future delivery is to be made elsewhere there must be more than the casual presence in the defendant's store of the person said to have there contracted for the illegal sale of liquor and to have there received the price of same, to bring the storekeeper within the provisions of s. 50 of the Liquor Act, 1916, Alta., declaring the "occupant" of the store personally liable to the penalty notwithstanding the sale cannot be proved to have been made by the directions of the occupant. The proprietor of a drug store is not liable under the Act for a sale so contracted for without his knowledge by a person not connected with the store, and the statutory presumption of s. 50 does not apply to make a person whose acts otherwise would indicate that he was merely a customer or casual caller, and as to whom no appearance of employment was testified to, a person who is "suffered to be or remain in or upon the premises of such occupant," so as to place the onus upon the proprietor of disproving the charge. The prosecution has still to prove general employment or general agency so as to raise the statutory presumption of specific authority or specific agency in the particular case.

R. v. Dominion Drug Stores (No. 2), 31 Can. Cr. Cas. 86, [1919] 2 W.W.R. 413, affirming 44 D.L.R. 382, 30 Can. Cr. Cas. 318, [1919] 1 W.W.R. 285.

LIABILITY OF PROPERTY OWNERS AND OCCUPANTS.

The effect of s. 112 of the Ontario Liquor License Act (amendments of 1907 and 1908) is to make liable for illegal sales of intoxicating liquor by his tenant on his premises in a local option district an owner of unlicensed hotel premises resident elsewhere and having no knowledge of the infraction of the liquor laws, by reason of the enactments contained in that statute that "in the event of the premises being

an unlicensed tavern the owner who permits any part of it in which liquor is sold or kept for sale to be occupied by any other person shall be "conclusively presumed" to be an "occupant" thereof and that an "occupant" shall be personally liable for any offence committed on the premises by any person who is suffered to remain upon the premises. [7 Edw. VII., (Ont.) c. 46, s. 5, as amended 8 Edw. VII., c. 54, s. 6, construed; R. v. Bradley, 13 O.W.R. 39, approved.]

The King v. Bradley, 19 Can. Cr. Cas. 110, 3 O.W.N. 58.

LIABILITY OF OCCUPANTS—EFFECT OF CONVICTION.

The disqualification of a member of a municipal council under the Liquor License Act, C.S.N.B. 1903, c. 22, s. 61, on his conviction for knowingly committing any offence against the Act, does not apply where the conviction was not expressed to be for an offence "knowingly" committed, and might have been for the illegal sale of liquor by another without his knowledge on premises of which he was the occupant and as to which he might on that account be liable to conviction under the act apart from any guilty knowledge on his part; the court hearing a motion to quash the council's resolution on the ground that it was passed on the invalid vote of the convicted member is under no duty to examine the proceedings before the magistrate to ascertain therefrom whether or not the offence was knowingly committed, the duty of finding upon that question being one primarily for the magistrate.

Ex parte Murchie; R v. Gloucester, 24 Can. Cr. Cas. 228.

LIABILITY OF OCCUPANT—PRESUMPTION ON FINDING LIQUORS UNDER SEARCH WARRANT.

Subsection 49 of s. 49 of the Nova Scotia Temperance Act, as amended by N.S. Acts 1911, c. 33 s. 14, is within the legislative powers of a provincial legislature in making the finding of intoxicating liquor under a search warrant prima facie evidence of keeping for sale in contravention of the Act, although sales to persons outside of the province are not within the prohibition of the N.S. Temperance Act, and this statutory presumption will apply without any allegation or proof on the part of the prosecution that the keeping for sale was not for the purpose of selling solely to persons outside the province.

R. v. Hoare, 24 Can. Cr. Cas. 279, 49 N.S.R. 119.

RESPONSIBILITY — MUNICIPALITY — SEIZURE OF INTOXICATING LIQUORS—PRESUMPTION—FOREIGNERS—MANNERS AND CUSTOMS—ILLEGAL ARREST—RATIFICATION—C. CIV. ART. 1053—SECTION REF., [1909] ARTS. 1097, 1098.

When a Pole, on the occasion of the baptism of one of his children, has gathered in his home his relatives, friends and countrymen to the number of 60 or 80 persons, and following the usages and customs of his country has brought there to entertain them, 85 or 90 gallons of beer, and several bottles of whiskey as well as food, the chief of police and constables of a municipality, where a prohibition law exists, have no right to enter the house, disperse the guests and seize all the intoxicating liquors found there. To do so they cannot justify themselves either by the authority of arts. 1097, 1098, R.S.Q. 1909, which provide that the possession of a large quantity of intoxicating liquors raises the presumption that it is held for the purpose of sale, or on account of the noise and quarrelling of the guest among themselves. In this case, the municipality, in prosecuting this Pole several days afterwards, for having kept intoxicating liquor for the purpose of sale, (which charge was thrown out) has approved and ratified the act of its constables and assumed the responsibility therefore, it is liable for damages.

Rinkuk v. St. Pierre, 56 Que. S.C. 43.

PERMITTING DRUNKENNESS "TO TAKE PLACE."

The offence of permitting drunkenness to take place in the house of the accused (Alberta Liquor Act, s. 36) involves something more than merely permitting drunkenness to exist on the premises; there must be proved against the accused some act or default on his part conducing to or continuing the drunkenness of the person who was allowed to remain on his premises while drunk.

R. v. Pomerleau, 35 D.L.R. 33, 28 Can. Cr. Cas. 7, [1917] 1 W.W.R. 1457.

PERMITTING DRUNKEN PERSONS IN HOTEL.

A summary conviction of an hotel keeper for permitting drunken persons to meet on his premises contrary to the Liquor Act, Alta., 1916, will be quashed if the evidence shews that the hotelkeeper did everything which could reasonably be expected during severe weather conditions in getting the drunken persons to leave the hotel without placing them in peril by an immediate ejectment.

R. v. Creighton, 29 Can. Cr. Cas. 161, [1917] 3 W.W.R. 499.

(§ III A—59a)—LIABILITY OF TELEGRAPH OPERATOR SENDING ORDER FOR LIQUOR.

Where it was shewn upon the trial of a telegraph operator for selling liquor contrary to law, that upon being asked if he had any liquor, he told his questioner that he had not, but that he could telegraph for a bottle, which he did, but signed the telegram with the name of the other party, and the bottle was sent to the latter who paid the accused therefor, the purchaser not knowing to whom to apply for the liquor and the accused taking an active part in the matter, it was sufficient to warrant the trial justice to conclude that the accused

did receive an order for the liquor and that he placed it with the dealer.

R. v. O'Connor, 3 D.L.R. 23, 20 Can. Cr. Cas. 75, 3 O.W.N. 840, 21 O.W.R. 691.

B. Sales by clubs and their agents.

(§ III B—60)—Club building—Jurisdiction of magistrate.

On an information under the Nova Scotia Temperance Act against a member of a club for unlawfully keeping liquor in the club building, the question is one of fact to be determined by the stipendiary magistrate, no question of jurisdiction arises on which a writ of prohibition can issue. [Hawes v. Hart, 18 N.S.R. 42, distinguished.]

The King ex rel. Burns v. Fielding, 40 D.L.R. 246, 52 N.S.R. 98, 29 Can. Cr. Cas. 293.

Statutory presumption.

A boat moored on a river is a "place" or "premises" within s. 45 of the Liquor License Act, R.S.O. 1914, c. 215, so as to bring into operation the statutory presumption of keeping liquor for sale where the boat is controlled by a club and it is proved that liquor is consumed there.

R. v. Himmelspach, 24 Can. Cr. Cas. 381, 9 O.W.N. 38.

Criminal law — British Columbia Prohibition Act, ss. 10, 35, 38, 39, 41—Knowledge and consent of accused—Onus of proof—Doctrine of reasonable doubt.

For an accused to be found guilty of an offence under ss. 10, 39 or 41 of the British Columbia Prohibition Act, personal knowledge and consent must be brought home to him. Section 35 does not apply to a charge of selling, but only to a charge of keeping for sale. Notwithstanding the provisions of said Act relating to the shifting of the onus of proof, the doctrine of reasonable doubt still prevails; and if the Crown's whole case consists of inferences to be drawn by virtue of ss. 35, 39, 41, denial by accused of any knowledge or consent, which denial raises a reasonable doubt in, though it may not convince, the mind of the court, justifies the acquittal of accused. Section 38 of said Act is not limited in its application to hotel keepers. That section presupposes knowledge and consent on the part of the occupant whereby authority and direction may be presumed; but it is material to the guilt of the occupant that there is knowledge and consent.

Northern Club & Cafe Co. v. Whimster, [1919] 3 W.W.R. 411.

Incorporated club—Evasion of Act.

The King v. Byng, 44 N.S.R. 524, 9 E. L.R. 215.

C. Sales by agent, clerk or partner.

(§ III C—65)—Unlawful sale contracts —Sales by agent.

Knowledge of the agent making sales of liquor in bulk for a nonresident seller, that the buyer intended to resell same in a district in which its delivery by resale would be illegal as contravening the Nova Scotia Temperance Act, 1910, will be imputed to the nonresident principal so as to debar him from recovery in Nova Scotia in an action for goods sold or delivered or upon bills of exchange given for the price.

Wilson v. Mayflower Bottling Co., 14 D. L.R. 711, 47 N.S.R. 441, 13 E.L.R. 489.

Unlawful sales by clerk of company—Liability of president.

The president of a company dealing in intoxicating liquors may be convicted of shipping liquor in violation of the Canada Temperance Act, although the shipment was made by a clerk, but on an order received directly by the president.

R. v. Holyoke; Ex parte McIntyre, 13 D. L.R. 225, 21 Can. Cr. Cas. 422, 42 N.B.R. 135, 13 E.L.R. 210.

Agents or servants—Affidavit negativing offence on taking appeal.

Where the affidavit required from the appellant on appealing from a summary conviction under the Liquor License Act, R.S.S. 1909, c. 130, negativing the offence refers to agents and servants in the plural while the statute requires the affidavit that the appellant did not, by himself "or by his agent, servant, or employee," etc., commit the offence, the variance is not fatal to the appeal, as the affidavit must be construed as including the agents, etc., individually as well as collectively.

R. v. Curran, 19 D.L.R. 120, 22 Can. Cr. Cas. 388.

Sale by employee of license holder to person of prohibited class—Criminal liability of employer.

A hotel keeper holding a liquor license is liable to conviction under the Indian Act (Can.) for unlawful sales of liquor made to Indians by his employees within the general scope of their employment although he had expressly forbidden his employees to sell to Indians.

R. v. Verdi, 23 Can. Cr. Cas. 47.

Unlawful sales—Liability of principal for offence of agent.

The act of a bartender in selling liquor to Indians in contravention of the Indian Act, R.S.C. 1906, c. 81, is one within the scope of his ostensible authority and the hotel keeper who employed him may be convicted for it. [Police Commissioners v. Cartman, [1896] 1 Q.B. 655, followed; R. v. Gee, 5 Can. Cr. Cas. 148, distinguished.]

R. v. Labrie, 23 Can. Cr. Cas. 349.

Orders solicited by unlicensed person.

The solicitation of an order for liquors within Saskatchewan to be supplied by an unlicensed person from a point outside is an offence under R.S.S. c. 130, s. 13, and no recovery can be had in Saskatchewan upon bills of exchange representing the price of the liquors supplied pursuant to the order so obtained because of the prohibition by that statute of actions founded on a contravention thereof; and this although the plaintiffs had a licensed traveller who could

legally have taken the defendant's order but, owing to that traveler's illness, an officer of the plaintiff company, not himself licensed as a commercial traveler for liquors, took the order in his stead.

Strang v. McEwen, 28 Can. Cr. Cas. 445, [1917] 3 W.W.R. 310.

LIQUOR LICENSE ACT (QUE.)—VIOLATION BY AGENT—REFILLING OF BOTTLES.

White v. Leet, 18 Can. Cr. Cas. 337.

(§ III C—67)—ORDERS — FORWARDING TO DEALER OUTSIDE PROVINCE.

It is an offence under the Ontario Temperance Act to receive in Ontario on behalf of a liquor dealer in another province an order for liquor for beverage purposes to be filled by sending the liquor by express directly from the outside province to the customer; the offence of receiving the order would be complete even if the liquor were not sent.

R. v. McEvoy, 28 Can. Cr. Cas. 135, 38 O.L.R. 202.

"PURCHASERS' AGENT" — TRANSMISSION OF ORDER TO SELLER OUT OF PROVINCE—"TRANSACTION IN LIQUOR."

The true meaning of ss. 42, 139 of the Ontario Temperance Act, 1916, when read together, is: "We cannot and do not intend to prohibit dealing with merchants abroad, but we can and do prohibit all canvassing and soliciting of orders for liquor within this province, no matter whence the liquor is to come." Canvassing or soliciting is not a "transaction in liquor" within s. 139—it is a separate act from which a transaction may result. A motion to quash a conviction for receiving an order for intoxicating liquor for beverage purposes, contrary to s. 42, was refused, notwithstanding the signing of a document which gave the dealing the appearance of a "transaction in liquor" through a "purchasers' agent" for a vendor abroad. Whether it was a real transaction or a sham was a question for the magistrate, and there was evidence on which he could convict.

R. v. Toyne, 38 O.L.R. 224.

SOLICITING ORDERS—DISTRIBUTION OF CIRCULARS.

The defendant undertook the distribution of certain circulars in a city. He employed a man, who left at the houses of citizens envelopes with enclosures. Each envelope had upon it the name and address of a person in Buffalo, New York. Enclosed in each envelope was a list of alcoholic liquors and the name of the person in Buffalo. On the back of the list was a form of order, addressed to the person in Buffalo. The agent knew what was in the envelopes—the actual distributor did not. Neither of them took orders, nor was either of them authorized to do so:—Held, that what was done amounted to soliciting orders for beverage purposes, within the meaning of s. 42 of the Ontario Temperance Act, 6 Geo. V., c. 50.

R. v. Lynch-Staunton, 41 O.L.R. 317, 30 Can. Cr. Cas. 209.

ORDER FOR LIQUOR—SHIPPED FROM WITHOUT PROVINCE—AGENT.

The accused applied by way of rule nisi to quash a conviction under the Manitoba Act (c. 50, 7 Geo. V.) providing that no person shall, within Manitoba, take or receive any order or instruction for the purchasing or supplying of liquor for beverage purposes within the province. The accused was supplied, as an agent, by one W., with money with which the accused was to obtain liquor for W. There was nothing to shew that the name or place of residence of the person who was to supply the liquor was known or mentioned. The liquor was shipped by the vendors from outside the province to W. at Winnipeg. Held, that the application should be dismissed.

R. v. Shaw, 29 Can. Cr. Cas. 130, 28 Man. L.R. 325, [1917] 3 W.W.R. 798.

D. BY DRUGGISTS.

(§ III D—70)—MEDICATED INTOXICANT—"DRINKS AND DRINKABLE LIQUIDS WHICH ARE INTOXICATING"—INTERPRETATION.

A special finding by the trial magistrate that an elixir preparation contained sufficient medication to prevent its use as an alcoholic beverage and no more alcohol than was necessary to keep its component parts in solution negatives his finding that it is liquor as defined in the Manitoba Temperance Act, 6 Geo. V. 1916, c. 112, by reason of its containing over 2½ per cent of proof spirits and negatives his finding that it is a "drinkable liquid" which is intoxicating. The intention of the Act is not to include such a preparation in its prohibition of sales of "drinks and drinkable liquids which are intoxicating." [R. v. MacLean, 40 D. L.R. 443, 29 Can. Cr. Cas. 270, approved and followed.]

R. v. Dojacek, 49 D.L.R. 36, 31 Can. Cr. Cas. 224, [1919] 2 W.W.R. 667.

PATENT MEDICINE ACT.

A manufacturer registered as a proprietor of a patent medicine under the Proprietary or Patent Medicine Act, 1908, c. 56 (Can.), cannot be prosecuted under the Sales of Liquor Act (Sask.) for selling it, even if it contains a higher percentage of alcohol than that permitted by the Proprietary or Patent Medicine Act. The proper course would be a prosecution under the latter Act.

R. v. Druggist Sundries Co., 31 D.L.R. 761, 9 S.L.R. 441, 27 Can. Cr. Cas. 346, [1917] 1 W.W.R. 681.

UNLAWFUL SALE BY DRUGGIST—CONVICTION—RIGHT OF APPEAL — STATED CASE—ALTA. LIQUOR ACT.

A druggist convicted of an offence under the Alberta Liquor Act has the right to an appeal by way of stated case under s. 41, subss. 2 and 8, of the Act.

R. v. Weinfield, 47 D.L.R. 85, 31 Can. Cr. Cas. 163, [1919] 2 W.W.R. 586.

UNLAWFUL KEEPING FOR SALE BY DRUGGIST —INVALID'S PORT WINE—ONTARIO TEMPERANCE ACT—DOMINION PROPRIETARY OR PATENT MEDICINES ACT—SCOPE OF PROVINCIAL POWERS—SUMMARY CONVICTIONS ACT—RIGHT OF APPEAL—CERTIORARI.

R. v. Warne Drug Co., 37 D.L.R. 788, 40 O.L.R. 469, 29 Can. Cr. Cas. 384.

MEDICATED WINE.

A patent medicine registered under the Proprietary and Patent Medicine Act, 1908, c. 56, (Can.) which contains more than 2½ per cent proof spirits, but is so medicated as to cause nausea and sickness before intoxication is not an intoxicating liquor within the meaning of the Alberta Liquor Act (1916, c. 4, s. 23).

R. v. Maclean, 40 D.L.R. 443, 13 A.L.R. 244, 29 Can. Cr. Cas. 270, [1918] 2 W.W.R. 154.

PROPRIETARY MEDICINES ACT — MANUFACTURER'S LICENSE—COMPANY.

A manufacturer's certificate granted under the Proprietary Medicine Act, (Can.) for the manufacture of invalid port wine containing a high percentage of alcohol, is not available by way of justification for the manufacture of the same product by a company other than the registered one, even with the latter's consent, where the manufacture and sale would infringe a provincial liquor law but for the registration.

R. v. Redman, 29 Can. Cr. Cas. 304, [1918] 1 W.W.R. 572.

CORPORATION AS DRUGGIST—"LIQUOR"—PATENT MEDICINE ACT.

The defendant, a corporation, kept a drug-store at Regina, and in the course of business sold a liquid known as "Kennedy's Tonic Port." A magistrate convicted the defendant of selling liquor contrary to the Saskatchewan Temperance Act (1917, c. 23), and imposed a fine of $100 under s. 24 of the Act, holding the defendant to be a druggist and therefore within that section. The defendant appealed. Held, that as the evidence shewed that the liquid contained more than 2½ per cent of proof spirits, it must be "conclusively deemed to be intoxicating" under s. 2 (1) of the Act, and as the evidence further shewed that it was capable of human consumption, it was "liquor" within the meaning of that Act. That as the defendant being a corporation was not capable of registration under the Pharmacy Act, it was not a druggist and was not therefore within the protection of the order-in-council of the Province of Saskatchewan of April 24, 1917, nor was it indeed within the protection of that order-in-council on the evidence as the liquid did not contain "sufficient medication or sufficient treatment to prevent its use as an alcoholic beverage." That since the enactment of 7 & 8 Geo. V., c. 30 (4d), registration under the Proprietary or Patent Medicine Act, 7 & 8 Edw. VII., c. 56 (Can.), is not an answer to a charge of want of compliance with a provincial statute. That the defendant had been properly convicted, but not being a druggist the minimum fine that could be imposed was $500 as provided by ss. 26 and 27, and that its fine must be increased accordingly.

R. v. Campbell's Pharmacy, 11 S.L.R. 231, [1918] 2 W.W.R. 794.

INTOXICATING LIQUOR ACT, 1916—OFFENCE UNDER—PARTNERS—JOINT CONVICTION.

The defendants, who were in partnership as druggists, were convicted for an offence under the Intoxicating Liquor Act, 1916, and were fined $25 and costs, and in default of payment, imprisonment for 3 months. Held, on certiorari, that the offence being several in its nature the penalty ought to have been imposed on the defendants severally and the conviction should be quashed. [Ex parte Howard & Crangle, 25 N.B.R. 191 followed.]

The King v. Vroom, Ex parte Johnston, 46 N.B.R. 336.

ONTARIO TEMPERANCE ACT—CONVICTION OF DRUGGIST FOR KEEPING INTOXICATING LIQUOR FOR SALE FOR OTHER THAN STRICTLY MEDICINAL PURPOSES — MOTION TO QUASH — PRELIMINARY OBJECTION — RIGHT OF APPEAL UNDER S. 92 (2)— RIGHT TO CERTIORARI TAKEN AWAY— ONTARIO SUMMARY CONVICTIONS ACT, R.S.O. 1914, c. 90, s. 10 (3).

R. v. Breen, 13 O.W.N. 100.

THE SASKATCHEWAN TEMPERANCE ACT— PENALTY FOR VIOLATION BY DRUGGIST'S CLERK OR ASSISTANT—ABSENCE OF AFFIDAVIT OF MERITS ON CERTIORARI—RIGHT OF COURT TO LOOK AT PROCEEDINGS — ONUS ON ACCUSED TO PROVE TO MAGISTRATE HE WAS DRUGGIST'S CLERK OR ASSISTANT—MAGISTRATE'S RIGHT OF DECISION ON THE EVIDENCE.

A druggist's clerk or assistant can only be convicted for violation of the Saskatchewan Temperance Act under s. 42 thereof and is therefore only liable to a penalty of $100. Where a conviction under the Saskatchewan Temperance Act sentencing accused to a fine of $200 and costs and imprisonment complied with the wording provided in form F. in the schedule of the Act but it was impossible from a reading of the conviction to say whether accused was convicted under ss. 24, 27, or 42, in a proceeding by way of habeas corpus and for certiorari in aid thereof, though on an application by way of habeas corpus the court is not supposed to go outside the warrant of conviction and though the certiorari proceedings did not comply with the Act because the applicant had not filed an affidavit of merits under s. 59, it was held that the court was entitled to look at the proceedings to ascertain whether or not accused was convicted as a clerk or assistant (in which case he was subject to a less penalty and without imprisonment) rather than as a druggist or unauthorized person, as it could not have been the intention of the legislature under

ss. 57, 59, to deprive an accused when illegally sentenced to imprisonment of his legal remedy. The sale of liquor having been proved, the onus is on accused to prove to the magistrate that he was an assistant or clerk and liable only to the penalty applicable to such and the magistrate has a discretion to decline to hold that the appointment as clerk has been proved.

Re Keunedy, [1919] 3 W.W.R. 777.

(§ III D—72)—Unlawful sales—"Specially licensed druggists or vendors"—Sacramental purposes.

Under s. 118 of the Canada Temperance Act, R.S.C. 1906, c. 152, the sale of wine by a "specially licensed druggist or vendor" for sacramental purposes upon a clergyman's certificate may be of an unlimited quantity.

R. v. McAllister, 14 D.L.R. 430, 22 Can. Cr. Cas. 166.

(§ III D—73)—Unlawful sales—Sale on physician's certificate — Canada Temperance Act.

Under s. 119 of the Canada Temperance Act, R.S.C. 1906, c. 152, the sale for medicinal use of intoxicating liquor upon the certificate of a "legally qualified physician having no interest in the sale" may (by analogy to s. 118 of the Act as to sacramental wine) be of an unlimited quantity. The permission for the sale "for medical purposes" of intoxicating liquor on the certificate of a "legally qualified physician having no interest in the sale" granted by s. 119 of the Canada Temperance Act, R.S.C. 1906, c. 152, may include a medical provision for contingencies which may not have arisen at the time of the application for the certificate. The penalty prescribed against physicians by s. 126 of the Canada Temperance Act, R.S.C. 1906, c. 152, read with s. 119, is for giving a certificate for other than strictly medical purposes and the offence in no way depends upon the subsequent use which may be made of the liquor which may be obtained by means of the certificate, and where such certificate is given bona fide and with reasonable discretion and upon professional grounds for "strictly medical purposes," the physician is protected.

R. v. McAllister, 14 D.L.R. 430, 22 Can. Cr. Cas. 166.

Physician's liability for issuing unlawful prescriptions in evasion of prohibitory law.

A conviction of a physician for "unlawfully giving prescriptions in evasion or violation of the Ontario Temperance Act contrary to s. 51" will be quashed as made without proof of any offence if there was no evidence that the prescription was given to anyone in evasion or violation of the Act except that 261 liquor prescriptions were shewn to have been issued by the accused within 30 days.

R. v. Maclaren, 28 Can. Cr. Cas. 210, 39 O.L.R. 416.

Ontario Temperance Act — Illegal prescription by physicians—Finding as to physician's belief in actual need of patient.

It is a question of fact whether a physician prescribing intoxicating liquor for a patient under the Ontario Temperance Act did or did not believe that the case was one "of actual need" and that the use of liquor by the patient was "necessary" (6 Geo. V. Ont. c. 50, s. 51). If there is any evidence before the magistrate to warrant his finding that the physician did not honestly believe that the occasion was one of "actual need," his finding should not be disturbed.

R. v. Rankin, 31 Can. Cr. Cas. 275, 45 O.L.R. 96.

(§ III D—74)—Prohibition Act, N.B.—Practising physician having liquor in his possession—Professional requirements—Quantity allowed.

The intention of the N.B. Prohibition Act (1916, 6 Geo. V. c. 20), is that a duly registered physician should have the right to obtain liquor from anyone holding a wholesale license, or from any retail licensee under the Act, in sufficient quantities to meet his professional requirements and to fill such prescriptions as he may consider it necessary to give, and there is no limit upon the quantity such physician may have at any one time in his possession for such purpose.

The King v. Ritchie; Ex parte Baxter, 45 D.L.R. 461, 31 Can. Cr. Cas. 302, 46 N.B. R. 224.

Unlawful sales—By "physicians themselves, chemists or ordinary druggists"—Canada Temperance Act.

Under s. 125 of the Canada Temperance Act, R.S.C. 1906, c. 152, the sale of spirituous liquors or alcohol by physicians themselves, chemists or druggists, who are not "specially licensed vendors" (under ss. 118, 119) is restricted to the ten-ounce quantity.

R. v. McAllister, 14 D.L.R. 430, 22 Can. Cr. Cas. 166.

E. To prohibited persons.

(§ III E—75)—Professional examination —Illegal prescription — Delivery — Person not entitled to receive—Liability of carrier.

A prescription for liquor given by a physician for the use of the applicant's children who have not been professionally examined by him is illegal under the New Brunswick Intoxicating Liquor Act, (6 Geo. V. c. 20.) The wife of the party obtaining the prescription is not a party entitled to receive the liquor, and anyone who innocently and in perfect good faith carries the liquor and delivers it to her, is guilty of "carrying liquor" and liable under the Act, although such liquor was administered to the children on the advice of a doctor.

The King v. Vroom; Ex parte Merchant, 49 D.L.R. 5.

UNLAWFUL SALES—WHOLESALE TO PROHIBITED PERSONS—ABSENCE OF LICENSE—NOTICE, EFFECT OF.

Where a wholesale bottler and seller of table waters sells some of the commodity to a restaurant keeper in a local option town with warranty that it is "nonintoxicating hop ale," and knowing that the buyer intended to serve it to his customers although having no license to sell intoxicating liquor, there is in effect a warranty that the ale was such that it could be sold by the buyer in the course of his business without thereby contravening the provisions of the Liquor License Act (Ont.), where he proceeded to so deal with the ale believing that it was not an intoxicating liquor.

Stephenson v. Sanitaris, 16 D.L.R. 695, 30 O.L.R. 60.

INTERDICTION — DRUNKENNESS — FAMILY COUNCILS—SUSPENSION OF JUDGMENT—C.C. ART. 336a.

When it is established that an individual is habitually drunk, that the council of the family is pronounced against interdiction, and that the respondent appears to be trying to correct himself of this fault, the court may, on a request for inhibition for 3 months, suspend its judgment.

Adam v. Longpré, 25 Rev. Leg. 28.

(§ III E—77)—DRUNKENNESS ON INDIAN RESERVE—INDIAN ACT (CAN.).

An Indian Agent has jurisdiction under the Indian Act, R.S.C. 1906, c. 81, to try a person who is not an Indian for the offence of being drunk upon an Indian reserve.

R. v. Atkinson, 18 D.L.R. 462, 23 Can. Cr. Cas. 149, 24 Man. L.R. 308, 28 W.L.R. 412, 6 W.W.R. 1055.

INDIAN RESERVE — INVALID CONVICTION — CERTIORARI.

Where a justice of the peace sentenced the petitioner to 2 months imprisonment for having intoxicating liquor in his possession on an Indian Reserve, a writ of certiorari was upheld and the conviction quashed on the grounds that: (1) the complaint was not made in writing; (2) the sentence was pronounced June 2, but the record showed no adjournment, from April 4 to that date, made in the presence of the petitioner, which constituted a sufficient irregularity to quash the conviction.

Nagazoa v. Niquet, 24 Rev. de Jur. 339.

SALES TO PROHIBITED PERSONS—INDIAN ACT (CAN.).

The provisions of the Indian Act (Can.) as to selling intoxicants to Indians will apply to make it an offence to sell to a halfbreed if he is a recognized member of an Indian tribe and votes at tribal elections, although he has abandoned the Indian mode of life and draws no government bounties as an Indian.

R. v. Verdi, 23 Can. Cr. Cas. 47.

SELLING TO INDIAN—IRREGULARITY IN CONVICTION NOT INCLUDING CERTAIN COSTS.

R. v. Matheson; Ex parte Bellivean, 9 E.L.R. 561.

(§ III E—78)—INTEMPERATE PERSONS.

An hotel is not a "public place" within the meaning of s. 13 of 2 Geo. V., c. 55, amending the Liquor License Act (Ont.); such a "public place" must be a street, square, park or other open place.

R. v. Cook, 8 D.L.R. 217, 20 Can. Cr. Cas. 201, 27 O.L.R. 406, 23 O.W.R. 425.

(§ III E—79)—DUPLEX HOUSE—PRIVATE DWELLING—ONTARIO TEMPERANCE ACT.

R. v. Carswell, 43 D.L.R. 715, 42 O.L.R. 34.

F. PROHIBITED HOURS AND DAYS.

(§ III F—81)—ELECTION DAY.

It is not illegal, under the Quebec License Law, s. 974, for a person who is not a licensee and who is not required to obtain a license under that statute, to give away intoxicating liquor to his friends by treating them on the day of a municipal election being held in the municipality; the limitation of the section as to beer and wines used at meals indicates that the words "by any person" used in the second paragraph of s. 974 refer only to licensees.

Collector of Revenues v. Plourde, 24 Can. Cr. Cas. 48.

(§ III F—82)—SALES TO GUESTS AT MEALS WHEN BAR IS CLOSED—ORDERS FOR FLASK OF WHISKEY—TAKING AWAY UNCONSUMED PORTION.

If a hotel proprietor supplies liquor to guests in the dining room of the hotel on a Sunday, the exception in the Liquor License Act R.S.S. 1909, c. 130, s. 65 as to such sales of liquor to be drunk by guests "at their meals at the table," demands that the hotelkeeper shall not sell to any guest more liquor that he reasonably believes a man can drink at the meal and if he supplies a bottle of hard liquor he must see to it that the guest does not carry away in the bottle any left-over portion of its contents. [R. v. Stephens, 1 S.L.R. 509, applied.]

R. v. Curran, 19 D.L.R. 120, 22 Can. Cr. Cas. 388.

"DISPOSAL" OF LIQUOR IN PROHIBITED HOURS—PREVIOUS SALE CONTRACT.

Where a bottle of whiskey was sold by a licensed tavern keeper, during the business hours allowed by the Liquor License Act, and was "laid away" in the kitchen attached to the licensed premises, for the purchaser, who called for it on a Sunday when sales and disposals of liquor are prohibited by the Act, the tavern keeper by then delivering it to the purchaser is guilty of an illegal "disposal" thereof.

R. v. Clarke, 9 D.L.R. 517, 27 O.L.R. 525, 20 Can. Cr. Cas. 486.

(§ III F—83)—HOURS.

Where a bartender of a licensee, permitted to sell intoxicating liquors, sold, during prohibited hours, two separate orders for intoxicating liquors to two individuals both present at the same time and place, each man paying for the liquor furnished him,

such constitutes two separate and distinct violations of the Saskatchewan Liquor License Law, and the holder of the license is liable to 2 separate penalties. [Apothecaries Co. v. Jones, [1893] 1 Q.B.D. 89, and R. v. Scott, 33 L.J.M.C. 15, distinguished.]

Mahoney v. Leschinski, 1 D.L.R. 535, 19 Can. Cr. Cas. 169, 5 S.L.R. 323, 20 W.L.R. 589, 1 W.W.R. 1064.

UNAUTHORIZED SALE BY SERVANT.

The provision of the B.C. Liquor License Act, s. 81, subs. 118, making the licensee liable to conviction for unlawful sales by his servants, does not apply to the offence of selling during prohibited hours in contravention of the Liquor License Act Amendment Act, 1916, c. 37 (B.C.); the liability under s. 3 of the latter Act is upon the "person violating" it, and the penalty applies only when the accused has personally committed the offence or has authorized or connived at it.

R. v. Cienci, 35 D.L.R. 164, 28 Can. Cr. Cas. 107, 24 B.C.R. 81.

PROOF OF LICENSE.

On a charge under the Liquor License Act, C.S.N.B., 1903, c. 22, s. 48 (1), against an alleged licensee for selling in prohibited hours, the magistrate may infer that the accused was a licensee from uncontradicted oral testimony of witnesses, that he kept a hotel and habitually conducted it as if it were a licensed house, although the prosecution did not formally prove the license by a certificate of the license inspector under s. 93 of the Act.

Ex parte McCleary: R. v. Dugas, 25 Can. Cr. Cas. 148, 43 N.B.R. 65.

SALE DURING PROHIBITED HOURS—SUFFICIENCY OF CONVICTION.

In a prosecution for selling intoxicating liquor contrary to the provisions of s. 48 (1) of the Liquor License Act, which prohibits the sale by license holders during certain hours, proof that the accused kept an hotel and sold liquors is, in the absence of any proof to the contrary, evidence that the accused was a licensed holder, and a conviction based on such evidence will not be quashed on certiorari.

The King v. Dugas; Ex parte McCleary, 25 Can. Cr. Cas. 148, 43 N.B.R. 65.

G. PLACE OF SALE OR POSSESSION.

(§ III G—85)—"PRIVATE DWELLING HOUSE" —DWELLING AND SHOP.

A private dwelling, which is part only of a building, another part of which is used as a shop or factory, is not a place where intoxicating liquor may be kept, having regard to the definitions of "private dwelling house" in the Ontario Temperance Act, 6 Geo. V., c. 50: see s. 41 (1) and s. 2, clause (i) and subclause (i). A motion to quash a magistrate's conviction for having liquor on premises other than a private dwelling house, was dismissed.

R. v. Purdy, 41 O.L.R. 49.

ONTARIO TEMPERANCE ACT—MAGISTRATE'S CONVICTION FOR OFFENCE AGAINST S. 41 (1) — "PRIVATE DWELLING HOUSE" — SUITE OF ROOMS IN APARTMENT HOUSE IN CITY—DEFENDANT LIVING ALONE—"FAMILY"—SECTION 2 (I) (II).

The defendant had intoxicating liquor in his "flat" or suite of rooms in an apartment house in a city. He was unmarried; he slept in the apartment, and took his meals (except breakfast) in it; he was the only person who slept there, but a servant came in during the day, cared for the premises, and prepared the defendant's meals on the premises:—Held, that the defendant's apartment was a "private dwelling house" within the definition of that term in s. 2 (i) of the Ontario Temperance Act, 6 Geo. V. c. 50, which, by clause (ii), includes a suite of rooms in which "there are facilities for cooking, and a family actually residing, cooking, sleeping and taking their meals." And a magistrate's conviction of the defendant for having intoxicating liquor in a place other than the private dwelling house in which he resided, contrary to s. 41 (1) of the Act, was quashed.

R. v. Baird, 45 O.L.R. 242.

DEFECT IN INFORMATION.

A charge under the Canada Temperance Act that the accused on a specified date "unlawfully did sell intoxicating liquor contrary to Part II. of the Canada Temperance Act then in force in the said county of Sunbury" does not imply that the illegal sale took place in that county, as Part II. is in force in many different counties; nor will the facts that the summons stated an offence at a particular place in that county within the jurisdiction of the commissioner trying the charge, and that the evidence adduced proved such offence, cure the defect and give the commissioner jurisdiction where the defendant did not appear to answer the charge, but his counsel appeared to object to the jurisdiction and withdrew on the objection being overruled by the commissioner.

Ex parte Monahan: R. v. Hubbard, 24 Can. Cr. Cas. 127, 42 N.B.R. 524.

KEEPING FOR SALE.

The amendment of 1915 to the Quebec License Law, s. 1011, by which in lieu of the fine of $50 for unlawfully keeping liquors for sale, the fine is made discretionary with the judge, with a maximum of $200, does not apply to a prosecution which was pending when the amendment was passed; such case is governed by the prior law when the amendment is not expressly made retroactive, and the court has no discretion to reduce the fixed fine of $50 which it declares.

Collector of Revenue v. Boisvert, 24 Can. Cr. Cas. 138.

KEEPING FOR SALE—SEARCH AND SEIZURE.

R. v. Colton, 26 Can. Cr. Cas. 95, 9 O.W. N. 233.

ONTARIO TEMPERANCE ACT—MAGISTRATE'S CONVICTION FOR OFFENCE AGAINST S. 41 (1)—HAVING INTOXICATING LIQUOR IN PLACE OTHER THAN PRIVATE DWELLING HOUSE—PROOF OF INTOXICATING NATURE OF LIQUOR FOUND ON PREMISES—PROOF THAT HOUSE WHERE LIQUOR FOUND NOT "PRIVATE DWELLING HOUSE"—USE OF HOUSE AS BAWDY-HOUSE—CONVICTION OF DEFENDANT AS KEEPER—SECTION 2 (i) OF ACT.

R. v. Tereschuk, 17 O.W.N. 281.

TEMPERANCE ACT—LIQUOR ORDERS.

It is not an offence under the Manitoba Temperance Act to take orders for liquor in Manitoba provided the liquor is supplied from outside of Manitoba.

Re Manitoba Temperance Act and Great West Wine Co., [1917] 1 W.W.R. 232.

(§ III G—86)—AGENT TO TRANSMIT BUYER'S ORDER.

A person acting in Alberta as agent for others wishing to transmit orders for liquors and the price of same to persons outside of the province for shipment direct to the buyers, does not thereby become liable to conviction for unlawfully "selling" liquor in Alberta, although he is remunerated out of the price with the concurrence of the buyer by a commission allowed him by the liquor dealer to whom the order is sent; "selling" implies a transference of the property in the thing sold unless the statute creating the offence gives it a more extended meaning.

R. v. People's Wine & Spirit Brokers, 35 D.L.R. 115, 28 Can. Cr. Cas. 16, 10 A.L.R. 535, [1917] 2 W.W.R. 14.

WHAT IS PLACE OF SALE.

To constitute the offence under s. 111 of the Ontario Liquor License Act, as amended by 2 Geo. V. c. 55, s. 9, in an unlicensed place, of keeping up a bar sign or of displaying bottles and casks so as to induce a reasonable belief that liquors are sold there it is essential that what is done should induce a belief that (a) premises in fact unlicensed are licensed or (c) that liquor, i.e., intoxicating liquor, is "sold or served therein;" the statute requires something more to be shewn than what would be necessary, and proper for the sale of nonintoxicating liquors.

R. v. Bevan, 8 D.L.R. 86, 4 O.W.N. 400, 20 Can. Cr. Cas. 237, 23 O.W.R. 510.

PLACE OF SALE—DWELLING HOUSE.

A dwelling house may be a place wherein liquors are sold or reputed to be sold, within the meaning of the N.S. Liquor License Act, C.S.N.B. 1903, c. 22, so as to permit an inspector to enter and search for liquors which he has good reason to believe are being therein stored for sale in violation of law, where, to his personal knowledge, the owner of the house has been previously convicted both for illegally keeping and illegally selling liquor on the premises.

The King v. Matheson; Ex parte Guimond, 12 D.L.R. 480, 21 Can. Cr. Cas. 312, 41 N.B.R. 581, 13 E.L.R. 58.

ILLEGAL KEEPING—"THE OCCUPANT" OF DWELLING.

Where a dwelling house is owned by the husband alone and he is in actual use and possession of same, he is "the occupant" under s. 54 of the Ontario Temperance Act, 6 Geo. V., Ont., c. 50, and the exemption under that Act of the dwelling house as a place where liquor may be kept is not withdrawn under s. 54 by the conviction of "the occupant's" wife for infraction of the Act. [R. v. Irish, 18 O.L.R. 351, applied.]

R. v. Condola, 30 Can. Cr. Cas. 298, 43 O.L.R. 591.

WHAT IS PLACE OF SALE—ACCEPTANCE OF ORDER FOR DELIVERY ELSEWHERE.

A brewer holding a brewer's provincial license may not sell even in wholesale quantities at the brewery to a person who is not a holder of a liquor license if a local option by-law is in force in the municipality in which the brewery is situated, and the transaction is none the less a "sale" in such municipality in contravention of the statute [Liquor License Act, R.S.O. 1914, c. 215, s. 155], although the order was given and accepted at the brewery for delivery in another municipality in which also local option was in force and although there was no appropriation of the goods at the time; the word "sell" in s. 155 is not to be construed as limited to the strict technical sense so as to demand an allocation of the goods. [Lambert v. Rowe, [1914] 1 K.B. 38, applied; Pletts v. Campbell, [1895] 2 Q.B. 229, distinguished.]

R. v. Wright, 24 Can. Cr. Cas. 321, 33 O.L.R. 237.

(§ III G—87)—TEMPERANCE ACT—PLACES APPLICABLE.

Part II. of the N.S. Temperance Act, 1910, is in force under Acts 1916, c. 22, in the city of Halifax; the penalties provided thereunder are applicable to offences in the said city against Part I. of that Act.

Re Carrie Bradbury, 30 D.L.R. 756, 27 Can. Cr. Cas. 68, 50 N.S.R. 298.

PROHIBITED AREAS—EXCEPTIONS—SEIZURE—REPLEVIN.

It is not a violation of s. 9 of the Nova Scotia Temperance Act, 1910, c. 2, as amended by Acts 1911, c. 33, to send intoxicating liquor from the city of Halifax into any part of the province in which the prohibitory part of that Act is in force, because s. 9 is in that part of the Act which by s. 3 is expressly declared not to apply to the city of Halifax. There being scope for the application of s. 9 of the Act, without applying it to a charge (laid prior to the amendment of 1915) of unlawfully causing liquor to be sent from the city of Halifax to a prohibition district in Nova Scotia prosecuted in the latter district, full effect must be given to the declaration contained in s. 3 of the statute to the effect that Part I. thereof shall not apply to the city of

Halifax unless and until a proclamation shall bring it into effect there; and where there was no such proclamation and the information, summary conviction, and warrant of distress thereunder disclosed only that the accused caused the liquor to be "sent" from Halifax to the prohibition district without stating that it reached its destination or even left the city of Halifax, summary conviction discloses no offence under the Act; and such conviction together with the warrant of distress issued thereunder form no answer to a writ of replevin against the constable to recover goods seized to realize the fine illegally imposed.

Kelly v. Scriven, 28 D.L.R. 319, 26 Can. Cr. Cas. 187, 50 N.S.R. 96.

ILLEGAL POSSESSION—STATUTORY PRESUMPTION FROM RECEIVING.

The consignee who receives at an express office in Ontario a consignment of liquor has cast upon him the statutory onus of proving a legal disposition or possession thereof (Ontario Temperance Act, s. 88), and if he fails to satisfy the magistrate on his trial for illegally having or keeping the liquor in a place other than his dwelling house that he did not commit the offence a conviction may legally be made.

R. v. Moore, 30 Can. Cr. Cas. 206, 41 O.L.R. 372.

POSSESSION—PRIVATE DWELLING HOUSE—BOARDER.

A dwelling where only one boarder is kept is still a "private dwelling house" within the meaning of the Liquor Act, 1916 (Alta.), s. 3, so as to permit lawful possession by the boarder of liquor kept by him there if the quantity is not excessive.

R. v. Scott, 28 Can. Cr. Cas. 102, 11 A.L.R. 163, [1917] 2 W.W.R. 317.

CARRIER'S LIABILITY FOR DELIVERING TO PERSON NOT KNOWN TO BE ENTITLED TO HAVE LIQUOR IN POSSESSION—STATUTORY ONUS OF PROOF.

The effect of s. 49 of the Ontario Temperance Act, 6 Geo. V. c. 50, is that a carrier may be convicted of delivering liquor to "a person not entitled to sell and who sells such liquor or who buys for the purpose of reselling," if the magistrate has before him evidence from which he could properly infer that the person taking delivery from the carrier, and who was personally unknown to the carrier, had bought for the purpose of reselling although there was no direct evidence of any resale or as to the identity of the consignee. The onus is upon the carrier to satisfy the magistrate that he had reason to believe, and did believe, that the consignee did not buy to resell.

R. v. McEwan, 30 Can. Cr. Cas. 212, 41 O.L.R. 324.

(§ III G—88)—PLACE OF SALE—EXTRA BAR PROHIBITED.

The maintenance of a separate extra bar in a licensed hotel, although temporary and for one day only, is an infraction of the Liquor License Act, R.S.O. 1897, c. 245, s. 65, the inhibiting words of the Act that not more than one bar shall be "kept" meaning that more than one bar should not be had in use and not involving the idea of permanency or continued user. [R. v. Lewis, 41 C.L.J. 842, dissented from; Shelley v. Bethell, 12 Q.B.D. 11, applied.]

R. v. Genz, 22 Can. Cr. Cas. 110.

(§ III G—89)—KEEPING FOR SALE—STATUTORY PRESUMPTIONS.

The mere finding of liquor does not create a statutory presumption that liquor is kept for sale on the premises unless the special circumstances stated in s. 102 of the revised Act, R.S.O. 1914, c. 215, are shewn to exist, for example, the maintenance of a bar.

R. v. Nero, 18 D.L.R. 688, 23 Can. Cr. Cas. 167, 6 O.W.N. 420.

EVIDENCE OF UNLAWFUL KEEPING—CARRIER.

Under s. 54 of the Alberta Liquor Act the onus is upon the accused of proving that a package of intoxicating liquor consigned to the accused and received by him from the express company, and which was found in his possession while he was taking it from the express office to his dwelling house, was not intended for sale on being charged under s. 23 of the Act with keeping liquor for sale; and this although the liquor was found in an omnibus of which the accused had charge as driver for a local common carrier, the express company's responsibility in respect of the consignment from outside of Alberta having ceased on delivery to the accused.

R. v. Collins, 35 D.L.R. 296, 28 Can. Cr. Cas. 105, 11 A.L.R. 32, [1917] 2 W.W.R. 170.

STATUTORY PRESUMPTIONS—REVIEWING EVIDENCE ON CERTIORARI.

On certiorari in respect of a summary conviction for keeping liquor on premises other than a private dwelling house in contravention of s. 24 of the Alberta Liquor Act, the court is bound to examine the evidence on the part of the accused, not to weigh any contradiction, but, assuming the truth of the evidence for the prosecution, to ascertain whether the accused has negatived the statutory presumption raised by s. 54 of the Act on prima facie proof being given of his possession, charge or control of the liquor, whereby the onus of disproving the offence is, by said s. 54, then thrown on the accused.

R. v. Covert, 34 D.L.R. 662, 28 Can. Cr. Cas. 25, 10 A.L.R. 349, [1917] 1 W.W.R. 919.

REBUTTING STATUTORY PRESUMPTION — QUANTITY.

The statutory presumption of keeping liquor for sale which arises under the Alberta Liquor Act from possession of a large quantity at a private house, may be rebutted by the testimony of the accused denying that he kept it for sale; and where there was no evidence of frequenting of the place by others and nothing to throw dis-

credit upon the testimony of the accused, the magistrate is bound to accept his evidence in disproof of the statutory presumption and cannot legally convict in the face of such rebuttal where the case for the prosecution depends on the statutory presumption alone. The court on certiorari will look at the evidence and set aside a summary conviction under such circumstances as not supported by any evidence upon which the magistrate could find the accused guilty. [R. v. Emery, 33 D.L.R. 556, 27 Can. Cr. Cas. 116, and R. v. Covert, 28 Can. Cr. Cas. 25, 34 D.L.R. 662, applied.]

R. v. Barb, 35 D.L.R. 102, 28 Can. Cr. Cas. 93, [1917] 2 W.W.R. 326.

IRRELEVANT EVIDENCE — STATUTORY PRESUMPTION.

Where the magistrate's discredit of the defendant's evidence on a charge of keeping liquor given in rebuttal of a statutory presumption arising under the Ontario Temperance Act from the finding of a small quantity in defendant's shop, may have been influenced by irrelevant evidence of a kind which would be likely to cause prejudice to the accused, the conviction will be set aside on certiorari. [R. v. Lapointe, 4 D.L.R. 210, 20 Can. Cr. Cas. 98, 3 O.W.N. 1469, applied.]

R. v. Melvin, 34 D.L.R. 382, 38 O.L.R. 231, 27 Can. Cr. Cas. 350.

STATUTORY FORMS OF PROCEEDINGS.

Where a liquor law authorizes the use of special forms thereby provided for certain offences and as to others declares that those forms shall form a guide for framing new forms in like manner, the use of the word "liquor" as meaning "intoxicating liquor" will be validated as regards an information, summons and conviction under the Act for an offence as to which a specific form is not provided, if such use of the word is generally, although not universally, made in the statutory forms.

Ex parte Pirie, 29 Can. Cr. Cas. 164, 45 N.B.R. 195.

DOCUMENT IMPROPERLY ADMITTED TO PROVE ANALYSIS.

Where the only legal evidence to support a summary conviction for keeping liquor in contravention of the Ontario Temperance Act does not satisfy the court hearing a certiorari motion to quash the conviction that the offence was committed (Cr. Code s. 1124), and the proceedings returned shewed that the magistrate had improperly admitted an invalid certificate of analysis which probably had influenced his finding of guilt, the conviction will be quashed. [R. v. Melvin, 38 O.L.R. 231, applied.]

R. v. Schooley, 27 Can. Cr. Cas. 444, 11 O.W.N. 341.

STATUTORY PRESUMPTION FROM POSSESSION.

Although sales of intoxicating native wine in quantities of over five gallons are allowed by the Ontario Temperance Act, the possession of same by the purchaser throws upon him the onus of proving that he was not guilty of the offence of having the same in his possession for illegal sale or disposal, if charged with that offence (s. 88).

R. v. Nazzareno, 30 Can. Cr. Cas. 290, 44 O.L.R. 36.

UNLAWFUL KEEPING—LABELS AS EVIDENCE.

On a conviction for unlawful possession of intoxicating liquor being brought up for review on certiorari, the bottles put in as exhibits at the trial should be transmitted for the certiorari hearing, if the labels on the bottles are relied upon as a representation of their contents by the accused.

R. v. Dickey, 25 Can. Cr. Cas. 55, 32 W.L.R. 404, 9 W.W.R. 142.

SEPARATE CONVICTIONS FOR SELLING AND KEEPING FOR SALE.

The offences of illegally selling intoxicating liquor and of keeping intoxicating liquor for sale are distinct offences, and separate proceedings for each are maintainable under the Liquor License Act, R.S.O. 1914, c. 215, although charged as of the same day.

R. v. Sinkolo, 24 Can. Cr. Cas. 293, 8 O.W.N. 515.

STATUTORY PRESUMPTION OF UNLAWFULLY KEEPING.

R. v. Williams, 27 Can. Cr. Cas. 264, 11 O.W.N. 243.

STATUTORY PRESUMPTION—COMMUNICATING DOORS.

It is a question of fact for the magistrate as to whether one or more parts of a building divided off into sections with locked doors between the sections is or are under the control of the accused found in possession of one section so as to raise against him the statutory presumption, under R.S.O. 1914, c. 215, s. 102, of keeping liquor for sale by reason of the police finding intoxicating liquor in quantity stored in another section.

R. v. On Kee, 26 Can. Cr. Cas. 392, 11 O.W.N. 137.

POSSESSION—STATUTORY PRESUMPTIONS.

The onus is upon the accused charged with an offence under the Ontario Temperance Act, 1916, c. 50, to prove his innocence to the satisfaction of the magistrate after it has been shewn that he was in possession of the liquor (s. 88); the onus is not shifted by the mere denial of the offence by the accused in giving evidence on his own behalf if the magistrate does not given credence to the denial.

R. v. Le Clair, 28 Can. Cr. Cas. 216, 39 O.L.R. 436.

The fact that a person charged with keeping liquor for sale testifies that the liquor found in his possession was kept for his own use and not for the purpose of sale, does not necessarily disprove the statutory presumption arising from such possession; the justice is entitled to weigh the evidence. [R. v. Covert, 34 D.L.R. 662, 10 A.L.R. 349, explained.] Evidence held sufficient to justi-

fy a conviction for keeping intoxicating liquor for sale.

R. v. McKinley, 28 Can. Cr. Cas. 294, [1917] 2 W.W.R. 1069.

PRESUMPTION FROM FINDING ON SEARCH WARRANT.

The finding of intoxicating liquor upon a search made under warrant raises a statutory presumption of keeping for sale under s. 97 of the Ontario Temperance Act, 1916, only against the occupant of the premises where found and not against another person charged who was the owner of the liquors and had stored it on the premises with the consent of the occupant.

R. v. Riddell, 28 Can. Cr. Cas. 317, 38 O. L.R. 222.

CRIMINAL LAW—PROHIBITION ACT—SALE OF LIQUOR — CONVICTION — CERTIORARI — VENUE—B.C. STATS. 1916, c. 49.

Before imposing the consequences of an infraction of the Prohibition Act there should be reasonable particularity of proof as to when and where the offence alleged was committed.

R. v. Lewis, 25 B.C.R. 442.

EVIDENCE OF SALE — PARTNERSHIP — PRESUMPTION OF KNOWLEDGE.

The King v. Milkins, 17 Can. Cr. Cas. 20.

H. SEIZURE AND DESTRUCTION.

(§ III H—90)—SEARCH AND SEIZURE—LICENSE INSPECTOR — RIGHT TO ENTER PREMISES WITHOUT SEARCH WARRANT.

A liquor license inspector may enter a house without a search warrant in order to search for liquor which he, with good reason, believes is being stored for sale in violation of law, when he can do so peaceably and without force.

The King v. Matheson; Ex parte Guimond, 12 D.L.R. 480, 21 Can. Cr. Cas. 312, 41 N.B.R. 581, 13 E.L.R. 58.

SEIZURE AND DESTRUCTION—LIQUORS IN POSSESSION OF GOVERNMENT RAILWAY — RIGHT TO BREAK INTO STATION AND SEIZE.

Since the title to the property of the Intercolonial Railway is vested in the Dominion Government, and is not subject to provincial legislation, a provincial revenue officer cannot lawfully break into a railway station of that railway for the purpose of seizing under a provincial law a consignment of intoxicating liquor which he may have reason to believe the consignee intends to sell in violation of the provincial liquor license law.

The King v. L'Heureux, 14 D.L.R. 604, 14 Can. Ex. 250.

ILLEGAL SEARCH OF PERSON.

A search warrant for liquors issued under the Nova Scotia Temperance Act, 1910, s. 42, does not authorize the officer or his assistant to search the person of the occupant of the premises wherein liquor is suspected of being unlawfully kept for sale; a compulsory search of the person at the time of searching the premises referred to in the search warrant is punishable as a common assault, if no liquor was found on the premises, and there was no authority to arrest the party searched.

R. v. Paint, 36 D.L.R. 717, 28 Can. Cr. Cas. 171, 51 N.S.R. 114.

VALIDITY—STATUS OF INFORMANT.

An order for the destruction of liquor condemned, following a conviction under the Canada Temperance Act for storing the liquor, is entirely separate and distinct from the conviction itself. The magistrate, therefore, may properly order the liquor to be destroyed by the complainant on whose information the conviction was made. [Ex parte Dewar, 39 N.B.R. 143, followed; Ex parte McCleave, 35 N.B.R. 100, distinguished.] An inspector appointed for the enforcement of the Act may legally be appointed to carry out an order for destruction of seized liquor following a conviction for illegally storing the same, although such liquor was originally seized by the inspector and the prosecution in respect thereof was taken at his instance. [Ex parte Dewar, 15 Can. Cr. Cas. 273, 39 N.B.R. 143, applied.]

Ex parte Doyle; R. v. Lawlor, 31 D.L.R. 90, 27 Can. Cr. Cas. 60, 44 N.B.R. 90.

EVIDENCE — GOVERNMENT ANALYSIS — CERTIFICATE.

A municipal constable or policeman is not an "officer of the Crown" within the meaning of s. 106 of the Liquor License Act, R.S.O. 1914, c. 215, so as to make admissible in evidence for the prosecution under that section a certificate of analysis of alleged intoxicating liquors seized by him and forwarding at his instance to the provincial government analyst for analysis and report.

R. v. Hurley, 31 D.L.R. 18, 26 Can. Cr. Cas. 159, 36 O.L.R. 159.

LIQUOR IN BONDED WAREHOUSE — PERMISSION OF CROWN TO REMOVE TO ANOTHER PROVINCE—"DUTY SECURED BY BOND"—LIQUOR SEIZED UNDER TEMPERANCE ACT —RIGHT OF CROWN TO LIEN FOR DUTY.

The Crown having parted with its possession of intoxicating liquor by granting permission to the shipper in Ontario to remove it from his bonded warehouse as being the property of the shipper about to be transferred into the possession of a merchant in Nova Scotia, the duty having been "secured by bond" and such course being authorized by order-in-council; is not entitled to a lien on such liquor for such duty, and the liquor having been seized under the N.S. Temperance Act, is under the jurisdiction of the court to be dealt with under the Act. The Att'y-Gen'l of Canada is not a necessary party.

Att'y-Gen'l of Canada v. McCormick, 45 D.L.R. 463, 53 N.S.R. 216.

SEIZURE OF LIQUOR—GOVERNMENT RAILWAY — NOVA SCOTIA TEMPERANCE ACT, 1 GEO. V. C. 33—PROVISIONS AS TO CARRIERS.

The provisions of the Nova Scotia Tem-

perance Act authorizing the seizure of liquor in transit or on the premises of any carrier do not apply to liquor in the custody of the Crown on the premises of a Government Railway. [The Queen v. McLeod, 8 Can. S.C.R. 1.]

Martinello v. McCormick, 50 D.L.R. 799, reversing 45 D.L.R. 364, 31 Can. Cr. Cas. 51, 53 N.S.R. 64 at 76.

INQUIRY FOR FORFEITURE ORDER.

On an equal division of the Supreme Court of Nova Scotia, a motion for prohibition stood dismissed by which it was sought to prevent a magistrate who had made a summary conviction for keeping liquor for sale in contravention of the Nova Scotia Temperance Act following a plea of guilty of the charge laid in general terms without identification of the liquor, from proceeding with a further hearing and inquiry upon a proceeding in rem under that Act to determine whether the liquor seized or what part thereof should be ordered to be destroyed.

R. v. Fong Quing, 39 D.L.R. 60, 51 N.S.R. 503, 29 Can. Cr. Cas. 61.

SEIZURE UNDER WARRANT — REASONABLE TIME—REPLEVIN.

Where intoxicating liquor has been seized under warrant (s. 46 of c. 2, N.S. 1910), and brought into court, the magistrate may lawfully detain it for a reasonable time pending proceedings for its condemnation, and no other court has a right to interfere with such possession.

Lavie v. Hill, 40 D.L.R. 459, 29 Can. Cr. Cas. 287, 52 N.S.R. 215.

REPLEVIN OF LIQUOR SEIZED — PRIVATE DWELLING HOUSE.

A replevin order should not be granted against a chief of police for the return of intoxicating liquor in his custody which has been seized in a place other than a private dwelling house.

Lim Jim v. McRae, [1918] 1 W.W.R. 404.

WHEN JUSTIFIED.

Where there is no reason to suspect that intoxicating liquor consigned by rail from a licensed district to an unlicensed district in Nova Scotia is intended for sale or to be used otherwise than for the personal use of the consignee, the seizure of the liquor is not justified under s. 36, N.S. Acts, 1911, c. 33, and the magistrate should order it restored to the consignee.

R. v. Publicover, 21 D.L.R. 203, 24 Can. Cr. Cas. 1, 49 N.S.R. 85.

SEIZURE UNDER SEARCH WARRANT — PRESUMPTION.

The statutory presumption of keeping liquor for sale raised against the occupant of premises where liquor is found by officers executing a search warrant under the Nova Scotia Temperance Act has reference not merely to the arrest of the occupant in that event, which s. 46 authorizes, but applies also against such occupant on being charged with unlawful keeping the liquor for sale.

R. v. Hoare, 24 Can. Cr. Cas. 279, 49 N.S.R. 119.

SEIZURE AND CONDEMNATION — STATUTORY PRESUMPTION — SHIPMENT AS OTHER GOODS—DESTINATION OUTSIDE OF ONTARIO.

On the seizure of intoxicating liquor in transit in Ontario, and the hearing by a justice of condemnation proceedings under the Ontario Temperance Act, 1916, the fact that the liquor was consigned as other goods raises a statutory presumption that it was intended for use in contravention of the Act. The application of the Act is not displaced by the production of a way-bill shewing places of shipment and destination both outside of Ontario; and because of the statutory presumption the claimant of the liquor seeking to prevent its confiscation has cast upon him the onus of proving not only that the transaction was one to which the Act does not apply, but that he is the owner.

Re Renaud's Application, 30 Can. Cr. Cas. 426, 44 O.L.R. 238.

SEIZURE AND DESTRUCTION — NOVA SCOTIA TEMPERANCE ACT NOT EFFECTIVE AS TO LIQUOR IN TRANSIT ON FEDERAL GOVERNMENT RAILWAY.

A provincial liquor law cannot authorize a constable to seize, for the purpose of confiscation proceedings thereunder, intoxicating liquor under the control of the Crown as represented by the Government of Canada operating a Canadian Government Railway although the liquor was merely received by the railway as freight consigned to a person in the province. Magistrate's order for destruction of the liquor set aside.

Ex parte McGrath, 31 Can. Cr. Cas. 10.

SEIZURE AND DESTRUCTION—WHO MAY EXECUTE ORDER FOR.

There is nothing in the Canada Temperance Act, R.S.C. 1906, c. 152, to prevent the appointment of the officer who laid the information for violation of the Act from carrying out an order to destroy liquors seized in the proceeding. [Ex parte Dewar, 15 Can. Cr. Cas. 273, 39 N.B.R. 143, distinguished.]

The King v. Le Blanc, 21 Can. Cr. Cas. 221, 12 E.L.R. 66.

SEIZURE AND DESTRUCTION.

A commissioner of police appointed under R.S.C. 1906, c. 92, is a person "fulfilling a public duty" within the terms of R.S.O. 1897, c. 88, and is entitled to notice of action thereunder before suit is brought against him for a return of a fine and costs alleged to have been irregularly levied upon the plaintiff by the commissioner in virtue of his office in respect of plaintiff's possession of intoxicating liquor within a prohibited district in alleged contravention of ss. 150, 151, Cr. Code. Where an order for the forfeiture and destruction of intoxicating liquor seized was made by a commissioner of

Dominion police assuming to act under the authority of Code s. 614 in the presence of the owner of the liquor brought before him by the seizing officer, and the commissioner had, by statute, jurisdiction over the subject-matter and over the owner in respect thereof, a notice of action must be given within 6 months under R.S.O. 1897, c. 88, even if the forfeiture was irregularly made or was wholly void or contrary to natural justice, and was not reduced to writing; and semble the action itself must be brought within 6 months under Cr. Code, s. 1149.

Geller v. Loughlin, 18 Can. Cr. Cas. 461, 24 O.L.R. 18, 19 O.W.R. 318.

JURISDICTION OF MAGISTRATE TO ORDER DESTRUCTION—CONDITIONS TO BE STRICTLY OBSERVED—INFORMATION NOT LAID BY PERSON MAKING SEIZURE.

The provisions of s. 36 of c. 33 of the Acts of 1911, as amended by c. 46 of Acts of 1913, with respect to the seizure and removal of liquor found in transit or in course of delivery and the power of magistrates to order the destruction of the same, must be strictly followed, and where the information is not laid by the person who makes the seizure, the magistrate before whom the matter is brought has no jurisdiction to order the destruction of the liquor seized, and such order, if made, will be set aside.

The King v. Clarke, 52 N.S.R. 406.

I. TRIAL OF OFFENDERS.

(§ III I—91)—EXCLUSIVE JURISDICTION OF TOWN STIPENDIARY MAGISTRATE—NOVA SCOTIA TEMPERANCE ACT, 1900.

The provision of the Town Incorporation Act, R.S.N.S. 1900, c. 71, ss. 233, 234, whereby a police office is established where "all the police business of the town shall be transacted," and whereby the police court is presided over by a stipendiary magistrate for the town exercising therein "all the jurisdiction of two justices of the peace or a stipendiary magistrate" has the effect of establishing a separate and exclusive jurisdiction and of taking away the jurisdiction of county justices to try an offence against the Nova Scotia Temperance Act, 1900, where the commissions to county justices do not expressly include the town, and this although the Temperance Act provides that prosecutions thereunder may be brought before "any magistrate" having jurisdiction where the offence was committed and defines magistrate as a "stipendiary magistrate or two justices."

R. v. Cody, 18 D.L.R. 773, 23 Can. Cr. Cas. 211, 48 N.S.R. 255.

ALBERTA LIQUOR ACT—INFORMATION—PARTICULARS — CONVICTION — EVIDENCE TO SUPPORT—APPEAL.

It is no ground for objection to an information under the Alberta Liquor Act, that it does not contain all the particulars it might, where it is clear from the evidence that the informant was prosecuting for a breach of the Act, in selling on a prescription signed by a certain doctor, and where there is ample evidence to support a conviction for an offence in so doing. Whether the magistrate should have ordered particulars to be given is not a question of law which can be raised on a stated case.

R. v. Weinfield, 47 D.L.R. 85, 31 Can. Cr. Cas. 163, [1919] 2 W.W.R. 586.

ABSENT DEFENDANT — PLEA OF GUILTY BY COUNSEL.

As ss. 715, 720 Cr. Code, pertaining to the appearance of counsel at trial before a magistrate are made applicable by s. 17 of the Prohibition Act, P.E.I. 1907, to prosecutions thereunder, counsel may appear and enter for an absent defendant a plea of guilty for a violation of the latter Act.

R. v. McDonald, 11 D.L.R. 710, 21 Can. Cr. Cas. 229, 12 E.L.R. 166.

INFORMATION — AMENDMENT — DATE AND INFORMANT.

A conviction under the Liquor Act (Alta.) is not invalidated, by amending the original information before any evidence is taken, by changing the date of the offence, and changing the informant to another constable who swears to the information as amended. [R. v. Chew Deb, 9 D.L.R. 266, distinguished.]

R. v. Van Fleet, 41 D.L.R. 65, 13 A.L.R. 320, 30 Can. Cr. Cas. 147, [1918] 2 W.W.R. 432, affirming 38 D.L.R. 592.

A magistrate may try a person in his absence for selling liquor without a license where he has been duly summoned and is represented by counsel at the trial.

R. v. Matheson; Ex parte Martin, 2 D.L.R. 835, 20 Can. Cr. Cas. 153, 41 N.B.R. 187, 10 E.L.R. 585.

The provision of s. 24 of the Nova Scotia Temperance Act (N. S. 1910, c. 2, as amended N.S. 1911, c. 33) which declares that the offender on each subsequent conviction shall be "liable to imprisonment for 3 months," gives no discretion to the magistrate to lessen the term of imprisonment.

The King v. Fraser, 7 D.L.R. 496, 11 E.L.R. 580, 20 Can. Cr. Cas. 167.

A conviction for selling liquor without a license will be quashed, where a magistrate with whom 3 informations were lodged against the accused for separate sales to different persons, heard evidence at the same time tending to prove the three offences, and found the accused guilty in all 3 cases.

R. v. Lapointe, 4 D.L.R. 210, 3 O.W.N. 1469, 20 Can. Cr. Cas. 98, 22 O.W.R. 601.

PROHIBITION ACT, N.B.—HAVING LIQUOR IN PLACE OTHER THAN A PRIVATE DWELLING HOUSE—EVIDENCE NECESSARY TO SUSTAIN CONVICTION.

In order to sustain a conviction under the N.B. Prohibition Act (1916, 6 Geo. V. c. 20) for having liquor in a place other than a private dwelling house, it is necessary to shew that at the time the offence was said to have been committed the premises were not so used, the fact that part of such premises had previously been used as a shop, or the fact that they had the physical qualities of

a shop is not sufficient for the purposes of the Act.

The King v. Vroom; Ex parte McDonald, 45 D.L.R. 494, 31 Can. Cr. Cas. 316, 46 N.B.R. 214.

WHAT IS "LIQUOR"—QUESTION OF FACT FOR MAGISTRATE TO DECIDE.

Whether liquor proved to have been sold by the defendant is liquor within the meaning of the Intoxicating Liquor Act N.B. is a question of fact the duty of deciding which is imposed by statute upon the magistrate who has jurisdiction over the person and the offence charged and where there is evidence to support his finding an appellate court will not interfere.

The King v. Vroom; Ex parte Crawford, 47 D.L.R. 578, 31 Can. Cr. Cas. 304.

MANITOBA TEMPERANCE ACT — RULES APPLICABLE.

The rules applicable to prosecutions in general apply to prosecutions under the Manitoba Temperance Act. The Crown cannot split up its case by merely putting in evidence of possession of the liquor to make a primâ facie case and withholding evidence relating to the charge so as to put it in rebuttal. The possession required by s. 49 of the Act is an actual possession and control over the liquor.

The King v. Stein, 47 D.L.R. 571, 31 Can. Cr. Cas. 345, [1919] 2 W.W.R. 959.

WRIT OF PROHIBITION RESTRAINING MAGISTRATE—NOVA SCOTIA TEMPERANCE ACT—CRIMINAL CHARGE—APPEAL.

Application for a writ of prohibition to restrain a magistrate from proceeding with a prosecution for violation of the Nova Scotia Temperance Act arises out of a criminal charge, and no appeal lies from the judgment thereon.

Mitchell v. Tracey, 46 D.L.R. 520, 58 Can. S.C.R. 640.

MINUTE OF CONVICTION — SUFFICIENCY — AMENDMENT.

In a prosecution for selling intoxicating liquor contrary to the Liquor License Act, the minute of conviction imposed a penalty and costs without specifying the amount of the costs or the costs of commitment, and conveying to gaol on default of payment. The conviction was in the proper form, imposed the penalty, fixed the amount of the costs, and awarded imprisonment in default of payment of the said sums and the costs of commitment and conveying to gaol:—Held, per curiam, on a motion to quash the conviction on certiorari, that apart from the provisions of s. 89, the minute was sufficient to support the conviction; but, assuming that it was defective, it is not a ground under s. 89 for quashing the conviction. If it were necessary to support the conviction the minute could be amended under s. 89 (2).

The King v. Dugas; Ex parte Paulin, 43 N.B.R. 58.

CONFISCATION—VALIDITY—REVENDICATION.

When a Magistrate's Court acting within the limits of its jurisdiction pronounces against an accused the confiscation of alcoholic liquors in proceedings taken by the collector of the revenue, the Superior Court should respect this decision so long as it has not been set aside by a proper authority and dismiss the application for revendication by the owner of the liquor confiscated.

Bergeron v. Tremblay, 51 Que. S.C. 520.

TRESPASS—ENTRY UPON HOTEL PREMISES—SEARCH FOR INTOXICATING LIQUOR—JUSTIFICATION UNDER SEARCH WARRANT—CANADA TEMPERANCE ACT, S. 136—AMENDING ACT, 6 & 7 GEO. V. C. 14—FORM OF WARRANT — "ALL NECESSARY AND PROPER ASSISTANCE"—REQUEST TO DEFENDANT BY CONSTABLE TO ASSIST—NUMBER OF PERSONS CALLED ON—DISCRETION OF CONSTABLE — ENTRY WITH INTENTION NOT COVERED BY WARRANT—ILLEGAL ACTS AFTER ENTRY — FAILURE TO PROVE—WITHDRAWAL OF CASE FROM JURY.

McLaren v. Knight, 11 O.W.N. 429.

EXECUTION OF SEARCH WARRANT ON SUNDAY.

Cr. Code, s. 661, as to the execution of warrants on Sunday, being in terms limited to warrants authorized by the Code, does not apply to search warrants issued under the Canada Temperance Act nor does Part XV. of the Code, which by s. 135 of the Canada Temperance Act is to be read into the latter Act, contain any enactment which would validate the execution on Sunday of a search warrant under the Canada Temperance Act.

Ex parte Willis (R. v. Lawlor), 27 Can. Cr. Cas. 383, 44 N.B.R. 347.

SEARCH WARRANT FOR LIQUORS—PARTICULARITY.

A search warrant for liquors under the Liquor Act (Alta.) should describe the premises to be searched with sufficient accuracy to enable one to know from the mere reading of it what premises are to be searched.

R. v. Gibson, 30 Can. Cr. Cas. 308, [1919] 1 W.W.R. 614.

QUEBEC LAW—DELIVERY OF LIQUOR IN PROHIBITION MUNICIPALITY—INFORMATION—CERTIORARI.

If a person is accused of having delivered intoxicating liquor in a municipality where a prohibition by-law is in force, the charge should be based upon such by-law and not upon the Quebec license law. The production, at the enquête, of a copy of such by-law not mentioned in the information, is illegal. In such circumstances, a conviction will be annulled by certiorari. No contestation by writing is permitted to invalidate a writ of certiorari, not even by way of motion to quash. A conviction or order complained of can only be objected to by affidavit if lack of jurisdiction be shewn.

Fraser v. Cour du Recorder, 19 Que. P.R. 5.

SUMMARY CONVICTION—AMENDMENT ON APPEAL.

On an appeal from a summary conviction on a charge under the Prohibition Act of unlawfully having intoxicating liquor in a place of public entertainment, held that an amendment should not be allowed so as to make the charge one of having liquor in a place other than a private dwelling house.

R. v. Chung Chan, [1918] 1 W.W.R. 398.

CANADA TEMPERANCE ACT — CONVICTION — PROCEEDINGS COMMENCED TWO YEARS AFTER OFFENCE.

R. v. Peck; Ex parte Beal, 9 E.L.R. 501.

CANADA TEMPERANCE ACT—EX PARTE PROCEEDINGS—IRREGULARITIES IN PROCEDURE.

R. v. Peck; Ex parte O'Neill, 9 E.L.R. 524.

CANADA TEMPERANCE ACT — INFORMATION —IRREGULARITY — NONAPPEARANCE OF INFORMANT BEFORE MAGISTRATE.

R. v. Murray; Ex parte Copp, 9 E.L.R. 519.

CANADA TEMPERANCE ACT — CERTIORARI — CONVICTION — THIRD OFFENCE—PENALTY AND IMPRISONMENT — "CALENDAR MONTHS"—DEPUTY STIPENDIARY MAGISTRATE—JURISDICTION.

Re Neily, 9 E.L.R. 345.

NOTICE OF VIOLATIONS—AUTHORITY TO PROSECUTE.

Bruneau v. Black Lake, 39 Que. S.C. 91.

SELLING LIQUOR BETWEEN CERTAIN DATES—AUTREFOIS ACQUIT—PRESUMPTION OF REGULARITY—ONUS OF PROVING IDENTITY OF CHARGES.

The King v. Johnson, 17 Can. Cr. Cas. 172.

CANADA TEMPERANCE ACT—MAGISTRATES' CONVICTIONS FOR HAVING INTOXICATING LIQUOR IN POSSESSION OR BRINGING IT INTO COUNTY OF PEEL—ABSENCE OF EVIDENCE TO SUPPORT CONVICTIONS—ORDER QUASHING CONVICTIONS.

R. v. Solovari, 17 O.W.N. 177.

J. SECOND AND SUBSEQUENT OFFENCES.

(§ III J—94)—HABEAS CORPUS—SECOND OFFENCE—EVIDENCE OF PREVIOUS CONVICTION.

A certificate with a person of the same name mentioned as having been convicted in a locality is some evidence of the identity of the defendant and in the absence of proof to the contrary the magistrate is justified in taking this evidence of a previous conviction. [R. v. Leach, 14 Can. Crim. Cas. 375; Ex parte Dugan, 32 N.B.R. 98, followed.]

Blackburn v. The King, 49 D.L.R. 482, 32 Can. Cr. Cas. 119.

SECOND OFFENCE—FORFEITURE OF LICENSE—OFFENCES OF DIFFERENT CLASS.

A prior conviction of the licensed hotelkeeper for permitting persons to be in the barroom during prohibited hours of sale is not sufficient under s. 83 of the Liquor License Act, R.S.S. 1909, c. 130, to warrant a conviction as for a second offence with a consequent forfeiture of license on proof of a latter offence of selling during prohibited hours.

R. v. Curran, 19 D.L.R. 120, 22 Can. Cr. Cas. 388.

SECOND OFFENCES—NOVA SCOTIA TEMPERANCE ACT—SUMMONS—PARTICULARS OF PREVIOUS CONVICTION—REQUIREMENTS —AMENDMENTS—WHEN INCLINED.

In a criminal prosecution for an alleged second offence under the Nova Scotia Temperance Act, 1910, as amended by 1 Geo. V. c. 33, incorporating by reference for procedure certain sections of Cr. Code, and the forms of the Canada Temperance Act, a summons is defective which does not specify with any detail the previous conviction either as to (a) its date; (b) the nature of the offence; (c) whether for selling or keeping or which of the other possible offences; (d) the place of the offence or (e) otherwise earmark it; although it is alleged therein that the present offence "was and is a second offence against the Nova Scotia Temperance Act, 1910;" such summons is an insufficient basis for a conviction in the absence of the accused for a second offence with the increased penalty. The defect of such summons cannot be got rid of by merely omitting to carry such defect into the present conviction, and, where the hearing has proceeded in the defendant's absence, a conviction as for a second offence cannot be based upon such defective summons, even though the present conviction and information may in themselves be sufficient in form. In a proceeding for an alleged second offence under the Nova Scotia Temperance Act, 1910, as amended by 1 Geo. V. c. 33, s. 8, the latter alone providing the punishment by imprisonment without option of fine for a second offence; where the information and conviction set out that the alleged second offence is contrary to the provisions of part I. of the Nova Scotia Temperance Act, 1910, and contain no reference to or recital of the amendment of c. 33, s. 8, the omission constitutes, at common law, a misdescription of the statutory provisions and is not cured by the general Interpretation Act for the Statutes of Canada, 6 Edw. VII. c. 21, s. 6 (now R.S.C. 1906, c. 1 s. 39), lacking all amendments, since the latter provision is not incorporated by reference in the Nova Scotia Temperance Act.

Re Noble Crouse; R. v. Crouse (No. 2), 11 D.L.R. 759, 12 E.L.R. 499, 21 Can. Cr. Cas. 243.

Offering in evidence before an accused person was found guilty of the subsequent offence on a trial for a second offence of selling liquor without a license, of a certificate of his former convictions, is not such a violation of para. (a) of s. 85 of the Liquor License Act of N.B. 1903, as will oust a magistrate of jurisdiction, where the

latter, upon objection to the admission of such certificate, did not proceed further with such inquiry until the accused was found guilty of the subsequent offence, as such provision of the Liquor License Act relative to the order of time to be observed by the court in proving the first and second offences is directory only except as to the questions to be put to the accused. [R. v. Graves (No. 2), 16 Can. Cr. Cas. 318, 21 O.L.R. 329, followed.]

R. v. Matheson; Ex parte Martin, 2 D.L.R. 835, 20 Can. Cr. Cas. 153, 41 N.B.R. 187, 10 E.L.R. 585.

Where on the trial for an offence against the provisions of the Nova Scotia Temperance Act, the prosecutor in answer to a question as to whether the accused had been convicted of keeping intoxicating liquor for sale during the last year, replied in the affirmative, this question and answer before adjudication of the principal charge does not constitute an enquiry by the magistrate "concerning such previous conviction," in contravention of the Nova Scotia Temperance Act 1910, c. 2, s. 44, and a motion for the discharge of the prisoner on habeas corpus will be refused. [R. v. Passerini, 6 E.L.R. 541, distinguished.]

R. v. McNutt, 7 D.L.R. 651, 20 Can. Cr. Cas. 174, 46 N.S.R. 209.

"EACH SUBSEQUENT CONVICTION" — ADDITIONAL PENALTIES.

The additional punishment provided by s. 24 of the Nova Scotia Temperance Act, 1910, as amended by 1911, c. 33, for "each subsequent conviction" after conviction for the first offence, applies only to an offence of the same kind; selling liquor in contravention of the Act is a distinct offence from that of keeping for sale, and a prior conviction for selling will not support a conviction with a penalty as for a second or subsequent offence of keeping for sale.

R. v. Moore, 35 D.L.R. 394, 51 N.S.R. 51, 28 Can. Cr. Cas. 91.

PROOF OF PREVIOUS CONVICTION.

A summary conviction under the Alberta Liquor Act, 1916, with the additional penalty for a second offence will be quashed where there was no evidence by certificate or otherwise of a prior conviction and no reference thereto at the trial; the court hearing a certiorari application will refuse to receive the magistrate's affidavit tendered in opposition to the motion for the purpose of shewing that the magistrate acted upon his recollection of the former conviction he himself had made.

R. v. Brown, 37 D.L.R. 505, 28 Can. Cr. Cas. 208.

CONVICTION OF MAGISTRATE—EVIDENCE—AMENDMENT.

The court may amend the conviction, so as to impose only the penalty for a first offence, where there is no evidence to support the finding of the magistrate that the accused had been previously convicted under the Liquor Act (Alta.).

R. v. Van Fleet, 41 D.L.R. 65, 13 A.L.R. 320, 30 Can. Cr. Cas. 147, [1918] 2 W.W.R. 432, affirming 38 D.L.R. 592.

READING WHOLE INFORMATION.

On a charge of a second offence under the Nova Scotia Temperance Act, it is proper for the magistrate at the commencement of trial to read over the whole information to the accused although by s. 44 he is required to enquire in the first instance concerning the subsequent offence and on a finding of guilt thereof "and not before" enquire concerning the previous conviction. This requirement relates to the trial and examination of witnesses and not to the arraignment. [Faulkner v. The King, [1905] 2 K.B. 76, and R. v. Fox, 10 Cox C.C. 502, distinguished.]

R. v. Shatford, 38 D.L.R. 366, 51 N.S.R. 322, 28 Can. Cr. Cas. 284.

RECORD—STENOGRAPHIC NOTES.

The stenographic notes of evidence in a summary conviction matter are not necessarily a record of all the proceedings apart from the depositions, and where a conviction for a second offence is in due form it is not to be presumed that there was no adjudication on the later offence before recording the plea to the charge of having been previously convicted, although no note of the adjudication on the offence then being tried appeared in the stenographic notes other than a reference to the sentence as for a second offence. Even if there were an irregularity in that respect in proceedings under the Ontario Temperance Act, the conviction would not be invalidated thereby as the provisions of the Act in that regard are merely directory and do not go to the jurisdiction.

R. v. Hanley, 30 Can. Cr. Cas. 63, 41 O.L.R. 177.

PLEA OF GUILTY BY COUNSEL.

As the provisions of the Cr. Code, Part XV. (Summary Convictions), are in terms applicable to prosecutions under the Nova Scotia Temperance Act, 1910, counsel may appear before the magistrate and plead guilty for the accused without the personal attendance of the latter in respect of an illegal sale of intoxicating liquor in contravention of the Act. [R. v. Montgomery, 102 L.T.R. 325, and R. v. Thompson, [1909] 2 K.B. 614, 100 L.T.R. 970, applied.]

R. v. Thompson, 21 D.L.R. 743, 23 Can. Cr. Cas. 463, 48 N.S.R. 515.

SECOND AND THIRD OFFENCES.

There must be a conviction as for a second offence before there can be a conviction as for a third offence under the Canada Temperance Act, R.S.C. 1906, c. 152, and the magistrate who has entered a conviction made as for a third offence, and which recites two previous convictions, must be taken to have found that there was in fact a second conviction as for a second offence. Where the magistrate had jurisdiction over

the subject-matter and over the person, and certiorari is taken away by statute in respect of the particular offence, the court, upon a certiorari necessarily limited to the question of jurisdiction, cannot interfere with a summary conviction as for a third offence under the Canada Temperance Act, which recites 2 prior convictions proved before the magistrate, although such third conviction does not specify that the second conviction was made as for a second offence.

Ex parte Gogan; R. v. Steeves, 24 Can. Cr. Cas. 371, 43 N.B.R. 285.

SECOND OFFENCE—ADJUDICATION FIRST ON LATER CHARGE—PROCEDURE UNDER ONT. TEMPERANCE ACT.

A summary conviction under the Ontario Temperance Act, 6 Geo. V. c. 50 is not invalidated because on cross-examination of the accused giving testimony on his own behalf on a charge of a second offence of unlawfully having possession of liquor in contravention of the Act, he was asked about and admitted his previous conviction. Section 96 of the Act, that the magistrate "shall in the first instance inquire concerning such subsequent offence only," is directory only and not imperative as affecting the magistrate's jurisdiction. [R. v. Coote, 17 Can. Cr. Cas. 211, 22 O.L.R. 269, followed.

R. v. Mercier, 31 Can. Cr. Cas. 171, 45 O.L.R. 237.

SECOND AND SUBSEQUENT OFFENCE—FIRST CONVICTION UNDER ALIAS NAME—ABSENCE AT TRIAL.

The previous conviction necessary to support a summary conviction for a second offence and the more onerous punishment provided for second offences under the Liquor License Act, C.S.N.B. 1903, c. 22, need not have described the accused by the same name as that under which he was summoned for the second offence; the second conviction will be regular in that respect if the evidence upon the trial for the second offence proves the identity of the person previously convicted with the person summoned for the second offence, although not present to defend the case. A defendant who has been duly summoned may be convicted in his absence upon a charge of a second offence under the Act, notwithstanding that s. 85 directs that on the accused being found guilty of the subsequent offence he shall "then and not before be asked whether he was so previously convicted" and further specially provides the course of procedure: (a) if the accused answers admitting the fact; (b) if he denies or stands mute of malice, or (c) does not answer directly to such question. [R. v. Coote, 17 Can. Cr. Cas. 211, 22 O.L.R. 269, approved; Ex parte Groves, 24 N.B.R. 57, applied.]

The King v. Matheson; Ex parte Haid Shilala, 20 Can. Cr. Cas. 496, 41 N.B.R. 386, 11 E.L.R. 519.

SECOND OFFENCE—FAILURE TO PROVE IDENTITY OF PARTY—JURISDICTION—CERTIORARI.

A summary conviction for a second offence against the Quebec License Law is not justified without proof of identity of the person first convicted with the person on trial as for a second offence. Failure to make such proof goes to the jurisdiction of the magistrate to convict for a second offence and is a ground for quashing the conviction on certiorari when a more onerous penalty would result in the event of a future conviction, because of the conviction made being for a second offence rather than for a first offence (7 Geo. V., c. 17, ss. 10, 38).

Duberger v. Morkill, 31 Can. Cr. Cas. 271, 20 Que. P.R. 49.

Where there is no proof, either by admission or certificate, of the prior offences upon a charge of a third offence of selling intoxicating liquor without a license under the Liquor License Act (Sask.), the conviction imposing a larger penalty than is authorized for a first offence must be quashed. [R. v. Brook, 7 Can. Cr. Cas. 216, and R. v. Nurse, 8 Can. Cr. Cas. 173, followed.]

The King v. Koogo, 19 Can. Cr. Cas. 56, 19 W.L.R. 246.

SECOND AND SUBSEQUENT OFFENCES.

A second summary conviction for unlawful sale of liquor under the Ontario Liquor License Act is not invalid because it charges an offence prior in time to the date of conviction for the first offence.

The King v. Mitchell, 19 Can. Cr. Cas. 113, 24 O.L.R. 324, 19 O.W.R. 588.

SECOND AND SUBSEQUENT OFFENCES—CERTIFICATES OF PRIOR CONVICTION.

In a prosecution under the Ontario Temperance Act, 6 Geo. V., c. 50, certificates of prior conviction thereunder issued under s. 96 (b) are prima facie evidence only in prosecutions charging a second or subsequent offence in which the accused is called upon to answer whether he had been previously convicted as charged (ss. 58, 59, 96, 97, and sch. F), Such special certificate produced on a charge laid as for a first offence is not evidence for the purpose of proving that it was a third offence for the purpose of cancelling a license under the Inland Revenue Act, although the informant had given prior notice to the defendant that he would charge the prior convictions as a ground for asking a cancellation of the license and gave particulars of the alleged prior convictions in his notice.

R. v. Berlin Lion Brewery, 31 Can. Cr. Cas. 155.

LIQUOR LAW—PENALTY FOR THIRD OFFENCE, FINE OR IMPRISONMENT—DISCRETION OF MAGISTRATE TO IMPOSE IMPRISONMENT INSTEAD OF FINE.

Plante v. Cliche, 17 Can. Cr. Cas. 43, 38 Que. S.C. 535.

ILLEGAL SALE—CHARGE OF SECOND OFFENCE —INTERROGATION AS TO PRIOR OFFENCE CHARGED—TAKING PROOF OF PRIOR CONVICTION IN THE ABSENCE OF ACCUSED.

The King v. Coote, 17 Can. Cr. Cas. 207.

TWO CONCURRENT CHARGES—SEPARATE OFFENCES OF A SIMILAR CLASS—MIXING THE TRIALS—TIME OF SECOND OFFENCE OVERLAPPING PERIOD OF FIRST CHARGE.

Ex parte Monahan, 17 Can. Cr. Cas. 53, 39 N.B.R. 430.

PENALTY FOR SECOND OFFENCE.

Section 101, subs. 5, of the Ontario Liquor License Act applies to authorize the resummoning of the offender and revision of the penalty in respect of a subsequent conviction in any case where the prior conviction has been set aside.

R. v. Rudolph, 17 Can. Cr. Cas. 207.

JUSTICE'S CONVICTION FOR SECOND OFFENCE —ABSENCE OF WRITTEN EVIDENCE—ADMISSIONS OF ACCUSED IN OPEN COURT—COMMITMENT WITHOUT FORMAL CONVICTION.

R. v. Dagenais, 23 O.L.R. 667, 19 O.W.R. 252.

SALE WITHOUT LICENSE—SECOND CONVICTION BY MAGISTRATE—MOTION FOR HABEAS CORPUS — EVIDENCE — FOREIGNERS — INTERPRETER — REFUSAL TO ADJOURN AFTER EVIDENCE TAKEN.

R. v. Pfister, 3 O.W.N. 440, 20 O.W.R. 778.

IV. Civil remedies.

A. IN GENERAL; NUISANCES.

(§ IV A—95)—ACTIONS AGAINST LIQUOR LICENSEES—SUSPENSION BECAUSE WAR.

Only actions arising out of the business as liquor licensee are within a proclamation prohibiting actions against such licensees whose interests are affected by war, and there is no prohibition against creditors whose debts have accrued in another capacity, such as merchant or farmer: nor is any protection given to property other than the licensed premises or that used in connection therewith. [Novello v. Toogood, 1 B. & C. 554, applied.]

Imperial Elevator & Lumber Co. v. Kuss, 25 D.L.R. 55, 8 S.L.R. 360, 32 W.L.R. 941, 9 W.W.R. 606, varying 9 W.W.R. 164. [Followed in Miller v. Kuss, 25 D.L.R. 816.]

ACTIONS UNDER LIQUOR ACT—PRESCRIPTION.

The 2 months prescription in art. 1171 of the License Law of Quebec only applies to actions and proceedings brought by the Collector of Revenue of the province, or by a municipal corporation, and not to those provided for by art. 1091 of R.S.Q. for damages against a hotelkeeper on account of assaults committed by drunken persons to whom he had served intoxicating liquor.

Martin v. New Carlton Hotel, 53 Que. S. C. 380, reversing 50 Que. S.C. 191.

B. CIVIL DAMAGES.

(§ IV B—100)—COMPENSATION—CURATOR —FORM OF ACTION.

An action, by which a party asks to be declared entitled to governmental compensation (Quebec), for the discontinuance of the business of a liquor dealer since insolvent, is less an action than a petition under art. 876 C.C.P., and the curator has no ground of complaint if the action is made returnable 2 days after service. Although the action is accompanied by a writ of seizure the curator can not object if no seizure is made. The fact of calling this action one of saisie—in revendication is not a ground for an exception to the form.

Touzin v. Garièpy, 17 Que. P.R. 319.

(§ IV B—102)—FOR DEATH OF PERSON TO WHOM LIQUOR SOLD.

The civil liability imposed under the Ontario Liquor License Act upon a hotelkeeper for the death of a person caused by intoxication from drinking in the hotel is not avoided by showing that the deceased resumed drinking elsewhere while still intoxicated as a result of his drinking in the hotel, if such intoxication was the proximate cause of death and if the subsequent drinking was alone insufficient to lead to the cause of death apart from his intoxicated condition at the time when the subsequent drinking began.

De Struve v. McGuire, 2 D.L.R. 100, 25 O.L.R. 491, 21 O.W.R. 138.

JAILS.

LIABILITY FOR INJURIES TO INMATES.

Where a small rural community allowed its peace officer to combine also the duties of several other officers, and, as such peace officer, he placed a prisoner in the lock-up, which 3 hours afterwards burned up, and in which fire the prisoner lost his life, all during the absence of the peace officer, who was attending to other duties, it was not unreasonable on the part of the municipality to permit its peace officer to attend to the duties of other offices which he held, and it was not the duty of the municipality to keep said officer or any one else in constant attendance on the prisoner.

McKenzie v. Chilliwack, 8 D.L.R. 692, [1912] A.C. 888, affirming 15 B.C.R. 256.

PERMITTING INTERVIEW WITH PRISONER—DETECTIVE'S INTERROGATION OF ACCUSED.

Unless a prisoner asks for an interview with the detective, or there are exceptional circumstances, the jailer should not permit interviews between a Government detective and the prisoner, at which others are not present.

United States v. Wrenn, 10 D.L.R. 452, 21 Can. Cr. Cas. 119.

JOINDER.

See Action; Pleading; Parties.

JOINT CREDITORS AND DEBTORS.

I. In general.
II. Release of one joint debtor.

I. In general.

(§ I—1)—Several purchasers of land—Joint and several liability.

Joint and several liability must be stipulated for and will not be presumed beyond the cases provided for by law. Thus there is no such liability in case of a sale on the part of purchasers even when they have purchased immovables en bloc and have created a joint estate among them, if such has not been expressly created by the deed of sale. Each in such case owes only his proportion of the balance due on the price of sale.

Versailles v. Harel, 47 Que. S.C. 468.

Loan—Separate actions.

If by one deed several lenders individually loan distinct and separate sums of money, the borrower is debtor to each of them for the amount loaned. The defence of the borrower, to the action of one of the lenders, that he could not be summoned to defend different actions taken against him by each of the lenders and that one of them has no right to sue without joining his coereditors, will be dismissed on inscription en droit.

Bourgouin v. Franklin, 18 Que. P.R. 105.

Joint and several liability—Manufacture of timber—Commercial act.

An undertaking by 2 persons to manufacture timber is a commercial act, and the contractors are compelled jointly and severally to carry out their contracts. It does not create a partnership as between themselves, but, had there been a partnership, it would be dissolved by the abandonment of the undertaking, in consequence of which the creditors have their remedy against each of the contractors as joint and several debtors.

Grenier v. Simoneau, 45 Que. S.C. 329.

Practice—Money paid into court by two defendants—Judgment against one—Money the property of other defendant.

C.N.R. Co. v. Peterson, 7 W.W.R. 741.

(§ I—2)—Several promisors — Joining the promisee as a promisor.

Where the obligation to pay is joint only, and not joint and several, it is an objection of substance and not of form that the promisee is joined as a promisor, but in a proper case the document may be rectified on the ground of mutual mistake.

Hepburn v. Mutch, 17 D.L.R. 23, 28 W.L.R. 292, 6 W.W.R. 990.

Joint purchase of land — Moneys advanced by one of two purchasers—Liability of the other to make contribution.

Wicks v. Miller, 21 Man. L.R. 534, 19 W.L.R. 486.

II. Release of one joint debtor.

(§ II—6)—Assignment of debt—Joint liability—Mise en demeure.

When in a transfer of debt the transferror undertakes, jointly and severally with all the debtors mentioned in it, to pay the sum due on default of the debtors, renouncing at the same time the benefit of discussion, the transferror can be sued alone at the maturity of the debt without an allegation of mise en demeure or demand of payment or of a default in payment on the part of the other debtors.

Décarie v. Archambault, 47 Que. S.C. 302.

(§ II—7)—Verdict against one.

In an action for tort where 2 persons are alleged to have been guilty of negligence causing an injury and are joined as defendants, each defendant is to be considered as charged with a breach of duty which he individually owed to the plaintiff and a verdict may be supported which is in favour of one defendant and against the other both at common law and under Sask. r. 34 (Sask. r. of 1911).

Harris v. Gottselig, 1 D.L.R. 671, 20 W.L.R. 391, 1 W.W.R. 949.

Release of one by giving time to the other—Release by accepting separate obligations of one joint debtor.

Schwartz v. Bielschowsky, 21 Man. L.R. 310, 17 W.L.R. 616.

Joint debtors—Effect of taking judgment against one.

Wilson v. Stuart, 20 Man. L.R. 507, 16 W.L.R. 403.

Joint tortfeasors — Judgment against one of several persons responsible for damages—Bar to action.

Longmore v. McArthur, 43 Can. S.C.R. 640.

JOINDER.

Of causes of action, see Action; Pleading.
Of parties, see Parties.

JOINT TENANTS.

See Co-tenancy.

JUDGES.

I. In general.
II. Appointment and removal.
III. Disqualification; eligibility.
IV. Change; special judge; assignment of judges.
V. Compensation.
VI. Jurisdiction.

See Courts; Trial; Appeal.

Constitutional powers as to appointment, see Constitutional Law, I E—30.

Annotation.

Constitutional powers as to creation of courts and appointments thereon: 37 D.L.R. 183; 24 D.L.R. 22.

I. In general.

(§ I—7)—De facto—Colourable title—Status cannot be attacked in collateral proceeding.

The status of a de facto judge having at least a colourable title to the office, cannot be attacked in a collateral proceeding, the proper proceeding to question his right to the office is by quo warranto information.

Re Toronto R. Co. and Toronto, 46 D.L.R. 547, 44 O.L.R. 381, 24 Can. Ry. Cas. 278. [Reversed, 51 D.L.R. 69.]

III. Disqualification; eligibility.

(§ III—23)—Disqualification by interest — Procedure in naming substitute.

Where a County Judge is disqualified by interest from hearing and determining an assessment appeal to which he is a party, the disqualification is absolute, preventing the County Judge from even nominating the Judge of another county to act for him, where there is a statutory provision under which the selection of a disinterested person to try the appeal may be made by a High Court Judge in Chambers.

Re Chisholm and Berlin, 9 D.L.R. 264, 4 O.W.N. 431, 23 O.W.R. 571.

Stipendiary magistrate — Disqualification — Bias — Magistrate attorney for defendant in action in which accused is plaintiff.

A stipendiary magistrate is not disqualified from entertaining an information against a person, by reason of the fact that the former is attorney of record for the defendant in a pending action in another court in which the accused is plaintiff. A person who has any monetary interest, however small, in the result of judicial proceedings, should not take part in them as a judge.

Re McKinnon, 12 D.L.R. 809, 12 E.L.R. 238.

Disqualification—Pecuniary interest in imposing fine.

That a stipendiary magistrate may be interested in imposing a fine for a violation of the Canada Temperance Act in order to swell the fund from which his fees are paid is too remote an interest to disqualify him from entertaining a complaint for a violation of the Act. [Ex parte McCoy, 33 N.B. R. 605, followed.]

R. v. Holyoke, Ex parte McIntyre, 13 D.L.R. 225, 21 Can. Cr. Cas. 422, 42 N.B.R. 135, 13 E.L.R. 210.

Interest or bias—Disqualification.

Uncontradicted affidavits filed on a motion to quash a summary conviction under a liquor law that the magistrate had stated he would convict any parties charged with selling liquor whether the evidence proved it or not, if he believed them to be guilty, shews a disqualifying bias on the part of the magistrate, and the conviction on a liquor selling charge will be quashed.

The King v. Rand, 15 D.L.R. 69, 47 N.S.R. 556, 13 E.L.R. 450.

Interest—Bias.

In the administration of justice, whether by a recognized legal court, or by persons who, although not a legal court, are acting in a similar capacity, public policy requires that, in order that there should be no doubt about the purity of the administration, no person who is to take part in it should be in such a position that he might be suspected of being biased. [Allinson v. General Medical Council, [1894] 1 Q.B. 750, followed.]

R. v. Woodroof, 6 D.L.R. 300, 20 Can. Cr. Cas. 17, 11 E.L.R. 373.

V. Compensation.

(§ V—35) — Allowances for traveling expenses—Meaning of "where he resides;" Judges Act, R.S.C. 1906, c. 138, s. 18.

The residence of the defendant, a Judge of the Supreme Court of British Columbia, was held to be at the city of Vancouver, where the courts were held, and was not, as claimed by the defendant, at Grand Forks, some 700 miles distant; and therefore he had no right to charge for traveling allowances under the above Act. The words "where he resides" must be taken in their plain and ordinary sense without any question of domicile, which might be different from residence, and the words quoted cannot be twisted by any legal fiction to mean that the judge should be paid for expenses never incurred, or contemplated by the Act.

The King v. Clement, 50 C.L.J. 67.

VI. Jurisdiction.

(§ VI—50)—Of Supreme Court—Not to include local Judge of Supreme Court—Bills of Sale Act, 1911, R.S.B.C. c. 20.

The expression, "Judge of the Supreme Court," as used in the Bills of Sale Act, 1911, R.S.B.C. c. 20, does not include a "Local Judge of the Supreme Court."

Re Royal Trust Co. and Austin Hotel Co., 44 D.L.R. 480, [1919] 1 W.W.R. 934.

County Court—Order dispensing with restrictions of War Relief Act—Jurisdiction.

A County Court Judge has no jurisdiction to make an order dispensing with the restrictions of the War Relief Act, 1916, c. 74 (B.C.) and amending Act, 1917, c. 74.

Hanna v. Costerton, 44 D.L.R. 478, [1919] 1 W.W.R. 930.

JUDGMENT.

I. Rendition; entry; amendment; summary judgment.

- A. In general.
- B. By confession.
- C. Jurisdiction; necessity of service or appearance.
- D. For and against whom; several or joint.
- E. Form and substance.

F. Entry; record; summary or speedy judgment.
G. Modification; varying terms of.
II. Effect and conclusiveness: res judicata.
A. In general.
B. Decrees interlocutory, by default, direction, or on demurrer; dismissal.
C. Collateral attack.
D. What matters concluded.
E. As to parties.
III. The lien.
A. In general.
B. On what property.
C. Sufficiency of index.
IV. Foreign judgments.
A. Of foreign country.
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V. Discharge; assignment.
VI. Revival; enforcement.
A. Enforcement.
B. Revival; scire facias.
VII. Relief against; rehearing; actions to annul.
A. In general
B. Defences.
C. Grounds.
D. Procedure.
E. Time.
F. Rehearing.

Annotations.

Foreign judgment, action upon: 9 D.L.R. 788, 14 D.L.R. 43.

Judgment; conclusiveness as to future action; res judicata: 6 D.L.R. 294.

Judgment; enforcement; sequestration: 14 D.L.R. 855.

Judgment as affected by moratorium: 22 D.L.R. 865.

I. Rendition; entry; amendment; summary judgment.

A. In general.

Against Indians, see Indians, II—5.
As new debt, see Execution, I—11.

(§ I A—1)—Partnership.

Rule 603 (Ont. Con. Rules 1897) does not authorize a summary judgment against one who is alleged to be a member of a firm against which a judgment was previously obtained, but who was out of the jurisdiction when the writ in the original action was issued, and who entered no appearance and did not admit himself to be and was not adjudged a member of the firm.

Bank of Hamilton v. Davidson, 10 D.L.R. 303, 4 O.W.N. 749, 23 O.W.R. 944.

Motion for—Failure to comply with order for security for costs—Adjournment.

A motion to strike out defendant's appearance and to enter summary judgment against him cannot be proceeded within the face of an order against the plaintiff to give security for costs although the order was made after service of the notice of motion for judgment, but the motion may be adjourned until the security order shall have been complied with or vacated.

Cavendish v. Gasson, 11 D.L.R. 487, 6 A.L.R. 101, 24 W.L.R. 382, 4 W.W.R. 690.

Counterclaim—Right to plead.

If the defendant shews in answer to a motion for summary judgment that he has a reasonable ground for defending or if he has a counterclaim arising out of the same matter, he is entitled to defend.

McDonald v. Pinder, 20 D.L.R. 494, 42 N.B.R. 227.

Practice—Affidavit—Support of motion.

Under the new practice introduced by rr. 56, 57, where the writ of summons is specially endorsed, the plaintiff may move for summary judgment without cross-examining the defendant upon the affidavit filed with his appearance; and, if the affidavit does not disclose a good defence nor set out facts and circumstances sufficient to entitle the defendant to defend, judgment will be granted to the plaintiff. An affidavit filed by the plaintiff in support of his claim, though it may not be necessary, is unobjectionable. Rule 57 does not alter the practice laid down in Jacobs v. Booth's Distillery Co., 85 L.T.R. 262—upon a motion under that rule the court does not attempt to determine facts in issue upon controversial affidavits.

Langdon-Davies Motors Canada v. Gasolectric Motors, 32 O.L.R. 84, affirming judgment of Denton Co., C.J.

Election of remedies — Negligence — Workmen's compensation—Reference to in formal judgment.

Where the Trial Judge dismisses a negligence action brought by a workman against his employer and others, but states that the plaintiff would be entitled to compensation under the Workmen's Compensation Act (Alta.), it is improper to make a reference to the compensation in the formal decision issued in the negligence action at least where the amount of the compensation has not been fixed; a clause in the formal judgment inserted at the request of the defendants, purporting to declare the plaintiff entitled to compensation under the Act and to reserve leave to apply to fix the amount should the parties not agree, will not operate in bar of the plaintiff's appeal from the dismissal of the negligence action where the plaintiff had not elected to abandon the common law remedy and to accept compensation under the Act. [Isaacson v. New Grand, [1903] 1 K.B. 539, applied.]

Klukas v. Thompson & Co., 24 D.L.R. 67, 31 W.L.R. 438, 8 W.W.R. 778, reversing 21 D.L.R. 312, 7 W.W.R. 1162.

Principles governing the granting of.

Summary judgment should not be granted when there is any serious conflict as to a matter of fact or any real difficulty as to a matter of law.

Western Security Bank v. Martin, 31 W.L.R. 149.

SIGNING FINAL JUDGMENT—LEAVE TO DEFEND.

On an application for leave to sign final judgment, a defendant, who was surety for the debt sued upon, sought leave to defend on the ground that the plaintiff should have obtained a greater sum for certain securities he sold, the proceeds of which were applied in reduction of the debt. An order was made for leave to sign final judgment. Held, on appeal, that the order should be set aside and the defendant be allowed in to defend.

Royal Bank v. Pacific Bottling Works, 23 B.C.R. 463, [1917] 2 W.W.R. 227.

KING'S BENCH ACT.

Summary judgment cannot be ordered under r. 625 of the King's Bench Act, when the statement of claim, in addition to the money demand, asks for other relief such as foreclosure or forfeiture or the setting aside of an alleged fraudulent conveyance.

Campbell v. Morgan, 28 Man. L.R. 531, [1918] 2 W.W.R. 810.

MOTION FOR SUMMARY JUDGMENT UNDER R. 56—ACTION ON PROMISSORY NOTE—DEFENCE—PART FAILURE OF CONSIDERATION—VAGUE STATEMENTS IN AFFIDAVIT — UNASCERTAINED AND INDEFINITE CLAIM — LEAVE TO DEFEND REFUSED — RIGHT OF ACTION ON CROSS-CLAIM RESERVED.

McLaren v. Peuchen, 14 O.W.N. 39.

DEFENDANT NOT APPEARING AT TRIAL — JUDGMENT FOR PLAINTIFF ON PROOF OF CLAIM—SETTING ASIDE—TERMS.

Harris v. Garson, 15 O.W.N. 140.

MOTION FOR SUMMARY JUDGMENT—RULE 57 —AFFIDAVIT FILED WITH APPEARANCE—CROSS-EXAMINATION OF DEPONENT—ACTION FOR PRICE OF GOODS—DEFENCE—DEFECT IN QUALITY OF GOODS AND MISREPRESENTATION—AFFIDAVIT NOT SHEWING AMOUNT OF REDUCTION ASSERTED—LEAVE TO FILE NEW AFFIDAVITS—WAIVER OF IRREGULARITY—COSTS.

Suckling v. Ryan, 17 O.W.N. 213.

MOTION FOR — RULE 322 — ADMISSIONS — PRACTICE—RIGHT TO TRIAL.

Dixon v. Schell, 12 O.W.N. 364.

CHAMBERS ORDER ISSUED EX PARTE — DISPUTE AS TO TERMS OF ORDER—ORDER NOT CONFORMING TO ORDER AS PRONOUNCED—DEATH OF JUDGE WHO PRONOUNCED ORDER—ORDER AS ISSUED SET ASIDE BY ANOTHER JUDGE — RESETTLEMENT OF ORDER — STAY OF ACTIONS — "EVENT"—DETERMINATION BY COURT OF LAST RESORT—DELAY IN SETTLING ORDER —COSTS.

Flexlume Sign Co. v. Globe Securities, 12 O.W.N. 138, 196, 228.

SUMMARY JUDGMENT—BONA FIDE DISPUTE, PROPER TO BE TRIED — UNCONDITIONAL LEAVE TO DEFEND.

C.P.R. Co. v. Matthews S.S. Co., 5 O.W.N. 437.

(§ I A—2)—BY DEFAULT.

When the claim is for a declaration that plaintiff has acquired a title to land by possession, the court will not grant judgment in default of appearance without an examination of the witnesses in open court, if the writ has not been served personally.

Wallace v. Potter, 7 D.L.R. 114, 22 W.L.R. 281, 2 W.W.R. 1085.

AFFIDAVIT OF MERITS—DISCLOSING DEFENCE.

McKay v. Johnston, 10 D.L.R. 806, 23 W.L.R. 531, 4 W.W.R. 133.

PROMISSORY NOTE—RELEASE—PLEA OF.

Leave to defend should be allowed where the defendant's affidavit in answer to a motion for summary judgment on a promissory note alleges that the note payable in one month was delivered to plaintiff's solicitor in escrow to hold until a release in form satisfactory to defendant's solicitor, should be signed and that plaintiff proceeded to sue without waiting for such approval and thereby committed a breach of the agreement under which the notes were given, for there is at least the question to be submitted to the jury; whether or not ample time and opportunity had been afforded to defendant of submitting the release to his solicitor.

McDonald v. Pinder, 20 D.L.R. 494, 42 N.B.R. 227.

ON COUNTERCLAIM—PLAINTIFF'S FAILURE TO DEFEND.

Thompson v. Yockney, 8 D.L.R. 776, 23 Man. L.R. 571, 22 W.L.R. 863, 3 W.W.R. 591. [Affirmed, 14 D.L.R. 332, 23 Man. L.R. 571, 25 W.L.R. 602, which was affirmed by 16 D.L.R. 854, 50 Can. S.C.R. 1, 6 W.W.R. 1397.]

SERVICE OF NOTICE OF MOTION—DELAY.

The service of a notice of motion for leave to enter judgment in default of defence upon a liquidated demand will not deprive the plaintiff of the right to sign judgment in default of defence under Sask. r. 224 without an order and without waiting for the return of the motion which was afterwards abandoned; and unexplained delay for a long time in moving against the judgment will disentitle the defendant to relief on the ground that he was misled by the service of the notice.

Mills v. Harris, 21 D.L.R. 230, 8 S.L.R. 113, 8 W.W.R. 428.

BY DEFAULT—JURISDICTION TO GRANT—ABSENTEE—PROPERTY WITHIN PROVINCE.

Art. 94 (4), C.C.P., gives jurisdiction over the defendant who has left his domicile in the province of Quebec or has never had any, when the cause of action did not originate in the district wherein he is summoned, only when the plaintiff proves that the defendant possess property therein. When judgment is obtained by default, in the above case without such proof, the defendant, who has neither domicile nor property in the above-mentioned district, may

have the judgment set aside by the Court of Review for want of jurisdiction.

Bank of B.N.A. v. Levy, 47 Que. S.C. 282.

The plaintiff who obtains judgment by default is not obliged to have a copy of such judgment served on the defendant.

Hantz v. Wills, 14 Que. P.R. 256.

Article 532 C.C.P. does not apply in case of an action en séparation de corps of such a nature that judgment, in a like cause, could not be given on affidavits.

Landry v. Rivard, 14 Que. P.R. 375.

DEFENDANT NOT APPEARING AT TRIAL—JUDGMENT SET ASIDE ON TERMS.

Toronto General Trusts Corp. v. Weaver, 13 O.W.N. 293.

MOTION FOR—DEFAULT OF DEFENCE—APPLICATION TO BE LET IN TO DEFEND—DELIBERATE DEFAULT — PREJUDICE TO PLAINTIFF BY DELAY.

Pherrill v. Henderson, 4 O.W.N. 1487, 24 O.W.R. 819.

OPENING UP—TERMS IMPOSED.

Jackson v. Murray, 26 W.L.R. 402.

RATE OF INTEREST—BANK.

Where a bank issues a statement of claim for the amount of a promissory note, bearing interest at 8 per cent, and for interest at that rate, judgment for the amount and interest claimed is not "justified by the statement of claim" within the meaning of r. 152 as to judgment in default of defence.

Quebec Bank v. Lessard, [1917] 1 W.W.R. 542.

(§ I A—3)—JUDGMENT AGAINST VENDOR—EXECUTION—IMMORAL SALE — POSSESSION.

An action to recover the balance of the purchase price of property having been successfully defended on the ground that the transaction was immoral and void, but the sale not having been formally set aside, the purchaser being in fact in possession animo domini, a seizure by the sheriff under a judgment against the vendor will be set aside as in contravention of art. 699 C.C.P.

Vézina v. Lafortune, 41 D.L.R. 208, 56 Can. S.C.R. 246, reversing 25 Que. K.B. 544, which reversed 48 Que. S.C. 254.

BY CONSENT—CONSENT MINUTES—MOTION TO ENFORCE TERMS OF—JURISDICTION OF MASTER.

Sovereign Bank v. Sevigny, 4 O.W.N. 459, 23 O.W.R. 651.

CIVIL REQUEST — DELAY—ACQUIESCENCE—APPEAL—C.C. ARTS. 885, 887, 890, 1177, 1178, 1209.

There is no jurisdiction to permit the production of a civil request against a judgment in which the defendant has acquiesced to the Superior Court and against which he has made without success all his complaints in the Court of Appeal. The judgments rendered in virtue of arts. 885, 887, C.C.P. are not susceptible to be retracted by a civil application seeing that these judgments do not fall in the exceptions of art. 890 C.C.P. and can be carried to appeal. The civil application cannot be admitted by way of a revision or appeal. There is nothing in our law as in the French law regarding the delay in which one may make a civil application to distinguish between a preparatory and an interlocutory judgment. Thus judgments such as those mentioned above on Jan. 27, and Feb. 14, 1916, are susceptible to be attacked by civil request as soon as they are pronounced and within 6 months afterwards and not conjointly as in France only after the final judgment.

Krauss v. Michaud, 25 Rev. Leg. 139. [See 20 Que. P.R. 1.]

B. BY CONFESSION.

Conclusiveness of, see infra, II.

Foreign judgment, see infra, IV.

Correction of an appeal, see Appeal.

Injunction against enforcement, see Injunction.

(§ I B—5)—PRO CONFESSO—INSUFFICIENCY OF PLEA—SPECIFIC DENIALS AND TRAVERSES.

If the defendant does not, by his plea, deny specifically or by necessary implication the allegations of fact stated in the plaintiff's claim, or state that defendant does not admit the truth of such allegations, he will be taken to have admitted them under New Brunswick O. 19, r. 13, notwithstanding general words of denial in the plea; and he is liable to have judgment moved against him upon the admissions so implied. [Rutter v. Tregent, 12 Ch. D. 758, applied.]

Kennedy v. Gorman, 12 D.L.R. 812, 13 E.L.R. 54.

JUDGMENT—OPTION TO PURCHASE—ABANDONMENT—JUDGMENT BY CONFESSION.

McLeod v. McLeod (B.C.), 40 D.L.R. 741.

REFUSAL OF PLAINTIFF TO ACCEPT—FAILURE TO GIVE NOTICE.

Default by a plaintiff to give, within 30 days, to a defendant who confesses judgment, notice of his refusal to accept the confession does not create a presumption that he accepts it, and does not authorize the defendant to enter judgment on his confession.

Morin v. Davidson, 46 Que. S.C. 120.

QUE. C.P. 125, 527.

A confession of judgment is not a plea, and there is nothing to authorize a demand for particulars of it.

Fearing Whiton Mfg. Co. v. Melzer, 15 Que. P.R. 414.

FORECLOSURE—SETTING ASIDE.

A plaintiff not refusing within 30 days to accept a partial confession of judgment from the defendant, the latter can, even after judgment is inscribed, be relieved from the foreclosure subject to paying the costs incurred by the opposite party.

Gingras v. Rinfret, 52 Que. S.C. 237.

So long as the defendant has not served on the plaintiff the confession of judgment

which he has signed the plaintiff may ignore it and proceed to judgment ex parte.

Ducoudu v. Berthelet, 13 Que. P.R. 190.

INTEREST — REFUSAL — MOTIVES —EXPENSES—C.C.P. ARTS. 527, 530, 549.

A confession of judgment is insufficient in an amount determined without declaring that it is made with interest, when this amount carries interest. It is not necessary for one who refuses to accept a confession of judgment to make known in the notice which he gives, the motives of his refusal. Then after the refusal of such a confession of judgment, the contestation is binding between the parties only on question of knowing if the defendant has a right to divers creditors which he claims, and the examination of the cause only bears on this point, without touching the question of interest. Costs ought not to be born by the defendant alone but the plaintiffs ought to pay the subsequent expenses of contesting and the expenses of revision.

Castle v. Rabinovitch, 25 Rev. Leg. 264.

The defendant to an action for the price and value of work performed and materials supplied according to an itemized account, who confesses judgment for a sum less than that claimed, can be ordered by the court to specify the items which make up the amount which he admits. His failure to do so supplies, according to circumstances, special cause for making, in the final judgment, the exceptional adjudication as to costs provided for by art. 549 C.C.P.

Kennedy v. Canadian Fire Underwriters Association, 43 Que. S.C. 302.

QUEBEC PRACTICE—LIBEL ACTION.

Subject to the provisions of art. 530, C. C.P., the plaintiff is not obliged to accept a confession of judgment and he has an absolute right to proceed in the case as if the confession of judgment had not been filed after having given notice of his refusal to the defendant. On default of the latter to file a defence within the time prescribed, the plaintiff may proceed ex parte to adduce evidence of the charges alleged by his action. In an action for damages for defamatory libel, where it is sought to re-establish the plaintiff's good reputation, the plaintiff is justified in refusing to accept a confession of judgment whereby the defendant consents to judgment being entered for the amount demanded after having denied all the allegations in the action.

Robichon v. Monfette, 25 Que. K.B. 528.

CONFESSION OF JUDGMENT—COSTS—CONFESSION BY THE WIFE—AUTHORIZATION.

Picher v. Gaumont, 12 Que. P.R. 391.

(§ I B—6)—MOTION FOR PARTICULARS.

A party is not bound to give particulars on his confession of judgment.

Mercure v. Charron, 16 Que. P.R. 237.

JUDGMENT UPON ADMISSIONS—ACCEPTANCE OF DEFENCES — CERTAINTY OF ADMISSIONS.

The court will not allow final judgment to be signed upon admissions contained in an examination for discovery, unless the admissions are clear and unequivocal, nor where there is any serious question of law to be argued. If a plaintiff wishes judgment upon such admissions, he must accept as true the various defences to the action raised by the pleadings and not shewn to be false by admissions. [Ross v. McBride, 3 W.L.R. 561; United Telephone Co. v. Donohoe, 31 Ch. D. 399, and Barry v. Toronto & Niagara Power Co., 11 O.L.R. 48, followed.]

Canadian Bank of Commerce v. Harvey, 7 S.L.R. 295, 30 W.L.R. 549, 7 W.W.R. 883.

(§ I B—8)—GENERAL AUTHORIZATION TO ANY ATTORNEY TO CONFESS JUDGMENT—PUBLIC POLICY.

It is against the policy of the law of Alberta to give effect to a stipulation accompanying an acknowledgment of a debt that to secure payment thereof the debtor authorizes any attorney to confess judgment for the amount appearing unpaid; and this although the acknowledgment was given in a foreign country where such an agreement to confess judgment was recognized as legal.

Waters v. Campbell, 14 D.L.R. 448, 7 A. L.R. 298, 25 W.L.R. 838, 5 W.W.R. 410.

C. JURISDICTION; NECESSITY OF SERVICE OR APPEARANCE.

Deficiency of judgment in foreclosure action, power of Master, see Mortgage, VI I —135.

(§ I C—10)—JURISDICTION OF PROTHONOTARY.

The prothonotary has jurisdiction to allow an opposition to judgment to be filed when the judge is absent from the chief place of the district. This jurisdiction is derived not from art. 70, but from art. 33, C.C.P.

Lemieux v. Crépeau, 52 Que. S.C. 481.

OPPOSITION TO JUDGMENT—SERVICE.

An opposition to judgment served on the parties more than 3 days after it was received by the judge will be dismissed on motion therefor.

Chaput v. Goltman, 18 Que. P.R. 203.

PRACTICE—AFFIDAVIT FILED WITH APPEARANCE TO SPECIALLY ENDORSED WRIT—RULE 56 (1), (4)—"GOOD DEFENCE UPON THE MERITS"—DEFECTIVE AFFIDAVIT—MOTION FOR SUMMARY JUDGMENT UNDER R. 57—LEAVE TO MOVE SUBSTANTIVELY FOR PERMISSION TO FILE PROPER AFFIDAVIT—DUTY OF OFFICER OF COURT RECEIVING AFFIDAVIT WHEN FILED.

Leushner v. Linden, 7 O.W.N. 456.

PRACTICE—SPECIALLY ENDORSED WRIT OF SUMMONS—AFFIDAVIT FILED BY DEFENDANT WITH APPEARANCE — RIGHT OF CROSS-EXAMINATION WITHOUT LAUNCHING MOTION FOR JUDGMENT—RULE 57.

Clark v. International Mausoleum Co., 7 O.W.N. 94.

SUMMARY APPLICATION—FAILURE TO SERVE ONE DEFENDANT—COUNSEL APPEARING ON MOTION—MOTION TO SET ASIDE JUDGMENT GRANTED ON TERMS—EXECUTION TO STAND AS SECURITY.

Hunter v. Perrin, 12 O.W.N. 200.

ON PRAECIPE—NOTICE.

When a demand for notice is filed and served the plaintiff cannot obtain judgment on praecipe but must move for judgment and give the defendant notice of the motion therefor.

Toronto General Trusts Co. v. Hammil, [1917] 3 W.W.R. 462.

(§ I C—16)—NONRESIDENT — DEFENDANT CASUALLY WITHIN "LAW DISTRICT"—SERVICE—SUFFICIENCY OF.

The circumstances that the defendant's presence in the province was casual only, as upon a short visit, does not create any exception from liability to serve of process of the courts of such province in a civil action against him; territorial jurisdiction is effective against him on account of his presence in the territory when action was begun and process served upon him. (Sirdar, etc. v. Rajah, etc., [1894] A.C. 670; Emanuel v. Symon, [1908] 1 K.B. 302, applied.]

Forbes v. Simmons, 20 D.L.R. 100, 8 A. L.R. 87, 29 W.L.R. 445, 7 W.W.R. 97.

(§ I C—19)—IRREGULAR SERVICE OF WRIT.

A judgment, recovered in an action upon a promissory note against an incorporated company, in which the plaintiffs are four directors, one of the four being secretary-treasurer, of the defendant company, and in which the writ of summons was served upon the defendant company by delivering it to the secretary-treasurer while himself a party plaintiff, is voidable for want of due service of the writ.

Crawford v. Calville Ranching Co., 6 D. L.R. 375, 22 W.L.R. 50, 2 W.W.R. 926.

ENTRY IN CAPIAS PROCEEDINGS—SPECIAL BAIL.

A court has no authority to enter a default judgment against a defendant who was arrested in a civil action under a writ of capias and who gave bail to the sheriff, but did not put in special bail as conditioned by his bond to the sheriff, since a defendant so arrested is not in court until after he puts in and perfects special bail.

Gunns v. Dugay, 10 D.L.R. 416, 41 N.B. R. 402.

D. FOR AND AGAINST WHOM; SEVERAL OR JOINT.

(§ I D—20)—JOINT NEGLIGENCE.

The fact that an action of joint negligence has been brought against two defendants, and one has been proven to be not liable, is no reason why judgment cannot be maintained as against the one remaining.

Evans v. Richmond, 43 D.L.R. 214, 26 B. C.R. 60, [1918] 3 W.W.R. 487. [Affirmed in 48 D.L.R. 209, [1919] 3 W.W.R. 339.]

PERSONAL OR PROPRIETARY JUDGMENT—MARRIED WOMAN.

A judgment entered against a defendant, who was a married woman, though a personal judgment, instead of a proprietary one, was not a nullity.

Joss v. Fairgrieve, 32 O.L.R. 117.

DIVISION COURT JUDGMENT ENTERED BY DEFAULT AGAINST HUSBAND AND WIFE IN ACTION UPON TWO MONEY DEMANDS—WIFE LIABLE UPON ONE ONLY—RETURN OF NULLA BONA TO FI. FA. GOODS—EXECUTION ISSUED AGAINST LANDS—SALE BY SHERIFF OF WIFE'S LAND—ACTION TO SET ASIDE SALE AND JUDGMENT—ABSENCE OF FRAUDULENT INTENT—ABUSE OF PROCEDURE OF COURT—WIFE'S LIABILITY FOR DEBT OF HUSBAND—UNDERSTANDING OF TRANSACTION—INFLUENCE OF HUSBAND—IRREGULARITY—NEGLECT OF WIFE TO DEFEND DIVISION COURT ACTION OR MOVE AGAINST JUDGMENT IN DIVISION COURT—COSTS.

Mundier v. Robinson, 16 O.W.N. 185.

E. FORM AND SUBSTANCE.

(§ I E—25)—A declaratory judgment may be had, declaring that a by-law was not submitted or voted upon according to law, in order to remove the uncertainty as to the actual effect of the submission and voting; whether any consequential relief is or could be claimed or not. [Jud. Act (Ont.) R.S.O. 1897, c. 51, s. 57, subs. 5.]

Stoddart v. Owen Sound, 8 D.L.R. 932, 27 O.L.R. 221.

WHAT TO CONTAIN—MINOR OMISSIONS.

Although by art. 541, C.C.P. a judgment should mention the cause of action, the issues of law and fact raised and decided and the reasons for the decision, nevertheless the fact that a judgment gives no reasons, but only the final conclusions, constitutes an informal draft which is not sufficient to void the judgment.

Beaudry v. Prefontaine, 51 Que. S.C. 78.

DISPOSITIF.

To make a judgment executory it is not necessary that its dispositif should employ the word "condemned;" it is sufficient if it declares that the defendant is obliged to pay the plaintiff.

Massé v. Bertrand, 26 Que. K.B. 335.

FORM OF—CONTRACT—TRUSTEES—REGISTRATION OF CONVEYANCES—CANCELLATION.

Wiley v. Trusts & Guarantee Co., 4 O. W.N. 829, 24 O.W.R. 69.

"DECREE"—ALIMONY.

While a decision in favour of a wife's claim for alimony granted in proceedings under the Divorce and Matrimonial Causes Act may be termed a "decree," it is nevertheless a "judgment" of the Supreme Court and in the same position as any other judgment of that court.

Francis v. Wilkerson, [1917] 3 W.W.R. 920.

(§ I E—28)—"WITH INTEREST"—RETROACTIVENESS.

Judgments are declaratory of right and have retroactive effect to the day of the service of the action. The words "with interest" in a judgment involving condemnation for the payment of moneys include interest upon such capital sum from the date of the service of the action and not from the date of the judgment. In the case of damages awarded as compensation, the same rule applies unless the court has liquidated all damages up to the date of the judgment.

Quebec Harbour Comm'rs. v. New Zealand Shipping Co., 50 Que. S.C. 305.

(§ I E—35)—CONFORMITY TO PLEADINGS AND PROOF—AMENDMENT OR REDUCTION—APPEAL—DAMAGES.

Although, even after verdict, a claim may be amended to conform to the verdict, yet where the matter of a verdict, rendered for a sum larger than that claimed by the pleadings, comes on by way of appeal from a judgment based on such verdict, rather than on a motion for a new trial, the judgment will be reduced to conform to the claim, where such course appears to meet the justice of the case. Where a verdict is rendered for a sum larger than that claimed by the pleadings, such verdict is not sufficient basis upon which to enter judgment for the excessive sum, unless the statement of claim shall have been amended to conform with the verdict. [Chattel v. "Daily Mail" (1901), 18 Times L.R. 165, applied.]

Rumely Co. v. Gorham, 10 D.L.R. 591, 6 A.L.R. 66, 23 W.L.R. 827, 4 W.W.R. 193.

CONFORMITY TO PLEADINGS—DECLARATORY JUDGMENT, WHEN DENIED.

A declaratory judgment will not be rendered where the statement of claim not only does not ask for it, but also fails to ask for damages.

Kennerley v. Hextall, 9 D.L.R. 609, 5 A.L.R. 192, 23 W.L.R. 205, 3 W.W.R. 699.

CONFORMITY TO PLEADINGS AND PROOF—RELIEF NOT SPECIFICALLY CLAIMED.

A general claim for further and other relief made in the plaintiff's statement of claim, will not, upon a motion for judgment in default of defence entitle the court to award any relief beyond that which is specifically claimed. [Faithfull v. Woodley, 43 Ch. D. 287, applied.]

Maxwell v. Cameron, 20 D.L.R. 71, 7 W.W.R. 365.

CONFORMITY TO PLEADINGS AND PROOF—DECLARATION OF NONLIABILITY.

On the dismissal of an action by vendors for the purchase price and specific performance of an agreement for sale of lands, the judgment should not include a declaration that the defendant is in no way liable upon the agreement unless there has been a counterclaim for such declaration of rights, and this although the ground of dismissal was the want of mutuality in the contract.

Houghton Land Corp. v. Ingham, 18 D.L.R. 682. [See 18 D.L.R. 660, 24 Man. L.R. 497, 28 W.L.R. 826, 6 W.W.R. 1275.]

ACTION ON GUARANTY—LIQUIDATED DEMAND.

Manitoba K.B. r. 625, is not confined to causes of action formerly covered by the common counts, but extends also to a liquidated demand, and leave to sign final judgment thereunder may be granted in respect of an action upon a guarantee of a debt which was a liquidated demand if sufficient particulars of the plaintiff's claim upon the guarantee are disclosed and the defendant guarantor files no affidavit negativing liability or stating that he does not know that the debt is due. [Lloyd's Banking Co. c. Ogle, 1 Ex. D. 262, distinguished.]

Merchants Bank v. Hay, 23 D.L.R. 554, 25 Man. L.R. 275, 8 W.W.R. 303, 31 W.L.R. 154.

MOTION FOR ON ADMISSIONS IN DEFENCE—ORDER FOR PAYMENT INTO COURT.

On application for judgment upon admissions in the defence under O. XXXII, r. 6, the defendant company (a foreign corporation licensed to carry on business in British Columbia) set up that the money sued for was claimed by third parties under a foreign jurisdiction. An order was made directing the defendant company to pay the amount claimed into court, but that the said moneys be not paid out unless notice of the application therefor be served on the foreign claimants, the application for judgment to be finally disposed of on that application. Held, on appeal, affirming the decision of Hunter, C.J.B.C., that the order was properly made in the circumstances.

Lockwood v. National Surety Co., 21 B.C.R. 249.

REFERENCE ORDER FOR PAYMENT IN ACCORDANCE WITH REFEREE'S FINDING—PRACTICE—NECESSITY FOR MOTION FOR JUDGMENT ON REPORT—JUDICATURE ACT, SS. 64, 65—RULE 772—FORM 75.

Dyet v. Truesdale, 7 O.W.N. 663.

DEFENCES—AFFIDAVITS—PARTICULARS.

To resist an application for final judgment under r. 276, there must be more than a mere statement that the defendant has a good defence to the action on the merits. The defence must be disclosed by the evidence either by affidavit or by viva voce evidence or otherwise. Sufficient facts and particulars must be given to show that there is bona fide defence. The affidavit in support of an application for final judgment under r. 275 may be made by the manager of a plaintiff company.

Advance Rumely Thresher Co. v. Laclair, [1917] 1 W.W.R. 875.

(§ I E—40)—NON OBSTANTE VEREDICTO—CONTRIBUTORY NEGLIGENCE.

Where a jury finds the damages suffered to amount to a certain sum, which sum they reduce owing to their finding of contributory negligence, the Supreme Court on appeal, considering the finding as to contributory negligence to be unwarranted upon the

facts, may award to the plaintiff the full amount of damages found by the jury to have been sustained.

Robertson v. Montreal, 30 D.L.R. 312, 50 Que. S.C. 208.

NON OBSTANTE VEREDICTO — COUNTERCLAIM IN REPLEVIN ACTION PREVIOUSLY ADJUDICATED.

Amherst Pianos v. Adney, 30 D.L.R. 495, 44 N.B.R. 7.

F. ENTRY; RECORD; SUMMARY OR SPEEDY JUDGMENT.

(§ 1 F—45)—ORDER FOR LEAVE TO ENTER—PERIOD AFTER JUDGMENT, HOW COMPUTED—CLERK'S INSCRIPTION—ORDER FOR JUDGMENT—EFFECT OF.

Under order 46, r. 1, of the rules of the Supreme Court N.S., providing for an order of arrest in certain actions and that the defendant be imprisoned until final judgment in the action and for 30 days thereafter, if the final judgment is against him, and further providing that within 30 days after final judgment an order may be made under the Collection Act for his appearance at a further examination, the period of 30 days in which such order may be obtained runs from the time of the entry of the judgment and not from the time of the order for leave to enter judgment. Where an order is obtained under O. 14, r. 1 (a) to enter summary judgment upon affidavits when no defence is shewn to send the case for trial, the "final judgment" in the action takes place on the date of entering the judgment and not upon a prior date when the order was pronounced. [Re Debtor, 19 T.L.R. 1521; Standard Discount Co. v. Otard de la Grange, 3 C.P.D. 67; Re Gurney, [1896] 2 Ch. 863, applied.] An order obtained under O. 14, r. 1 (a), for leave to enter final judgment, is not in itself a "final judgment" though it is a final order deciding the rights of the parties and one from which an appeal may be taken.

Chesley v. Benner (No. 2), 10 D.L.R. 679, 47 N.S.R. 20, affirming 8 D.L.R. 625.

In an action against the drawer of a cheque, summary judgment will not be granted where the material is sufficient to justify the suspicion that the plaintiff, to whom it was endorsed, is not the holder in due course; and it appears that a defence may be established as between the drawer and the payee.

Gordean v. Douglas, 7 D.L.R. 458, 3 W.W.R. 139.

PROMISSORY NOTE—EXAMINATION BY DEFENDANTS OF PLAINTIFF'S OFFICER—DISCLOSURE OF FACTS ENTITLING TO DEFEND—OBJECT OF CON. R. 603—COSTS.

Quebec Bank v. Freeland, 6 D.L.R. 900, 4 O.W.N. 305, 23 O.W.R. 245.

ENTRY—FINAL JUDGMENT PRIOR TO FIXING AMOUNT OF DAMAGES—TIME FOR APPEAL.

Where a final judgment is to be perfected by the insertion of the amount of damages to be ascertained by the registrar, the time to appeal will run from the date of the judgment itself and not from the date when the judgment was finally perfected by inserting the amount of damages.

Laursen v. McKinnon, 9 D.L.R. 758, 18 B.C.R. 10, 23 W.L.R. 1, 3 W.W.R. 717.

CON. R. 603—ACTION ON GUARANTY—PROOF OF AMOUNT DUE—REFERENCE.

Union Bank v. McKillop, 5 D.L.R. 882, 4 O.W.N. 36, 23 O.W.R. 16.

When, at the close of the trial, counsel for the losing party asks the judge to grant the "usual stay" and the judge says "yes" and nothing more is said, the meaning is that the successful party may sign judgment, but may neither issue an execution nor register a certificate of judgment until after the lapse of the time allowed for appealing from the decision.

Johnston v. Henry, 21 Man. L.R. 700, 17 W.L.R. 327.

A judgment should not be held to be invalid because the clerk of the court had omitted to make, in the procedure book, the note required by s. 105 (now 109) to be entered, in a case where some defendants have been served and some have not, that the plaintiff had requested him to strike out the names of the defendants that had not been served and to amend the style of the action accordingly, and it should not, after a great lapse of time, the judgment standing unreversed, be presumed, from the absence of such a note in the procedure book, that the plaintiff had not given such instructions.

Dixon v. Mackay, 21 Man. L.R. 762.

A claim based on a contract for lease and hire of services under which the plaintiff demanded a balance due for salary and damages as provided for in the contract should be recovered under the provisions for summary procedure.

Delestre v. Montreal Opera Co., 13 Que. P.R. 264.

SUFFICIENCY — WHEN BINDING — POWER TO AMEND.

The entry of the judgment by the prothonotary or clerk in open court, either in the docket or on the back of the proceedings, is not the court's final judgment. Such entry is only a note of the delivery of the judgment and has no authentic character. So long as the judge's signature is not on the draft, that document is nothing but an informal draft of the judgment without any value, because the signature is the essential formality which renders that document authentic and of legal effect. The court or a judge has discretionary power to modify the judgment after it has been given, not only in the case provided for in art. 546, C.C.P. but also in the case of error or surprise, so long as it has not been signed and registered; but the judgment thus amended must be given in open court under art. 537. An application to correct or alter a judgment before its signature or

registration should be made by motion or petition, supported by a sworn statement, in accordance with r. 47, and not by a mere notice addressed to the opposite party. But as soon as the judgment becomes final by the signature of the judge, and its registration according to art. 544, its revocation or setting aside can be accomplished only by the methods laid down in the Code of Procedure.

Arthur v. Baillargeon, 19 Que. P.R. 392.

REGISTRATION OF JUDGMENT.

The registration of a judgment is a conservatory step which may be taken by a conditional creditor, notwithstanding that it is subject to appeal.

Desjardins v. Belanger, 19 Que. P.R. 338.

OPPOSITION TO JUDGMENT—EXECUTION.

A plaintiff who, after obtaining judgment, obtains a writ of execution against the defendant, and interrogates him under art. 590 C.C.P., thereby acquiesces in the judgment, and cannot then desist. A second judgment obtained upon an amended declaration after such desistment can be annulled upon an opposition to judgment.

Charland v. Lamaire, 54 Que. S.C. 156.

OPPOSITION—REASONS—CHAMPERTY.

The fact that a defendant thought that the action against him was taken only for champerty and would not be returned into court, would not, even if proven, be a sufficient reason to have an opposition to judgment received.

Picard v. Nolet, 19 Que. P.R. 24.

(§ I F—46)—MOTION FOR—LEAVE TO DEFEND—N.B. JUDICATURE ACT—ORDER 14.

Judgment on a specially endorsed writ for the amount endorsed on the writ, with interest and costs, should only be ordered under order 14 of the New Brunswick Judicature Act, 1909, where assuming all the facts in favour of the defendant, they do not amount to a defence in law, and where there is a triable issue, though it may appear that the defence is not likely to succeed, the defendant should not be shut out from laying his defence before the court, either by having judgment entered against him or by being put under terms to pay money into court as a condition to obtaining leave to defend. [Neil v. Balmain, 11 D.L.R. 294, 41 N.B.R. 429, followed.]

Blanchard v. Neve, 46 D.L.R. 453, 46 N.B.R. 353.

APPLICATION TO COURT FOR SUMMARY JUDGMENT AFTER WRIT.

Judgment may be granted on a motion made to the court on notice under r. 608 (Ont. Jud. Rules 1897) by leave granted after the issue of the writ, where the defendant is an insolvent trader admittedly having no defence to the action brought against him on overdue promissory notes to wholesale merchants, and it is shewn on affidavits that he has been selling off his stock without replacing the same or paying the proceeds of sales to the wholesalers who supplied the goods, and is in arrears for rent and taxes.

Hayes v. Robinson, 10 D.L.R. 799, 4 O.W.N. 1280.

MOTION FOR SUMMARY JUDGMENT—REPLY AFFIDAVITS—RIGHT TO RECEIVE—LEAVE TO DEFEND.

On application under C.S.N.B. 1903, c. 116, as amended by N.B. 1911, c. 37, for liberty to sign final judgment, it is largely discretionary with the judge to permit plaintiff to read affidavits in reply to defendant's affidavits of defence. In such case, any conflict between the affidavits of the parties as to the merits of the defence should be resolved in defendant's favour. Under C.S.N.B. 1903, c. 116, s. 50, which authorizes, on return of summons, an order for leave to sign judgment on a liquidated demand, unless defendant satisfies the judge that he has a good defence, or that he is entitled to defend, the right of defence is absolute on defendant shewing that he has a good defence; but if he merely shews such facts as in the opinion of court are sufficient to base an order giving leave to defend, as distinguished from facts basing an absolute right of defence, the court may then impose conditions in granting the leave such as payment of the amount into court.

Balmain v. Neil, 11 D.L.R. 294, 12 E.L.R. 376, 41 N.B.R. 429.

LIQUIDATED DEMAND.

Summary judgment should not be ordered under r. 603 (Ont. Con. Rules 1897) in an action by a solicitor against his client for costs of an action against a municipal corporation as to the validity of a drainage by-law which was disposed of by a special statute validating the by-law and fixing and directing payment of the client's costs as between solicitor and client by the municipality, where the fund for payment of such costs was held by the municipality, subject to notice of the solicitor's lien and the client produced evidence to shew that such fund was intended to go to the solicitor and consented to the fund being held by the municipal corporation subject to the lien claim pending the trial of the action.

Gundy v. Johnston, 5 D.L.R. 470, 3 O.W.N. 1601, 22 O.W.R. 798.

In order to obtain summary judgment for a liquidated demand on affidavits negativing any possible defence the indorsement on the writ must shew beyond question that the claim is for liquidated damages.

Lembke v. Chin Wing, 4 D.L.R. 431, 17 B.C.R. 218, 21 W.L.R. 895, 2 W.W.R. 897.

Summary judgment should not be granted under r. 603 (Ont. Con. Rules 1897), upon a Chambers application founded upon affidavits that there is no defence to an action upon a promissory note, where there is any real question either of law or of fact between the parties. The power of summarily directing judgment to be entered for the plaintiff for a liquidated demand on a

Chambers' application where it appears that there is no real defence (r. 603, Ont. Con. Rules 1897), is to be exercised with caution and only where it is plain that the facts set up by the defendant could not possibly entitle him to defend, and the plaintiff's proofs are complete. [Farmers Bank v. Big Cities Realty and Agency Co., 1 O.W. N. 397, applied.]

Clarkson v. McNaught, 2 D.L.R. 52, 3 O.W.N. 638, & 670, 21 O.W.R. 629.

TRIABLE ISSUE — NOTE — MISREPRESENTATION.

An affidavit in answer to an application for a summary judgment, that the note sued on was obtained by fraudulent representations, and that it was intended for a cash advance and not as security for a past indebtedness, raises a triable issue which cannot be disposed of by a summary judgment.

Scandinavian American National Bank v. Sauman, 37 D.L.R. 419, [1917] 3 W.W.R. 745, 12 A.L.R. 338.

APPLICATION AFTER JOINDER OF ISSUES—ACCOMMODATION NOTE—INDORSEMENT BY PLAINTIFF—DEFENCE OF EQUAL LIABILITY.

Rutherford v. Taylor, 24 D.L.R. 882, 9 A.L.R. 129, 8 W.W.R. 790.

APPLICATION AFTER JOINDER OF ISSUE—DEFENCE OF AGREEMENT TO RENEW NOTE.

Cushing v. Horner, 25 D.L.R. 824, 9 W. W.R. 289, 32 W.L.R. 588.

Upon a motion for summary judgment upon a specially endorsed writ in an action by the endorsee of a promissory note against the maker, the latter is entitled to unconditional leave to defend on shewing by affidavit that it was obtained from him by fraud on the part of the original payee. [Flour City Bank v. Connery, 12 Man. L.R. 305; Fuller v. Alexander, 52 L.J.Q.B. 103, 47 L.T. 443, and Millard v. Baddeley (1884) W.N. 96, applied.]

Bank of Ottawa v. Adler, 6 D.L.R. 410, 17 B.C.R. 378, 2 W.W.R. 899.

SUMMARY LIQUIDATED DEMAND — BALANCE ON PROMISSORY NOTES—SUGGESTED DEFENCE—UNCONDITIONAL LEAVE.

Berlin Lion Brewery Co. v. Lawless, 11 D.L.R. 848, 4 O.W.N. 1441, 24 O.W.R. 745.

CON. R. 603—ACTION ON COVENANT IN MORTGAGE — RELEASE — DELAY IN BRINGING ACTION.

Martin v. Clarke, 2 D.L.R. 917, 20 O.W. R. 901, 3 O.W.N. 569.

RULE 603—ACTION ON BILLS OF EXCHANGE—DEFENCE — REFERENCE UNDER CON. R. 607.

Charlebois v. Martin, 2 D.L.R. 905, 3 O. W.N. 1155.

RULE 603—ACTION AGAINST DIRECTORS OF COMPANY FOR WAGES—COMPANIES ACT, S. 94—AFFIDAVIT OF SOLICITOR'S AGENT.

Rogers v. Wood, 2 D.L.R. 914, 3 O.W.N. 1241.

RULE 603—APPLICATION BY DEFENDANT FOR REFERENCE UNDER CON. R. 607—DOUBT AS TO ACCURACY OF AFFIDAVIT — OMISSION.

Union Bank v. Aymer, 1 D.L.R. 912, 3 O.W.N. 773. [See 1 D.L.R. 910, 3 O.W.N. 771.]

SPEEDY JUDGMENT — PROMISSORY NOTE — HOLDER IN DUE COURSE.

Summary judgment should not be awarded the endorsee of promissory notes where the maker discloses on affidavit a prima facie case of fraud which would be available against the original payee, and the evidence that the plaintiff is a holder in due course is dependent upon depositions and discloses room for doubt; the court will in such a case permit the defendant to go to trial although he has cross-examined upon the plaintiff's affidavit.

Elgin City Banking Co. v. Mawhinney, 16 D.L.R. 74, 27 W.L.R. 54, 5 W.W.R. 1274.

SUMMARY JUDGMENT—RULE 57—SPECIALLY ENDORSED WRIT OF SUMMONS—AFFIDAVIT UNDER R. 56—AMOUNT CLAIMED DISPUTED — FAILURE TO GIVE DETAILS — ONUS—ACCOUNT.

Peck v. Lemaire, 5 O.W.N. 926, 25 O.W. R. 872.

SUMMARY JUDGMENT—RULE 57—DEFENCE—EXTENSION OF TIME FOR PAYMENT OF DEBT — ARBITRATION—APPLICATION OF COMMISSIONS ON DEBT—DISPUTE AS TO CREDIT ITEM—REFERENCE.

Jardine Co. v. Macdonald; Toledo Pipe Threading Machine Co. v. Macdonald, 6 O. W.N. 444, 26 O.W.R. 675.

SUMMARY JUDGMENT—RULE 577.

McDonald v. Miller, 6 O.W.N. 358.

SUMMARY JUDGMENT—DISMISSAL OF ACTION AS FRIVOLOUS—ATTEMPT TO RELITIGATE QUESTIONS DISPOSED OF IN A PRIOR ACTION—SUBSTANTIAL IDENTITY OF CAUSES OF ACTION—LAND TITLES ACT—CAUTION—DISCHARGE.

Wightman v. Coffin, 6 O.W.N. 112, 26 O. W.R. 75.

SUMMARY JUDGMENT—MOTION FOR—RULE 56—COMPANY-DEFENDANT — AFFIDAVIT OF PRINCIPAL OFFICER — INFORMATION AND BELIEF — SUFFICIENCY—CROSS-EXAMINATION — DISCLOSING DEFENCE — AMENDMENT OF WRIT OF SUMMONS.

Robinson Brothers Cork Co. v. Perrin, 7 O.W.N. 105, 26 O.W.R. 801.

LIQUIDATED DEMAND.

An application for summary judgment upon a liquidated demand should not be granted where there is any serious conflict as to matter of fact, or any real difficulty as to matter of law. [Jacobs v. Booth's Distillery Co., 85 L.T. 262, followed.]

Weyburn Security Bank v. Martin, 22 D.L.R. 689, 8 W.W.R. 228.

ACTION ON PROMISSORY NOTES—DEFENCE.

Judgment should only be ordered under O. XIV, where, assuming all the facts in

favour of the defendant, they do not amount to a defence in law.

Bank of Commerce v. Indian River Gravel Co., 20 B.C.R. 180.

ACTION ON GUARANTEE.

An order for summary judgment cannot be made under r. 625 or otherwise, when the cause of action is upon the guarantee of a debt.

Merchants Bank v. Hay, 7 W.W.R. 1223.

RULE 62—ACTION BEGUN BY SPECIALLY ENDORSED WRIT—MOTION FOR JUDGMENT BEFORE APPEARANCE.

Canadian General Electric Co. v. Dodds, 7 O.W.N. 665.

APPLICATION FOR — EVIDENCE — DEFENCE—UNCONDITIONAL LEAVE TO DEFEND.

Naiman v. Wright, 7 O.W.N. 728.

MOTION FOR—ACTION FOR THE PRICE OF GOODS SOLD AND DELIVERED—DISPUTED FACTS—REFUSAL OF MOTION.

Leitch Bros. Flour Mills v. Dominion Bakery Co., 8 O.W.N. 83.

RULES 56, 57—AFFIDAVIT FILED WITH APPEARANCE — "GOOD DEFENCE ON THE MERITS"—WRIT OF SUMMONS—ENDORSEMENT—PRACTICE.

Martin v. Grantham, 8 O.W.N. 616.

RULE 57—ACTION ON PROMISSORY NOTE—DEFENCE—AUTHORITY OF AGENT OF MAKER—POWER OF ATTORNEY — SCOPE OF — CONDITIONAL LEAVE TO DEFEND.

Canada Glass Mantels, etc. v. Shepard, 9 O.W.N. 141.

MOTION FOR SUMMARY JUDGMENT—DISCOVERY.

An application for summary judgment may be made at any time, and the plaintiff may, if he wishes, examine the defendant for discovery before launching the motion. [Victoria Lumber Co. v. Magee, 6 Terr. L.R. 187, followed.]

Foster v. Dlugos, 10 S.L.R. 361, [1917] 3 W.W.R. 183.

HUSBAND AND WIFE—ACTION BY WIFE FOR RECOVERY OF CHATTELS IN HOUSE OF HUSBAND—TITLE TO CHATTELS—WEDDING-GIFTS—JOINT PROPERTY OF HUSBAND AND WIFE—GIFTS MADE TO WIFE ALONE—SPECIALLY INDORSED WRIT OF SUMMONS—RULES 33, 56, 57.

East v. East, 13 O.W.N. 316.

RULE 57 — SPECIALLY ENDORSED WRIT OF SUMMONS—CLAIM FOR PRICE OF ADVERTISING IN NEWSPAPER — CONTRACT — SUGGESTED DEFENCE—BREACH OF CONTRACT—CONSTRUCTION AND EFFECT OF CONTRACT.

Mail Printing Co. v. Bleakley, 13 O.W.N. 90.

RULE 57—ACTION ON BOND—SUGGESTED DEFENCE—TENDER OF BOND BEFORE ACTION A CONDITION PRECEDENT.

Doubledee v. Dominion Securities Corp., 12 O.W.N. 369. [Affirmed, 13 O.W.N. 29.]

AMOUNT DUE UNDER AGREEMENT FOR PURCHASE OF LAND—ASSIGNMENT BY PURCHASER—COVENANT OF ASSIGNEE TO PAY VENDOR—DEFENCES—WANT OF PRIVITY AND CONSIDERATION—SEAL.

City Estates v. Birnbaum, 11 O.W.N. 33.

SUMMARY JUDGMENT—FAILURE TO DISCLOSE DEFENCE—ACTION ON JUDGMENT.

Ontario Bank v. O'Reilly, 10 O.W.N. 36, 215.

MOTION FOR JUDGMENT—CON. R. 603—CONTRACT CONTAINING PROVISO AS TO LOCAL OPTION.

Smyth v. Bandel, 4 O.W.N. 425, réargued, see 4 O.W.N. 498.

MOTION FOR JUDGMENT—COSTS OF ACTION—PARTIES AGREE THAT JUDGE SHOULD DETERMINE QUESTION.

Bartrum v. Scott, 4 O.W.N. 389, 23 O. W.R. 537.

SUMMARY JUDGMENT—ACTION ON SECURITY BOND — SUGGESTED DEFENCES — UNCONDITIONAL LEAVE TO DEFEND.

McPherson v. United States Fidelity Co., 4 O.W.N. 1140, 24 O.W.R. 482. [Affirmed, 4 O.W.N. 1182.]

SUMMARY JUDGMENT — LIQUIDATED DEMAND — ACTION ON PROMISSORY NOTE — DEFENCE — COUNTERCLAIM — UNCONDITIONAL LEAVE TO DEFEND.

Augustine Automatic Rotary Engine Co. v. De Sherbinin, 4 O.W.N. 834, 24 O.W.R. 115.

INSCRIPTION FOR JUDGMENT.

In an action for the price of goods sold and delivered, the plaintiff may inscribe immediately for judgment ex parte by filing an affidavit with his inscription without first inscribing the case for enquête.

Michaels v. Heymann, 14 Que. P.R. 271.

SUMMARY JUDGMENT — PROMISSORY NOTE—DEFENCE NOT SHEWN.

Union Bank v. Anchor Investment Co., 19 W.L.R. 587.

LIQUIDATED DEBT—FOREIGN JUDGMENT.

Rule 135 which provides for summary judgment in an action upon a liquidated demand or debt is applicable to an action upon a foreign judgment, and, therefore, in such a case, where the plaintiff applies for summary judgment and the defendant does not file an affidavit showing that he has a defence and the nature of it the plaintiff must succeed. [Gaetz v. Hall, 2 S.L.R. 184, distinguished.]

Thomas v. Zeramba, [1917] 1 W.W.R. 159.

(§ I F—47)—AFFIDAVIT VERIFYING CAUSE OF ACTION — SUFFICIENCY — SPEEDY JUDGMENT.

Union Bank v. Anchor Investment Co., 16 B.C.R. 347.

APPLICATION BY PLAINTIFF FOR FURTHER DIRECTIONS AND TO SETTLE MINUTES OF JUDGMENT REPORTED IN 18 O.W.R. 850, 2 O.W.N. 927 — DEFENDANT COMPANY NOT BEFORE COURT—ALTERNATIVE JUDGMENTS.

Hyatt v. Allen, 19 O.W.R. 676, 2 O.W.N. 1382.

(§ I F—52)—ENTRY NUNC PRO TUNC AS OF DATE OF ARGUMENT—DEATH OF PARTY IN THE INTERIM.

Snell v. Brickles, 12 D.L.R. 753, 28 O.L.R. 358, reversing 9 D.L.R. 840, 28 O.L.R. 358, 24 O.W.R. 28.

G. MODIFICATION; VARYING TERMS OF.

Correction of ambiguity as to costs, see Costs, II—20.

(§ I G—55)—MODIFICATION—PRESUMPTION—NEW JUDGMENT.

Where an action was dismissed as to all but one defendant, against whom judgment was rendered, it will be presumed that a subsequent ex parte entry on the records of a County Court of a "trial and judgment for the plaintiff" for a larger sum was merely a correction of the first judgment as to the one defendant only, and that it was not intended as a judgment on a new trial against all of the defendants.

Wallace v. Lindsay (No. 2), 13 D.L.R. 8, 23 Man. L.R. 553, 24 W.L.R. 698, reversing 9 D.L.R. 625, 23 Man. L.R. 553, 23 W.L.R. 165, 3 W.W.R. 829.

CORRECTION—FEME SOLE—COVERTURE.

There is no jurisdiction in a County Court to correct its own judgment, affirmed on appeal, from a personal to a proprietary judgment, where the judgment in the first instance was against the defendant as a feme sole and she failed to lead her coverture. [Prevost v. Bedard, 24 D.L.R. 862, 51 Can. S.C.R. 269; Oxley v. Link, [1914] 2 K.B. 734, distinguished.]

Pearson v. Calder, 30 D.L.R. 424, 36 O.L.R. 458.

MISTAKE.

Although a formal judgment in an action has been issued and an appeal therefrom dismissed, the Trial Judge is nevertheless not functus officio, so as to prevent his entertaining an application to correct a "slip" or "mistake" in the judgment as entered, so as to conform with the judgment as pronounced by him.

Kidd v. National Railway Assn., 31 D.L.R. 354, 37 O.L.R. 381.

ELIMINATION OF PART—EFFECT—NOTHING DECIDED THAT IS NOT SHEWN IN REASONS.

The mere elimination of a declaration of invalidity of assessment and taxation does nothing more than leave the formal judgment without any declaration on the point and nothing can be deemed to be decided except what is shewn by the reasons.

Sutherland v. Spruce Grove, 44 D.L.R. 375, 14 A.L.R. 292, [1919] 1 W.W.R. 281. [See 43 D.L.R. 280, 14 A.L.R. 284, [1919] 1 W.W.R. 274.]

DEALING IN COMPANY SHARES—BROKERS—PROOF OF ACTUAL SALE—REFUSAL TO GIVE FURTHER EVIDENCE.

Gray v. Buchan (No. 3), 9 D.L.R. 880, 24 O.W.R. 70, 4 O.W.N. 770, affirming 6 D.L.R. 875, 23 O.W.R. 210.

AMENDMENT—COSTS—MISTAKE.

An Appellate Court may amend its judgment, after it has been formally entered, to correct a mistake as to costs.

Fawell v. Andrew, 36 D.L.R. 408, 10 S.L.R. 320, [1917] 3 W.W.R. 174, amending 34 D.L.R. 12, 10 S.L.R. 162, [1917] 2 W.W.R. 400.

CORRECTION — OF CONFIRMED REFEREE'S REPORT.

A description of land in a referee's report cannot be amended summarily, under a judge's order, after the report has been confirmed by a judgment of court.

Gass v. Dickie, 36 D.L.R. 431, 51 N.S.R. 338.

VARIATION OF DECREE BY PRIVY COUNCIL—RAILWAYS—ACCOUNTS.

Mackenzie, Mann & Co. v. Eastern Trust Co., 32 D.L.R. 780. [See 22 D.L.R. 410, [1915] A.C. 750; also 50 N.S.R. 26.]

MOTION TO VARY MINUTES OF JUDGMENT IN AN ACTION TO ESTABLISH A WILL—SECRET TRUST.

Beattie v. Beattie, 10 O.W.N. 371.

MOTION TO VARY MINUTES—COUNTY COURT APPEAL.

Parks v. Simpson, 4 O.W.N. 829, 24 O.W.R. 71.

CORRECTION AFTER SETTLEMENT AND ENTRY—PERSONAL LIABILITY OF ASSIGNEE FOR BENEFIT OF CREDITORS—CHATTEL MORTGAGE—CONVERSION.

Clifton v. Towers, 11 O.W.N. 11.

JURISDICTION OF COURT TO MODIFY—ABANDONMENT.

After having pronounced the final judgment in a case, the Court of Review has no jurisdiction to give effect to a total or partial abandonment of said judgment nor to modify it by reason of the abandonment.

Gignac v. Can. North. Que. R. Co., 48 Que. S.C. 319.

AMENDMENT OF FINAL JUDGMENT.

A final judgment which decides the merits of the litigation virtually maintains a reply en droit dismissed by an interlocutory judgment but without containing any reference to this inscription en droit, can be afterwards amended by the judge who delivered the final judgment on application of one of the parties by adding provisions maintaining the inscription.

Peloquin v. Clermont, 47 Que. S.C. 403.

CORRECTION—POWER OF COURT WHERE JUDGMENT AS ISSUED DOES NOT CONFORM TO JUDGMENT AS PRONOUNCED.

Sask. Land & Homestead Co. v. Moore, 22 D.L.R. 903, 8 O.W.N. 458, 525.

CLERICAL ERROR—CORRECTION—COSTS—CODE OF CIVIL PROCEDURE, ART. 546.

When a judge in giving judgment in the principal action and in an action in warranty in which the principal defendant, on the refusal of the defendant in warranty to take his part has contested the principal action, maintains both actions with costs, but omits to make an order as to the costs of the principal action, he only commits a clerical error which he can correct at any time on the request of the interested party. Thibodeau v. Outrement, 46 Que. S.C. 261.

VARYING ORDERS—CHAMBER ORDER VARIED BY JUDGE SITTING IN COURT—ENGLISH JUDICATURE ACT—INTERPRETATION—ARBITRATION—AWARD—RAILWAY ACT—EXPROPRIATION—PERSONA DESIGNATA—PAYMENT OUT OF COURT—INTEREST ON AWARD.

Re Grand Trunk Pacific R. Co. and Marsan, 3 A.L.R. 65.

ORDER MADE ON CONSENT—TERMS OF CONSENT NOT FOLLOWED—POWER TO VARY ORDER AFTER FORMAL ISSUE.

Brown v. Pepall, 23 O.L.R. 630, 19 O.W.R. 262.

II. Effect and conclusiveness: res judicata.

A. IN GENERAL.

(§ II A—60)—RES JUDICATA.

The recovery of a judgment for damages for wrongful ejectment from land bars a subsequent action between the same parties for the loss of profits as the result of such expulsion. [Brunsden v. Humphrey, 14 Q.B. D. 141, followed.]

Gardiner v. Ware, 13 D.L.R. 151, 6 S.L.R. 110, 25 W.L.R. 153, 4 W.W.R. 1356.

If a judgment debtor against whom judgment had been rendered in a prior action between the same parties (in which original action he was defendant), proceeds as plaintiff against the judgment creditor in a new and separate action seeking in his new action, as against the judgment rendered in the original action, the identical relief for which at the trial and on appeal therefrom he had failed to plead in the original action, and had unsuccessfully sought leave to amend his pleading, such new and separate action cannot be maintained, as the prior judgment is conclusive, not only upon all matters which were actually brought forward, but also as to all matters which might have been brought forward as part of the subject matter of the contest.

Boeckh v. Gowganda-Queen Mines, 6 D. L.R. 292, 4 O.W.N. 27, 23 O.W.R. 4.

A prior judgment dismissing a motion on behalf of the company to set aside an appointment to examine certain company directors in support of an application for a winding-up order and holding such witnesses to be compellable witnesses for examination under s. 135 of the Winding-up Act, R.S.C. 1906, c. 144, supplemented by Con. Rules 1897 (Ont.) 489, 491, 492, is conclusive as against the company so as to bar or waive any preliminary objection to defects of form in the petition raised by their subsequent motion to dismiss, if such defects were of such a character as might have been given effect to had they been raised on the prior motion and if the prior judgment implies the validity of the form of petition.

Re Baynes Carriage Co., 8 D.L.R. 309, 27 O.L.R. 244. [See 7 D.L.R. 257.]

Where a liquidator on winding up the affairs of a bank places the names of the transferees of stock made after the proceedings were commenced upon the list of contributories, who are liable upon a deficiency in the property and assets of the bank, under s. 125 of the Bank Act, R. S.C. 1906, c. 29, instead of the names of the holders of the stock on the day the proceedings were begun, he is not estopped from later placing the names of the original holders of stock on the list, though he had already obtained judgments against the transferees.

Re Ontario Bank; Massey and Lee's Case, 8 D.L.R. 243, 27 O.L.R. 192.

Where a judgment finds that a party (e.g., plaintiff) has caused to another damages in a given amount, such judgment has the effect of a final judgment res judicata, even though it does not condemn such party to pay such amount; and in a subsequent action the production of the first judgment is sufficient proof of the amount of damages suffered either as set-off or as direct action; nor can such judgment in a previous action be attacked or enquired into for alleged irregularities in procedure or insufficiency of proof.

Brazer v. Elkin, 3 D.L.R. 114, 19 Rev. de Jur. 153.

FORMER ACTION—DISMISSED—NEW ACTION—IDENTICAL ISSUES—ESTOPPEL—RES JUDICATA.

When the cause of action and the issues sought to be set up are identical with the cause and the issues already disposed of upon a former trial, the plaintiff is estopped from bringing the new action.

Fenerty v. Halifax, 50 D.L.R. 435.

CONCLUSIVENESS OF FORMER JUDGMENT—RES JUDICATA.

Johnston v. Hetherington, 7 D.L.R. 784, 1 W.W.R. 775.

RES JUDICATA—POINTS COVERED.

The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time. [Henderson v. Henderson, 3 Hare 114, applied.]

Churchill v. McRae, 22 D.L.R. 99, 8 S.L.R. 105, 30 W.L.R. 945, 8 W.W.R. 394.

RES JUDICATA—NEW ISSUE—PRIOR OPINION OF JUDGES.

The doctrine of res judicata applies to bind the parties by the decision of the issues raised in a prior case, but does not bind the parties or the court trying a second case raising a new issue under the same contract in regard to mere expressions of opinion by the judges in appeal, on delivering their judgment in the first case, as to the interpretation of a document adduced in evidence where the record in the first case raised no such issue.

Swanson v. McArthur, 21 D.L.R. 580.

RES JUDICATA—JUDGMENT FOR POSSESSION OF LAND—SECOND ACTION FOR CHATTELS.

Where a contract of sale of lands included also certain chattels and both land and chattels were sold for a lump sum without its appearing how much was to be paid for the chattels, the vendor who recovers judgment for possession of the land in an action to forfeit the payments made and to foreclose the purchaser's interest in the land, and who does not claim in such action any relief as regards the chattels, will be barred by the judgment in such action from claiming the chattels in a second action, the matter having become res judicata.

Churchill v. McRae, 22 D.L.R. 99, 8 S.L.R. 105, 30 W.L.R. 945, 8 W.W.R. 394.

EXECUTION—INTERPLEADER—SECOND EXECUTION CREDITOR NOT PARTY TO FIRST INTERPLEADER.

Res judicata cannot be set up to bar the claimant of goods seized under execution in respect of an adverse decision in an interpleader issue with another execution creditor where the second seizure in question, although in respect of the same chattel, was not made until after the first interpleader issue was decided and where the execution creditor under whose execution the sheriff made the second seizure had not been made a party to the first interpleader although his execution was then in the sheriff's hands.

Gregory v. Great West Lumber Co., 22 D.L.R. 70.

RES JUDICATA—SECOND ACTION BY DIFFERENT PARTIES.

The identity of the parties is necessary to support a plea of res judicata and such defence is not available where the first action was brought by a different company from the company suing in the second action and was dismissed because there was no assignment by the latter to the former of the claim sued upon.

International Harvester Co. v. Leeson, 23 D.L.R.674, 31 W.L.R. 219.

RES JUDICATA—ANNUAL TAXATION.

Where municipal taxes are imposed on a separate valuation roll each year, judgment on one year's tax does not constitute chose jugées (res judicata) as regards the action for the tax of a subsequent year.

Montreal L. H. & P. Co. v. Chambly Basin, 24 D.L.R. 665.

CHOSE JUGÉE ON INSCRIPTION.

A judgment delivered on an inscription en droit is chose jugée between the parties.

Filiatrault v. Meloche, 47 Que. S.C. 108.

CAUSE OF ACTION NOT SAME.

Where the cause of action is not the same as a former action [Wentworth v. Hamilton Radial Electric R. Co., 28 D.L.R. 110, 31 O.L.R. 659, 33 D.L.R. 439, 35 O.L.R. 434, 54 Can. S.C.R. 178] and the same question was not in issue and was not raised or decided, there can be no application of the doctrine of estoppel or res adjudicata.

Wentworth v. Hamilton Radial Electric R. Co., 41 D.L.R. 199, 41 O.L.R. 524, affirming 12 O.W.N. 379, 23 Can. Ry. Cas. 209.

NEW EVIDENCE.

The plaintiffs obtained a judgment against the defendant by default in 1895, for debt. Ten years later the defendant brought action to set aside the judgment on the ground that it was obtained by fraud, which was dismissed. In an action by the plaintiffs for the amount due on the first judgment the grounds for defence was substantially the same as those upon which the action of 1905 was based, but the defendant also claimed that new evidence had been discovered since the action in 1905. The Trial Judge dismissed the action on the ground of res judicata. Held, that on the question of res judicata the test is whether the issues now sought to be set up were disposed of on the former trial. The discovery of new evidence has no bearing on the case.

Williams v. Richards, 25 B.C.R. 19, affirming judgment of Clement, J.

BY CONFESSION—NO JUDICIAL INQUIRY IN MERITS—EFFECT OF—RES JUDICATA.

A judgment obtained by arrangement between the contending parties and without the court making any judicial examination of the merits of the question, does not become res judicata.

Hair v. Meaford, 20 D.L.R. 475, 31 O.L.R. 124.

DECREE FOR ALIMONY—RES JUDICATA—INSCRIPTION IN LAW—QUE. C.C. 1241, QUE. C.P. 191.

A final judgment is a "res judicata" between the parties, as to the obligation itself to pay alimony. A defendant who is sued to have the amount of the alimony revised or modified, cannot inscribe in law on grounds decided upon by the principal judgment.

O'Brien v. Berger, 16 Que. P.R. 160.

The plaintiff, an extra-provincial corporation, sued S. in a County Court for debt. S. died and the plaintiff then recovered judgment by default against the defendant as administrator of S. Execution was issued and returned nulla bona, although the administrator had assets in his hands. The plaintiff then brought this action against the defendant personally upon the County Court judgment relying on the judgment as evidence of assets, and the return of the

execution as evidence of waste. Judgment having been given for the plaintiff, the defendant moved to set it aside on the ground that the County Court judgment was void because (1) no affidavit of debt had been filed under C.S.N.B. 1903, c. 118, s. 44, and (2) the plaintiff had no license under c. 18. Held, the County Court judgment was conclusive against the defendant upon both defences and that they could not be set up in this action.

Sanford Mfg. Co. v. Stockton, 40 N.B.R. 423.

RIGHT TO LUMBER—ACTION FOR DECLARATION—FACTS FOUND IN PRIOR ACTION.

Quebec Bank v. Sovereign Bank, 4 O.W.N. 463, 23 O.W.R. 574.

(§ II A—62)—RES JUDICATA — SECOND PROSECUTION OF AFFILIATION PROCEEDINGS.

The effect of a certificate of dismissal of affiliation proceedings under the Illegitimate Children's Act, R.S.M. 1913, c. 92, granted after a hearing on the merits pursuant to Cr. Code, s. 730 (made applicable to such proceedings by the Summary Convictions Act, R.S.M., 1913, c. 189, s. 4), is to bar further proceedings upon a second information before another magistrate for the same matter on production of the certificate; the jurisdiction of the second magistrate is at an end when in hearing the facts relevant to the defence of the previous acquittal or dismissal of the charge the conclusion is clear that the matter before him has been previously disposed of by a competent tribunal. [Reg. v. Machen, 14 A. & E. 74; Reg. v. Gaunt, L.R. 2 Q.B. 466, and Williams v. Davies, 11 Q.B.D. 74, distinguished.]

Davis v. Feinstein, 24 D.L.R. 798, 24 Can. Cr. Cas. 160, 25 Man. L.R. 507, 31 W.L.R. 635, 8 W.W.R. 1003.

(§ II A—63)—RES JUDICATA — APPLICATIONS FOR WINDING-UP ORDER—DIFFERENT MATERIAL AND PARTIES, BUT SIMILAR PURPOSE.

The objection that a second application for a winding-up order under the Winding-up Act, R.S.C. 1906, c. 144, cannot be made after the first application has failed, on the ground that the matter is res judicata, does not apply where on the second application it appears that the parties are not the same and the material urged in favour of the second application is different, although the purpose of this application is similar to that of the former.

Re Manitoba Commission Co., 9 D.L.R. 456, 23 Man. L.R. 477, 22 W.L.R. 950, 3 W.W.R. 736. [See 2 D.L.R. 1, 22 Man. L.R. 268, 21 W.L.R. 86, 2 W.W.R. 276.]

(§ II A—64)—JUDICIAL EXPRESSION OF OPINION—EFFECT.

In an action by a guardian to compel the executor of an estate to pay $500 to his ward where the defence was a denial of the facts alleged, and where the parties had produced an agreement to submit the matter for a decision on the point as to whether the ward was entitled to the revenues of the inheritance or simply to fixed annuity, until his majority, a judgment which concluded in these terms: "For these reasons the court declares that the said A. B. is entitled to the revenues of the inheritance of H.B." only contains an expression of opinion, and is not a decree to be carried out, consequently it is not further capable of revision, and a court made cognizant by an inscription to this effect can only send back the case to the court of first instance, to be there dealt with according to the law.

Boismenu v. Merineau, 45 Que. S.C. 10.

(§ II A—65)—COURT MUST BE OF COMPETENT JURISDICTION.

Before a matter can be considered res judicata it must have been determined by the judgment of a court of competent jurisdiction.

Att'y-Gen'l v. Winnipeg Electric R. Co., 5 D.L.R. 823, 22 Man. L.R. 761, 21 W.L.R. 906, 2 W.W.R. 854.

(§ II A—66)—MERGER OF PRIOR CLAIM.

When, upon a demand for restitution of the thing given in pledge, the issue turns upon the payment of the debt and the debtor without succeeding in proving payment in full establishes that the debt has been reduced by payment or compensation (set-off), the judge may adjudicate on the fact and embody the finding in the dispostif of the judgment in which case res judicata will be established between the parties.

Klock v. Molsons Bank, 2 D.L.R. 445, 41 Que. S.C. 370. [Affirmed, 9 D.L.R. 877; 18 D.L.R. 796.]

(§ II A—67)—IN SHIPPING—WRECK COMMISSIONERS' DECISION.

The decision of the Wreck Commissioner in favour of a person accused of a breach of regulations under the Canada Shipping Act, R.S.C. 1906, c. 113, does not constitute res judicata as against an individual complaining under s. 926 of that Act that he has been aggrieved by such breach.

Eastaway v. Lavallee, 5 D.L.R. 229.

B. DECREES INTERLOCUTORY, BY DEFAULT, DIRECTION, OR ON DEMURRER; DISMISSAL.

Finality of order, see Mortgage, VI E—90.

Final or interlocutory, see Appeal, V D—275.

(§ II B—70)—STATED CASE—CONTENTS OF —BASED ON FACTS ADMITTED OR ASCERTAINED — ARBITRATION ACT, R.S.B.C. 1911, c. 11, s. 22.

The words "special case" in s. 22 of the Arbitration Act have the same meaning as in marginal r. 389 of the Supreme Court Rules and a "stated case" thereunder must be based on a statement of fact, either admitted or judicially ascertained. It is not the province of a court to advise parties what their rights would be under a hypothetical case. All the facts must be stated, as facts admitted or ascertained necessary to

raise the question of law upon which the opinion of the court is asked.

Re Laursen and South Vancouver, 18 B. C.R. 528.

FICTITIOUS REGISTRY—FINAL OF INTERLOCUTORY JUDGMENT—APPEAL—C.C.P. ARTS. 43, 44, 46, 52, 52A, 68, 117, 214, 215, 216, 225, TO 230, 232, TO 234, 1020, 1178—C. CRIM. ART. 469—S.R.B.C., [1861] C. 77, ART. 26, N. 2.

An application by which is formed a demand for fictitious registry is introductive to a true action. A judgment which rejects an application asking for permission for a fictitious registration is definite. On the contrary a judgment which admits or rejects a fictitious registration after the commencement of this mode of action, is interlocutory. The same judgment can be interlocutory on one point, and definite on others, according to the object to which it refers. Judges are not bound by interlocutory judgment rendered by them. The right of appeal exists always in our law, unless it has been taken away especially by the Act. Such is the principle of French Common Law, formally approved by art. 43 of the Code of Procedure.

From the view point of the right of appeal, there is no distinction between judgment rendered in actions commenced by writ, and judgments rendered on application introductive to an action.

Guilbeault v. Banque D'Hochelaga, 55 Que. S.C. 79.

(§ II B—71)—DISMISSAL OF MOTION—POWER OF ATTORNEY—APPEAL.

A judgment of the Superior Court dismissing a motion for the rejection of a power of attorney from a foreign plaintiff is an interlocutory judgment from which an appeal lies under art. 46, C.C.P.

San Martin Mining Co. v. Ingeniera Importadora, etc., Co., 43 D.L.R. 322, 27 Que. K.B. 527.

REPORT OF MASTER—MOTION TO SET ASIDE—REFUSAL TO RECEIVE EVIDENCE—REFERENCE BACK FOR LIMITED PURPOSE—RES JUDICATA.

Scott v. Gardiner, 17 O.W.N. 236.

INTERLOCUTORY JUDGMENT—FAILURE TO APPEAL.

An appeal from a final judgment reopens the issues upon all interlocutory judgments rendered in the cause, and default by a party to appeal from an interlocutory judgment does not constitute res judicata with regard to such judgment.

Rigaud-Vaudreuil Gold Fields v. Bolduc, 25 Que. K.B. 97.

RES JUDICATA—INTERIM ALIMONY.

A judgment granting an interim allowance is not res judicata of a subsequent claim having the same object.

Phaneuf v. Prevost, 49 Que. S.C. 189.

INTERLOCUTORY ORDER.

Unless an order would finally dispose of the matter in dispute, no matter in which way it had been made, it is an interlocutory order. [Newkirk v. Stees, 3 S.L.R. 208, followed; Bozson v. Altrincham Urban Council, [1903] 1 K.B. 547, not followed.]

Charbonneau v. Pagot, [1917] 1 W.W.R. 1327.

(§ II B—72)—BY DEFAULT—EFFECT AND CONCLUSIVENESS OF DEFAULT JUDGMENT—IRREGULARITY OF SERVICE OF SUMMONS—SHERIFF'S RETURN—DISCONTINUANCE AGAINST ONE OF THE DEFENDANTS — SETTING ASIDE JUDGMENT — LEAVE TO DEFEND.

Urbasz v. Gall, 7 D.L.R. 826, 21 W.L.R. 753.

Relief from a judgment obtained in an undefended action will not be granted merely on the ground that judgment was taken contrary to some loose understanding between counsel for the several parties that the trial of the action should be postponed to a later day.

Ferguson v. Swedish Canadian Lumber Co., 2 D.L.R. 557, 41 N.B.R. 217, 10 E.L.R. 386.

Signing a default judgment against one of three members of a partnership does not prevent recovery against the others. [Castle v. Baird, 15 O.W.R. 273, followed.]

Thomas v. McNaughton, 2 D.L.R. 211, 21 W.L.R. 267, 2 W.W.R. 381.

PRACTICE — SETTING ASIDE — AFFIDAVIT OF MERITS.

A regular judgment will not be set aside without the production of an affidavit of merits, except for some very sufficient reason. [Farden v. Richter, 23 Q.B.D. 124, 58 L.J.Q.B. 244, followed.] Where, however, the defendant's solicitor informed a student of the plaintiff's solicitor in the hearing of the plaintiff's solicitor that he intended to enter an appearance at a specified time and the plaintiff's solicitor expressed no dissent, a judgment entered by the plaintiff in default of appearance before such time was properly set aside without an affidavit of merits although the judgment was otherwise regularly entered.

Great West Land Co. v. Powell, 12 S.L.R. 186, [1919] 2 W.W.R. 78.

EX PARTE JUDGMENT—REVERSAL—SECOND ACTION.

When an ex parte judgment is reversed on review with the mere declaration that the plaintiff must pay the costs of review that the latter may proceed anew in the court of first instance without first paying the said costs.

Tremblay v. Depatie, 12 Que. P.R. 356.

(§ II B—76)—DISMISSAL FOR NONCOMPLIANCE WITH RULE OF SECURITY—STAY OF PROCEEDINGS.

The dismissal of an action for failure to comply with an order for security for costs is not a bar to another action for the same cause, but the court has an inherent power to stay the second action until the costs of the former have been paid. Where the claims set out in the second action are new,

at least in form, and have not been specifically disposed of by the prior judgment, there is no res adjudicata apparent concerning them, but nevertheless the defendants are at liberty to plead res adjudicata.

Smith v. Merchants Bank, 38 D.L.R. 321, 40 O.L.R. 309.

DISMISSAL.

Where an action has been dismissed for noncompliance with an order for the payment of certain costs by the plaintiff, the court has no power to restore the action to the list for trial upon the plaintiff's paying such costs.

Smith v. Yukon Gold Co., 5 D.L.R. 31, 21 W.L.R. 902.

DISMISSAL—JUDGMENT ON DEFENDANT'S ADMISSIONS, CONCLUSIVENESS OF.

An order for judgment made on application of plaintiff under r. 615 of the King's Bench Act (Man.), upon admissions made by defendant in his pleading, puts an end to the action, where the admissions constituted the entire defence raised; and the plaintiff is, therefore, precluded from subsequently applying for an order for examination on discovery of defendant, notwithstanding that when the order for a judgment was made, nothing was said by counsel on either side with reference to the plaintiff proceeding for any further relief, and the plaintiff did not ask to have such right reserved, and no suggestion was made by defendant's counsel at the time that the order for judgment would be in the nature of a final judgment, or prevent the plaintiff from proceeding for the balance of his original claim. [Kelly v. Kelly, 18 Man. L.R. 362, distinguished; United Telephone Co. v. Donohoe, 31 Ch. D. 399, 55 L.J. Ch. 480; Andrews v. Patriotic Ass'ce Co., 18 L.R. Ir. 115, applied.]

Smith v. Simpson, 10 D.L.R. 366, 23 Man. L.R. 31, 23 W.L.R. 266, 3 W.W.R. 931.

OF NONSUIT.

A judgment of nonsuit under s. 110 of the County Court Act (B.C.) is not a bar to another action by the plaintiff on the same subject-matter. [Poyser v. Minors, 7 Q.B.D. 329, followed.]

Skelding v. Levin, 23 B.C.R. 47.

DISMISSING PETITION TO QUASH SAISIE-ARRÊT—CHOSE JUGÉE.

A judgment of the Superior Court, confirmed by the Court of Review, dismissing a petition of the defendant to have a saisie-arrêt before judgment quashed, because this petition had been filed without the permission of a judge after the expiration of the delay for contesting the saisie-arrêt, is chose jugée upon the question of whether the defendant was or was not within the legal delays for filing his contestation, which ground can be raised on the hearing of a motion to obtain permission to file it.

Ménard v. Choiniere, 24 Que. K.B. 528.

Where an action or other proceeding is discontinued on payment of costs, the adverse party may inscribe for judgment on such discontinuance.

Blake v. Goyette, 13 Que. P.R. 412.

C. COLLATERAL ATTACK.

(§ II C—80)—ORDER FOR ARREST—AUTHORIZATION TO CURATOR.

An opposition to judgment will not lie against an order for arrest or an authorization, from a judge to a curator in a judicial abandonment of property, to continue proceedings commenced by a temporary guardian.

Laurentides Brique et Sable Co. v. Charron, 48 Que. S.C. 4.

(§ II C—86)—JUDGMENT BY DEFAULT.

Having regard to the statutory origin of the proceeding by petition in revision of default judgments, the leave given to file such petition does not have the effect of obliterating the default judgment, and consequently the defendant, petitioner in revision, is not entitled to have this action declared peremptied, after 2 years from the said filing.

Taylor v. Grant, 18 Rev. de Jur. 90.

(§ II C—91)—LACK OF JURISDICTION.

The amendment of the Division Courts Act (Ont.) substituting the words "fail for want of jurisdiction" for the words "abate for want of jurisdiction," in 10 Edw. VII. (Ont.) c. 32, s. 79 (1) does not give a Division Court jurisdiction to try an action which should have been brought in the court of another division.

Re Gibbons v. Cannell, 8 D.L.R. 232, 4 O.W.N. 270, 23 O.W.R. 401.

LACK OF JURISDICTION—APPEAL—"FINALITY" OF DECISION APPEALED FROM.

The judgment by which a court declares itself to be without jurisdiction and transfers the cause to another court is not interlocutory but final in its nature. From such a judgment rendered by the Superior Court an appeal lies de plano to the Court of King's Bench.

Toudreau v. Montmagny, 22 Que. K.B. 289.

(§ II C—93)—SPECIAL TRIBUNALS—MINISTER OF LANDS—DECISION OF AS TO VALIDITY OF LAND PATENT—RES JUDICATA.

A decision of the Minister of Lands, Forests and Mines in favour of the validity of a Crown land patent is not res judicata as to a subsequent action to set aside the patent in the courts.

Zock v. Clayton, 13 D.L.R. 502, 28 O.L.R. 447, reversing 6 D.L.R. 205, 3 O.W.N. 1611.

SPECIAL TRIBUNALS.

The rule that the judgment of a court which has jurisdiction cannot be called in question by collateral attack applies to the decisions of special tribunals and to proceedings that are directed by statute.

United Shoe Machinery Co. v. Laurendeau, 2 D.L.R. 77.

D. WHAT MATTERS CONCLUDED.

(§ II D—100)—EFFECT AND CONCLUSIVENESS.

The plaintiff is not estopped by judgments in former actions, where the same subject has not been adjudicated, although such former actions may have been between the same parties and concerning the same estate.

Kennedy v. Kennedy, 13 D.L.R. 707, 24 O.W.R. 943, affirming 11 D.L.R. 328, 28 O.L.R. 1.

INTERPLEADER.

Where one real state agent procured the execution of the contract of sale providing that the commission to himself should form part of, and be paid out of, the purchase money, and on another real estate agent making an adverse claim thereto as against the fund out of which it was so payable upon an allegation that the first agent had acquired the information which led up to such contract while in the employ of such adverse claimant, an order made in interpleader proceedings finding the first agent entitled to that proportion of the purchase money so set apart for the stipulated commission should not bar the claimant from an independent action against the vendor for any commission to which he may be entitled by reason of having acted for the vendor in finding the party who eventually purchased through the other agent; the formal judgment on the interpleader may in such case properly include a statement that its determination is without prejudice to the latter claim against the vendor.

Rice v. Proctor, 11 D.L.R. 603, 4 O.W.N. 1242, 24 O.W.R. 527.

(§ II D—102)—CHOSE JUGÉE—WAGES.

Where in contestation of a demand of judicial abandonment of property based on salary due, the principal question is that no salary being due to the plaintiff and that he was therefore not a creditor of the defendant, and on this ground, the demand is rejected by the Superior Court, there is chose jugée in a subsequent action by the same plaintiff against the same defendant for the same salary.

Sills v. Pyke, 49 Que. S.C. 315.

(§ II D—107)—EXPROPRIATION MATTERS.

Orders in matters of expropriation have all the juristic character of judgments of the Superior Court in matters within its jurisdiction. Subject to such appeals as are provided by the statutes they have the authority of res judicata. The exception of res judicata is a good reason for the dismissal of an action to set aside an order on arbitration for causes which the plaintiff ought to have urged by way of appeal.

Bouchard v. Quebec Development Co., 50 Que. S.C. 246.

(§ II D—112)—AGREEMENT OF SALE—FORECLOSURE — REDEMPTION — PERSONAL REMEDY — MORATORIUM ACT, 1914 (MAN.)—APPLICABILITY TO PENDING AS WELL AS SUBSEQUENT ACTIONS.

The period of one year to be allowed for redemption of land under s. 8 of the Moratorium Act, 1914, Man. in court decrees applies not only to actions commenced after the passing of the Act, but also to actions then pending.

Fisher v. Ross, 19 D.L.R. 69, 24 Man. L.R. 773, 7 W.W.R. 359.

(§ II D—117)—CONTRACTS.

Res judicata cannot be claimed as to the construction of a contract in a prior action in which the defendant in the second action was a joint defendant, but as to whom such contract was not in issue.

Klock v. Molsons Bank, 3 D.L.R. 521, 44 Que. S.C. 193.

(§ II D—118)—SUMMARY APPLICATION UNDER VENDORS AND PURCHASERS ACT (ONT.).

In an action for specific performance of a contract for the sale of land, any point previously decided on a summary application under the Vendors and Purchasers Act (Ont.) relating to that contract cannot be reviewed.

Cameron v. Hull, 9 D.L.R. 843, 4 O.W.N. 581, 23 O.W.R. 736.

(§ II D—121)—ALIMONY.

Arrears of alimony due under a judgment which has been registered in the land registry office, pursuant to s. 35 of the Ontario Judicature Act is a statutory charge upon the lands belonging to the husband, and may be enforced by a petition in the original action.

Abbott v. Abbott, 1 D.L.R. 697, 3 O.W.N. 683, 21 O.W.R. 281.

ALIMONY.

When a judgment grants an allowance for maintenance there is res judicata between the parties as to the obligation to supply those allowances until such judgment is annulled or revoked by another one. In an action for an increase in the alimony already granted by the judgment, one cannot on an inscription in law use grounds for the annulment or revocation of the first judgment.

O'Brien v. Berger, 49 Que. S.C. 278.

(§ II D—127)—REVIEW OF ASSESSMENT—SUBSEQUENT ACTION FOR TAXES.

In an action by a city corporation against a railway company for the recovery of taxes assessed against certain property belonging to the company within the city limits, the company may set up as a defence the exemption privilege provided in s. 14, c. 40, R.S.S. notwithstanding an unsuccessful appeal by them from the assessment to the Court of Revision and the dismissal of a subsequent appeal to a judge of the District Court on this very ground.

Prince Albert v. Can. Northern R. Co.,

10 D.L.R. 121, 15 Can. Ry. Cas. 87, 6 S. L.R. 49, 23 W.L.R. 275, 3 W.W.R. 900.

(§ II D—130)—As to executor's power of sale.

A judgment determines every right, question, or fact distinctly put in issue as a ground of recovery or defence, and all matters which ought to have been brought forward as part of the controversy. A judgment by which an executor was ordered to make a sale is conclusive as to his power of sale though not expressly adjudicated.

Kennedy v. Suydam, 30 D.L.R. 744, 36 O.L.R. 512.

(§ II D—136)—Joint agreement on contracts.

The decision adverse to the plaintiff company in a previous action in which it sued another person who jointly with the present defendant had entered into the contract in question with the company, by which previous decision it was held adversely to the company that both the present defendant, not a party to the previous action, and the party then sued were entitled to certain rights against the plaintiff as to the supply of gas and that the cutting off of the supply to the defendant in the first action operated as a forfeiture in favour of the present defendant of the plaintiff company's claim to an oil and gas lease over his farm, operates as res judicata in bar to the company's second action as regards the same points of controversy.

Welland County Lime Works v. Augustine, 4 D.L.R. 315, 3 O.W.N. 1329, 22 O.W. R. 235.

(§ II D—140)—Corporate matters—Negligence—Nuisance.

The defence of res judicata has no application between an action by a municipal corporation against the owner of property for the purpose of compelling him to open and clear out a watercourse, and another action by such owner against the same municipality to recover damages caused by defects in such watercourse.

Sevigny v. St. David, 50 Que. S.C. 291.

(§ II D—145)—Conclusiveness—Judgment for return of subscription money.

A winding-up order obtained by a judgment creditor of the company in respect of a judgment recovered for the cancelation of his stock subscription and the return of money paid thereon is res judicata as to his right to be relieved from his subscription on the settling of the list of contributories in the winding-up.

Re National Husker Co., Worthington's Case, 10 D.L.R. 644, 4 O.W.N. 1077, 24 O. W.R. 385. [Affirmed, 14 D.L.R. 696, 25 O. W.R. 348.]

(§ II D—147)—Conclusiveness—Wages claim—Directors' personal liability.

In an action by a creditor against a surety, a judgment obtained by the creditor against the principal debtor is not evidence against the surety, on the maxim res inter alios acta, whether the defendant is a contractual or a statutory surety; consequently a judgment against a company sued for a labourer's wages for which the directors would be personally liable under the Companies Ordinance [Alta. Ord. 1911, c. 61] is not conclusive as against the directors sued in a subsequent action. [Re Kitchin, Ex parte Young, 17 Ch. D. 668, applied.]

Guenard v. Coe, 17 D.L.R. 47, 7 A.L.R. 245, 28 W.L.R. 259, 6 W.W.R. 922, reversing 16 D.L.R. 513, 7 A.L.R. 245, 26 W.L.R. 626, 5 W.W.R. 1044.

E. As to parties.

(§ II E—150)—Res judicata—Principal and agent.

Where an agent has been sued and judgment taken against him, it operates as res judicata barring the prosecution of an action on the same grounds against the principal, even if the judgment is by default. [Partington v. Hawthorne, 52 J.P. 807, applied.]

Brennen v. Thompson, 22 D.L.R. 375, 33 O.L.R. 465.

Principal and agent.

A judgment, recovered by a real estate broker in an action against the owner for his commissions, is not binding upon the owner's agents who were not parties to the action, and cannot be set up as res judicata in an action by the broker against the agents for the commissions he claims to be entitled to out of the funds in their hands, nor is it admissible evidence of the facts established by it.

Chalmers v. Machray, 26 D.L.R. 529, 26 Man. L.R. 105, 33 W.L.R. 656, 9 W.W.R. 1435, reversing 21 D.L.R. 635, 30 W.L.R. 836, 8 W.W.R. 27. [Affirmed, 39 D.L.R. 396, [1917] 3 W.W.R. 361.]

(§ II E—152)—Action for death of servant—Employer and contractor.

Where an action for negligently causing death is brought by the representative of the deceased workman against the employer in respect of negligence in operating a hoist in building operations as to which the employer and a subcontractor would each have a measure of responsibility, the taking of judgment and receiving satisfaction in the action against the employer is a bar to a second action against the subcontractor in respect of his alleged negligence; and after receiving satisfaction of the judgment so recovered against the one, the plaintiff is estopped in the second action from saying that the injury resulted from the negligence of the subcontractor only and that the principal contractor who had consented to judgment in the first action was not in fact liable. [Brown v. Cambridge, 85 Mass. 476; Kemball v. Hamilton, 4 App. Cas. 504, applied; Atlantic Dock Co. v. New York, 43 N. Y. 64; Donovan v. Laing, [1893] 1 Q.B. 629, distinguished.]

Black v. Dom. Fireproofing Co. 23 D.L.R. 161, 8 W.W.R. 823, 31 W.L.R. 352.

(§ II E—154)—Vendor and purchaser.

In an action against the lessee of certain land for possession or other relief, brought by both parties to a contract for the sale thereof, the legal estate being still in the vendor and constituting a substantial interest in the land, the defence of res judicata fails as to the vendor, though judgment had been registered against his co-plaintiff in a former action brought by the latter against the same defendant, and involving the same issues, and though the vendor on his examination for discovery disclaim any interest in the property.

Alexander v. Herman, 2 D.L.R. 239, 3 O.W.N. 755, 21 O.W.R. 461.

Contest of will—Absent beneficiaries.

A judgment in an action for the contest of a will is binding only between the parties to the action and cannot prejudicially affect any beneficiaries not before the court.

Beament v. Foster, 26 D.L.R. 474, 35 O.L.R. 365.

Purchaser at judicial sale.

A judgment determining the conditions of a judicial sale is not res judicata between the one who has obtained it and the person who has become purchaser of the immovable at the sale.

Hope v. Leroux, 25 Que. K.B. 130.

(§ II E—162)—Equitable owner of land.

Where final judgment was rendered against the purchaser in a land contract in an action brought by him for possession or for other relief against a lessee of the said property, a suit involving the same issues afterwards brought by the vendor must be dismissed.

Alexander v. Herman, 2 D.L.R. 239, 3 O. W.N. 755, 21 O.W.R. 461.

(§ II E—163)—As between defendants.

In an action by the Attorney-General on the relation of a city and its building inspector and by the city in its own right against an electric railway company to restrain the breaches of certain city by-laws concerning the erection of buildings and of any gas works or gas holders within the city, in which action the company claimed that by virtue of the powers derived from another company that it was not subject to the by-laws and also denied their validity, and at the opening of the trial applied to amend its defence by pleading that the plaintiffs, by the judgment of the Privy Council in the company's favour in a former action which the city alone brought against the company and in which the issues were similar to those in the present action, were estopped from denying that the latter possessed all the powers of its predecessor, the Attorney-General is not estopped by the judgment in the former action and as against him the application to amend should be refused. [St. Mary Magdalene v. Att'y-Gen'l. 6 H.L.C. 189; People v. Halladay, 93 Cal. 241, 29 Pac. R. 54, writ of error dismissed, 159 U.S. 415, distinguished.]

Att'y.-Gen'l. v. Winnipeg Electric R. Co., 5 D.L.R. 823, 22 Man. L.R. 761, 21 W.L.R. 906, 2 W.W.R. 854.

(§ II E—178)—Administrator's bond—Default judgment—Liquidated demand.

Where a judgment has been obtained for the amount of the plaintiff's claim against an estate, and the Court of Probate, being satisfied that the condition of the administration bond has been broken, has assigned the bond under the provisions of the Probate Act to the plaintiff who thereby became entitled to sue on the bond, and recover thereon as trustee for all parties interested, a default judgment may be entered for the judgment, debt, and interest, the statement of claim being for a liquidated demand under O. 27, r. 2. The sureties on such bond cannot compel the creditor to establish the claim over again against the estate.

McKay v. McKay, 41 D.L.R. 390, 52 N. S.R. 349.

(§ II E—180)—Principal and agent—Husband and wife.

Where a husband acting as agent for an undisclosed principal, his wife, in an exchange of lands, gives to the vendor as part payment for his wife's purchase two promissory notes signed by himself alone, a judgment against the husband upon the notes, which was not satisfied, is no bar to a subsequent action for a personal judgment against the wife for the unpaid purchase-money represented thereby.

Dick v. Lambert, 29 D.L.R. 42, 9 S.L.R. 355, 34 W.L.R. 1156, 10 W.W.R. 1320, affirming 25 D.L.R. 730, 33 W.L.R. 259, 9 W.W.R. 905.

(§ II E—195)—Mortgage cases.

A decision given in favour of execution creditors against the execution debtor rejecting his claim that the lands seized under the execution were exempt from seizure under execution as being his homestead is res judicata as against a mortgagee of the lands from the execution debtor subsequent to the operation of the execution or judgment as a charge on the lands but the mortgagee may apply for a rehearing of the case on the ground of the discovery of new evidence of a material character.

Johnson v. Hewitt, 1 D.L.R. 251, 5 S.L. R. 125, 19 W.L.R. 937, 1 W.W.R. 775.

Judgment—Amount of judgment and costs of appeal—One cause of action.

Mah Po v. McCarthy, 18 W.L.R. 656, 5 S.L.R. 17.

Res judicata—Company—Winding-up—Consent judgment.

Re Ontario Sugar Co.; McKinnon's Case, 24 O.L.R. 332, 19 O.W.R. 764. [Leave to appeal refused, 44 Can. S.C.R. 659.]

Summary—Under r. 603—Method of computation of power used—Evidence technical and conflicting.

Wilson v. National Electrotype, 19 O.W. R. 945, 3 O.W.N. 28.

ANNUITY—FORMER ACTION FOR—RES JUDICATA.

In a former action on a bond, all questions as to its validity and the question as to whether or not there had been delivery of the same, having been disposed of it is not competent to bring up anything that was or might have been set up in the former action. This is so even when the judgment is a consent judgment.

O'Leary v. Nihan, 2 O.W.N. 990, 19 O. W.R. 9.

III. The lien.

A. IN GENERAL.

See Execution, I—8; Land Titles, IV—40.

(§ III A—200)—LIEN ON LAND—REGISTRATION AFTER CONVEYANCE—CONSTRUCTIVE NOTICE.

Where land was conveyed to and the title registered in the name of a creditor merely as security for a debt, it was not bound, under s. 2 (f) of the Judgments Act, R.S. M. 1902, c. 91, by the subsequent registration before the sale of the land by the grantee, of a judgment against the grantor, where the conveyance was not attacked until after the latter sale and the payment of the surplus (above the debt secured) to the debtor, without notice of such judgment.

Robinson v. McCauley, 14 D.L.R. 681, 23 Man. L.R. 781, 26 W.L.R. 285, 5 W.W.R. 789, affirming 13 D.L.R. 437, 24 W.L.R. 617, 4 W.W.R. 930.

(§ III A—202)—LIEN—HOW LOST OR SUSPENDED — SUBSTITUTION AGREEMENT — SALE OF LAND.

Except as to the costs under the writ of execution following a judgment for an overdue instalment of purchase money, the right to levy is lost if by agreement between the parties and a company the latter was substituted as the purchaser and the defendant relieved from his obligation to purchase, but with a reservation of the defendant's liability for the overdue instalment, and if the agreement of sale and the moneys paid thereunder have been forfeited by the vendor under a power contained in the contract; retention of rights notwithstanding the termination of the agreement would require clear and definite expression and could not be inferred from a proviso that nothing "done under it" should cancel the liability for the first instalment. [Cameron v. Bradbury, 9 Gr. 67; Fraser v. Ryan, 24 A.R. (Ont.) 441; Gibbons v. Cozens, 29 O.R. 356; McPherson v. U.S. Fidelity, 6 O.W.N. 677, followed.]

Vivian v. Clergue, 20 D.L.R. 660, 32 O. L.R. 200. [Affirmed 24 D.L.R. 856, 51 Can. S.C.R. 527. See also 41 Can. S.C.R. 607.]

(§ III A—203)—REGISTRATION—ASSIGNMENT FOR CREDITORS—KNOWLEDGE.

The registration of a judgment by an assignee thereof after the death of the judgment debtor and subsequent to an unregistered assignment for creditors by the latter, of which the judgment creditor and the assignee of the judgment had knowledge does not, by virtue of ss. 15, 16 of the Registry Act, R.S.N.S. 1900, c. 137, create a charge upon the land of the deceased debtor which has passed to the assignee for creditors under the deed of assignment, and against which, therefore, no execution can issue thereon.

The King v. Kent, 26 D.L.R. 94.

REGISTRATION—EFFECT OF APPEAL.

Inscription on appeal, or in review from a judgment, does not deprive the creditor of the right to register the judgment against the immovables of his debtor, the inscription being a conservatory measure.

McGee v. Morrison, 18 Que. P.R. 38.

B. ON WHAT PROPERTY.

Of interest of mortgagee, see Execution, I —8.

(§ III B—205)—CHARGING ORDER ON SHARES.

The Imperial Judgments Act (1838), 1 & 2 Vict., c. 110, and amending Act (1840), 3 & 4 Vict., c. 82, are in force in Saskatchewan, and under s. 14 of R.S.S. (1909), c. 52, the court adopts English r. 631, which gives a judge power to make a charging order on shares of the stock of a company for payment of the amount due on a judgment against a shareholder of the company.

Miller Morse Hardware Co. v. Smart, 38 D.L.R. 171, 10 S.L.R. 409, [1917] 3 W.W.R. 1113, varying [1917] 2 W.W.R. 439.

REGISTRATION—BUILDING—LAND.

A building may have a right of property different and distinct from that of the land on which it stands. A judgment may be registered against this immovable, although the debtor, owner of the building, has, in respect to the land, only an agreement of sale.

Bonnier v. Roy, 51 Que. S.C. 1.

CHARGING ORDER—SHARES—RECEIVER.

Stock standing in the name of a judgment debtor cannot be reached by the appointment of a receiver, but a receiver may be appointed of the dividends. [Bryant v. Bull, 10 Ch. D. 153, followed.] To reach the stock itself an order charging it may be granted upon notice of motion. [Miller-Morse Hardware Co. v. Smart, [1917] 2 W.W.R. 439, varied in 38 D.L.R. 171, 10 S.L.R. 409, [1917] 3 W.W.R. 1113, followed.]

Lehane v. Porteous, [1917] 2 W.W.R. 560.

(§ III B—209)—HOMESTEAD.

Where a judgment creditor registers an execution against the debtor in the land titles office during the interval between the debtor's entry for homestead and the grant of the certificate of title, and the land is subsequently acquired as a homestead by the debtor under the Dominion Lands Act, the court will not, upon application of the judgment debtor, grant a declaratory judgment declaring that the land in question is not subject to any rights of the judg-

ment creditor under the execution, or that the execution is not a charge or lien upon the land, or that it is a cloud upon the judgment debtor's title, since such a declaratory judgment would not establish any rights, inasmuch as the execution only binds the land which is subject to it under the Exemptions Act (c. 47, R.S.S. 1909), this land is exempt as long as it remains "homestead." [Gilmore v. Callies, 19 W. L.R. 545, followed: Fredericks v. North-West Thresher Co., 3 S.L.R. 280, 44 Can. S.C.R. 318, distinguished.]

Trottier v. National Mfg. Co., 8 D.L.R. 138, 5 S.L.R. 244, 22 W.L.R. 615, 3 W.W.R. 383.

(§ III B—210)—CHATTELS.

Where, upon the rescission of a sale of a chattel for the default of the vendor, a judgment was given the vendee for part of the purchase money he had paid the vendor under the sale contract which did not provide for a lien therefor on the property, the vendee in an action brought after the vendor's insolvency to recover possession of the chattel from the vendee may be declared to have a lien thereon for the payments so made, and such lien may be realized by sale of the chattel after due notice.

Canadian Gas Power & Launches v. Orr, 4 D.L.R. 641, 3 O.W.N. 1362, 22 O.W.R. 351.

(§ III B—212)—LAND EQUITABLY OWNED.

In an action for the sale of lands under a certificate of judgment for a sum of money, registered in the land titles office (Man.), where the judgment debtor, prior to the registration, had entered into a verbal agreement to sell the lands in question to a purchaser for a fixed and adequate consideration contemporaneously paid, and, subsequent to the registration, conveyed to the purchaser pursuant to the agreement; the effect of the agreement and payment was to vest in the purchaser at once the beneficial ownership of the land, leaving in the judgment debtor no interest or estate that could be sold under a registered certificate of judgment. Under the Judgments Act (Man.), which creates in favour of a registered certificate of judgment a charge upon "all the lands" of the judgment debtor, the judgment creditor's right depends entirely upon the statute, and while his registered certificate binds the judgment debtor's lands it does not bind such lands as have already been sold by the debtor, even when the purchaser's ownership is only equitable and unregistered.

Fenson v. Shore, 6 D.L.R. 376, 22 W.L.R. 202, 2 W.W.R. 1082. [Affirmed, 7 D.L.R. 812, 22 Man. L.R. 595, 3 W.W.R. 607.]

(§ III B—213)—PERSONAL JUDGMENT.

Where the court awards damages for a contract of support of the plaintiff for life by the defendant which was part consideration of a deed from the plaintiff to the defendant, the plaintiff is not entitled to have the amount of such damages charged as a lien upon the land in addition to a personal judgment against the defendant.

Zdan v. Hruden, 4 D.L.R. 255, 22 Man. L.R. 387, 21 W.L.R. 620, 2 W.W.R. 665, reversing, on this point, 1 D.L.R. 210, 19 W. L.R. 883.

PERSONAL JUDGMENT — FORECLOSURE — AGREEMENT OF SALE.

Hord v. Wolf, 19 D.L.R. 893.

IV. Foreign judgments.

A. OF FOREIGN COUNTRY.

See also Conflict of Laws.

(§ IV A—220)—VALIDITY OF MARRIAGE.

Foreign decrees of nullity of marriage will be recognized as fully as will foreign decrees of divorce, when such nullity is held to have arisen because of bigamy; and a foreign judgment of annulment on the ground of bigamy in an action between parties both subject to the foreign jurisdiction is admissible to prove want of consideration of a transfer of property in Canada made in consideration of the annulled marriage which took place in Canada.

Wilcox v. Wilcox, 16 D.L.R. 491, 24 Man. L.R. 93, 27 W.L.R. 359, 6 W.W.R. 213, reversing 14 D.L.R. 1, 25 W.L.R. 489, 5 W. W.R. 136.

A judgment in personam of a foreign court of competent jurisdiction may be sued upon in Saskatchewan where the evidence sufficiently establishes the identity of the defendant in the action on the judgment with the defendant in the judgment sued upon, and that the court which rendered the judgment had jurisdiction over the defendant in respect of the cause of action.

Read v. Ferguson, 8 D.L.R. 737, 5 S.L.R. 405, 22 W.L.R. 751, 3 W.W.R. 611.

FOREIGN JUDGMENT—JURISDICTION OF FOREIGN COURT—SUBMISSION BY APPEARANCE.

Baldwin v. Smith, 18 W.L.R. 207.

FOREIGN JUDGMENT—ACTION ON—DEFENCE.

Fore Street Warehouse Co. v. Vandelinder, 18 W.L.R. 518.

FOREIGN—ACTION TO RECOVER ON—OBTAINED IN YUKON TERRITORY.

Johnston v. Occidental Syndicate, 3 O. W.N. 60, 20 O.W.R. 67.

PRESCRIPTION—INTEREST ON FOREIGN JUDGMENT—DEBT AND COSTS.

Royal Trust Co. v. Baie Des Chaleurs R. Co., 13 Can. Ex. 9.

(§ IV A—225)—EX PARTE PROCEEDING—AWARD OF CUSTODY OF CHILDREN—EFFECT IN CANADA.

An order of a court of one of the states of the United States, made in a divorce proceeding instituted without personal service on the husband, awarding the custody of infant children to their mother, will not be given effect in Canada.

Re Chisholm, 13 D.L.R. 811, 47 N.S.R. 250, 12 E.L.R. 182.

In an action in a Provincial Court on a

judgment in personam obtained in one of the United States, evidence that the defendant against whom judgment was rendered was a resident of the state in question when the action was begun, was personally served with the summons which was the first step in the action is sufficient to shew that he was subject to the jurisdiction of the court which rendered the judgment, and where he submitted to the jurisdiction of the State Court by entering an appearance in the action by his authorized attorney such evidence is sufficient to establish the jurisdiction of the State Court over the defendant at the time of the rendition of judgment.

Read v. Ferguson, 8 D.L.R. 737, 5 S.L.R. 405, 22 W.L.R. 751, 3 W.W.R. 611.

Plaintiff brought an action in Manitoba, in respect of a cause of action arising in Manitoba. At the time of action brought the defendant was residing in Saskatchewan, and had his domicile there, and was served there. He did not appear to the action, and judgment was recovered by default. The plaintiffs then brought action in Saskatchewan upon this judgment, and alternatively for relief in respect of the original cause of action. The defendant objected that the Manitoba Court had no jurisdiction:—Held (following Dakota Lumber Co. v. Rinderknecht, 2 W.L.R. 275), the Manitoba Court having no jurisdiction over the defendant when the judgment was recovered, an action could not be maintained thereon, but such judgment, being invalid for the purpose of action, was invalid for all purposes, and, therefore, the plaintiff could maintain an action in respect of the original cause of action.

British American Investment Co. v. Flawse, 4 S.L.R. 372.

In order to establish a change of domicile so as to oust the jurisdiction of the Manitoba Court a defendant must shew a physical removal from Manitoba to Saskatchewan, and that at the time the action was begun he had the intention of establishing in Saskatchewan a residence of a permanent character, the onus of proving which was upon him. The statement of the defendant that when he was served with the process he was a resident of Saskatchewan and that he had since then resided there except during a temporary absence must be interpreted, in the absence of evidence of a contrary intention, as a declaration that he had not only his physical residence in Saskatchewan, but that he had also the intention of making it his permanent home, and this being the case, he must be deemed to have acquired a permanent domicile there, and the foreign judgment could not be enforced.

Fairchild v. McGillivray, 4 S.L.R. 237.

A foreign judgment, even if regularly obtained according to the practice and procedure of the foreign country, in order to create that duty or obligation to pay which English courts will enforce, must come within one or the other of the five cases mentioned in Emanuel v. Symon, [1908] 1 K.B. 309. An agreement to submit to the jurisdiction of the courts of a foreign country is not to be implied from the making of a promissory note payable in such foreign country. A foreign judgment does not in Nova Scotia, by reason of O. 35, r. 38, stand on a different footing from foreign judgments sought to be enforced in England. That rule was merely intended to give to a defendant another defence to an action on a foreign judgment, and was not intended to regulate or alter the law of the country as to when a foreign judgment can be enforced.

Gifford v. Calkin, 45 N.S.R. 277, 9 E.L.R. 385.

ACTION ON—PENDENCY OF APPEAL AGAINST.

The fact that an appeal against a foreign judgment is pending in the courts of the state or country in which it was obtained is no defence to an action upon it here, although the court would stay execution on proper terms. [Howland v. Codd, 9 M.R. 435; and Charlebois v. G.N.W. Central R. Co., 9 M.R. 286, followed.]

Campbell v. Morgan, 29 Man. L.R. 20.

ATTACHMENT — PAYMENT — DISCHARGE — EFFECT.

A debtor against whom proceedings were taken abroad, and who was there compelled to pay a debt which it had contracted, is freed from the debt, both as regards its own creditor and the creditors of the latter in this Province. A debtor cannot be compelled by attachment proceedings, to pay the debt a second time. [Martin v. Nadel, 2 K.B. 27; Harris v. Cordingley, 16 Can. S.C. 501; Barker v. Central Vermont, R., 13 Can. S.C. 2; Equitable Ass'ce Co. v. Perrault, 26 L.C.J. 382, followed.]

Fraser v. Byers-Allen Lumber Co., 45 Que. S.C. 42.

(§ I.7 A—226)—DIVORCE.

The plaintiff sued in Alberta upon a judgment recovered in a court of the State of Washington, U.S.A., for permanent alimony in connection with a divorce granted plaintiff from defendant. Defendant, during the action in the Washington court, was domiciled in Canada, but was personally served in Washington, though he had not appeared or submitted himself to the jurisdiction of the court:—Held, that plaintiff could not recover. The domicile of the defendant, and consequently that of the wife, at the time of the action in the Washington court, not being in that State, that court had no jurisdiction to entertain the action for divorce. Even assuming that the Washington Court could grant permanent alimony in an action in which divorce was not sought, which was doubted, it could not be said that in the absence of a decree of divorce such alimony would have been granted. [Le Mesurier v. Le Mesurier, [1895], A.C. 517, 64 L.J. P.C. 97, 11 R. 527, 72 L.T. 873, and Magurn v. Ma-

gurn, 11 A.R. (Ont.) 178, 3 O.R. 570, followed.]

Casavallo v. Casavallo, 4 A.L.R. 6.

B. Of other provinces.

(§ IV B—230)—Jurisdiction — Attornment—Conditional appearance.

A nonresident defendant, who appears conditionally and defends the action on the grounds of want of jurisdiction and on the merits, thereby voluntarily attorns to the jurisdiction of the court, and a judgment recovered against him in such action is enforceable in the courts of any other province; the question whether he has submitted to the foreign jurisdiction is primarily one of fact.

Richardson v. Allen, 28 D.L.R. 134, 11 A.L.R. 245, 34 W.L.R. 606, 10 W.W.R. 720, affirming 24 D.L.R. 883, 31 W.L.R. 437.

Fraud, sufficient to permit a judgment of a Territorial Court to be attacked in an action brought upon it in the courts of Ontario, is not shewn by the fact that the plaintiff, who was in some doubt as to whether the defendant or another closely related company was his employer, in good faith brought his action against the defendant on a demand that was justly due him. [Jacobs v. Beaver, 17 O.L.R. 496, followed.]

McDougal v. Occidental Syndicate, 4 D.L.R. 727, 3 O.W.N. 1384, affirming, sub nom. Johnston v. Occidental Syndicate, 3 O.W.N. 60.

Finality of judgment—Appeal pending to Privy Council—Motion for summary judgment—Order—Terms—Security.

Eastern Trust Co. v. Mackenzie Mann & Co., 10 O.W.N. 445.

Company winding up.

Under ss. 125, 126, 127 of c. 144, R.S.C. 1906 (the Winding-up Act), a judgment of one of the courts of another province of Canada cannot be executed in this province without the consent of one of its courts after such consent has been requested by the court which gave the judgment.

Clarkson v. Marcoux Succession, 14 Que. P.R. 309.

Title to a movable—Exemplification of judgment.

Carsley v. Humphrey, 12 Que. P.R. 133.

Judgment obtained in another province—Suit on exemplification of judgment.

Riordan v. McLeod, 13 Que. P.R. 156.

(§ IV B—232)—Jurisdictional matters—Want of service on defendant—Effect.

A judgment rendered in the Province of Quebec without personal service of process on the defendant who was out of that province while the proceedings were going on, is not binding on the courts of British Columbia in an action based on the Quebec judgment.

Wanderers' Hockey Club v. Johnson, 14 D.L.R. 42, 18 B.C.R. 367, 25 W.L.R. 434, 5 W.W.R. 117.

Action upon.

An action does not lie in Alberta upon a personal judgment by default recovered in another province of Canada against a defendant served with its process in Alberta, and there resident and domiciled, if he did nothing to submit to the jurisdiction of the court of such other province and did not acquire any domicile in such other province while the proceedings were being carried on. [Dakota Lumber Co. v. Rinderknecht, 6 Terr. L.R. 210, applied.]

Belcourt v. Noel, 9 D.L.R. 788, 23 W.L.R. 368, 3 W.W.R. 926.

Action upon—Jurisdictional matters.

A foreign judgment on a promissory note or other personal demand will not be recognized and given effect to in Alberta where the defendant was not served in the foreign law district and had not appeared in the action there brought, nor otherwise attorned to the jurisdiction of the Foreign Court. A competent foreign judgment becomes in the domestic law district a simple contract debt; action may be brought either for the original cause of action or upon the foreign judgment.

State Bank of Butler v. Benzanson. 16 D.L.R. 848, 27 W.L.R. 812.

Company—Extra-provincial—No license for Ontario—Recovery of judgment in Saskatchewan—Right to recovery by action in Ontario.

Assiniboia Land Co. v. Acres, 28 D.L.R. 364, 10 O.W.N. 328. [See 25 D.L.R. 439, 27 D.L.R. 103, 9 S.L.R. 142.]

Judgment obtained on conditional appearance—Attornment to jurisdiction by plea to merits.

A Dominion company, with its head office in Alberta, entered a conditional appearance in Ontario, expressed to be "without prejudice to the right of defendant to dispute the jurisdiction of the court." In its statement of defence, defendant, after stating that it was delivered without prejudice to its said rights, set out grounds of defence to the action on the merits. The action was tried in the presence of defendant's counsel, and the plaintiff, and judgment was given for the latter. Held, that the plaintiff was entitled to sue in Alberta upon the said judgment on the ground that defendant attorned to the jurisdiction of the foreign court and could not afterwards be heard to say that it was not bound by the judgment of the said court. [Boissiere v. Brockner & Co., 6 T.L.R. 85, followed.]

McFadden v. Colville Ranching Co., 30 W.L.R. 909, 8 W.W.R. 163.

Where defendants at their own instance obtain an adverse decision in Ontario on the question of jurisdiction, they cannot again raise it when sued on the judgment in British Columbia.

Kennedy v. Trites, 10 W.W.R. 412.

(§ IV B—245)—Divorce—Foreign judgment — Alimony—Action to recover in Ontario—Jurisdiction.

Wood v. Wood, 28 D.L.R. 367, 31 D.L.R. 765, 37 O.L.R. 428.

V. Discharge; assignment.

(§ V—250)—Release—Joint creditors.

The general rule that a release of a debt by one of several joint creditors constitutes a release as against any subsequent claim made by the remaining creditors, will not be adhered to where there are special circumstances which would make its strict application inequitable. Three persons obtained a judgment against two defendants: two of the joint judgment creditors entered into an agreement with one of the judgment debtors under which they took from him a lease of a coal mine on a royalty basis, the third judgment creditor, obtaining on the face of the document, no interest in the lease at all; they also agreed to take from the one judgment debtor a mortgage upon the mine for an amount in excess of the judgment debt and agreed that the royalties to be paid by them should be applied in a certain order in payment, inter alia, of the interest and principal of their own mortgage; and they also agreed that their lease might be forfeited upon notice for nonoperation of the mine, though the third joint creditor had apparently no means of intervening to prevent the forfeiture, and they agreed that upon such a forfeiture no further amounts should be payable upon their mortgage. In consequence of this agreement, an appeal by the judgment debtors was discontinued. An action was subsequently brought upon a bond given as security for the judgment in the first action and the defendants relied upon the agreement as a release. Held, that, although there was no allegation, or evidence of intent to defraud, it would be unjust and unequitable to hold the third joint creditor bound by such agreement. [Niemann v. Niemann, 43 Ch. D. 198, 59 L.J. Ch. 290, applied.]

Larose v. Ocean Accident & Guarantee Co., 13 A.L.R. 187, [1918] 1 W.W.R. 616.

(§ V—251)—Satisfaction — Rescission after judgment of the contract sued on—Costs.

That part of a judgment recovered by a vendor against the purchaser which represents purchase money is to be deemed satisfied by the vendor's exercise of a power of rescission of the contract and his resale of the lands; but the vendor may still enforce payment of the costs awarded him by the judgment. [Jackson v. Scott, 1 O.L.R. 488, applied.]

Meighen v. Knappen, 17 D.L.R. 409, 27 W.L.R. 881, 5 W.W.R. 1158.

Satisfaction—Trial of issue—Parties—Sheriff—Solicitor—Injunction.

Brazeau v. Bedard, 7 O.W.N. 613.

(§ V—252)—Illegality—Enforcement.

Where the assignment of a judgment debt is of an illegal nature, the assignee cannot enforce it, but the illegality does not affect the right of action of the assignor.

Walker v. Brown, 30 D.L.R. 204, 36 O.L.R. 287.

Foreign judgment—Assignment—Effect of payment by codebtor — Foreign law.

Rusch v. McAndrews, 28 D.L.R. 764, 10 W.W.R. 295.

Cession of debt—Right of action—Advocates—C.C. arts. 1484, 1485, 1582, 1584—C.C.P. arts. 220, 525, 526, 688.

A person who has obtained a judgment against a defendant in a contested action, cannot transfer the amount of the judgment to his advocates in payment of their costs, when the action is pending appeal, this debt being still in litigation. This nullity is absolute. The reception by the court of an intervention in a garnishee summons after judgment is equivalent to permission to contest the declaration of the third party. A creditor has the right to intervene in a garnishee summons after judgment when there are several other garnishments against the debtor, who is insolvent, in order to contest an illegal or fraudulent transfer and to make a list of the creditors. A person can, on a contestation of the declaration of a third party, ask for the annulment of an Act, where this annulment has the effect of making the third party a debtor, when he would not be one otherwise. It is unnecessary to obtain permission of the court to bring into the action a party interested in it.

Porcheron v. Benoit, 56 Que. S.C. 203.

VI. Revival; enforcement.

A. Enforcement.

See also Execution; Levy and Seizure.

As affected by moratorium, see Moratorium.

(§ VI A—255)—Enforcement by plaintiff—Stay of proceedings — Defendant's counterclaim awaiting trial.

Proceedings will ordinarily be stayed upon a judgment rendered in the principal action pending the disposal of defendant's counterclaim, if for any reason the trial of the latter is deferred; but only upon the defendant using due expedition in bringing his counterclaim to trial.

Snyder v. Minnedosa Power Co., 13 D.L.R. 804, 23 Man. L.R. 588, 25 W.L.R. 383. [Affirmed, 14 D.L.R. 332, 23 Man. L.R. 588, 25 W.L.R. 602.]

Damages for noncompliance with—Nature and requisites as basis of action.

To be available as a cause of action, a judgment must be definitive and personal for the payment of money, of a character as would support an action of debt under the old forms of procedure; but no action will lie to recover damages for the breach of directions of a judgment for the return of

certain bees and honey, the detention of which resulted in the destruction of that property.

Parks v. Simpson, 22 D.L.R. 840, 33 O.L.R. 382.

EXECUTION—LEAVE TO ISSUE—JURISDICTION OF COUNTY COURT—TITLE TO LAND.

Under the County Court Act (N.S.), ss. 44, 45, a motion for leave to issue execution on a judgment of the County Court may properly be referred to the Supreme Court en banc where a question of title to land bona fide comes into question by reason of the judgment being for purchase money of land and of an objection being raised in good faith of want of title and that the description of the land offered to be conveyed was of a different property.

Kaulbach v. Woodworth, 22 D.L.R. 811, 49 N.S.R. 46.

EXECUTION CAVEATS — WHEN ALLOWED — LAND TITLES ACT — UNREGISTERED INTEREST OF DEBTOR.

Section 125 of the Land Titles Act (Sask.), which provides for lodging a caveat by an execution creditor, applies only where the interest of the execution debtor in the land is such as could be seized and sold by the sheriff under the execution were it not that the title is registered in a name other than that of the execution debtor. The procedure to be followed by an execution creditor to realize against the unregistered interest of his debtor as a purchaser of lands under contract is an application under Sask. rr. 336-341 and not by the filing of a caveat in support of the execution.

Foss v. Sterling Loan, 21 D.L.R. 755, 8 S.L.R. 289, 8 W.W.R. 569. [Affirmed in 23 D.L.R. 540, 31 W.L.R. 860, 8 W.W.R. 1093.]

DECLARATION OF RIGHT—SUMMARY ENFORCEMENT.

After judgment declaring the plaintiff entitled as of right to a share of such royalties as might thereafter be received by defendant, an order for a receiver and an account as to such receipts will not be granted in the same action; a new proceeding must be taken. [Stewart v. Henderson, 19 D.L.R. 387, 30 O.L.R. 447, applied.]

Hoffman v. McCloy, 33 D.L.R. 526, 38 O.L.R. 446.

MORTGAGE — REGISTRATION — NOTICE OF JUDGMENT—PRIORITY.

In Nova Scotia one who has actual notice of a judgment or compensation order cannot gain priority by obtaining a mortgage of the property and having it registered before the judgment or order has reached the registrar.

Morse v. Kizer, 46 D.L.R. 607, 59 Can. S.C.R. 1, affirming 39 D.L.R. 640, 52 N.S.R. 112.

DEMAND FOR IMPRISONMENT — SERVICE OF JUDGMENT—STATEMENT OF COSTS.

A demand for imprisonment must be preceded not only by the service of the judgment, but also of an order to pay and of a notice that the plaintiff will be forced, under penalty of coercive imprisonment to pay the judgment three months after such notice. A detailed statement of the costs must also be previously served on the defendant.

Beby v. Schafer, 19 Que. P.R. 289.

PROVISIONAL ALLOWANCE.

If a judgment condemns the appellant to pay a monthly alimentary allowance, the court may order, if not the interim execution of the judgment, at least an allowance pending the appeal.

Draper v. Draper, 18 Que. P.R. 344.

ORDER OF BOARD OF RAILWAY COMMISSIONERS—RULE OF COURT—ENFORCEMENT—VAGUENESS.

Re Strathclair and C.N.R. Co., 19 W.L.R. 195.

(§ VI A—257)—JUDGMENT ORDERING DEMOLITION.

A judgment for the demolition of a fishery which is being maintained in infringement of the plaintiff's ownership of a salmon fishery on the Lower St. Lawrence river may further direct that in default of its removal to a distance of not less than 250 yards from the plaintiff's fishery (R.S. C. 1906, c. 45, s. 18), the plaintiff may cause the infringing fishery to be demolished and that the defendant in that event shall pay to the plaintiff the expense of demolition.

Robertson v. Grant, 3 D.L.R. 201, 21 Que. K.B. 279.

(§ VI A—258)—DECREE AS TO EXHIBITS.

In an action on an endowment and life insurance policy in which the court finds that, according to the terms thereof, only a lesser sum than the face of the policy is payable at the option of the insured on accepting cash at the termination of the expired tontine period, and that the insured had given notice of his election to take the accelerated cash payment plan under the option contained in the policy, a direction may be included in the judgment that in default of the plaintiff accepting the amount so found due, and on payment thereof into court, the policy filed as an exhibit on the trial be declared satisfied and delivered up to the insurance company.

Labonté v. North America Life Ass'ce Co., 3 D.L.R. 177, 3 O.W.N. 585, 21 O.W.R. 93.

(§ VI A—259)—SEQUESTRATION—ORDER TO PAY MONEY IN A LIMITED TIME.

Rule 710 of the King's Bench Act, R.S.M. 1902, c. 40, providing for application for a writ of sequestration where a person by a judgment or order is ordered to pay money within a limited time and neglects to obey the judgment or order, cannot be applied to a judgment which without limitation merely provides "that the plaintiff shall recover against the defendant the costs of the action to be taxed," there being no jurisdiction to fix a time within which the plaintiff shall recover and the judgment not being an "order to pay money."

Romanisky v. Wolanchuk (No. 3), 14 D.L.R. 851, 23 Man. L.R. 615, 26 W.L.R. 12, 5 W.W.R. 661, 697, affirming 13 D.L.R. 798, 25 W.L.R. 385, 5 W.W.R. 72.

SEQUESTRATION.

If a party does not allege special reasons in his application for the appointment of a sequestrator, but contents himself with saying that it is for his interest that one should be appointed, his application will be dismissed as insufficient in law.

Constantineau v. Plouffe, 14 Que. P.R. 307.

VII. Relief against; rehearing; actions to annul.

A. In general.

(§ VII A—270)—IRREGULAR ENTRY—PARTIES ABSENT—TRIAL.

There is no authority for giving judgment in favour of either party when neither is present when an action comes up for trial; where a judgment has thus been irregularly entered, the judge has power, under the Division Courts Act, R.S.O. 1914, c. 63, ss. 104, 226, to set it aside and order a trial, which, however, is not a new trial.

Arnold v. Cook, 31 D.L.R. 777, 37 O.L.R. 509, affirming 31 D.L.R. 269, 36 O.L.R. 504.

UNAUTHORIZED TRANSFER TO ANOTHER COURT.

After trial and judgment in a County Court (Man.) action, an order made without jurisdiction for the transfer of the cause to the King's Bench does not relieve the judgment debtor of his liability, nor in any way impair or affect it.

McInnes v. Nordquist, 13 D.L.R. 725, 23 Man. L.R. 815, 25 W.L.R. 422, 5 W.W.R. 95.

ENFORCEMENT OF COLLATERAL AGREEMENT.

A judgment for the seller suing for the price of company shares may, in a proper case, be made subject to a stay of proceedings thereon for a sufficient delay to enable the defendant to make a substantive application to the court for the enforcement of a collateral term of the sale contract that the price should be handed over to the company by the vendor as a loan in conformity with an agreement between the latter and the company.

Lazier v. McCullough, 14 D.L.R. 270, 25 W.L.R. 911, 6 A.L.R. 503, varying 7 D.L.R. 851.

PREVIOUS ACTION—REFERENCE—AGREEMENT — COMMON ERROR — JUDGMENT SET ASIDE.

A judgment must be set aside, where there has been a common error in the expression of the intentions of the parties. [Wilding v. Sanderson, [1897] 2 Ch. 534, followed.]

Royal Bank v. Skene, 50 D.L.R. 213, 59 Can. S.C.R. 211, [1919] 3 W.W.R. 1071, affirming [1919] 3 W.W.R. 740, which affirmed [1919] 1 W.W.R. 390.

RELIEF AGAINST—REHEARING—MOTION TO VARY.

Sheardown v. Good, 11 D.L.R. 863, 4 O.W.N. 1443, 24 O.W.R. 753. [See 11 D.L.R. 318.]

SOLICITOR'S FAULT.

Where an application was made to set aside a judgment under s. 110 of the County Courts Act (B.C.) by reason of the applicant's solicitor being at fault, and the judgment is set aside ex dubito justitiae on the ground of irregularity of the judgment. Held, on appeal, that as there was no exercise by the judge below of his judicial discretion as required under said section the order should be set aside.

Eddy v. C.P.R. Co., 22 B.C.R. 294.

EXECUTION — MOTION TO SET ASIDE — "RENEWAL" OF FORMER APPLICATION.

Hunter v. Perrin, 15 O.W.N. 359.

PETITION IN REVOCATION—NATURE OF REMEDY.

A petition in revocation of judgment is a means of withdrawal and not of revision or construction of the judgment. A judgment, ill founded on the merits and the grounds of the main contestation decided by it, cannot be grounds on which the petition in revocation can be based. French law has never allowed the recourse by a petition in revocation of a judgment, which simply decides a question of law. The mere submitting a case to the decision of the court on a factum or statement, with the consent of the parties' attorneys, cannot give rise to a petition in revocation of judgment. The King's declaration of April 22, 1732, addressed to the superior council of Quebec, and giving to the parties, by art. IX., the simple remedy by petition, of having an ambiguous judgment construed, has never been repealed, and is still in force.

Michelakis v. Regimbald, 19 Que. P.R. 300. [See 36 D.L.R. 367.]

PETITION IN REVOCATION—CANCELLATION.

Contrary to an opposition to judgment, the filing of a petition in revocation of judgment does not cancel the judgment rendered.

Popliger v. Glazer, 19 Que. P.R. 241.

PETITION IN REVOCATION — CONCLUSIONS — INSCRIPTION IN LAW.

A petition in revocation of judgment has the effect of putting the parties in the same position they were previous to the judgment. Accordingly the following conclusions taken in this request, namely, "that all the proceedings be declared void and of no value; that the parties, the plaintiff and defendants, be declared out of court and in the same state in which they were before action brought" should be rejected in an inscription in law.

Duclos v. Dagenais, 54 Que. S.C. 71. [See 50 Que. S.C. 333.]

PETITION IN REVOCATION—PÉREMPTION.

A petition in revocation of judgment will be received against a judgment declaring an action périmpted, if such judgment was given by default on a day when the court sits only for uncontested motions and those in which witnesses should be heard, and

after there had been, by consent, several adjournments of the application for péremption.

McGibbon v. G.T.R. Co., 20 Que. P.R. 62.

REVOCATION — RECORD — GARNISHMENT — RENUNCIATION.

A creditor, who holds a judgment which he has tried to execute against his debtor's assets, may by way of a petition in revocation, ask the cancellation of a judgment rendered at his debtor's request, and have noted in the record his renunciation of the estate in whose hands he had a writ of garnishment issued. Such a petition, showing prima facie a good claim, will be received by the court.

Robert v. Charbonneau, 19 Que. P.R. 237.

REVOCATION — ACTION — PRESCRIPTION — INSCRIPTION IN LAW.

A provincial action is not, under Quebec law, a way of providing against final judgment. The prescription of 6 months, mentioned in art. 1178, C.C.P., concerning petitions in revocation of judgment, is a good ground for an inscription in law directed against such an action.

Faust v. Avisais, 19 Que. P.R. 109.

REVOCATION — THIRD PARTY OPPOSITION — GUARDIAN AND WARD.

It is by a petition in revocation of judgment, and not by a third party's opposition, that a tutor should ask the setting aside of a judgment rendered ex parte against his ward during his predecessor's administration.

McMullin v. Spark, 19 Que. P.R. 442.

ACTION TO ANNUL — ILLEGAL SENTENCE — PENALTIES—COLLECTOR OF REVENUE—LICENSE ACT.

When there is no way of protecting oneself against a judgment rendered illegally, then the direct action to set aside may be made use of. If the judgment, the nullity of which is sought, is a sentence rendered according to the License Act under art. 1163, R.S.Q., the court will not consider defects in the merits or in the form unless the plaintiff shews prejudice. One who pays a fine, condemned under penalty of imprisonment, is not considered as having acquiesced in the judgment. An action to recover back penalties illegally paid cannot be directed against a revenue collector.

Riberdy v. Tremblay, 27 Que. K.B. 385.

OPPOSITION TO ANNUL — COMPENSATION — PRACTICE—COSTS.

A defendant may, on the ground of compensation, make an opposition to annul a seizure, under art. 645, C.C.P., alleging that the judgment which is being executed is extinct, the opposition indicating a claim easily realized, such as an account of a few items for advertisements published in a newspaper, according to a scale of prices stipulated in a written contract. The priority of the claim offer in compensation of the judgment is not a legal means sufficient to have the seized party's opposition dismissed, because compensation takes place "de jure," according to the principle enacted by art. 1188, C.C. (Que.), from the moment two debts exist together, before it has been declared by the judge or opposed by the parties. As a matter of principle the C.C.P. does not recognize the opposition to annul as a means of attacking a final judgment in a contested case. Art. 645, C.C.P., which entitles the seized defendant to allege, by such an opposition, all grounds which might affect the merits of the judgment, is in derogation of the common law and hardly harmonizes or agrees with the other means of recourse allowed by the Code. However, the provisions of that article are so close and positive that there is no ground for construction, and they must be applied to their full extent, according to art. 12, C.C. (Que.), even if they appear not to agree with the general principles of the Code. They thus include, without any distinction, all the grounds of the seized party provided they have not been raised and decided. Art. 217, C.C.P., is an exception to the common law which requires that any action should start by a writ, in the name of the Sovereign. It may be applied only if the ground of the cross-demand cannot be raised by a plea to the action. Therefore, the defendant is not bound to make a cross-demand to prove the compensation he alleges, if the debt the plaintiff owes him is clear and liquidated or easy to realize, and he may, in such case, allege compensation in his plea to the action. Art. 217, is optional and not imperative, all the other means of recourse are left open to the defendant who has not made use of the cross-demand. The object of the special recourse given by art. 217 to a defendant is to avoid costs. If a defendant, by way of an opposition to annul the seizure, raised a ground of compensation which he might have raised to contest the main action, either by a plea to the merits or by cross-demand, and if such an opposition, being accepted, incurs more costs than such a plea to the merits or cross-demand, the court, in giving the final judgment, will be justified in setting off the costs.

Wiseman v. Eagle Publishing Co., 19 Que. P.R. 79.

OPPOSITION TO ANNUL — JOINT DEBTORS — SURETY—APPEAL.

In proceedings brought against two joint and several debtors, a contestation of the action brought by one debtor does not benefit his codebtors notwithstanding a contestation of the justness of the debt by one of them, the creditor has the right to proceed to judgment against the other and to execute such judgment against his goods. In any case, the debtor injured by a judgment given by default against him ought to appeal, by one of the methods of appeal against judgments and not by opposition to the execution of the judgment.

La Compagnie Julien v. Lamy, 53 Que. S.C. 304.

Article 1177, C.C.P., which enumerates

the cases in which recourse may be had to a requête civile is not restrictive. Thus, a defendant subjected to judgment by the negligence of his attorney in failing to file his pleas has a right to attack the judgment by requête civile.

Dufresne v. Caisse, 13 Que. P.R. 193.

REQUÊTE CIVILE—EVIDENCE.

A requête civile will not be received when based on the ground that the judge who rendered the judgment admitted in evidence documents produced by the petitioner but did not take them into account.

Archambault v. McGlashan, 17 Que P.R. 375.

REQUÊTE CIVILE—CONTESTATION.

To oppose the reception of a requête civile the sole right of the adverse party is to shew that even on its face it is not based upon any juridical grounds sufficient to cause the judgment attacked to be set aside, or that it does not comply with the formalities required by law; he cannot file any written contestation or declarations under oath to support a claim that it should be dismissed.

Charland v. Landry, 18 Que. P.R. 41.

NEW MATTER—QUEBEC PRACTICE.

A requête civile will not be granted if the facts alleged are not such as will alter the judgment, nor if the documents required and produced should have been known to the parties before the judgment.

St. Denis v. Trudeau, 14 Que. P.R. 173.

COMPANY WINDING UP.

The judgment which orders the winding-up of a company is a final judgment which cannot be set aside, on application of a shareholder on the ground that the headquarters of the company being in another province a Quebec court has no jurisdiction to make the order.

Re Belle Isle Park Co., 14 Que. P.R. 247.

BY APPEAL OR OPPOSITION IN QUEBEC.

A party may ask to set aside a judgment by means of an opposition to judgment, but he is not deprived from adopting at his option the other remedy by way of appeal.

Burns v. Cousineau, 14 Que. P.R. 389.

DECREE—ACTION TO ANNUL.

A direct action lies to set aside a decree of the court. In such case the action does not form part of the record of the cause in which the decree was made but is subject, in respect to the jurisdiction of the courts, to the rules drawn from the provisions of arts. 94 or 100 C.C.P.

Marchand v. Allaire, 12 Que. P.R. 436.

PETITION IN REVISION OF JUDGMENT—ALLEGATION OF A GOOD DEFENCE.

If an action has not been duly served, defendant may, by petition in revision, obtain relief without alleging or establishing that he has a good defence to the action. As is the case with an exception to the form, it suffices to allege nullity of service and falsity of bailiff's return.

Grant v. Taylor, 12 Que. P.R. 315.

REVOCATION—NEW EVIDENCE.

When a judgment has been rendered dismissing an action for tort arising out of an accidental drowning, the evidence of witnesses examined at the coroner's inquest before the institution of the action in presence of plaintiff's attorney is not "new evidence" affording ground for revocation of judgment.

Duchaine v. Dussault, 20 Que. K.B. 451.

JUDGMENT—APPLICATION TO SET ASIDE—COLLUSION.

Irwin v. King Edward Smelting Co., 10 E.L.R. 75.

(§ VII A—271)—INTERLOCUTORY JUDGMENT ON STRIKING OUT DEFENCE—RELIEF AGAINST.

Where an order has been made by a local judge striking out the statement of defence in an action because of the failure on the part of the defendant to answer proper interrogatories, the same judge has jurisdiction, under the Manitoba practice, on a substantive application on fresh material, to set aside an interlocutory judgment signed against the defendant and to reinstate the statement of defence upon the defendant finally consenting prior to the signing of such judgment against him but subsequent to the granting of the order striking out the defence to answer the interrogatories.

Douglas v. C.N.R. Co., 13 D.L.R. 800, 23 Man. L.R. 490, 24 W.L.R. 804, 4 W.W.R. 1121, reversing 12 D.L.R. 134, 24 W.L.R. 90, 4 W.W.R. 325.

FORM AND SUBSTANCE—RELIEF AGAINST—JUDGMENT DEBTOR'S RIGHT TO SET-OFF, HOW LIMITED.

Suttie v. Pelletier, 20 D.L.R. 956, 20 B. C.R. 212.

REQUÊTE CIVILE — JURISDICTION — DOCUMENTARY EVIDENCE.

A requête civile should be presented to the court in which it is desired to have the judgment revoked. Thus a requête civile against a judgment of the Court of Review at Montreal reversing that of the Superior Court of the district of Terrebonne should be presented to the Court of Review at Montreal. When a requête civile is based upon the fact that an evidentiary document was omitted from the record submitted to the court, the petitioner should establish that such document was decisive and would have exercised an important influence upon the final decision, and that with it the judgment would have been different; if he alleges that the opposite party has had recourse to artifices, he should stake facts which shew their nature and effect. A party who knows that one of the evidentiary documents is missing from the record, and who nevertheless agrees to plead and sub-

mit his case without the document, cannot after judgment have recourse to a requête civile based on such omission.

Mayer v. Miller, 48 Que. S.C. 145.

MASTER'S REPORT — WHEN REOPENING REFUSED.

Hancock v. Rose, 31 W.L.R. 547.

REVIEW OF JUDGMENT REFUSING APPLICATION—APPEAL.

Where a judge of the Supreme Court makes an order refusing an application, the remedy is, in general, by appeal, unless leave be given to renew it.

Irving v. Bucke, 21 B.C.R. 17.

OPPOSITION—QUEBEC.

The opposition to judgment forms part of the original proceedings and is a defence to the action; it cannot be dismissed on motion.

Tournier v. Noel, 14 Que. P.R. 234.

REQUÊTE CIVILE—OTHER REMEDIES.

A requête civile will not be entertained when the judgment complained of can be attacked on the grounds set forth (in this case the failure to file documents referred to in the declaration) either by appeal from, or opposition to said judgment.

McIntyre v. Eastmure, 12 Que. P.R. 196.

(§ VII A—272)—IMPOSING TERMS — EXCESSIVE JUDGMENT — CORRECTION.

On an application to vacate a default judgment because rendered for a greater sum than that to which the plaintiff was entitled, the court, instead of granting such relief, may vary the judgment by entering one for the amount to which the plaintiff is found upon the merits to be actually entitled, such practice being permissible under r. 99 (Yukon) which provides that a default judgment may be set aside or varied on such terms as are just.

Marcil v. Canadian Klondike Mining Co., 13 D.L.R. 805, 25 W.L.R. 339.

JUDGMENT IN PLAINTIFF'S ABSENCE—WITHDRAWAL OF COUNSEL.

Rule 351 of the Saskatchewan Rules of Court, 1911, by which any verdict or judgment obtained where one party does not "appear at the trial," may be set aside upon terms which the court may impose, does not apply to a case where plaintiff's counsel had appeared at the commencement of the trial and left the court-room without informing the court that he was withdrawing from the case which was proceeded with and tried in his absence.

Barnes v. Ellis, 14 D.L.R. 779, 6 S.L.R. 364, 26 W.L.R. 187, 5 W.W.R. 661.

TERMS ON SETTING ASIDE.

When a defendant applying to set aside a default judgment entered against him where his default was through a slip or mistake, puts in an affidavit of merits, the practice is to grant the application on terms; the terms will ordinarily include the payment of the costs occasioned by the signing of judgment and the costs of the application to set it aside, and the court will exercise its discretion upon the particular facts of the case as to making a further term of bringing the money into court or giving security. [Royal Bank v. Fullerton, 2 D.L.R. 345, 17 B.C.R. 11, distinguished; Collins v. Paddington, 5 Q.B.D. 368, applied.]

MacGill v. Duplisse, 15 D.L.R. 608, 18 B.C.R. 600, 26 W.L.R. 945.

TERMS ON SETTING ASIDE — AFFIDAVIT TO SET ASIDE DEFAULT JUDGMENT — SECURITY FOR COSTS—WAIVER.

Where judgment was entered by the plaintiffs against the defendant for default of appearance, and the defendant applied promptly to set it aside, by affidavit shewing an excuse for his failure to appear and disclosing a good defence, if substantiated, on the merits, an order was made, under Rule 99 of the Judicature Ordinance, setting aside the judgment and allowing him in to defend, upon terms of his paying the plaintiffs' costs of entering the judgment and opposing the motion and waiving his right to security for costs.

Kelly v. Palm, 28 W.L.R. 848.

B. DEFENCES.

(§ VII B—275)—OPPOSITION — AFFIDAVIT —SERVICE.

Service on the plaintiff's attorney as well as on the opposition, of the affidavit and receipt of the deposit before the reception by the judge of the opposition to judgment, substantially conforms to arts. 1168, 1170, C.C.P.

Charland v. Lamaire, 18 Que. P.R. 138.

C. GROUNDS.

(§ VII C—280)—GROUNDS — MISCONDUCT OF JURY — ILLEGAL PANEL — IRREGULARITIES.

A defendant has the right to petition in revocation of a judgment rendered according to the verdict in a jury trial, for the following reasons: (1) That the jury panel was illegal, of which fact the applicant was ignorant at the time of the trial; (2) That the applicant, defendant, had not received notice of action to which he was entitled; (3) That objections he made to the evidence were not stated in the report of the proceedings; (4) That the foreman of the jury was related to the opposite party and was not impartial; (5) That during the trial several members of the jury were in constant touch with the opposite party and his representatives; (6) That the verdict is for a "lump" sum, without any special answers to questions in the facts submitted. [Cook v. Caron, 10 Q.L.R. 152, and Roy v. Davis, 21 Can. S.C.R. 184, followed.]

Montreal Street R. Co. v. Normandin, 23 Que. K.B. 48.

The right of an unsuccessful party to apply for revocation of the judgment against him is not confined to the cases enumerated in art. 1177 C.C.P. If he swears that he was not notified of the date fixed

for the hearing of the cause, and that he owes nothing to the plaintiff the requête civile will be granted and the proceedings on the judgment stayed.

Depato v. Zarnic, 14 Que. P.R. 439.

(§ VII C—282)—Relief against default judgment — Conditional leave to defend.

A defendant who is in default under the terms of leave to defend granted upon his own application in respect of a default judgment given against him, may still be granted leave to defend if the plaintiff has not been prejudiced, and if the default of the defendant was not wilful but due to a bona fide misapprehension upon a question of practice in taking out the order; but the court may, in such case, expressly limit his right of defence to the merits excluding any mere technical defence.

Croome v. Leir, 9 D.L.R. 809, 23 W.L.R. 713, 4 W.W.R. 80.

Default judgment — Subsequent purchaser — Notice — Fraud.

Under ss. 162, 169 of the Land Titles Act, R.S.S., 1909, c. 41, except in case of fraud, a person dealing with the registered owner is not affected by notice of a prior unregistered interest in the land. A judgment by default obtained on a bare allegation that the land was purchased with knowledge of a prior sale, without alleging fraud, will be set aside ex debito justitiæ.

Kronau v. Ruteneier, 28 D.L.R. 212, 9 S.L.R. 133, 34 W.L.R. 168, 10 W.W.R. 351.

Excessiveness.

A judgment by default entered for a greater amount than is due will be set aside ex debito justitiæ, apart from any consideration as to whether there is a good defence on the merits.

Fawell v. Andrew, 34 D.L.R. 12, 10 S.L.R. 162, [1917] 2 W.W.R. 400. [Amended in 36 D.L.R. 408, [1917] 3 W.W.R. 365.]

Interlocutory and final.

The court's power to relieve against a judgment by default extends to a final judgment founded on an interlocutory judgment; in such case they are both judgments by default, and may be set aside on proper grounds.

Winnipeg Church Extension Assn. v. Markiewicz, 37 D.L.R. 697, 28 Man. L.R. 221, [1917] 3 W.W.R. 831.

Excessive amount—Foreclosure.

A personal judgment for an excessive amount, obtained by default in a foreclosure action, warrants the court, where there are other grounds, to set aside the whole judgment with leave to defend generally.

Scottish Temperance Life Ass'ce Co. v. Johnstone, 31 D.L.R. 649, 22 B.C.R. 510, [1917] 1 W.W.R. 538.

Default judgment entered prematurely —Grounds for relieving against—Laches of solicitor—Delay in moving to set aside — Consideration of the merits.

Hart, Parr Co. v. Worth, 8 D.L.R. 1035, 1 W.W.R. 494.

Default of appearance—Irregularity in copy of summons served on defendant—Inclusion of interest — Unliquidated damages.

Brooks v. Brooks, 7 D.L.R. 781, 1 W.W.R. 813.

Action for an accounting between partners — Default judgment — Application to set aside — Great delay.

Fieldhouse v. Buxton, 40 D.L.R. 736, 13 A.L.R. 269, [1918] 2 W.W.R. 355.

Petition in revocation — Absence of defendant.

A defendant, condemned by a judgment of the Superior Court deciding the merits of the case, cannot have the judgment revoked by a petition alleging that his attorney was forced to proceed in his absence by order of the court; that he has a good plea but that his attorney did not then have in his possession the documents supporting the plea; that those documents were bills of lading which the defendant has succeeded in obtaining only since the judgment had been rendered.

McCall v. Patenaude, 24 Rev. Leg. 394.

Inability to furnish costs.

A judgment obtained in default of appearance will be set aside on an application made one year subsequent to the entry of the judgment when it appears that the delay was due to the defendant's inability to secure the costs of the application.

Gordon v. Violette, 24 D.L.R. 721, 9 W.W.R. 127, 32 W.L.R. 389.

Relief against.

The court will not relieve against a judgment by default obtained for want of prosecution after an appearance has been entered by counsel; nor is the absence of counsel from the jurisdiction when the case is called sufficient ground for such relief, particularly where the affidavit accompanying the petition does not disclose a well-founded defence on the merits.

Putnick v. Henry, 47 Que. S.C. 184.

Setting aside judgment by default — Ineffective service — Leave to defend—Terms.

Defendants' manager, on being served with the statement of claim, was advised that the service was of no effect, as the proper party to be served would be the Insurance Inspector. He thereupon wrote to the plaintiff's solicitors informing them of the supposed mistake, and, having received no reply, believed that it was not necessary for him to do anything further. Plaintiff's solicitors signed interlocutory judgment in default of a defence and afterwards proceeded to trial of the action for

assessment of plaintiff's fire loss without notice to the defendants, and final judgment was entered in the action for $526, and costs. As soon as defendants heard of the judgment they moved to set it aside and to be allowed to defend and shewed, as grounds of defence (1) that plaintiff had absolutely assigned his claim after the fire; (2) that the plaintiff's actual loss was only $189. Held, by the Court of Appeal, that the judgment should be set aside and the defendants allowed in to defend, but only upon payment to the plaintiff's solicitor of the plaintiff's costs subsequent to the service of the statement of claim, and paying into court the sum of $189 within ten days.

Abramson v. Colonial Ass'ce Co., 24 Man. L.R. 852, varying 29 W.L.R. 482.

JURISDICTION — ABSENTEES — PROPERTY WITHIN.

Article 94, s. 4, C.C.P., gives jurisdiction over a defendant who has left his domicile in the province of Quebec or has never had any, when the cause of action did not originate in the district wherein he is summoned, only when the plaintiff proves that the defendant possess property therein. When judgment is obtained by default, in the above case, without such proof, the defendant, who has neither domicile nor property in the above-mentioned district, may have the judgment set aside by the Court of Review for want of jurisdiction.

Bank of B.N.A. v. Levy, 47 Que. S.C. 282.

RELIEF AGAINST — DELAY — LEAVE TO SHEW PAYMENT.

Huckell v. Gale & Williams, 25 D.L.R. 761, 22 B.C.R. 356, 33 W.L.R. 192, 9 W.W.R. 550.

MOTION TO SET ASIDE—LACHES.

Russell v. Coltman, 9 O.W.N. 108.

RELIEF AGAINST — OPPOSITION UNDER QUEBEC PRACTICE — ACTION TO ANNUL MARRIAGE.

A default judgment obtained by the husband in the Quebec Superior Court for annulment of his marriage may legally be abandoned by him on an opposition filed by the wife on her own behalf and a tierce opposition filed by her as tutrix to the infant child of the marriage; upon the filing of the désistement and its acceptance by the wife by inscribing for judgment thereon and obtaining acte thereof, the original judgment ceased to exist, where no affirmative declaration as to the wife's status was asked by the oppositions and nothing was thereby claimed, further than the cancellation of the original judgment.

Hébert v. Cloutre, 15 D.L.R. 498, 45 Que. S.C. 239, 16 Que. P.R. 29, reversing on other grounds 6 D.L.R. 411, 41 Que. S.C. 241.

JUDGMENT BY DEFAULT — OPPOSITION TO —NOTICE TO OTHER PARTY — DEPOSIT —QUE. C.P. 1167, 1169, 1170.

Opposition to judgment being a way to provide against a judgment by default, the notice required by Practice r. 52 for all petitions, motions, and applications does not apply. If the opposant to judgment has only a belated knowledge of the facts alleged, he may on the fifteenth day after judgment, have his opposition issued and prove that he had in no way acquiesced in the judgment. Insufficiency of deposit is not a reason for the opposition to judgment being dismissed when the opposant at the hearing has reserved his right to complete his deposit.

Ryan v. Baie d'Urfe Heights, 16 Que. P.R. 103.

DEFAULT OF APPEARANCE — JUDGMENT BY DEFAULT — NULLITY — SETTING ASIDE.

Where a plaintiff proceeds by default, every step in the proceedings must be strictly complied with. This is a matter of strictissimi juris. Where something is required to be done before the plaintiff is entitled to enter judgment in default of appearance, that constitutes a condition precedent, the nonperformance of which vitiates any judgment which may be entered thereon. [Bank of Hamilton v. Baldwin, 28 O.L.R. 175, distinguished.] An application to set aside a judgment entered at the trial in default of appearance of the plaintiff need not be made to the Trial Judge and may properly be made to the local master. [Hamp-Adams v. Hall, [1911] 2 K.B. 942, followed.] If a defendant is required to file an appearance within a certain time with the "local registrar," when in fact there is no local registrar; failure to file an appearance with the clerk of the court is not sufficient to entitle the plaintiff to sign judgment on default and any judgment so signed is a nullity. The defendant, if he can shew a defence which is prima facie good, is entitled to have such judgment set aside. [Smurthwaite v. Hannay [1894] A.C. 494 applied.]

Lumber Manufacturers' Yards v. Thompson, 7 S.L.R. 306, 7 W.W.R. 742.

JUDGMENT BY DEFAULT — MOTION TO SET ASIDE — ABSENCE OF DEFENDANT — EXCUSE — AFFIDAVIT OF SOLICITOR — CORRESPONDENCE.

Head v. Stewart, 4 O.W.N. 590, 23 O.W.R. 742.

DEFAULT OF STATEMENT OF DEFENCE — WRIT OF SUMMONS NOT SPECIALLY ENDORSED — SUFFICIENCY OF STATEMENT OF CLAIM — LEAVE TO DEFEND — SECURITY.

Brown v. Coleman Development Co., 4 O.W.N. 728, 23 O.W.R. 946.

DEFAULT OF APPEARANCE — LEAVE TO DEFEND — DEFENCE — TERMS — AMENDMENT — ASSIGNMENT — ASSIGNMENT PENDENTE LITE.

Union Bank v. Toronto Pressed Steel Co., 4 O.W.N. 887, 24 O.W.R. 158.

SETTLEMENT OF ACTION — JUDGMENT SIGNED FOR DEFAULT OF DEFENCE — ENFORCEMENT OF SETTLEMENT.

Cairncross v. McLean, 5 O.W.N. 352, 25 O.W.R. 324.

PROCEDURE—DELAY.

Delays of procedure are not generally of public order; they are only for the protection of the parties, and can be waived, if there is neither fraud nor collusion. An hypothecary creditor cannot maintain a petition for setting aside a judgment on the ground that the seizing creditor, who had caused the property seized to be sold by the sheriff, had obtained his judgment by default on proceedings irregular as to delays.

Price v. Boyer, 26 Que. K.B. 73.

DEFAULT—REQUÊTE CIVILE.

A defendant may cause a judgment by default rendered against him after such service to be set aside when in fact he resides in the province. Although the remedy stated for this purpose is by petition for review, the court should recognize conclusions to the same effect in a proceeding entitled requête civile.

Carrier v. Dube, 51 Que. S.C. 528.

REQUÊTE CIVILE—INSCRIPTION EN FAUX.

An application to set aside a judgment can only be made to the court which rendered it. There can be no inscription en faux against a document under a private seal and therefore no abuse of jurisdiction on the part of the court which refuses such inscription.

Larocque v. Circuit Court, 17 Que. P.R. 446.

REQUÊTE CIVILE — ULTRA PETITA — JURISDICTION — SCHOOL TAXES.

A requête civile will be received when alleging among other grounds: (a) that the judgment rendered granted what was ultra petita since it was a condemnation pure and simple without allowing the party as permitted by the declaration the choice of abandoning the mortgaged immovable; (b) that an action for school taxes even accompanied by a demand for a declaration of a hypothec is within the exclusive competence of the Circuit Court.

School Commissioners of Hochelaga v. Belleau, 18 Que. P.R. 246.

(§ VII C—288)—SETTING ASIDE — EVIDENCE — ALLEGED PERJURY — ACTION DECIDED ON EVIDENCE OF APPLICANT.

An application to set aside a judgment on the ground of perjury on the part of one party's witnesses will not be granted where the merits of the action were decided on the evidence given by the party who makes the application.

Brown v. Bank of Ottawa, 50 D.L.R. 430.

FRAUD — VACATING JUDGMENT OBTAINED BY.

Sask. Valley Land Co. v. Willoughby, 24 W.L.R. 40.

(§ VII C—289)—MISTAKE — MOTION TO VARY — FURTHER EVIDENCE — ERRONEOUS RECITAL IN JUDGMENT SETTLED AND ENTERED — MOTION TO STRIKE OUT, MADE AFTER HEARING OF APPEAL.

Strong v. Crown Fire Ins. Co., 3 D.L.R. 882, 3 O.W.N. 1377, 22 O.W.R. 309. [See 4 D.L.R. 224, 3 O.W.N. 1534.]

REVOCATION OF JUDGMENT—MISTAKE.

There may be a petition in revocation of judgment, when the judgment was rendered through a misunderstanding between the attorneys of the parties, and it is not proven that another judgment on the merits could not be rendered.

Poitras Woolen Mills v. Feathers, 53 Que. S.C. 509. [See also 46 Que. S.C. 257.]

CONSENT JUDGMENT — PROVISION FOR PAYMENT OF MONEY ON DEFINITE DATE—DEFAULT — HONEST MISTAKE AS TO DATE—POWER OF COURT TO RELIEVE.

Lovejoy v. Mercer, 23 O.L.R. 29, 18 O.W.R. 176.

D. PROCEDURE.

(§ VII D—290)—DEFAULT — THIRD PARTY—LEAVE TO DEFEND.

A third party brought into an action by notice served upon him by a defendant pursuant to r. 224 cannot, under r. 225, file a defence to this notice after the time allowed by rr. 182, 183 without the leave of the court or a judge. There is no provision in the rules for the defendant to sign interlocutory judgment against the third party for default in filing such defence; but, by the terms of r. 225, such third party, by default in filing a defence, is deemed to admit the validity of any judgment obtained or to be obtained against the defendant and his liability for the relief claimed against him.

Gomershall v. G.T.P. Development Co., 26 Man. L.R. 322, 34 W.L.R. 301.

REQUÊTE CIVILE — DEFAULT — DELAY.

Inscription en droit against a requête civile is an authorized procedure. The remedy by requête civile is not open to one who, being aware of the judgment rendered against him by default, allows the delays to pass without taking an opposition to judgment.

Molsons Bank v. Laframboise, 17 Que. P.R. 457.

REQUÊTE CIVILE.

A requête civile was presented to the court to revoke the judgment on a jury trial for the following reasons: (1) That the jury panel was illegally formed which fact was not known to the defendants at the time. (2) There was no proof that notice of action was given as required by law. (3) That certain objections were not entered on the minutes. (4) That a juror was related to the plaintiff. (5) That the plaintiff and his relations had communicated with the jury during the trial. (6) That the verdict was for a round sum. (7) Improper admission of evidence. The de-

fendants claimed that a new trial was not an adequate remedy as the application would have to be supported by affidavits which were not admissible under art. 497 C.C.P.:—Held that said article did not apply to these grounds for relief; that a new trial was an adequate remedy; and that the requête civile could not be received. Held, also, that the Court of Appeal may order the cross-examination of persons making affidavits in support of the application for a new trial.

Normandin v. Montreal Street R. Co., 14 Que. P.R. 248.

E. TIME.

(§ VII E—295)—RELIEF AGAINST — REHEARING—PROCEDURE—DELAY.

Mere delay where not intentional or wilful is not an answer to an application to set aside a judgment on the merits unless irreparable wrong will be done. [Hanson v. Pearson, 3 Terr. L.R. 199; Regina Trading Co. v. Godwin, 7 W.L.R. 651, and Vinall v. DePass, [1892] A.C. 90, applied.]

Tomlinson v. Kiddo, 20 D.L.R. 182, 7 S. L.R. 132, 29 W.L.R. 325, 7 W.W.R. 93.

APPLICATION TO SET ASIDE — LEAVE TO DEFEND—DELAY.

Where the entry of judgment is regular an application to set it aside and for leave to defend should be made as soon as possible after the judgment came to the defendant's knowledge, though some delay is not unnecessarily fatal to the application if the parties can be restored to their former position.

Mills v. Harris, 21 D.L.R. 230, 8 S.L.R. 113, 8 W.W.R. 428.

PRACTICE — DEFAULT — OPENING UP — DELAY.

On an application to open up, on the merits, a default judgment regularly entered, a month's unexplained delay is no answer where it appeared that the delay was not wilful and that no irreparable injury was shown.

Schmitt v. Schmitt, 12 S.L.R. 296, [1919] 2 W.W.R. 642.

F. REHEARING.

(§ VII F—300)—PROCEDURE — REHEARING — STORING CASE — JURISDICTION OF LOCAL MASTER — R. 351.

Morin v. Dupuis, 19 D.L.R. 876, 7 S.L.R. 195, 30 W.L.R. 196, 7 W.W.R. 753.

RELIEF AGAINST — MOTION TO SET ASIDE — PROCEDURE — REHEARING.

Bank of B.N.A. v. Graham, 19 D.L.R. 874.

FRAUD — NEW EVIDENCE — SEDUCTION — RESEMBLANCE OF CHILD.

In an action for seduction, a verdict and judgment were given for the plaintiffs, whose adopted daughter was the girl seduced. This was based on the testimony of the girl, who afterwards discredited her own testimony at the trial, and by affidavit denied that the defendant was the father of her child, ascribing the paternity to the male plaintiff. Fortified with this and other affidavits, the defendant made a motion, under r. 523, to open up the judgment, on the grounds of fraud, surprise, and the discovery of new evidence. The motion was dismissed upon the merits. Semble, that no court would open up a judgment on the ground that the child of a girl seduced resembled some one other than the defendant who had been found guilty.

Baldwin v. Hesler, 38 O.L.R. 172.

CONSENT MINUTES — REOPENING — REHEARING BY JUDGE AS ARBITRATOR — WILL — RIGHTS OF BENEFICIARIES UNDER — COMPROMISE — ALLOWANCE FOR MAINTENANCE OF WIDOW OF TESTATOR — USE OF HOMESTEAD.

Toronto General Trusts Corp. v. Godson, 11 O.W.N. 420.

MOTION FOR JUDGMENT — MOTION TO REHEAR—JURISDICTION.

Coe v. Smiley, 4 S.L.R. 43, 16 W.L.R. 486.

JUDICATURE ACT.

As affecting practice as to security for costs, see Costs, I—14.

JUDICIAL NOTICE.

See Evidence.

JUDICIAL SALE.

I. THE SALE GENERALLY.
II. EFFECT; VALIDITY; DEED.
  A. In general.
  B. The deed.
III. PURCHASES; THEIR RIGHTS AND DUTIES.
  A. In general.
  B. Title acquired.
IV. CONFIRMATION; SETTING ASIDE; RESALE.
V. REDEMPTION.
VI. DISTRIBUTION AND CONTROL OF PROCEEDS.

See also Execution; Levy and Seizure; Foreclosure Sales, see Mortgage; Vendor and Purchaser.

I. The sale generally.

(§ I A—I) — MALICIOUS PUBLICATION — LIABILITY—DAMAGES.

One who maliciously announces a judicial sale by others than the officer who, by law, is charged with this duty, in other places than that or those prescribed by C.C.P., is responsible in damages.

Gélinas v. Gerbeau, 53 Que. S.C. 294.

(§ I A—2) — TIME — OPPORTUNITY FOR CONTEMPLATING PURCHASERS TO INSPECT, NECESSITY OF.

In fixing a date for the judicial sale of property by a Master in Ordinary, regard should be had to the nature of the property, and where it appears that the property in question cannot properly be inspected by prospective purchasers before the date set for the sale, the court should order the date of sale postponed to such later time as

would afford an opportunity for inspection to contemplating buyers.

Leckie v. Marshall, 10 D.L.R. 785, 4 O.W.N. 913, 24 O.W.R. 513, reversing 9 D.L.R. 383, 24 O.W.R. 92.

NOTICES—DESCRIPTION.

It is not necessary in the judicial sale of an immovable for the notice of the sheriff to contain the civic numbers, nor any other description than the official cadastral numbers, but if the civic numbers are given they should be exact; if not the sale is void if the purchaser has been led into error.

Décarie v. Hanfield, 51 Que. S.C. 277.

(§ I A—4) — BIDS AND BIDDING — RESERVED BIDS—PRACTICE.

A judicial sale under the practice should be subject to a reserved bid, in order to protect the parties from having their interests sacrificed, and this principle is especially applicable where the security is of a variable nature, for instance, mining properties involving some hundreds of thousands of dollars, and this although there may already have been abortive efforts to sell under reserved bid conditions.

Leckie v. Marshall, 10 D.L.R. 785, 4 O.W.N. 913, 24 O.W.R. 513, reversing 9 D.L.R. 383, 24 O.W.R. 92.

II. Effect; validity; deed.

A. IN GENERAL.

(§ II A—15)—ATTACKING VALIDITY — ESTOPPEL.

A claimant who accepts a share of the proceeds of land sold under order of court, knowing the source from which it came, cannot afterwards attack the sale, upon the ground of irregularity. [Clark v. Phinney, 25 Can. S.C.R. 633; Swinfen v. Swinfen, 24 Beav. 549, followed.]

Sabeans v. Edwards, 32 D.L.R. 569, 50 N.S.R. 424.

SALE OF MINERAL CLAIMS UNDER EXECUTION —VALIDITY OF BIDS.

The sale by the sheriff under execution of a mineral claim under the Mining Act, R.S.B.C., c. 157, is not invalid because the purchaser was not the holder of a free miner certificate at the time of making his bid at the sheriff's sale, if he had a certificate at the later date when the sheriff made a bill of sale of the claim to him; the court will uphold sheriff's sales bona fide made notwithstanding mere irregularities.

Roundy v. Salinas, 22 D.L.R. 315, 21 B.C.R. 323, 8 W.W.R. 712, 31 W.L.R. 338.

(§ II A—16)—EFFECT.

The judgment on an application to enforce the statutory lien created pursuant to s. 35 of the Ontario Judicature Act in respect of an alimony judgment should provide for sale subject to prior incumbrancers unless the holders of these consent to sale free from their claims; subsequent incumbrancers must also be notified and allowed to prove their claims.

Abbott v. Abbott, 1 D.L.R. 697, 3 O.W.N. 683, 21 O.W.R. 281.

The sale by judicial order of two adjoining parcels of land "with a common right of way between them" has the same effect as a sale by the execution debtor since the plaintiff exercises the latter's rights and acts as his agent and the sheriff is only the ministerial officer, as a notary would be in a sale by private contract, therefore the adjudication under the above conditions constitute a servitude of passage by destination of the head of the family all the essential elements required by art. 551 C.C. being present.

Rosaire v. G.T.R. Co., 42 Que. S.C. 517.

(§ II A—19)—VOID SALE — INSUFFICIENT NOTICE.

A judicial sale of moveables made with a single notice in English and one in French on Dec. 27, when the notice of sale was only posted in the sheriff's office on Dec. 19, is illegal and void, and confers no title of ownership upon the purchaser.

Clement v. Déval, 47 Que. S.C. 196.

B. THE DEED.

(§ II B—21)—OF WORKSHOP AND ACCESSORIES — SUBSEQUENT SEIZURE OF MOVABLE EFFECTS — IRREGULARITIES — SEIZING PARTY BECOMING PURCHASER—QUE. C.P. 668.

A judicial sale, made en bloc, of a workshop or plant with all its working stock and implements, described in the return of seizure and in the sheriff's deed of sale in the widest way, includes the real properties by nature, the real properties by destination, and also the movable effects required to operate the plant. Therefore, a subsequent seizure made on those latter effects, as yet being the seized party's property, is made super non domino, and is therefore void. The second seizing party, who is sued on an action to annul the seizure, cannot plead against the purchaser the irregularity of the first seizure; he can, at the most, only take a direct action to have it cancelled. When a seizure and execution is made as above described, the distraction based on a release or an opposition for one of the buildings seized, does not apply to the moveable effects therein contained. A seizing party who, at the sale of the seized stock, himself becomes purchaser, is not allowed, in an action to annul the seizure, to take advantage of C.C.P., 668.

Donaghy v. O'Cain, 23 Que. K.B. 266.

III. Purchasers; their rights and duties.

A. IN GENERAL.

(§ III A—25) — RECEIVER'S SALE — CAVEAT EMPTOR — CLAIMS AGAINST ESTATE — NOTICE—KNOWLEDGE.

The interest of C. in the estate of his wife, under his wife's will, and in the estate of her father, A. under an appointment made by his wife, were sold by a receiver, under order of the court, to satisfy a judgment obtained by H. against C. (See 40

N.S.R. 229.) At the time of the sale C. was indebted to the estate of A. for advances obtained by him from the executrix either upon insufficient security or without security, and he was indebted to the estate of his wife for the proceeds of bank stock of which he had obtained possession as guardian of his infant children and which he had converted to his own use. Held, that the purchaser under order of the court of the equitable interests of C., was in no better position than C. himself would have been and must take the interests assigned to him as purchaser subject to the claims against them; that the maxim caveat emptor applied; that the filing of a schedule of accounts, pursuant to the order of the court, for the purpose of giving information to intending purchasers, and to which they were referred, disclosing the existence of claims against C., constituted means of knowledge of which the purchaser at the sale must be taken to have had notice; that the order for sale being made in a matter to which she was not a party, the executrix of A. was not bound by an error in the order, and in the deed made to the purchaser at the sale, as to the extent of C.'s interest. And further, for the reason that the purchaser at the sale, before paying his money and before receiving his deed, had notice as to the real extent of C.'s interest.

Grey v. Anderson, 50 N.S.R. 399.

SALE OF BOOK DEBTS.

A sale en bloc, by the Curator to the property of an insolvent, of the latter's book debts does not give the purchaser a right to recover debts due the insolvent which are not carried on the books.

Kouri v. C.P.R. Co., 44 Que. S.C. 5.

SALE UNDER EXECUTION.

Without prejudice to the recourse of the party aggrieved against the seizing creditor and those acting on his behalf, no demand to annul or rescind a sale of movables under execution, can be received against a purchaser who has paid the price, saving the case of fraud or collusion. The purchaser of effects, at a judicial sale, has an opposition, tierce opposition, against a judgment maintaining an attachment in revendication of the same effects between a creditor and his debtor to which he was not a party.

Elliott v. Crombie, 51 Que. S.C. 191.

SALE OF LAND BY COURT — DEPOSIT — FORFEITURE OF.

A deposit serves two purposes, if the purchase is carried out, it goes against the purchase money, but its primary purpose is this, it is a guarantee that the purchaser means business. Purchasers at court sales should be given to understand that, generally speaking, the deposit is required to be paid as an earnest to bind the bargain and that it is only in the event of the completion of the sale that they can benefit by such payment.

Chaffrey v. Robertson, 7 W.W.R. 829.

(§ III A—26)—SALE UNDER EXECUTION—COVENANT OF TITLE — LIABILITY OF SHERIFF TO PURCHASER.

Although a sheriff is not required to covenant for good title to a purchaser in a sale under execution, still, where in the absence of fraud or mistake a covenant of such effect and for indemnity to the purchaser is entered into by the sheriff in his bill of sale to the articles sold, he cannot be relieved from liability thereunder where the title of the purchaser failed because of an outstanding mortgage.

Sharp v. Ingles, 23 D.L.R. 636, 21 B.C.R. 584, 8 W.W.R. 1325, 32 W.L.R. 150.

(§ III A—27)—SHERIFF'S SALE — FAILURE OF TITLE—RECOURSE.

A purchaser at a sheriff's sale, who is unable to obtain possession of lots he purchased on account of an erroneous survey of the land, has no recourse for the purchase price against one who prosecuted the execution in subrogation to the rights of an attaching creditor.

U.S. Fidelity & Guarantee Co. v. Pharand 26 D.L.R. 264, 24 Que. K.B. 492, 22 Rev. de Jur. 153.

SHERIFF'S DEED — OPPOSITION A FIN DE CHARGE.

When the sheriff's deed erroneously mentions charges contrary to those decreed by a judgment upon an opposition a fin de charge, neither party can invoke rights other than those resulting from the judgment; where it is rendered upon an opposition a fin de charge founded upon a marriage contract, it cannot give further rights to the wife than those which are contained in the marriage contract.

Hope v. Leroux, 25 Que. K.B. 130.

(§ III A—28)—PROTECTION AGAINST EQUITIES.

A transfer of assets in a liquidation proceedings under a warranty "free from incumbrances" applies only to the mortgage on the buildings and liens on the stock, but not to an unsatisfied account.

Dominion Linen Mfg. Co. v. Langley, 46 Can. S.C.R. 633, affirming 19 O.W.R. 648.

(§ III A—29)—FORECLOSURE SALE — UNPAID VENDOR PURCHASING AT SALE — EFFECT ON DEFICIENCY JUDGMENT.

A deficiency judgment obtained in a foreclosure proceeding invalidly conducted by permitting the unpaid vendor to bid at the sale, and upon whose bid the sale of the property is confirmed at an upset price, is invalid and unenforceable against the guarantor of the defaulting purchaser.

Crown Life Ins. Co. v. Clarke, 25 D.L.R. 519, 9 A.L.R. 97, 9 W.W.R. 333, 32 W.L.R. 654.

LEAVE TO PLAINTIFF TO BID.

The objection to allowing a person who has the conduct of a sale to bid disappears when the property is sold at an upset price instead of subject to a reserve bid. Review

of cases in which party with conduct of sale was allowed to bid.

Griesbach v. Hogan, 8 W.W.R. 356.

B. TITLE ACQUIRED.

(§ III B—30) — SHERIFF'S DEED — CONVEYANCE OF LARGER ESTATE THAN POSSESSED BY JUDGMENT — DEBTOR — PRESCRIPTION — ART. 2251, C.C.P.Z. — COSTS.

Under the procedure of the Province of Quebec, a deed after seizure and sale only conveys the title at the time of the adjudication; and if it purports to convey a parcel of land, not in the possession of the judgment-debtor at such time, the title to that parcel does not pass, and the prescription of 10 years mentioned in art. 2251 C.C.P. cannot be invoked.

The King v. Ross, 15 Can. Ex. 33.

MISDESCRIPTION OF LAND.

Where in a judicial sale, the lots sold were described as being "Nos. 1, 3, 4 North 3rd range of the township of Wolfe," whereas the description of the official cadastre was "Nos. 1b, 1c, 2b, 3a and the north part of No. 4," the sale is illegal and conveys no title, and the owner is entitled to an order for the cancellation of the registration of the sale. The description, in the notice of sale, "north part of lot No. 4," is insufficient in that no information was given as to the particular portion of the lot to be sold.

Johnson v. Townshend, 52 Que. S.C. 392.

OF MOVABLES — PURCHASE — DELAY IN PAYMENT OF PRICE — THIRD OWNER — ACTION FOR CANCELLATION — RECLAIMING — C.C. ARTS. 1487, 1568, 2005 — C.C.P. ARTS. 236, 605, 608.

The purchaser of chattels, in a judicial sale, becomes owner from the moment of the purchase, even though the objects sold are not delivered then, nor the price paid at once. A third party, owner of the chattels sold by judicial sale because he has omitted to distrain them from the judgment, has no action to reclaim them against the purchaser in the absence of fraud or collusion, for the sole reason that the latter has not immediately paid the purchase price. No oral evidence can be admitted to contradict a report of a bailiff, unless the party who offers this evidence has contested the report by a motion conforming to art. 236, C.C.P.

Brochu v. Brochu, 55 Que. S.C. 327.

SALE OF ANOTHER'S PROPERTY — JUDICIAL SALE — FOR MUNICIPAL TAXES — SALE SUPER NON DOMINO — NULLITY — ACQUIESCENCE — CONCLUSION — RIGHT OF PURCHASER — REMOTE AND INDIRECT DAMAGES — AMENDMENT — COSTS — C.C. ARTS. 1487, 1492, 1521, 1535, 2098 — C.C.P. ARTS. 516, 522.

The principles which govern the sale of another's property do not apply to a sale by a person, who has purchased land from the sheriff at a sale for municipal taxes. This sale cannot be considered as not existing although it is tainted with defects. It presents all its effects as long as it is not annulled. Although sales of land by the sheriff for municipal taxes must be made as all other super domino and super possidente, there is always this fundamental difference that in a debt for municipal taxes it is the immovable which is taxed and not the owner or apparent possessor, and it is against the immovable that proceedings are taken and not against those who hold it, so, in a sale of this kind, if the true owner has knowledge of the facts, and does not protest or exercise the right of redemption given him by the Act, he acquiesces in the decree by his silence, and he who buys the lands from the purchaser cannot do it for him, and pretend that as the sale was void, he has a right to damages against the vendor. At all times in order to protect himself, this subsequent purchaser can refuse to pay the principal due by virtue of art. 1535, C.C. and if it is disputed he can name his vendor on a guarantee. He can, also, according to art. 1521, C.C., ask for a decision or the validity of the sale. The damages claimed for the increase in value brought to the land by the plaintiff on account of improvements made by him in the circumstances set out are not such as could have been foreseen at the time of the contract, and do not proceed necessarily and directly from its execution. When an action for damages is based on the refusal of the defendant to transfer a title of ownership in land according to an agreement for sale, a motion to amend the issues of the writ in order to add a petition for cancellation of the agreement for sale will be refused if an action in guarantee has been commenced by the defendant and is contested, since the amendment asked for would necessitate the amendment of the action of the guarantee, a new defence, and would entail costs which could not be fixed nor adjudged at once.

Perrault v. Chevalier and Chevalier v. Montreal, 55 Que. S.C. 92.

IV. Confirmation; setting aside; resale.

(§ IV—35) — PETITION TO ANNUL — NOTICE — PRESENTATION.

Where at the end of a petition to annul a decree there is a notice of presentation to the judge sitting for a certain district or in his absence to the prothonotary for the said court, and the petition is properly served on the attorney for the other party, it is properly presented if on the day fixed it is, in the absence of the judge, presented to the prothonotary who marks it "filed."

James Bay & E.R. Co. v. Bernard, 23 D.L.R. 701, 24 Que. K.B. 6.

SHERIFF'S SALE — FALSE BIDDING — RES JUDICATA — SERVICE.

There is res judicata in an opposition made by a purchaser to a resale of an immovable for false bidding when he has

already contested the petition for the resale on the same grounds as those alleged in his opposition, except that in the first case, in his conclusions, he only reserved his right to ask the nullity of the sheriff's sale, and in the second one, he asked that nullity. An application to set aside a sheriff's sale must be served on all parties interested.

Trust & Loan Co. v. Courville, 24 Rev. Leg. 489.

CANCELLING A JUDICIAL SALE—UNDERPRICED SALE — FRAUD — MOVES TO SET ASIDE THE BIDDERS—AWARD TO THE DISTRAINING CREDITOR, C.C. ARTS. 993, 1032, C.P., ARTS. 637, 638.

There is a means to annul a judicial sale of chattels when it is in fact a fraud on the creditors. The value of the goods sold, the cheapness of the award, the secrecy surrounding the sale, the systematic luring away of the bidders, the hurry in executing the sale, the removal of part of the goods seized from one place to another without permission from the judge, the award to the distrainer himself, are all circumstances establishing the fraud and the deceit. When the distrainor himself obtains the award of the seized goods, he is responsible to the party injured by the fraud and deceit which accompanies the sale and determines the nullity.

Gruninger v. Bertrand & Provencher, 28 Que. K.B. 1.

PETITION TO ANNUL — VACATING FOR DEFAULT.

The delays to present a petition in nullity of a sheriff's sale reckon only from the payment of the adjudication which makes it perfect. The only remedy to force the "adjudicataire" to pay the purchase price is by way of "folle enchere." Plaintiff has not the alternative of having the sale vacated for want of payment.

Westmount v. Evans, 15 Que. P.R. 96.

PARTITION—INCOMPETENT PERSONS—RESTITUTION.

If a judicial partition and auction sale between major and minor, or interdict, have not been legally made, owing to the omission of essential formalities, the minor or interdict can obtain restitution against such contract, but they are bound to give back what they received and they cannot procure a new partition and a new auction sale without making such offer. Very special and extraordinary facts are required to justify the judgment being treated as radically null, when not attacked by one of the methods given by law to have such judgment set aside and obtain the annulment of the judicial contract which might have resulted from it.

Archambault v. Maher, 25 Que. K.B. 436.

SHERIFF'S SALE—DELAY.

A petition to set aside an order for a sheriff's sale, made more than 2 months after the sale, will be dismissed on inscription en droit as barred and not properly in court.

Hyde v. Godin, 18 Que. P.R. 50.

CONFIRMATION OF SHERIFF'S SALE BY LOCAL MASTER—LAND TITLES ACT, S. 121.

Re Local Master, 9 W.W.R. 1286.

(§ IV—38) — RESALE — REALIZATION OF VENDOR'S LIEN ON MINING PROPERTIES—ABORTIVE SALE—RESERVED BID.

Leckie v. Marshall, 5 O.W.N. 29.

VI. Distribution and control of proceeds. (§ VI—45)—DEPOSIT PAID INTO COURT.

Where a purchaser at a judicial sale has paid a deposit on purchase-money into court in conformity with the conditions of sale in a partition action, but the sale goes off without any fault on the purchaser's part, the interest, earned thereon and credited to the court ledger account of the funds in that action while the money was in court, belongs to the purchaser to be repaid to him with his deposit.

Welsh v. Harrison, 7 D.L.R. 116, 4 O. W.N. 139, 23 O.W.R. 120.

LAND—DISPOSITION OF PROCEEDS—ALLOWANCES FOR MAINTENANCE—COSTS.

Mowat v. Mowat, 12 O.W.N. 309.

The owner of property seized under writ of saisie-gagerie and subsequently sold with other property assigned by the curator of defendant's estate, has a right to claim the price by privilege if the other property has produced an amount sufficient to pay the seizing creditor in full. It matters not that in his claim filed he did not invoke such privilege nor produce evidence to establish his rights. He is still in a position to contest the collocation.

Lester v. Turcotte, 43 Que. S.C. 385.

PARTITION — SALE BY ORDER OF COURT — SHERIFF'S DEED — EFFECT OF AS TO EASEMENTS.

Oland v. Mackintosh, 45 N.S.R. 13, 9 E.L.R. 230.

JURISDICTION.

See Courts; Appeal.
Review of jurisdiction, see Certiorari.
Of Railway Board, see Railways; Carriers; Railway Board.
In Criminal Cases, see Criminal Law; Summary Convictions; Justice of the Peace.
Admiralty matters, see Admiralty; Shipping; Seamen; Collision.
Of Exchequer Court, see Crown.

JURY.

I. RIGHT TO TRIAL BY.
A. In general.
B. When right exists.
C. Loss or waiver of right.
D. Denial or infringement of right.
II. IMPANELLING; SELECTION; COMPETENCY.
A. In general.
B. Qualification; competency.
C. Examinations.
D. Peremptory challenges.
E. Exclusion; rejection.

III. Number.
IV. Special jury.
V. Verdict; setting aside.
VI. Extra powers conferred on jury by agreement of parties.

See also Grand Jury; Trials.

I. Right to trial by.

A. In general.

(§ I A—1)—Nature of right.

The right to a trial by jury is a procedural not a substantive right, and may be restricted by rules of court made under general statutory authority.

Hubbard v. Edmonton, 37 D.L.R. 458, 2 A.L.R. 115, [1917] 3 W.W.R. 732.

Personal injury actions.

Rules 172, 173, 176 (Judicature Ord., Alta.) are not intended to leave the questions of jury or no jury to the arbitrary discretion or prejudice of the Trial Judge or Master, but each case must be considered on its own merits, as to the character of the action, the amount involved, with special regard as to whether the case is of a class which would traditionally be tried without a jury; but such discretion is exercised on a wrong principle when the judge or Master, while considering an application for a jury trial of an action for damages for personal injuries, is influenced by an opinion, that it is more for the interests of the administration of justice that all cases should be tried by a judge alone, and thus refusing a jury trial in an action where one should be granted.

Salter v. Calgary, 27 D.L.R. 584, 9 A.L.R. 134, 34 W.L.R. 72, 10 W.W.R. 173, reversing 33 W.L.R. 730, 9 W.W.R. 1201.

Action to set aside lease—Postponement of trial pending proposed appeal, when refused.

Where it seems clear that an order directing the trial of an action to set aside a lease be had without a jury was rightly made, the court will exercise its discretion by refusing an application to postpone the trial pending a proposed appeal from such order. [Pearson v. Dublin, [1907] A.C. 351, distinguished.]

Trimble v. Cowan, 19 D.L.R. 564, 20 B.C.R. 238, 29 W.L.R. 476, 7 W.W.R. 184.

Third trial.—New trial by judge at request of party giving jury notice.

On granting a new trial of a negligence action which has been twice tried by jury, the new trial should also be by jury irrespective of the wish of the party who gave the jury notice to have the third trial without a jury, if a fair jury trial is probable in the county in which the venue is laid and the case is one of a nature that is preferably tried by a jury.

Reiffenstein v. Dey, 13 D.L.R. 76, 28 O.L.R. 491, varying 7 D.L.R. 94, 4 O.W.N. 78.

Special jury—Costs.

Canadian Financiers Trust Co. v. Ashwell, 31 D.L.R. 786, 23 B.C.R. 341, [1917] 1 W.W.R. 459.

Order refusing—Appeal.

An order refusing a jury trial is an exercise of discretion, and when it has been based on a proper principle and in pursuance of a reasoned opinion, it should not be reversed on appeal.

Hogan v. Northern Construction Co., 13 A.L.R. 230, [1918] 1 W.W.R. 652.

Jury notice—Order striking out—Action for injunction and account.

Mining Corporation v. Irwin, 15 O.W.N. 64.

Motion for.

When the option for a jury trial is made in the declaration, a motion praying such is useless.

Dinardo v. Payette, 19 Que. P.R. 219.

Death of husband—Widow's action.

The injuries caused to a woman by the death of her husband are not personal injuries; they are injuries in respect to her means of subsistence. Where the widow brings an action claiming damages for the death of her husband by negligence she is not entitled to a trial by jury.

Robinson v. Montreal Tramways Co., 15 Que. P.R. 77.

B. When right exists.

(§ I B—5)—When right exists—Notice requiring jury after nonjury notice.

Where the plaintiff gave a nonjury notice of trial in a libel action that fact did not prevent the defendant, upon complying with the provisions of s. 59 of the Judicature Act (that is, upon filing with the local registrar and leaving with the solicitor of the other party at least 15 days before the day fixed for trial a notice demanding a jury), from having the issues of fact tried and determined by a judge with a jury. The decision of the Master in Chambers in MacBeth v. Flood, 5 W.W.R. 1271, that s. 59 of the Judicature Act is qualified by r. 239 of the Rules of Court, was disagreed with, and it was held that the provision in that rule requiring 20 days' notice of trial to be given could not override the plain provisions of s. 59 of the Judicature Act requiring only 15 days' notice.

Tadman v. Moose Jaw News, 6 W.W.R. 1122.

(§ I B—6)—Referee's interlocutory order for jury.

The plaintiff is not precluded from applying for an interlocutory order for a trial by jury by reason of the service of a notice of trial on him by the defendant for a nonjury sittings of the court, and the setting down of the case accordingly; such setting down does not fix the forum so as to prevent a jury being had except upon the Trial Judge's order. The referee in Chambers exercising certain judicial authority pursuant to the Manitoba King's Bench Act has the power to make an order granting a trial before a jury and setting

aside the notice of trial served for a non-jury sittings.

Moyer v. Jones, 8 D.L.R. 762, 22 Man. L.R. 803, 22 W.L.R. 858, 3 W.W.R. 590.

REFEREE'S ORDER FOR — NEGLIGENCE ACTION —WHEN GRANTED.

Clark v. Laing, 10 D.L.R. 807, 23 Man. L.R. 537, 23 W.L.R. 663, 3 W.W.R. 1087.

(§ I B—7)—NOTICE OF TRIAL—JURY NOTICE—REGULARITY—JUDICATURE ACT, S. 50—RULES 236, 237, 239—APPLICATION FOR ORDER FOR TRIAL BY JURY—DISCRETION — RIGHT TO JURY — CONVENIENT METHOD OF TRIAL—POSTPONEMENT OF TRIAL—PRACTICE.

MacBeth v. Flood, 27 W.L.R. 5, 5 W.W.R. 1271.

JURY NOTICE — IRREGULARITY — ACTION AGAINST MUNICIPAL CORPORATION — NONREPAIR OF HIGHWAY—JUDICATURE ACT, S. 54.

Jarvis v. Toronto, 13 O.W.N. 79. [Reversed, 13 O.W.N. 103.]

NOTICE OF TRIAL BY JURY—EXTENSION OF TIME.

In an action for libel, notice of trial without a jury was served on defendants on the 11th of May, and on the 6th of June defendants gave notice under O. 36, r. 2 of an application for an order extending the time for giving notice of trial before a judge and a common jury. The cause of the delay in giving this latter notice having been due to an oversight of the solicitor's clerk, the time should have been extended.

Clarke v. Ford-McConnell, 16 B.C.R. 344.

(§ I B—8)—ORDER FOR TRIAL BY — APPEAL FROM REFEREE—DISCRETIONARY ORDER.

Hewitt v. Hudson's Bay Co., 20 Man. L.R. 320, 17 W.L.R. 61.

ORDER FOR TRIAL BY JURY MADE SUBSEQUENT TO ORDER SETTING DOWN FOR TRIAL—IRREGULARITY—WAIVER.

An order granting the jury trial was held to have been regularly granted, but even if not, held, also, that advantage could not be taken of the irregularity by the defendant after the case had been tried and the verdict of the jury given.

White v. G.T.P.R. Co., 2 A.L.R. 522. [Reversed upon other grounds, 43 Can. S.C.R. 627.]

(§ I B—10)—IN CIVIL ACTIONS AND PROCEEDINGS.

It is discretionary, and not a matter of right, to order a trial by jury in cases of a class not specially designated for jury trial under the Manitoba King's Bench Act, R.S.M. 1902, c. 40, s. 59, where that statute provides that cases not so designated shall be tried by a judge without a jury "unless otherwise ordered by a judge." Where a plaintiff satisfies the court by his material on a motion for a trial by jury that the personal injuries he suffered by being hit by something falling from defendant's building were of a serious character, an order for trial with a jury should be made under s. 59, without requiring an affidavit also from the plaintiff's physician and thereby submitting the physician to cross-examination thereon before the trial.

Navarro v. Radford Wright Co., 8 D.L.R. 253, 22 Man. L.R. 730, 22 W.L.R. 665, 3 W.W.R. 457.

Where the option for a trial by jury should be made within 3 days after issue joined (423 C.C.P.) and the defendant after filing a plea of general denial is subsequently allowed to file a special detailed plea, then the plaintiff may move for a trial by jury on such special plea, although he did not do so on the plea of general denial.

C.N.R. Co. v. Levine, 4 D.L.R. 233, 21 Que. K.B. 521.

STATUTORY RIGHT — JOINDER OF SEVERAL CAUSES OF ACTION.

Where a statement of claim sets up several causes of action properly joined, one of which is akin to or within the general principles of the classes of actions which under s. 59 of the King's Bench Act, R.S.M. 1902, c. 40, are to be tried by a jury, the court will direct trial of the whole case to be with a jury. [Griffiths v. Winnipeg Electric R. Co., 16 Man. L.R. 512, applied.]

Robinson v. G.T.P.R. Co., 11 D.L.R. 67, 23 Man. L.R. 408, 24 W.L.R. 38, 4 W.W.R. 261. [Affirmed, 11 D.L.R. 835, 23 Man. L.R. 408, 24 W.L.R. 781, 4 W.W.R. 1192.]

PARENT'S ACTION ON BEHALF OF CHILD—JOINING CLAIM IN OWN RIGHT—QUEBEC PRACTICE.

An action by a father as tutor for his minor child for injuries sustained by the latter as the result of the negligence of a railway company, as well as on the parent's own behalf for money expended in caring for the child and for the loss of the child's services, is one "for the recovery of damages resulting from personal wrongs" which may, in the Province of Quebec, be tried by jury, under s. 26, of c. 83, C.S.L.C. 1860.

Steel v. C.P.R. Co., 14 D.L.R. 287, 15 Que. P.R. 215, 23 Que. K.B. 36.

EQUITABLE CLAIM—SUBSIDIARY MONEY DEMAND.

An action to set aside on the ground of fraud a transfer of land, in which no claim is made for possession, is not an action "for recovery of real property" and the plaintiff is not entitled to a jury trial, although a claim is made therein for a money demand where the latter claim is merely incidental to the main issue.

Hodder v. Lee, 9 D.L.R. 805, 5 A.L.R. 406, 24 W.L.R. 236, 3 W.W.R. 1041.

NEW BRUNSWICK RULES.

Under the New Brunswick rules of practice, the right is preserved to both parties to a jury for the trial of the issues in any action in the King's Bench Division except in the case covered by order 30, r. 4, where the matter to be determined is likely to require "prolonged examination of documents or accounts or any scientific investigation."

The judge should not, save with the consent of both parties, direct trial without jury except in the case covered by r. 4, but when such order has been made, neither party can obtain a jury by simply giving notice under r. 5 (1) while such order remains in force and unrescinded.

Fairweather v. Foster, 42 D.L.R. 723, 46 N.B.R. 46.

WHEN RIGHT EXISTS—CIVIL ACTIONS—NOTICE—SUFFICIENCY—RULE 238.

Prime v. Moose Jaw Electric R. Co., 19 D.L.R. 898.

PERSONAL INJURY ACTION.

Where the injury is serious and the damage in case of success would be substantial, in a negligence action for damages for personal injuries, an order for a jury trial is properly made under the Manitoba King's Bench Act, R.S.M. 1902, s. 59. [Navarro v. Radford Wright Co., 8 D.L.R. 253, followed.]

Jocelyn v. Sutherland, 9 D.L.R. 457, 23 W.L.R. 392, 3 W.W.R. 901. [Affirmed, 10 D. L.R. 842, 23 Man. L.R. 539, 23 W.L.R. 723.]

ACTION BY HUSBAND FOR INJURIES TO WIFE.

A jury trial may be had in an action for damages by a husband for corporal injuries suffered by his wife in a street car collision.

Kazaransky v. Montreal Tramways Co., 48 Que. S.C. 76.

JURY NOTICE—MOTION TO STRIKE OUT—DISCRETION—PLACE OF TRIAL.

McConnell v. Toronto, 8 O.W.N. 82.

JURY NOTICE—MOTION TO STRIKE OUT—ISSUES OF FACT—APPLICATION TO JUDGE IN CHAMBERS.

Galvin v. Imperial Guarantee & Accident Ins. Co., 8 O.W.N. 402.

ACTION FOR MALPRACTICE AND ASSAULT—MOTION TO STRIKE OUT JURY NOTICE—RULE 398 — DISCRETION OF JUDGE IN CHAMBERS—MOTION ADJOURNED BEFORE TRIAL JUDGE.

Wilkinson v. Hayes, 9 O.W.N. 124.

IN CIVIL CASES—IN QUEBEC.

It is never too late, during the pendency of the case, to raise the question whether or not the jury has jurisdiction to pronounce upon the merits of the case, even if a judgment has been given praying acte of the option for jury trial. Expenses made by plaintiff for the board and lodging of his men and horses and salary of his men, in relation to said contract, are also of a commercial nature, and may be recovered in a case tried by a jury. Damages alleged to have been suffered by false misrepresentation and based upon a written contract for the manufacture of logs are of a commercial nature and subject to trial by jury.

Delisle v. Menier, 15 Que. P.R. 92.

(§ I B—11)—ON DEFAULT.

British Columbia Supreme Court, r. 967, 1906, empowering the Court or Judge, save as otherwise provided by the rules or any Act, to enlarge or abridge the time appointed by these rules for doing any act or taking any proceeding upon such terms (if any) as the justice of the case may require and permitting any enlargement to be ordered through the application for the same is not made until after the expiration of the time appointed or allowed, gives a judge the power to extend the time for serving a jury notice under r. 430, 1906, as amended 1908, which provides that in any other cause or matter than those in which the court or judge might direct the trial without a jury, upon the application within 4 days after notice has been given to any party thereto for a trial with a jury an order shall be made accordingly.

Williams v. B.C. Electric R. Co., 6 D. L.R. 7, 17 B.C.R. 338, 22 W.L.R. 4, 2 W.W. R. 867.

ON DEFAULT.

A jury trial cannot be had in a default or ex parte case.

Kertland v. Montreal Tramways Co., 16 Que. P.R. 260.

(§ I B—14) — PERSONAL WRONGS — LORD CAMPBELL'S ACT.

The right of action, under art. 1056 C.C. (Que.) (Lord Campbell's Act), is given to dependents of a person whose death is caused by the delit or quasi-delit (offences or quasi-offences), is an action resulting from "personal wrongs" within the meaning of art. 421, C.C.P., in which there may be a trial by a jury.

Montreal Tramways Co. v. Séquin, 28 D.L.R. 494, 52 Can. S.C.R. 644.

LORD CAMPBELL'S ACT.

Section 3 of the Act respecting Compensation to Families of Persons Killed by Accident, R.S.M. 1902, c. 31, contemplates that an action by a representative of a person killed by accident against the person charged with negligence may be tried by a jury, and if a jury trial would have been ordered in case the person injured had brought the action, then the order should not be refused because the person died and the personal representative brings the action.

Marion v. Winnipeg Electric R. Co., 21 Man. L.R. 757.

TRIAL BY JURY, ART. 1056, QUE. C.C.—"PERSONAL WRONGS"—DEATH BY WRONGFUL ACT.

The damages which may be claimed under art. 1056, C.C. (Que.) from the person responsible, by the widow of the victim of an offence or quasi-offence, are those which result from personal wrongs, within the meaning of art. 421. Accordingly, the plaintiff, in an action to recover these, may claim a trial by jury.

Robinson v. Montreal Street R. Co., 23 Que. K.B. 60.

(§ I B—15)—RIGHT TO—IN ACTION OF EQUITABLE NATURE—DISCRETION OF TRIAL JUDGE.

Whether a jury may be had for the trial of a case of an equitable nature, rests in the discretion of the judge hearing an application to strike out the jury notice. [Bryans v. Moffat, 15 O.L.R. 220, 223; Bissett v. Knights of the Maccabees, 3 D.L.R. 714, followed.]

Kelly v. McKenzie, 11 D.L.R. 824, 4 O.W.N. 1412, 24 O.W.R. 711.

EQUITABLE ACTION—RESCISSION.

Where the gist of an action is for equitable relief to set aside documents on the ground of fraud, there is no right to a trial by jury.

Racey v. International Harvester Co., 32 D.L.R. 131, [1917] 1 W.W.R. 606, 9 S.L.R. 392.

Except in the classes of cases specified in r. 172 (Alta.) no litigant has a prima facie right to a trial by jury. The interest of justice should govern the discretion as to the granting or refusing the right. The fact that under the old practice a jury would have been granted or under the English practice a jury would be granted is not in itself sufficient ground for directing a jury trial under the present rules, although it is a fact which should be kept in view. In an action for specific performance of an agreement to sell a growing crop and for an injunction and receiver, there being no alternative claim for damages, held, on an application by the defendant for a jury, that there should be a trial by jury upon the issue only whether there was an oral agreement such as the plaintiffs alleged.

Godfrey v. Marshall, 11 A.L.R. 37, [1917] 1 W.W.R. 1097.

(§ I B—17)—INJUNCTION.

The plaintiff in an action for damages for breach of an agreement to supply water for domestic and irrigation purposes, and for a mandatory injunction to compel performance thereof, is not entitled upon notice to a jury, under B.C. Rules, 1906, marginal rr. 426–432.

McArthur v. Rogers, 2 D.L.R. 347, 17 B.C.R. 47.

(§ I B—18)—WILLS.

Whether a jury will be granted in a contest of the probate of a will transferred from the Surrogate Court to the High Court, is a matter within the discretion of the latter court or a judge thereof, under ss. 22, 35, of c. 59, R.S.O. 1897, as there is no vested or absolute right to have such an issue tried by jury.

Jarrett v. Campbell, 3 D.L.R. 763, 21 O.W.R. 447, 26 O.L.R. 83.

(§ I B—20)—IN CRIMINAL PROSECUTIONS AND PROCEEDINGS.

The Cr. Code does not prescribe that an accused can elect to be tried without a jury when without a preliminary inquiry, or a committal, or an admission to bail, a bill of indictment has been preferred against him by the Crown Attorney with the written consent of a judge of a court of criminal jurisdiction. [The King v. Wener, 6 Can. Cr. Cas. 406, followed.] If no election has been made before an indictment is returned founded on the facts disclosed by the depositions taken at the preliminary inquiry, the accused has no statutory right to demand a trial before a Judge of Sessions without a jury and avoid a trial on the indictment. [The King v. Wener, 6 Can. Cr. Cas. 406; R. v. Thompson, 14 Can. Cr. Cas. 27, 17 Man. L.R. 608, dissented from.]

R. v. Sovereen, 4 D.L.R. 356, 26 O.L.R. 16, 20 Can. Cr. Cas. 103, 21 O.W.R. 618.

C. LOSS OR WAIVER OF RIGHT.

(§ I C—25)—WANT OF NOTICE—AMENDMENT—FAIR TRIAL—NEWSPAPER COMMENT.

The failure to give notice of an election to a trial by jury in accordance with a rule of court (r. 239 Sask.), which was promulgated shortly before the filing of the pleadings of which counsel had no knowledge, is not fatal to the claim of such right and may be cured by amendment; nor is such right affected because of newspaper comment upon the action the statements whereof not being prejudicial to a fair trial of the action by a jury.

Heinrichs v. Wiens, 26 D.L.R. 705, 9 S.L.R. 227, 34 W.L.R. 394, 10 W.W.R. 414. [See also 21 D.L.R. 68, 32 W.L.R. 30, 23 D.L.R. 664, 30 W.L.R. 854, 8 W.W.R. 373, 8 S.L.R. 153, 31 D.L.R. 94, [1917] 1 W.W.R. 306.]

PLACING CASE ON NONJURY TRIAL LIST.

McConnell v. Winnipeg Electric R. Co., 11 D.L.R. 837, 23 Man. L.R. 23, 23 W.L.R. 325.

When the statement of defence has been amended, an action is not at issue, under r. 301 of the King's Bench Act, until the expiration of 10 days from the delivery of the amended statement of defence and an application for a special jury may, under s. 60 of the Jury Act, be made within 6 days after the expiration of such 10 days.

Brown v. Telegram Printing Co., 21 Man. L.R. 775.

TRIAL—ACTION FOR CRIMINAL CONVERSATION—ALLEGATION OF ADULTERY AND CLAIM FOR DAMAGES—JUDICATURE ACT, S. 53—ENTRY OF ACTION FOR TRIAL AT NONJURY SITTINGS—INADVERTENCE—APPLICATION TO TRANSFER TO JURY LIST—WAIVER OF RIGHT TO TRIAL BY JURY—RULES AS TO TRIAL.

Gordon v. See, 17 O.W.N. 285.

JURY NOTICE—FILING AND SERVING AFTER TIME FOR SO DOING EXPIRED — JUDICATURE ACT, S. 56—SOLICITOR'S ERROR OR OMISSION—MOTION TO STRIKE OUT JURY NOTICE AS IRREGULAR — FAILURE TO SPECIFY GROUNDS IN NOTICE OF MOTION — ORDER VALIDATING JURY NOTICE — COSTS.

Wilson v. Toronto R. Co., 16 O.W.N. 357.

JURY NOTICE—APPLICATION TO JUDGE IN CHAMBERS TO STRIKE OUT R. 398 — QUESTIONS OF LAW AND COMPLICATED FACTS—DELAY IN GOING TO TRIAL.

Union Machine Co. v. Can. Flax Mills, 10 O.W.N. 260.

NOTICE—PAYMENT OF FEES—EXTENSION OF TIME—FINAL JUDGMENT.

The pronouncement and entry of final judgment in an action terminates all interlocutory motions. A judge in chambers, on an application of the defendant to strike out a jury notice for nonpayment into court, of jury fees within the prescribed time enlarged the time for payment in and dismissed the application. On appeal, held that r. 239, which says that the jury notice shall be void unless the fees are paid into court within the prescribed time, is to be read with rr. 704, 747, and that failure to pay the jury fees within such perscribed time does not deprive the plaintiff of his right to a jury, but that a judge has power to enlarge the time and make good the proceedings under the 2 latter rules. Held, that rr. 704, 747 had no application to the payment into court under r. 239, and that the plaintiff having failed to pay the jury fees into court within the prescribed time, his jury notice was, under r. 239, void, and there was no power in a judge to revive it.

Andrews v. C.N.R. Co., 11 S.L.R. 203, [1918] 2 W.W.R. 331, affirming [1918] 1 W.W.R. 460.

DEPOSIT—FORFEITURE—HOLIDAY.

If the delay of 30 days to proceed to a trial by jury, mentioned in art. 442, C.C.P., expires on a holiday, it is continued in full force until the next day. When this delay ends on April 9, which falls on Easter Monday, a holiday, a motion to fix the day of trial and to choose the jury, notice served April 10 and presented April 12 is a valid proceeding which interrupts the forfeiture of the right. Default in making the deposit required by art. 434, C.C.P., within the delay allowed by art. 442, is not sufficient to cause the loss of right to a trial by jury.

Montreal Tramways Co. v. Dougan, 27 Que. K.B. 279.

FAILURE TO PLEAD.

A plaintiff who has only delayed his option for a jury trial, in order to permit the defendant to reply to an answer containing new facts has not lost his right to oppose a trial by jury.

Mathys v. Factories Ins. Co., 20 Que. P.R. 287.

ACTION IN WARRANTY.

A plaintiff who, by his declaration, has chosen a jury trial, does not lose that right because the defendant has called in warranty a third party; and, although the action in warranty is not subject to a jury trial, he also obtained the joinder of the action in warranty with the principal action.

Mercier v. Montreal Tramways Co., 19 Que. P.R. 15.

FAILURE TO DEMAND.

A party who does not proceed with his demand for a trial by jury within the 30 days which follow the date of the judgment determining the facts is entirely barred of his right to a jury trial.

Bertrand v. Canadian Sand & Gravel Co., 18 Que. P.R. 296.

To avoid being deprived of his right to a trial by jury, the party who has obtained it must within 30 days after the time issue was joined, take not only some but all of the proceedings necessary to bring his case to trial. Otherwise an inscription at enquête and merits by the adverse party will be maintained. [Landriaux and Heard, 12 Que. P.R. 198, followed.]

Cianfagna v. Atlantic, Quebec & Western R. Co., 13 Que. P.R. 117.

If an amended defence is filed according to a previous agreement of the parties, no option for a jury trial can then be made, when there is already in the record an inscription for enquete and merits.

C.N.R. and Levine, 13 Que. P.R. 417.

TRIAL—PLAINTIFF DEPRIVING HIMSELF OF RIGHT TO JURY TRIAL.

In an action for damages for breach of warranty, defendant set the action down for trial, and on application to the registrar a date was fixed for trial. On motion by plaintiff to postpone the trial, the referee postponed it to a date to be fixed by the registrar not earlier than a certain date. Subsequently, plaintiff filed a record and paid to the prothonotary a jury fee and set the case down for hearing by jury and applied to have a date fixed for such trial. Up to the time of the order postponing the trial, plaintiff had not expressed any intention to ask for a jury trial. Section 49 of the King's Bench Act provides inter alia that actions for breach of warranty "shall be tried by jury" unless the parties waive such a trial. Subsection 2 says that "except in cases of libel and slander, the right to a jury shall be held to be abandoned and the case shall be tried without a jury unless a jury fee . . . be paid. . . . The officer shall require payment of such fee before entering the case." Held, plaintiff, by his motion to postpone the trial and his taking out and serving the order postponing it to a date to be fixed by the registrar (the registrar having no authority to fix the date for a trial by a jury, which must be done by a judge), adopted the forum originally selected by the defendants. The plaintiff by his conduct abandoned his right to have the action

tried by a jury, and is in the same position as though he had himself entered the action for trial without payment of the required jury fee.

Sutherland v. Sterling Engine Co., [1919] 1 W.W.R. 512.

D. DENIAL OR INFRINGEMENT OF RIGHT.

(§ I D—30)—DENIAL OR INFRINGEMENT OF RIGHT—IMPOSING TERMS INVADING THE RIGHT—EFFECT.

It is the judge at the trial who is to decide under s. 50 of the Judicature Act (Sask.) whether the jury is to be dispensed with; and no such power is conferred on the Master in Chambers or a Judge in Chambers; therefore a term should not be imposed on setting aside a default judgment that defendant should submit to trial at a nonjury sittings.

International Harvester Co. v. Smith, 20 D.L.R. 138, 7 S.L.R. 151, 29 W.L.R. 333, 7 W.W.R. 73.

(§ I D—31)—JUDICIAL DISCRETION—MOTION TO STRIKE OUT NOTICE.

The granting of a motion by a Judge in Chambers to strike out a jury notice, under Con. r. 1322, will not interfere with the discretion of the judge who presides at the trial, in directing a trial by jury under Con. r. 1322 (2).

Bissett v. Knights of the Maccabees, 3 D.L.R. 714, 3 O.W.N. 1280, 22 O.W.R. 89.

JURY NOTICE—MOTION TO STRIKE OUT—CLAIM AND COUNTERCLAIM—PROPER CASE FOR TRIAL WITHOUT A JURY.

Stanzel v. J. I. Case Threshing Machine Co., 10 D.L.R. 803, 4 O.W.N. 1002, 24 O.W.R. 369.

Where issues of fact are raised upon the pleadings which must be settled before the question of liability or nonliability can be ascertained, it is a wrong exercise of his discretion on the part of a Judge in Chambers to strike out the jury notice, and such exercise of discretion is a proper subject for review. [Hunt v. Chambers, 20 Ch.D. 765, followed.] Prima facie a party who has given a jury notice has a right to a jury trial, subject to deprivation of such right if a judge so orders, but this order will not be made except upon good cause shewn by the party attacking the notice, as, for instance, that only questions of law are involved.

Starratt v. Dominion Atlantic R. Co., 5 D.L.R. 641, 46 N.S.R. 272.

Where important questions of fact proper to be determined by a jury are raised upon the pleadings, a party who has given a jury notice has a prima facie right to have the case so determined, and an order made, notwithstanding such notice, setting the case down for trial without a jury, will be set aside. [Starratt v. Dominion Atlantic R. Co., 5 D.L.R. 641, 46 N.S.R. 272, followed.]

Carruthers v. The Nova Motor Co., 8 D.L.R. 689, 46 N.S.R. 514.

Upon a Chambers motion to strike out a jury notice, where the case turns upon whether a conveyance of land absolute in form is so in substance or merely an equitable mortgage, the relief sought comes within s. 103 of the Ontario Judicature Act, and the case is one for trial without a jury.

Roscoe v. McConnell, 7 D.L.R. 188, 4 O.W.N. 126, 23 O.W.R. 108.

Upon a Chambers motion to strike out a jury notice, the judge should proceed under Con. Rule (Ont.) 1322, to determine the question whether the case is proper for trial with a jury or not, and should not merely direct that the question be left over to be determined by the judge at the trial. [Bissett v. Knights of the Maccabees, 3 D.L.R. 714, 3 O.W.N. 1280, followed.]

Gerbracht v. Bingham, 7 D.L.R. 259, 4 O.W.N. 117, 23 O.W.R. 82.

It is a proper exercise of discretion to deny a trial by jury in a cause that will require at least 2 weeks to try and in which many witnesses will be examined, in an action attacking the validity of a will.

Jarrett v. Campbell, 3 D.L.R. 763, 26 O.L.R. 83, 21 O.W.R. 447.

JUDICIAL DISCRETION—STRIKING OUT JURY NOTICE.

A Judge in Chambers hearing a motion to strike out a jury notice under Ont. Con. r. 1322, has the like discretion as the trial judge would have at the hearing. [Brown v. Wood, 12 P.R. (Ont.) 198, applied.]

Cornish v. Boles, 12 D.L.R. 245, 4 O.W.N. 1551.

DISPENSING WITH—PROLONGED EXAMINATION OF ACCOUNTS.

The right to a trial by jury as of a common law action may be displaced by shewing that a prolonged examination of accounts would be necessary, and this may be proved prima facie by the affidavit on production.

Wilson v. Henderson, 15 D.L.R. 768, 26 W.L.R. 936, 19 B.C.R. 46.

JURY NOTICE—MOTION TO STRIKE OUT.

Simonson v. C.N.R. Co., 12 D.L.R. 842, 23 Man. L.R. 540, 24 W.L.R. 705, 4 W.W.R. 1191.

JURY NOTICE—MOTION TO STRIKE OUT—POWERS OF JUDGE IN CHAMBERS—DISCRETION—RULE 398.

Neely's v. Dredge, 9 O.W.N. 247.

MOTION TO STRIKE OUT NOTICE.

Murray v. Thames Valley Garden Land Co., 4 O.W.N. 984, 24 O.W.R. 311.

(§ I D—35)—JURY NOTICE—QUEBEC PRACTICE.

The plaintiff whose reply is served on the defendant the day on which the defence is received, has, nevertheless, the 6 days allowed him by C.C.P. in which to file such reply, the delay of exercising the option for a jury trial only runs from the expiration of these 6 days even when the reply is previously filed.

Rubensky v. Montreal, 14 Que. P.R. 348.

(§ I D—38)—Matters as to evidence—Motion to strike out—Order—Rule 1322.

Scott v. Britton, 3 D.L.R. 873, 3 O.W.N. 568.

Where a statutory authority is conferred upon the court to dispense with the jury in any cause "requiring local investigation," the discretion will be exercised in favour of a trial without a jury if the case is one in which the principal issue is the amount of fire damage occasioned to timber lands in proof of which a large number of experts upon the value of standing timber are to be called.

Clarkson v. Nelson & Fort Shepherd R. Co., 1 D.L.R. 14, 19 W.L.R. 845, 1 W.W.R. 485, 17 B.C.R. 24.

Action against municipal corporation—Nonrepair of highway.

James v. Toronto, 2 D.L.R. 893, 3 O.W.N. 1007.

(§ I D—40)—"Reasonable refreshment" to jury.

Leave to appeal in a criminal case will not be granted on the ground that the jurors were kept eight hours without food in contravention of Cr. Code s. 946 which directs that they be allowed "reasonable refreshment," unless prejudice to the accused is shewn; nor can prejudice to the accused be assumed from that delay where the jury continued their deliberations for an hour after refreshments were provided.

R. v. Murray and Mahoney, 33 D.L.R. 702, 27 Can. Cr. Cas. 247, 10 A.L.R. 275, [1917] 1 W.W.R. 404. [See also 28 D.L.R. 372, 25 Can. Cr. Cas. 214, 9 A.L.R. 319, 33 W.L.R. 148, 9 W.W.R. 804, 38 D.L.R. 395, 28 Can. Cr. Cas. 247, 11 A.L.R. 502, [1917] 2 W.W.R. 805.]

Jury trial—Different causes of action—Damages and agreement of settlement.

McKinstry v. Irvin, 12 Que. P.R. 195.

Jury trial—Delay—Mixed jury.

Canadian Rubber Co. v. Karavokiris, 12 Que. P.R. 122.

Jury trial—Delays—Consent.

St. Paul Electric Light & Power Co. v. Quesnel, 12 Que. P.R. 158.

Trial by jury—Damages for wrongful dismissal.

Montreal v. De Montigny, 20 Que. K.B. 49.

II. Impanelling; selection; competency.

A. In general.

(§ II A—50)—Mixed language.

The plaintiff has not the right to obtain a mixed jury or a jury "de medietate linguae" if the defendant, a corporation, is opposed to it, although the latter can itself demand it.

Montreal Tramways Co. v. Crowe, 24 D.L.R. 567, 24 Que. K.B. 122.

Where defendant's counsel, in a criminal action, makes a premature application that he be allowed to interrogate the jury on a question involving their eligibility to sit, a ruling by the judge in these words: "We will see when the question arises," while it might give rise to a wrong impression on the part of counsel that the court would later do the questioning, does not, however, amount to a refusal of the defendant's right to challenge for cause, where the defendant's counsel allowed the jury to be sworn before renewing his application.

R. v. Pilgar, 8 D.L.R. 830, 20 Can. Cr. Cas. 507, 27 O.L.R. 337, 23 O.W.R. 433.

A sheriff may, in drawing a grand jury, without having before him the affidavit required by s. 43 of c. 162, R.S.N.S. 1900, strike from the panel the name of a juror, who, to the former's knowledge, by statute, was exempt from jury duty by reason of being a city official, or who, for some other reason, was exempt, and substitutes therefor the name of another duly qualified juror.

The King v. Brown and Diggs, 19 Can. Cr. Cas. 237, 45 N.S.R. 473.

Upon the exhaustion of the jury panel with the swearing of the eleventh juror in a murder case, the judge may, under s. 939 of the Cr. Code, direct the summoning of a number of persons by the sheriff, irrespective of their qualifications, from whom to select a twelfth juror.

Trepanier v. The King, 19 Can. Cr. Cas. 290, 18 Rev. de Jur. 177.

Jury trial—Summoning jurors.

Archibald v. Cullen, 20 Que. K.B. 206.

(§ II A—52)—Criminal trial—Peremptory challenge by Crown of jurors who had been stood aside when panel first called—Section 928 Criminal Code — Accused deprived of right given by law—New trial.

The peremptory challenging by the Crown of jurors who had been stood aside when the panel was first called, upon their being called a second time, instead of shewing cause why they should not be sworn, as provided by s. 928 Cr. Code, deprives the accused of a right given by law, and entitles him to a new trial, notwithstanding s. 1019.

R. v. Churton, 45 D.L.R. 725, [1919] 1 W.W.R. 774.

Statutory directions—Challenge—Jury list not revised—Prejudice—Demurrer.

Cr. Code, s. 1011, which directs that certain omissions of statutory directions as to the jury or jurors shall not be a ground of impeaching any verdict nor be allowed for error upon any appeal, applies to an objection raised by challenge of the array of jurors, as well as to objections taken after verdict. Where the jury lists had not been revised annually according to law by a revising board exercising ministerial duties (R.S.Q., art. 3423), but the provincial law stipulated that the old lists should remain in force until the new ones were com-

pleted or revised (art. 3432), the use of a list revised by the deputy sheriff who was clerk to the revising board will not constitute a ground of challenge to the array (Cr. Code, s. 925), although the sheriff as a member of the revising board was himself involved in the neglect to revise, unless the complainant further shews that someone not competent as a juror had been summoned or that someone competent as a juror had been left off the jury list by reason of the unauthorized revision. The opposite party may demur to a challenge of the array of petit jurors on the ground that the matter relied upon is not in law a ground of challenge.

R. v. Morrow, 24 Can. Cr. Cas. 310.

STANDING ASIDE JURORS—CROWN'S RIGHT.

The provisions of Cr. Code (ss. 927, 933), relating to the right of the Crown to have jurors stand aside, are not inconsistent with the provisions of the North West Territories Act (Can.), as it stood immediately before Sept. 1, 1905, and are consequently not excluded from being operative in Alberta (and Saskatchewan) under s. 9 Cr. Code.

R. v. Murray, 28 D.L.R. 372, 25 Can. Cr. Cas. 214, 9 A.L.R. 319, 33 W.L.R. 148, 9 W.W.R. 804.

B. QUALIFICATIONS; COMPETENCY.

Relationship as a disqualification, failure to challenge, see New Trial, III C—20.

(§ II B—55)—QUALIFICATION OF JUROR—RIGHT TO QUESTION AFTER VERDICT.

After verdict rendered and sentence passed it is too late to urge that one of the jurors who sat on the case was not qualified and that his name was not on the sheriff's list of jurors as s. 1010 Cr. Code, establishes the legal presumption that all those who rendered a verdict were competent to have served on the jury where no objection was taken at the trial of an indictment. [Rex v. McCrae, 12 Can. Cr. Cas. 253, 16 Que. K.B. 193, distinguished.]

R. v. Battista, 9 D.L.R. 138, 21 Can. Cr. Cas. 1.

After a jury is empanelled and sworn it is too late to challenge for cause.

R. v. Pilgar, 8 D.L.R. 830, 23 O.W.R. 433, 20 Can. Cr. Cas. 507, 27 O.L.R. 337.

DISCHARGE OF JURY AND EMPANELLING FRESH JURY.

Where, on the trial of a capital charge, the jury were not kept together on an adjournment over night, as directed by Cr. Code, s. 945, whereupon the Trial Judge discharged the jury and empanelled a fresh jury, before which the trial was commenced de novo, there is no duty upon the Trial Judge, on his own initiative, to exclude all the 12 jurors sworn on the first day from the second jury; and the circumstance that eight of the first jury before which testimony had been given were called and sworn on the second jury without challenge does not raise a presumption of "substantial wrong or miscarriage" to found an order for a new trial.

R. v. Luparello, 22 D.L.R. 344, 25 Man. L.R. 233, 24 Can. Cr. Cas. 24, 8 W.W.R. 89, 30 W.L.R. 777.

PREPARATION OF JURY LIST.

It is not the insertion of a name in the list of jurors or jury register which establishes the qualification of a juror in Quebec (R.S.Q. arts. 3405 et seq., and Cr. Code, s. 921), but the entry of the name in the municipal valuation roll (R.S.Q., art. 3406) with mention of the requisite property or rental valuation.

R. v. Morrow, 24 Can. Cr. Cas. 310.

(§ II B—57)—IGNORANCE OF ENGLISH—FRENCH AND ENGLISH.

The only grounds upon which a challenge to the array can be made in a jury trial, in a civil case, are partiality, fraud or misconduct on the part of the officer by whom the panel is returned, or causes of nullity in the summoning of the jurors, or in the making up of the panel. The summoning of a juror whose name had been struck from the list, of a French juror, who does not understand English, as English-speaking, and the failure to summon one of the jurors on the list, are not grounds of that kind.

Montreal Street R. Co. v. Girard, 21 Que K.B. 121.

FRENCH CANADIAN JUROR SPEAKING ENGLISH—ENGLISH SPEAKING JUROR.

It is no longer necessary that a juror should be English to serve on an English jury or French to serve on a French one. A knowledge of the language required is the qualification.

Bernier v. Montreal Light, Heat & Power Co., 13 Que. P.R. 116.

JURY TRIAL—CORPORATION—JURY DE MEDIETATE LINGUAE.

If one of the parties is a corporation and objects to a jury of the same language, the court in the Province of Quebec must order a jury de medietate linguæ.

Beaulieu v. Montreal Street R. Co., 12 Que. P.R. 263.

(§ II B—58)—BIAS—INTEREST.

A request by defendant's counsel, in a criminal trial for arson, made at the opening of the trial, that before the jury was called he would like to ask each of the men who are called whether he is interested in a certain insurance company, which interest on his part would have made him ineligible to serve, is prematurely made.

R. v. Pilgar, 8 D.L.R. 830, 23 O.W.R. 433, 20 Can. Cr. Cas. 507, 27 O.L.R. 337.

(§ II B—59)—OPINIONS FORMED.

A juror in a criminal case who, after he has been sworn, without objection or challenge, states that he is prejudiced against the accused will not be discharged, as objection to his qualification comes too late. [Reg. v. Stewart, 1 Cox C.C. 174; R. v. Edmonds, 4 B. & Ald. 471; R. v. Sutton, 8

B. & C. 417; Reg. v. Wardle, Car. & M. 647, followed.]

R. v. Mah Hung, 2 D.L.R. 568, 17 B.C.R. 56, 20 Can. Cr. Cas. 40.

D. PEREMPTORY CHALLENGES.

(§ II D—65)—BY CROWN.

The number of peremptory challenges by the Crown is limited to 4 in Alberta, both by the N.W.T. Act as of August 31, 1905 (see Cr. Code, s. 9), and by Cr. Code, s. 933.

R. v. Murray, 28 D.L.R. 372, 25 Can. Cr. Cas. 214, 9 A.L.R. 319, 33 W.L.R. 148, 9 W.W.R. 804.

III. Number.

(§ III—75)—VACANCY—DISQUALIFICATION—VERDICT—NEW TRIAL.

Art. 490 C.C.P. assumes that a full jury has been legally impanelled, and provides for the illness or withdrawal of a juror for a cause arising during a trial: it does not apply to a vacancy caused by the discovery that an unqualified juror has been part of the original jury; the verdict in such event must be annulled and a new trial ordered.

Myers v. Montreal, 33 D.L.R. 320.

IV. Special jury.

(§ IV—80)—SECOND TRIAL—SELECTION OF JURY—DRAWING NEW PANEL.

Where a verdict directed by the court to be entered for the defendant on withdrawing a case from the jury is reversed on appeal and a new trial ordered, the jury for the new trial cannot be selected from the panel drawn for the first trial, but a new jury must be summoned.

Starratt v. Dominion Atlantic R. Co. (No. 3), 14 D.L.R. 547, 13 E.L.R. 412. [Affirmed in 16 D.L.R. 777, 48 N.S.R. 82.]

RIGHT TO.

Under s. 59 of the Jury Act (R.S.M. 1913, c. 108), a judge may grant a special jury, (1) when he grants an order for a jury in a case otherwise triable without a jury and a party to the action requests a special jury; (2) when in a case triable by a jury, unless waived by consent, a request for a special jury has been made within 6 days from the time when the action is at issue; this is in harmony with the provisions of the King's Bench Act (Man.), ss. 49-50.

Narovlansky v. Portigal, 35 D.L.R. 213, 27 Man. L.R. 553, [1917] 2 W.W.R. 624, affirming, [1917] 1 W.W.R. 1305.

MIXED JURY.

The second line of art. 436, C.C.P., providing for a right to a mixed jury, applies only to the case where a corporation is a party to the action or the case where the maternal language of one of the parties is French and that of the other English, and vice versa. This privilege is not given to those whose maternal language is other than French or English and who can easily speak one of these languages.

Chicoine v. Gordon, 18 Que. P.R. 288.

If a corporation is added as a defendant to an action where the parties originally in the cause were allowed to proceed with the jury speaking one language, the new defendant is not thereby deprived of his right to demand a mixed jury.

McDonald v. G.T.R., 18 Que. P.R. 411. [See 40 D.L.R. 749.]

V. Verdict; setting aside.

See also Trial; New Trial; Appeal.

(§ V—90)—EXCESSIVENESS—WHEN UNREASONABLE.

Although the amount of the general damages awarded by the jury's verdict in a railway accident case may seem to the Appellate Court to be very high, such is not a ground for setting aside the verdict and granting a new trial unless the court finds that the verdict was unreasonable and almost perverse. [Cox v. English, [1905] A.C. 168, 170; Pickering v. G.T.P.R. Co., 50 Can. S.C.R. 393; Pickering v. G.T.P.R. Co., 24 Man. L.R. 544, applied.]

Houghton v. C.N.R. Co., 21 D.L.R. 295, 25 Man. L.R. 311, 8 W.W.R. 254.

WHEN.

The verdict of a jury cannot be set aside unless it is such that reasonable persons, and in good faith, would not have given it.

Perron v. Drouin, 46 Que. S.C. 336.

VI. Extra powers conferred on jury by agreement of parties.

(§ VI—95)—EXCESS OF JURISDICTION—AGREEMENT OF PARTIES—VALIDITY OF.

There is no legal authority, however, against the parties, by agreement, conferring on the jury powers in excess of its ordinary jurisdiction, such as submitting to the jury questions of law with questions of fact, the whole process forming between the parties a judicial contract.

Perron v. Drouin, 46 Que. S.C. 336.

JUS TERTII.

See Vendor and Purchaser, I E—25.

JUSTICE OF THE PEACE.

I. In general; appointment; removal.
II. Liabilities.
III. Jurisdiction; procedure.
IV. Review; appeal.

Constitutional powers as to appointment and creation of justice courts, see Constitutional Law, I E—130.

Jurisdiction in criminal matters, see Criminal Law; Summary Convictions; Intoxicating Liquors; Disorderly House; Certiorari; Habeas Corpus.

Annotations.

Order for further detention on quashing conviction: 25 D.L.R. 649.

Constitutional powers as to creation of Justice Courts and appointments thereon: 37 D.L.R. 183.

I. In general; appointment; removal.

(§ I—1)—Stipendiary magistrate—Status—Relation to the municipality—Reduction of salary—Remedy.

Notwithstanding that a stipendiary magistrate of a town was appointed by the Lieut.-Gov.-in-Council, he is, by virtue of ss. 111-120 of the Towns Act (R.S.N.S.C. 71), an officer of the town, and therefore he may, under s. 121 apply to the court for the rescinding of a resolution of the town council reducing his salary.

Re Pelton, 11 D.L.R. 623, 47 N.S.R. 103, reversing 7 D.L.R. 465, 12 E.L.R. 540.

(§ I—2)—Appointment — Territorial jurisdiction.

Although the authority of county justices of the peace is confined to the limits of the county for which they are named, it does not necessarily extend to all places within the county, if there be any district therein which possesses a separate and exclusive jurisdiction; and if concurrent jurisdiction is to be exercised by the County Judges in such separate jurisdiction the commission should so state in express words such as the phrase "as well within liberties as without."

R. v. Cody, 18 D.L.R. 773, 23 Can. Cr. Cas. 211, 48 N.S.R. 255.

Appointment and official title—Ex officio justices.

Statutory proceedings authorized to be taken before a justice of the peace will not be set aside because of failure to describe the magistrate in the record of proceedings by the words "justice of the peace," if he is designated therein as stipendiary magistrate for the county and consequently is an ex officio justice of the peace by virtue of a provincial statute.

Ex parte Seriesky, 10 D.L.R. 613, 12 E.L.R. 387, 41 N.B.R. 475, 21 Can. Cr. Cas. 140.

Official title in proceedings.

It will be assumed that a town magistrate signing as magistrate "in and for" the town a warrant of commitment which is headed with the name of both town and county, did so in the town although the warrant does not formally state that the warrant was there given.

R. v. Nolan, 35 D.L.R. 334, 28 Can. Cr. Cas. 100.

Ex officio justices—Proceedings taken in capacity of recorder—R.S.Q. art. 1410.

Where under a special provincial statute a justice of the peace is authorized to hear complaints, proceedings thereunder taken before him in another capacity, such as city recorder, are invalid and a summary conviction will be quashed on certiorari.

Latendresse v. Piette & the Corp. of Joliette, 31 Can. Cr. Cas. 248.

Ex officio justices—Mayor and aldermen.

The mayor and aldermen of a city in Ontario become ex officio justices of the peace on making their declarations of office and qualification under the Ontario Municipal Act, and 2 of them may as such justices try a charge of keeping liquor for sale in contravention of the Ontario Temperance Act.

R. v. Lake, 28 Can. Cr. Cas. 138, 38 O.L.R. 262.

Appointment—As affecting conviction—Women.

Although a de facto police magistrate may not be qualified for appointment to such office the legality of his appointment thereto cannot be inquired into on an application to quash a conviction made by him. Irregular proceedings by police magistrate held not to have prejudiced the accused and, therefore, not a ground for quashing a conviction. It is within the power of a police magistrate, who has stated after hearing the evidence of the prosecution only that he sentences the accused, but who has not made a minute of the conviction, to reopen the case for the purpose of permitting the accused to make his defence.

R. v. Cyr, 12 A.L.R. 320. [Affirmed in 38 D.L.R. 601, 29 Can. Cr. Cas. 77, 12 A.L.R. 320 at 325, [1917] 3 W.W.R. 849.]

Appointment of woman.

A woman is under no legal disqualification in the Province of Alberta from being appointed a Justice of the Peace or Police Magistrate.

R. v. Cyr, 38 D.L.R. 601, 12 A.L.R. 320, at 325, 29 Can. Cr. Cas. 77, [1917] 3 W.W.R. 849, affirming 12 A.L.R. 320.

(§ I—4b)—Disqualification—Bias.

In order to disqualify a magistrate from acting, on the ground of bias, it is not necessary to shew that he is in fact biased, but only that he is in such a position that he might be biased. [Reg. v. Gaisford, [1892] 1 Q.B. 382; and Reg. v. Huggins (No. 2), [1895] 1 Q.B. 563, followed.] One who is appointed stipendiary magistrate by a municipality at an annual salary, on the condition that he shall try all cases under the Canada Temperance Act, and shall make monthly reports, returns and payments to and for the use of the municipality of all fines, penalties and forfeitures collected by him as such magistrate on account of such cases, is disqualified from hearing a prosecution under the Act, inasmuch as there is a reasonable apprehension that he may be biased.

R. v. Woodroof, 6 D.L.R. 300, 20 Can. Cr. Cas. 17, 11 E.L.R. 373.

Justice of the peace—Disqualification—Relationship.

Campbell v. Walsh, 18 Can. Cr. Cas. 304, 40 N.B.R. 186.

II. Liabilities.

(§ II—5)—Though a magistrate acts beyond his jurisdiction in bringing a case on before the hour fixed, such action will not be taken as indicative of a corrupt motive if it appears that the magistrate did not know the hour for which the trial of the case had

been fixed and had taken the case at the earlier hour for the convenience of counsel for the accused, where the magistrate erroneously supposed that it was not necessary to have the prosecutor represented at the hearing, as defendant's counsel had informed the magistrate that the accused person would plead guilty and the accused did so plead at the hearing.

Re McMicken, 8 D.L.R. 550, 22 W.L.R. 641, 3 W.W.R. 492, 22 Man. L.R. 693.

(§ II—6)—PROTECTION ORDER ON QUASHING CONVICTION.

On quashing a summary conviction to which the Public Authorities Protection Act, R.S.O. 1914, c. 89, applies, the order of protection of the magistrate from civil action may stipulate an exception as to anything done by the magistrate maliciously and without reasonable and probable cause.

Re Lascelle and Wholehan, 34 D.L.R. 360, 27 Can. Cr. Cas. 369, 38 O.L.R. 119.

EXEMPTION FROM LIABILITY — PROTECTION ORDER.

Where a magistrate, a King's Counsel, with whom three informations were lodged charging a person with separate sales to different persons of liquor without a license, heard, at the same time, evidence tending to prove the 3 offences, if he fails to explain his conduct, upon one of the convictions being quashed, an order of protection will be granted him only upon payment by him of the costs.

R. v. Lapointe, 4 D.L.R. 210, 3 O.W.N. 1469, 22 O.W.R. 601, 20 Can. Cr. Cas. 98.

THE JUSTICES' PROTECTION ACT—JUSTICE EXCEEDING JURISDICTION—NOTICE AND TIME LIMIT FOR ACTION.

Where a justice of the peace had jurisdiction over the subject-matter of a complaint, but exceeded his jurisdiction in giving judgment without hearing evidence and in causing an execution to be issued and seizure made, an action against him for damages for malicious abuse of legal process was dismissed because it was not commenced within 6 months after the act complained of, nor was notice of action given, as required by ss. 8, 9 of the Justices' Protection Act. These sections applied because the action was brought for things done by him in the execution of his office and because, although he acted without jurisdiction, he acted bona fide and believed that as a justice he had a right to do what he did.

Pollon v. Kobzar School District, [1919] 3 W.W.R. 771.

(§ II—7)—EXCESS OF FEES.

A justice of the peace who receives from a person convicted before him more costs than are legally authorized and afterwards upon notice that they were not authorized by law fails to return such excess of costs, wilfully retains the illegal fees within the meaning of s. 1134, Cr. Code, and therefore the penalty imposed by such section upon such officers for so retaining fees not authorized by law may be recovered by the party from whom he took the excess of costs.

Aikins v. Simpson, 19 Can. Cr. Cas. 325, 9 E.L.R. 368, 45 N.S.R. 368, affirming 18 Can. Cr. Cas. 99.

DEBTOR AND CREDITOR—PROCEEDINGS BEFORE JUSTICE OF PEACE—RIGHT OF JUSTICE TO ACT AS SOLICITOR OR AGENT OF PARTIES.

A justice of the peace, before whom proceedings are taken to collect a debt, ought not to act as solicitor or agent of the plaintiff either before action brought or after judgment is obtained.

MacGillivray v. Conroy, 10 E.L.R. 195.

III. Jurisdiction; procedure.

(§ III—10)—JURISDICTION OF STIPENDIARY MAGISTRATE.

Under the Nova Scotia Statutes, as amended in 1905, c. 11, s. 3, a stipendiary magistrate for any of the municipalities within a county has jurisdiction anywhere within the limits of the county in all civil matters as to which two justices of the peace have jurisdiction, and in causes of action arising wholly outside his special municipality but within the county.

Jones v. Thompson, 35 D.L.R. 667, 51 N.S.R. 192.

Under the New Brunswick Statutes (C.S. N.B. 1903, c. 119, as amended in 1915, c. 221, a stipendiary or police magistrate has no civil jurisdiction where both the parties to the action reside outside the parish in which the magistrate resides, though within the county.

The King v. Carleton: Ex parte De Long, 36 D.L.R. 415, 44 N.B.R. 578.

JURISDICTION—COLLATERAL ATTACK.

Where the jurisdiction of magistrates is purely statutory, it is open to collateral attack by evidence dehors the proceedings, whether or not such proceedings purport to shew jurisdiction.

R. v. Taylor, 15 D.L.R. 679, 26 W.L.R. 652, 7 A.L.R. 72, 5 W.W.R. 1105, 22 Can. Cr. Cas. 234.

JURISDICTION—SITTING AT REQUEST OF ANOTHER JUSTICE.

The exclusive jurisdiction which by 1907, c. 5, (Alta.) is to attach to the first justice of the peace taking cognizance of the case is sufficiently displaced within the exception authorizing another justice to act on request, where the justice taking the information did so at the request of the trial justice accompanied by the latter's intimation that he himself would conduct the trial; acquiescence in such proposition is equivalent to a counter-request by the justice taking the information that the other justice should take the trial.

R. v. Cruikshanks, 16 D.L.R. 536, 7 A.L.R. 92, 6 W.W.R. 524, 27 W.L.R. 759, 23 Can. Cr. Cas. 23.

PRELIMINARY ENQUIRY — DEFENDANTS RIGHTLY BEFORE THE JUSTICE—WHEN EXCLUSIVE JURISDICTION ACQUIRED BY JUSTICE TAKING INFORMATION.

Cr. Code, s. 668 directing the justice

to proceed to inquire into the matters charged when a person is before a justice and is accused of an indictable offence is to be limited to cases in which the accused is rightly before such justice. Subs. 3 of s. 708 Cr. Code, which declares that it shall not be necessary for the justice who acts before the hearing e.g., in issuing the summons or warrant, to be the justice by whom the case is to be heard, applies only to summary conviction proceedings under part XV. of the Code, and not to preliminary enquiries for indictable offences.

Re Holman and Rea, 9 D.L.R. 234, 23 O.W.R. 428, 27 O.L.R. 432, reversing 7 D.L.R. 481, 4 O.W.N. 207.

JURISDICTION.

A magistrate has only such jurisdiction as is given him by statute in respect of claims for wages due to workmen and labourers, and his authority to issue a warrant of arrest upon defendant's default of appearance to a summons depends upon there having been before him at the time of the issue of the warrant proper proof of the service of the summons under the Master and Servants Act, R.S.S., c. 149.

Washburn v. Robertson, 8 D.L.R. 183, 3 W.W.R. 209.

Every police magistrate is ex officio a justice of the peace for the whole county or district for which, or for a part of which, he is appointed, and such a justice of the peace need not hear both sides on the preliminary hearing, before committing the accused for trial before another magistrate.

Gardiner v. Ware, 7 D.L.R. 480, 5 S.L.R. 268, 3 W.W.R. 24.

JURISDICTION — PROSECUTION UNDER TEMPERANCE ACT.

R. v. Boileau, 36 D.L.R. 781, 38 O.L.R. 607, 28 Can. Cr. Cas. 144.

The jurisdiction of justices of the peace is territorial. The territory of the county of Lac St. Jean being the same as that of the District of Roberval, the fact that a justice of the peace of such district designates himself in an information as justice of the peace for the county of Lac St. Jean, does not deprive him of jurisdiction.

Sorgius v. Bouchard, 26 Que. K.B. 242. [Appeal quashed, 38 D.L.R. 59, 55 Can. S.C.R. 324.]

JURISDICTION—IMMOVABLE RIGHTS—FENCES.

An action for $31.80, the cost of construction and maintenance of a fence by the plaintiff upon his land, in default of the defendant who had undertaken, in an authentic deed, to put up and maintain such fence, is within the jurisdiction of a District Magistrate's Court.

Rose v. Cour du Magistrat du District d'Ottawa, 24 Rev. Leg. 129.

DESCRIPTION OF OFFENCE—JURISDICTION OF JUSTICE.

An information charging the accused with having sold intoxicating liquors "contrary to the statute in such case made and provided" sufficiently describes the offence charged, and it is not necessary to add the words "words being authorized by license for this purpose," which imply negative facts to which the defendant can take exception. In a prosecution of this kind, all the proceedings except the hearing and the judgment, can be taken before a single justice of the peace.

Huot v. Truchon, 26 Que. K.B. 199.

JUSTICE OF THE PEACE—JURISDICTION—"LICENSEE"—KEEPER OF STANDARD HOTEL.

The word "licensee" in s. 61 (3) of the Ontario Temperance Act, 1916, 6 Geo. V. c. 50, is confined in its application to a person holding a license as a vendor of liquor; it does not include the keeper of a standard hotel, if he is in any sense a "licensee" within the meaning of the Act. Therefore s. 61 (3), which gives jurisdiction to a single justice of the peace in the case of the prosecution of a "licensee" charged with an offence against the Act, "or for any offence committed on or with respect to licensed premises," was held not to warrant the exercise of jurisdiction by a single justice in the summary conviction of the keeper of a standard hotel charged with keeping liquor for sale upon premises some distance from the hotel; and the conviction was quashed.

R. v. Boileau, 36 D.L.R. 781, 38 O.L.R. 607.

JURISDICTION—ENFORCEMENT OF BY-LAWS.

The Recorder's Court of the City of Montreal is given jurisdiction by the charter of this city in any action for the enforcement of any by-law in force in the City of Montreal.

Henry Morgan Co. v. City of Montreal, 24 Rev. Leg. 486.

JURISDICTION — MUNICIPAL BY-LAW—NUISANCE—CONTRACT—PROHIBITION.

The Recorder's Court of the City of Montreal has jurisdiction to hear and try any complaint or action for infraction of the by-laws of the City of Montreal, respecting public nuisances. A writ of prohibition lies only when a court of inferior jurisdiction exceeds its jurisdiction, and not to inquire whether it tried it rightly or wrongly.

Montreal Abattoirs v. La Cour du Recorder, 27 Que. K.B. 162, 32 Can. Cr. Cas. 220.

(§ III—12)—JURISDICTION — COMMON ASSAULT—TITLE TO LAND.

The jurisdiction of the magistrate to try for an assault is not ousted as involving a title to land, where an assault by a fence viewer was not committed in the assertion or in the defence of any title to land.

The King v. Shaw; Ex parte Kane, 27 D.L.R. 494, 26 Can. Cr. Cas. 156.

MINISTERIAL AND JUDICIAL ACTS—WARRANT OF ARREST.

The issue of a warrant for arrest upon a sworn information is in itself a ministerial act of the magistrate, but his preliminary decision under Cr. Code s. 655, on the question whether a warrant or summons is the

more appropriate, or whether in fact any offence is disclosed in the information, is a judicial act.

Marsil v. Lanctot, 28 D.L.R. 380, 25 Can. Cr. Cas. 223, 20 Rev. Leg. 237.

PRELIMINARY ENQUIRY—TRANSFER OF CASE TO ANOTHER JUSTICE.

When a magistrate has become seized of a case by taking the information for an indictable offence no other magistrate having general concurrent jurisdiction with him can acquire jurisdiction to intervene and preside at a preliminary enquiry, even with the consent of the first magistrate, except in so far as such course is authorized by statute in special circumstances such as illness or absence of the first magistrate.

Re Holman and Rea, 9 D.L.R. 234, 23 O.W.R. 428, 27 O.L.R. 432, reversing 7 D.L.R. 481, 4 O.W.N. 207, 23 O.W.R. 219.

SUFFICIENCY OF CONVICTION FOR UNLAWFUL SALES—JURISDICTION OF MAGISTRATE—PLACE AND TIME OF OFFENCE—JUDICIAL NOTICE — AMENDMENT — RIGHT OF APPEAL.

R. v. Gage, 30 D.L.R. 525, 26 Can. Cr. Cas. 385, 36 O.L.R. 183. [See also 10 O.W.N. 364.]

It is the duty of a magistrate to proceed with the trial of the accused when the accused is before him, when the accused has been committed for trial before him by another magistrate who is an ex officio justice of the peace for the same county; and this is so, even if the complainant does not appear at the trial, but has due notice of the time and place.

Gardiner v. Ware, 7 D.L.R. 480, 5 S.L.R. 268, 3 W.W.R. 24.

A stipendiary magistrate has power to try and to convict for an offense committed before the date of his appointment. [Reg. v. Bachelor, 15 O.R. 641, distinguished.]

The King v. Sweeney, 1 D.L.R. 476; 19 Can. Cr. Cas. 222, 45 N.S.R. 494, 11 E.L.R. 35.

IN CRIMINAL CASES.

The duties of a magistrate who undertakes to dispose of a matter brought before him are two-fold: first, to find if the party is guilty or not guilty of the charge, and secondly, to gather the facts and circumstances surrounding the criminal act, so that he may judicially find what penalty should be imposed. A magistrate before exercising his discretion as to the extent of the penalty to be imposed, within the limits provided by law, even where the accused pleads guilty to the crime charged, has no right to hear evidence in mitigation of the punishment without giving the private prosecutor having charge of the prosecution an opportunity to hear that evidence and cross-examine the parties giving it, and, if necessary, meet it with evidence on his own part in aggravation of the offence, or in contradiction of the alleged mitigating circumstances. A magistrate has no right to dispose of a case before the hour set for trial, in the absence of the prosecutor, although the accused appears before him and pleads guilty.

Re McMicken, 8 D.L.R. 550, 22 Man. L. R. 693, 22 W.L.R. 641, 3 W.W.R. 492.

TERRITORIAL JURISDICTON — CASES NEAR BOUNDARY.

Where an offence has been committed within 500 yards of the boundary between two magisterial jurisdictions, Cr. Code, s. 584 (b), will not enable the prosecutor to lay it in one jurisdiction and try it in another; he may both lay and try the offence in either jurisdiction. [R. v. Mitchell, 2 Q.B. 638, 2 C. & D. 274, followed.]

R. v. Jack, 25 D.L.R. 700, 24 Can. Cr. Cas. 385, 49 N.S.R. 328.

ASSAULT OCCASIONING ACTUAL BODILY HARM —CERTIORARI—PERSON AGGRIEVED.

Justices of the Peace have no jurisdiction under Part XVI to hear a charge of committing an assault occasioning actual bodily harm, contrary to s. 295 Cr. Code, inasmuch as the jurisdiction given to magistrates under s. 773 is a statutory one, and cannot be extended by implication. [R. v. Sharpe, 18 Can. Cr. Cas. 132, preferred to R. v. Hostetter, 7 Can. Cr. Cas. 221.] A person who has laid a charge as described supra is a person aggrieved by the action of the magistrates so as to be entitled to have the proceedings brought up for review before the Supreme Court.

R. v. Law, 9 W.W.R. 1075, 25 Can. Cr. Cas. 251, 33 W.L.R. 569.

JURISDICTION ALSO AS SUMMARY TRIAL MAGISTRATE—SUMMARY CONVICTION OR SUMMARY TRIAL PROCEDURE.

Where trials for keeping a disorderly house and for frequenting a common bawdy house are held before a magistrate having jurisdiction to proceed to a summary conviction under the vagrancy clauses (Cr. Code, s. 228) or to a summary trial without consent under s. 774 (amendment of 1909), it will be taken in the absence of any express statement in the record of proceedings to indicate which procedure was being followed, that the magistrate acted under the power of summary conviction from which an appeal would lie rather than that he acted under the powers of s. 774 upon summary trial from which there would be no appeal.

R. v. Belmont, 18 D.L.R. 53, 23 Can. Cr. Cas. 89.

MAGISTRATE — EXCESS OF JURISDICTION — JUSTICES PROTECTION ACT.

The Justices Protection Act, 1848, is in force in the Province of Alberta, but it cannot be relied upon as a defence where a magistrate does something quite outside of and beyond his jurisdiction.

Spurrel v. Lauder, 6 W.W.R. 1051.

COMPLAINT FOR A RECOGNIZANCE TO KEEP THE PEACE—INSUFFICIENCY OF THE INFORMATION—CR. CODE S. 748.

A complaint on a demand for a recognizance to keep the peace under Cr Code s.

748 (2) is invalid if it does not shew threats and fear of bodily harm.

R. v. Buteau, 30 Can. Cr. Cas. 411.

DEFECT IN SUMMONS.

Where the summons under which the defendant was called upon to appear before the court for an alleged infringement of the Canada Temperance Act shewed that the information upon which it was issued had been laid more than three months after the date of the commission of the offence charged, the justice had no jurisdiction to hear the charge. Neither ss. 723, 724 Cr. Code, nor s. 146 Canada Temperance Act, were broad enough to cure the vital defect in the summons.

R. v. Kay; Ex parte Le Blanc, 21 Can. Cr. Cas. 221, 12 E.L.R. 66.

At the hearing of an information under the Canada Temperance Act the magistrate adjourned his court from December 14, 1910, to January 5, 1911, at 10 a.m. Subsequently the counsel on both sides agreed, on account of convenience of train service, that the trial should not proceed until 2.30 p.m. When the court met, at 10 a.m., the magistrate was informed of the agreement but he proceeded with the trial, counsel for prosecutor being present and the defendant and his counsel absent. The defendant's counsel refused to take further part in the proceedings and the defendant was convicted. Upon certiorari:—Held, the magistrate did not lose his jurisdiction by reason of the agreement between counsel.

The King v. Allen; Ex parte Gorman, 40 N.B.R. 459.

POLICE MAGISTRATE—JURISDICTION—PETTY TRESPASS ACT R.S.O. 1914, c. 111, s. 2.

Re Broom, 11 O.W.N. 95.

Where an assault is committed upon a bailiff in the performance of his duties as a peace officer, viz., whilst attempting to effect a seizure in obedience to an order issued out of a Court of Justice, the accused cannot be tried before the Recorder's Court under the provisions of the Cr. Code, if no extraordinary violence resulting (e.g., in grievous bodily harm or murder) is used towards the complainant by the accused.

Desroches v. Foreman, 18 Rev. de Jur. 36.

SELLING LIQUOR — KEEPING FOR SALE—REFUSAL OF ADJOURNMENT—DISCRETION—JURISDICTION OF MAGISTRATE.

McCallum v. Hurry, 17 W.L.R. 531, 3 A.L.R. 342.

JUSTICES WITH POWER ONLY TO HOLD PRELIMINARY ENQUIRY MAKING CONVICTION ON PLEA OF GUILTY.

The King v. Frejd, 18 Can. Cr. Cas. 110, 22 O.L.R. 566.

(§ III—13)—JURISDICTION OF FIRST AND SECOND JUSTICE.

Under a statutory provision limiting a justice's jurisdiction in any particular case to the first justice having possession and cognizance of the fact, but with a proviso that at such justice's request any other justice may at the first justice's request "take part in" the case, a request to the second justice may be implied from the conduct of the justice who received the information, and in view of Cr. Code, s. 1120, such request will be implied and the conviction upheld where both the justice receiving the information and another sat at the hearing, but because of objection raised by the family of the accused to the first justice acting, he voluntarily refrained from trying the case. [R. v. Cruikshanks, 16 D.L.R. 536, 23 Can. Cr. Cas. 23, followed.]

R. v. Tally, 21 D.L.R. 651, 23 Can. Cr. Cas. 449, 8 A.L.R. 453, 7 W.W.R. 1178, 30 W.L.R. 396.

TEMPERANCE ACT.

Two justices of the peace appointed for the entire county and holding a session at the police office established in an incorporated town within the county under the Towns Incorporation Act (N.S.), have concurrent jurisdiction with the stipendiary magistrate of the town to try a charge of selling intoxicating liquor in contravention of the Nova Scotia Temperance Act, 1910.

R. v. Coady, 23 D.L.R. 278, 23 Can. Cr. Cas. 434, 48 N.S.R. 255.

IV. Review; appeal.

(§ IV—15)—MAGISTRATE'S CONVICTION—JURISDICTION—INDIAN ACT—AFFIDAVITS SUPPLEMENTING EVIDENCE—SENTENCE—"HARD LABOUR"—DISTRESS—WRITTEN INFORMATION—PLACE OF OFFENCE.

The defendant, having been convicted by a magistrate for unlawfully having intoxicating liquor in his possession, contrary to s. 41 of the Ontario Temperance Act, 6 Geo. V. c. 50, was imprisoned under a warrant of commitment issued pursuant to the conviction; and a motion having been made for his discharge, upon the return of a habeas corpus, it was held:—(1) That the mere statement of the defendant to the magistrate that he was an Indian, and therefore, as he attempted to shew, not subject to the Ontario Act, did not go far enough—it was incumbent upon him (if he was to have the benefit of the Indian Act, R.S.C. 1906, c. 81, s. 136) to prove that he was a male person of Indian blood reputed to belong to a particular band (s. 2 (f) (i) of that Act); and an affidavit supplementing the evidence given before the magistrate was not admissible. (2) That a sentence of imprisonment with hard labour may be imposed upon a conviction for an offence against the Ontario Temperance Act: Interpretation Act, R.S.O. 1914, c. 1, s. 25. (3) That the warrant of commitment and the conviction could, under s. 889 of the Criminal Code, be amended to meet the objection that it was only in default of sufficient distress that the defendant was to be imprisoned, and that no distress-warrant was issued. (4) That the objection that there was no written information or complaint could not prevail, not having been

taken before the magistrate. (5) That the place of the offence was sufficiently stated in the conviction as "at and in the city of H."

R. v. Martin, 40 O.L.R. 270. [Affirmed in 39 D.L.R. 635, 41 O.L.R. 79.]

(§ IV—16)—NOTICE OF APPEAL—EXHIBITS.

The County Court has no jurisdiction to entertain an appeal from an order of filiation made by justices of the peace against the defendant until the order of filiation and all the papers connected therewith shall have been sent by the justices, as prescribed by s. 69 of the County Court Act R.S.N.S. 1900, c. 156, to the clerk of the County Court for filing and production upon the appeal.

Overseers of the Poor v. Burbine, 11 D.L.R. 580, 12 E.L.R. 443, 47 N.S.R. 264.

(§ IV—17)—PENALTY—APPEAL.

There is no appeal from a conviction under the Intoxicating Liquor Act (1916 N.B., c. 20, s. 176 (1)) in cases where a pecuniary penalty is provided, although default in payment of the fine imposed may be followed by imprisonment.

The King v. Doherty, 42 D.L.R. 102, 45 N.B.R. 461.

Leave to appeal was refused by the Privy Council in respect of a judgment of the Supreme Court of Nova Scotia [Johnston v. McDougall (No. 1), 44 N.S.R. 265, 17 Can. Cr. Cas. 58] upon points of law involving the statutory jurisdiction of the magistrate, decided prior to any assessment of damages in an action claiming $2,000 for illegal execution of a search warrant issued under the Canada Temperance Act.

Johnston v. McDougall (No. 2), 17 Can. Cr. Cas. 398.

(§ IV—19)—MAGISTRATE'S CONVICTION—MOTION TO QUASH—JURISDICTION—EVIDENCE—CERTIORARI.

A magistrate's conviction for a breach of Part II of the Canada Temperance Act, R.S.C. 1906, c. 152, will not be quashed for want of jurisdiction because there was no evidence before the magistrate to warrant the conviction—certiorari being expressly taken away by s. 148 of the Act. [Reg. v. Wallace, 4 O.R. 127, followed.]

R. v. Berry, 38 O.L.R. 177, 11 O.W.N. 158. [See 39 O.L.R. 177, 28 Can. Cr. Cas. 341.]

JURISDICTION OF CONVICTING JUSTICES—MAYOR AND ALDERMAN OF CITY—EX-OFFICIO JUSTICES—MOTION TO QUASH—RELEVANCY OF TESTIMONY—SEARCH-WARRANT—INSUFFICIENT INFORMATION.

Upon a motion to quash the conviction of the defendant by two justices of the peace for keeping intoxicating liquor for sale upon premises in a city, without a license, in contravention of the Ontario Temperance Act, 1916, 6 Geo. V. c. 50, s. 40, it was held:—(1) That the convicting justices, being the mayor and an alderman of the city, who had made their declarations of office and qualifications, were, by virtue of s. 350 of the Municipal Act, R.S.O. 1914, c. 192, ex-officio justices of the peace for all purposes incidental to the office, and had jurisdiction to make the conviction. (2) That there was evidence (set out below) which, if believed, supported the conviction. (3) That evidence that a man was seen taking a bottle of whisky away from the house of the defendant and that the wife of the defendant was seen trying to hide a case of whisky, was not irrelevant upon the charge of keeping intoxicating liquor for sale—though the charge was mainly based upon the testimony of police officers who entered the defendant's premises under the authority of a search-warrant and found a large quantity of liquor upon the premises and men drinking with the defendant. [R. v. Melvin, 34 D.L.R. 382, 38 O.L.R. 231, distinguished.] (4) That the conviction was not affected by the fact, if it was the fact, that the search-warrant was issued upon an insufficient information. [R. v. Swarts, 37 O.L.R. 103, followed.]

R. v. Lake, 38 O.L.R. 262, 28 Can. Cr. Cas. 138.

JUSTICES' CONVICTION FOR SELLING ON LICENSED PREMISES IN PROHIBITED HOURS—ABSENCE OF EVIDENCE OF LICENSE.

R. v. Mahoney, 18 W.L.R. 74.

(§ IV—22)—APPEAL FROM SUMMARY CONVICTION—RECOGNIZANCE—IRREGULARITY—QUASHING CONVICTION ON APPEAL FOR OBJECTIONS APPEARING ON PAPERS RETURNED.

The King v. Koogo, 19 W.L.R. 246.

JUSTIFICATION.

Annotation.

As to defence on a criminal charge: 42 D.L.R. 439.

LABOURERS.

See Master and Servant.

LABOUR ORGANIZATIONS.

See annotation on Seditious Conspiracy, where the real object of a strike by labour organizations, is revolution and the overthrowing of the existing government: 51 D.L.R. 35.

INTERFERENCE WITH FELLOW MEMBER—"JUST CAUSE"—DAMAGES—SCOPE OF ORGANIZED REDRESS.

A trade union acts without "just cause" where in seeking to compel a member to comply with its decision, it forbids his fellowmembers to work in the same employ, and it is liable in damages for the resultant loss of wages to the member where his dismissal was occasioned by the attitude adopted by the union. Although a trade union, combining with a common purpose to conserve the interests of its members and their trade, may lawfully do the acts reasonably necessary to secure and advance such interests, their course of conduct becomes un-

lawful if it degenerates into acts intended and calculated to injure the other party in his trade. [Quinn v. Leathem, [1901] A.C. 495, applied.]

Slenter v. Scott, 16 D.L.R. 659, 6 W.W.R. 451, 27 W.L.R. 698.

TRADE UNIONS — DISMISSAL OF NONUNIONISTS — INTIMIDATION — QUESTION OF DAMAGES — LIABILITY OF INDIVIDUAL MEMBERS OF COMMITTEE—PRACTICE.

When intimidation is resorted to by a local trade union to prevent the employment of nonunionists, the members of the local committee taking the message of intimidation to the employer are held as liable for damages suffered by the discharged parties. No action can lie against the Union itself as it is an unincorporated and unregistered body.

Local Union, United Mine Workers v. Williams, 49 D.L.R. 578, [1919] 3 W.W.R. 828, varying 45 D.L.R. 150, 14 A.L.R. 251 at 258, [1919] 1 W.W.R. 217, which affirmed 41 D.L.R. 719, [1918] 2 W.W.R. 767.

LIABILITY FOR ILLEGAL ACTS OF MEMBERS DURING STRIKE — PICKETING — RATIFICATION—DISTRIBUTING STRIKE-PAY.

Vulcan Iron Works Co. v. Winnipeg Lodge No. 174 Ironmoulders Union, 21 Man. L.R. 473, 16 W.L.R. 649.

INDUSTRIAL DISPUTES INVESTIGATION ACT, 1907 — AIDING STRIKER — INTENT — CR. CODE.

R. v. Neilson, 9 E.L.R. 210.

LACHES.

See Estoppel; Limitation of Actions.

LAND CONTRACTS.

See Vendor and Purchaser; Land Titles; Contracts.

LANDLORD AND TENANT.

I. CREATION AND EXISTENCE OF RELATION.
II. LEASES.
A. In general.
B. Covenants.
C. Terms; holding over; renewal.
D. Termination; forfeiture.
E. Assignment; subletting.
III. RIGHTS AND LIABILITIES OF PARTIES.
A. In general.
B. As to fixtures and property on premises.
C. Liability of landlord for defective or dangerous premises.
D. As to rent.
E. Re-entry; recovery of possession.
F. Liability of tenant to landlord for injury to reversion.

Annotations.

Forfeiture of lease; waiver: 10 D.L.R. 603.

Lease; covenants for renewal: 3 D.L.R. 12.

Lease; covenant in restriction of use of property: 11 D.L.R. 40.

Municipal regulations and license laws as affecting the tenancy; Quebec Civil Code: 1 D.L.R. 219.

Law of obligation of tenants to repair; 52 D.L.R. 1.

I. Creation and existence of relation.

(§ I—1)—VERBAL LEASE—CREATION—POSSESSION BY TENANT—TERMINATION.

Fabrie v. Hewelman (Hewelmaus), 45 D.L.R. 744, [1919] 2 W.W.R. 146.

SALE OR LEASE — DEFAULT — REMEDY OF VENDOR.

The deed called a lease of an immovable made for a period of 6 years by which the alleged lessee undertakes to pay to the alleged lessor $100 per annum with interest, with a provision that the lessee could, at any time purchase the immovable for $610, or the balance of that sum after deducting the instalments of $100 which he had paid, is not a contract of lease, but an actual sale. Therefore, failure to pay one or several of the annual sums as they fell due does not give the vendor a right of action for resiliation of the contract accompanied by saisie-gagerie and saisie-brandon.

Carey v. Carey, 42 Que. S.C. 471.

PERMITTING GRATUITOUS USE OF GARAGE TO INCREASE PATRONAGE.

Where the owners of a garage allow mechanics to occupy for an indefinite time a part of the premises on consideration that they shall have a repair shop nearby, and also with the intention that the latter shall do their best to induce their own customers to patronize the garage in preference to any other, there is not between the parties a contract of lease, but a contract of gratuitous loan or an indefinite contract by which the mechanics undertake, in consideration of the occupation of the premises, to favour the garage. In such case there is no right to bring an action for rent, but it could only be for damages in consequence of failure to carry out the conditions of the contract.

Simard v. Rousseau, 47 Que. S.C. 197.

ATTORNMENT CLAUSE IN MORTGAGE—ESTOPPEL—DISTRESS.

An attornment clause in a mortgage under the Land Titles Act (Sask.) does not create the relationship of landlord and tenant so as to entitle the mortgagee to the protection of the statute of 8 Anne, c. 14, s. 1. The clause creates by estoppel a personal right of the mortgagee against the mortgagor, not against a stranger. [Hyde v. Chapin Co., 26 D.L.R. 381, followed.]

First National Bank v. Cudmore and Law Union & Rock Ins. Co. and First National Bank, 34 D.L.R. 201, 10 S.L.R. 201, [1917] 2 W.W.R. 479.

(§ I—2)—ATTORNMENT CLAUSE IN SALE AGREEMENT.

An attornment clause in an agreement for the sale of land whereby the amount of rent payable on the "crop payment" plan should be a yearly rental equivalent to and applicable in satisfaction of the instalments of

principal and interest will be valid and support a distress thereunder where the share of the crop stipulated, namely, one-half, would not be an unreasonable rent. [Foster v. Moss, 17 W.L.R. 174; and Independent Lumber Co. v. David, 19 W.L.R. 387, applied.]

Dornian v. Crapper, 17 D.L.R. 121, 7 S.L.R. 229, 27 W.L.R. 599, 6 W.W.R. 551.

CREATION OF RELATIONSHIP—FORMAL LEASE NOT EXECUTED.

Robillard v. Galeries Parisiennes, 20 D.L.R. 983.

(§ I—3)—LEASE—REQUISITES — DEFINITE COMMENCEMENT OF TERM—STATUTE OF FRAUDS.

In order to satisfy the Statute of Frauds, and create a valid lease there must appear either in express terms or by reasonable inference from the language used, on what day the term is to commence and when it is to end. A memorandum which has inserted alternative time for the commencement of the term does not satisfy these conditions and is insufficient.

Mitchell v. Mortgage Co. of Canada, 48 D.L.R. 420, 59 Can. S.C.R. 90, [1919] 3 W.W.R. 324, affirming 43 D.L.R. 337, 11 S.L.R. 447, [1918] 3 W.W.R. 838.

CAVEAT EMPTOR—COVENANT FOR QUIET ENJOYMENT.

The principle of caveat emptor applies to a tenant in respect to his landlord's title. A tenant cannot dispute his landlord's title. In an action for rent evidence intended to show lack of title in the plaintiff was admitted subject to it being dealt with as the judge saw fit in giving judgment. A covenant for quiet enjoyment applies only to the acts of the lessor himself and of those who claim through or under him, and to constitute a breach of such a covenant there must be an actual interference with the tenant's possession, a notice demanding possession for nonpayment of rent is not sufficient. It is the duty of a tenant to protect and support the title of his landlord.

Woods v. Opsal (B.C.), [1918] 1 W.W.R. 985.

WARRANTY—BUGS.

A tenant is justified in refusing to take possession of a dwelling, if he discovers that it is infested with bugs. Where, at the signing of a deed of lease, the lessor verbally gave the lessee, who made the remark that he had been informed that the house was full of bugs, the assurance that such was not the case, there is a warranty on the part of the lessor justifying the lessee in refusing to enter into occupation of the house, if he finds that the dwelling is in fact infested with this vermin.

Foley v. Baker, 24 Rev. Leg. 185.

EXPENSES—TAXES—PAROL EVIDENCE.

The lessee of a shop who in his written lease undertook to pay for his rent "half of all expenses of the said shop for rent, taxes and all other expenses, etc.," must pay half of the land taxes imposed upon real property by the City of Montreal. Parol evidence cannot be admitted to prove such an agreement.

Robert v. Latourelle, 54 Que. S.C. 168.

(§ I—4)—CREATION OF THE RELATION—AGREEMENT — RIGHTS OF PARTIES — "WAR RELIEF ACT 1918," 8 GEO. V. (MAN.) C. 101, S. 10.

A clause in an agreement covenanting that the relationship of landlord and tenant is constituted between vendor and purchaser is good and creates such a relationship. The landlord or vendor may maintain an action for rent or payments due under this agreement under s. 10 of "The War Relief Act 1918" even though the tenant or purchaser is a privileged person under the statute.

Jamieson v. Moore, 50 D.L.R. 775.

ATTORNMENT UNDER CONTRACT FOR PURCHASE OF LAND.

Independent Lumber Co. v. David, 19 W.L.R. 387.

II. Leases.

A. IN GENERAL.

(§ II A—5)—REFORMATION—ACTION TO SET ASIDE LEASE FOR MISREPRESENTATIONS BY LESSOR—FAILURE TO PROVE MISREPRESENTATIONS—COSTS.

Willis v. Harrison, 12 O.W.N. 248.

LEASE — BREACH OF COVENANT — NONPAYMENT OF RENT—FORFEITURE—NOTICE—RIGHTS OF PARTNER OF LESSEE—TENDER OF OVERDUE RENT—ABSENCE OF PRIVITY — RELIEF AGAINST FORFEITURE — PARTIES—INJUNCTION—INTERIM ORDER.

Ping Lee v. Crawford, 17 O.W.N. 20.

EMPHYTEUSIS — RENT — ASSIGNMENT — EFFECT.

The purchaser at a judicial sale of land, subject to an emphyteutic lease, assumes towards the lessor all the obligations of the lessee especially the obligation of paying the stipulated annual rent. A transfer of the lease by the lessee to a third party, with the knowledge and implied assent of the lessor, has not the effect, in the absence of a formal novation of discharging him from his obligations.

Lampson v. Quebec, 49 Que. S.C. 307.

RENT PAYABLE WITH GOODS OR WORK DONE.

In order to constitute a valid lease, it is not necessary that a rent payable in money should be agreed upon, but the rent can be represented by something which is the equivalent of money, such as work done by the lessee or even payment in goods, but in such a case it is necessary that the equivalent should consist of some definite thing, and not merely of an expectation that may depend upon the will of persons other than those who may occupy the premises.

Simard v. Rousseau, 47 Que. S.C. 197.

LEASE TO TWO TENANTS — OMISSION OF CLAUSE PROVIDING THAT TENANTS SHOULD PAY TAXES—AGREEMENT BY ONE TENANT TO PAY TAXES — ABSENCE OF KNOWLEDGE BY THE OTHER—STATUTORY RIGHT TO DEDUCT TAXES FROM RENT—PAYMENT OF TAXES—CONSTRUCTION OF LEASE — EVIDENCE — INTERPRETATION ACT.

Tyrrell v. Verral, 8 O.W.N. 114.

IN GENERAL.

A lease of an immovable for a period exceeding 1 year, creates, by registration, a real right in the same, and an opposition a fin de charge lies in favour of the lessee.

Keegan v. Raymond, 13 Que. P.R. 371.

(§ II A—7)—CONVEYANCE BY AND LEASE OF LANDS TO DEBTOR—EXCESSIVE RENT RESERVED—INTENT TO PROTECT LESSEE AGAINST CREDITORS.

Waterous Engine Works Co. v. Wells, 4 S.L.R. 48.

B. COVENANTS.

Lessor; covenant to convey as conferring no ownership, see Insurance, III E—80.

(§ II B—10)—COVENANT AGAINST DISPLAY OF SIGNS—BREACH—SIGNS PLACED BEFORE MAKING COVENANT.

A landlord may disentitle himself to take objection, under a tenant's covenant, against the display of projecting or window signs on a demised building to signs previously put up by the lessee while in possession under a prior tenancy without restrictive covenants, if, at the time of executing the lease containing such covenant, the lessor knew of the display of such signs and made no objection to them.

Just v. Stewart, 12 D.L.R. 65, 23 Man. L.R. 517, 24 W.L.R. 433.

COVENANTS.

In interpreting ambiguous terms of a lease, as to the right to renew, the extraordinary and one-sided character of the agreement under one interpretation, is a feature which may be taken into consideration by the court in favour of the other interpretation more consistent with the usage in such transactions and with the conduct of the parties prior to the dispute which led to the litigation.

MacDonnell v. Davies, 9 D.L.R. 24, 4 O. W.N. 620, 23 O.W.R. 778.

COVENANT FOR PRE-EMPTION—TERMINATION UPON NONPAYMENT OF RENT.

A lessee's right of pre-emption, under a lease containing a covenant that the lessee may "at any time during the stated term exercise his right of pre-emption of the said premises," terminates upon the determination of the lease through a failure of the lessee to pay the stipulated rent, notwithstanding that the term of years during which the lease was to run had not come to an end.

Guise-Bageley v. Vigars-Sheir Lumber Co., 9 D.L.R. 4, 4 O.W.N. 559, 23 O.W.R. 728.

COVENANT RUNNING WITH THE LAND—TAXES —DISTRESS.

A lessee's covenant to pay all taxes on the demised premises, with a provision that in default the lessor may do so and recover by levy or distress by way of rent reserved, runs with the land. [Spencer's case, 1 Smith's L. Cases, 12th ed., p. 62; Vernon v. Smith, 5 B. & Ald. 1, applied.]

Mackinnon v. Crafts, 33 D.L.R. 684, 10 A.L.R. 509, 11 A.L.R. 147, [1917] 1 W.W. R. 1402.

COVENANT AS TO SUITABILITY—BREACH—REMEDY—LIABILITY OF ASSIGNEE.

Notwithstanding the general rule that there is no implied covenant in a lease of an existing building that it is fit for the purpose it is intended to be used for, a lessor who agrees to construct for the lessees' occupancy a building on the leased land is bound to construct a building suitable for the purposes for which he knows the lessees intend to use it; if, however, the lessees have gone into occupancy, the remedy for a breach of the contract is in damages, not repudiation of the lease, even as against an assignee of the reversion.

Tarrabain v. Ferring, 35 D.L.R. 632, [1917] 2 W.W.R. 381, 12 A.L.R. 47.

PROVISION FOR RENEWAL—TERMS OF TO BE AGREED UPON—COVENANT AS TO COSTS OF ALTERATIONS—FIXTURES TO BECOME PROPERTY OF LESSOR — TRADE FIXTURES NOT INCLUDED.

Under a lease providing for a renewal "upon such terms as may be mutually agreed upon," and further providing that "in the event of a renewal of this lease not being granted . . . the lessor shall pay to the lessee . . . the actual costs . . . of alterations and additions," the lessor is liable if no agreement for renewal is in fact made no matter how unreasonable one of the parties may be as to the terms and conditions of renewal. A clause providing that "all improvements, alterations and fixtures constructed or made or to be constructed or made in or upon the said premises shall become the absolute property of the lessor," at the expiration of the lease does not include trade fixtures, and these the lessee is entitled to remove.

Godson v. Burns, 46 D.L.R. 97, 58 Can. S.C.R. 404, [1919] 1 W.W.R. 848, affirming [1918] 3 W.W.R. 587, 26 B.C.R. 46, which affirmed [1917] 3 W.W.R. 966.

COVENANTS—ALLEGED BREACH—DETERMINATION OF LEASE—DAMAGES.

After the surrender of a lease, the landlord can only recover damages for breaches of covenant committed before the surrender. The measure of damages should be the actual loss to the landlord by reason of such breaches. [Ex parte Glegg, 19 Ch. D. 7; Ex parte Dyke, 22 Ch. D. 410, referred to.]

Beckord v. Brandle, 50 D.L.R. 450.

COVENANT FOR RENEWAL — PERPETUAL RENEWAL.

A covenant for renewal, in a lease, pro-

viding that the "new lease shall contain all the covenants contained in the present lease including the covenant for renewal," creates a right of perpetual renewal and to have the covenant for renewal, as originally worded, repeated in the new lease.

Re Jackson and Imperial Bank, 36 D.L.R. 589, 39 O.L.R. 334.

TERMINATION OF LEASE UPON SALE OF PREMISES—NOTICE.

On a sale of property subject to an unregistered lease containing a clause that "The lessor will have the right, in the event of the property being sold, to bring the lease to an end at any time, whether during the said term of 3 years or afterwards—by giving the lessee 3 months' notice in writing to that effect," the purchaser takes all the rights of his vendor, and on a resale by him may exercise the right of termination by giving proper notice.

St. Charles v. Friedman, 31 D.L.R. 652, affirming 21 Rev. Leg. 96.

OPTION TO PURCHASE—RIGHTS OF LESSEE.

Mere written notice to the lessee to exercise his option, without particularizing the terms and conditions of the sale, is not a sufficient compliance with a provision in a lease whereby the lessee is given an option to purchase the property during the term of the lease, and that in the event of a proposed sale to any other person at whatsoever price, the lessor should notify the lessee to enable him, by preference, to exercise the option to purchase; and the rights of such lessee, where the lease is registered, will continue to subsist, even after a subsequent sale of the premises, during the currency of the lease.

St. Denis v. Quevillon, 25 D.L.R. 144, 51 Can. S.C.R. 603, reversing 23 Que. K.B. 436.

AS TO RETURN OF UNMATURED NOTES—EXTENT OF LESSOR'S RIGHT OF RECOVERY.

A lease, providing that, on default of payment of any of the notes given as consideration of the contract, the lessor could retake possession of the property, and that the lessee would lose all that he had paid to the lessor, and that the lessor "should return the notes unmatured at the time of their maturity, that is to say, that the lessor would only be obliged to retire them and return them to the lessee at the time of their maturity," gives to the lessor a right of action against the lessee to recover the amount of the notes due at such time, the amount of which would represent the value of the enjoyment of possession of the restaurant during the running of the lease; and in such case the lessor need only deliver up the notes not yet due at the time of the retaking possession.

Richards v. Octeau, 47 Que. S.C. 259.

COVENANT FOR QUIET ENJOYMENT — BREACH — EVICTION — DAMAGES — MEASURE OF — RECOVERY OF RENTS RECEIVED BY LANDLORD FROM NEW TENANTS AFTER EVICTION — VALUE OF IMPROVEMENTS — VALUE OF RENEWAL TERM — "TREATY TERMINATING THE WAR" — ARMISTICE — COUNTERCLAIM FOR RENT AND TAXES — COSTS.

Sunderland Athletic Assn. v. Toronto General Trusts Corp., 16 O.W.N. 293.

LEASE OF FARM — ACTION BY LANDLORD FOR BREACHES OF COVENANTS — FAILURE OF CLAIMS FOR WANT OF REPAIR AND BAD HUSBANDRY — CLAIM FOR BREACH OF COVENANT "NOT TO CUT DOWN TIMBER" — EXPANSION BY SHORT FORMS OF LEASES ACT — EXCEPTION — "FIREWOOD" — "CLEARANCE" — "AS HEREIN SET FORTH" — EFFECT OF PUNCTUATION OF STATUTE — FELLING OF TIMBER TREES FOR FIREWOOD — INJURY TO REVERSION — WASTE — INJUNCTION — PLEADING — JUDICATURE ACT, S. 17 — DAMAGES — FORFEITURE — RELIEF AGAINST — LANDLORD AND TENANT ACT, S. 20 — TERMS — DEFAULT — FORFEITURE OF RIGHT OF RENEWAL OF LEASE — COSTS.

By indenture under the Short Forms of Leases Act, R.S.O. 1914, c. 116, the plaintiff leased a farm to the defendant for 2 years, with a right of renewal for 3 years more, at the option of the defendant. Action for damages for breaches of covenants and a declaration of forfeiture:—Held, that, though a small part of the land was not ploughed 6 inches deep, as required by the lease, there was no evidence that the plaintiff's reversion would, at the expiration of the lease, be damaged or depreciated in value. The covenant "not to cut down timber" was expanded, by the Act, into a covenant not at any time during the term to cut down or destroy, "without the consent in writing of the lessor, any timber or timber trees, except for necessary repairs, or firewood, or for the purpose of clearance as herein set forth." There was nothing in the lease setting forth what timber trees might be cut for repairs, firewood, and clearance:—Held, that the words "as herein set forth" applied to the exception. Quære, whether the words "as herein set forth" referred only to "clearance" or to "repairs" and "firewood" also. An injunction asked for at the hearing should, under s. 17 of the Judicature Act, R.S.O. 1914, c. 56, be granted, to restrain apprehended waste or trespass. Under s. 20 of the Landlord and Tenant Act, R.S.O. 1914, c. 155, the plaintiff gave notice to the defendant of the breaches complained of, and claimed $400 damages:—Held, that a forfeiture should be declared, but that, under the discretion given to the court by s. 20, relief against the forfeiture should be granted to the defendant upon payment of $320 and costs. In default of payment at a time fixed, the forfeiture should be enforced and should include the defendant's right to an extension of the term.

McPherson v. Giles, 45 O.L.R. 441.

OPTION TO PURCHASE — TERMINATION — NOTICE — WRITTEN AND TYPEWRITTEN, CLAUSES.

The following clauses in a lease in typewritten form—"The lessee hereby agrees to give 3 months notice (in writing), that is, on the 1st day of February, to the lessor, in case of his desire to leave said premises upon expiration of present lease, failing such, there will be a tacit understanding between said lessee and lessor that the lease continue in force for a further period as mentioned herein at same terms and conditions," and another clause at the end of the typewritten form written out by the plaintiff himself as follows: "Lessee has option of 2 further years from May 1, 1915, for consideration of $1,440, payable $60 on the 1st of every month, first payment becoming due and payable on June, 1915," are in conflict, and the written clause should have effect as more likely to contain the real intentions of the parties. Therefore, the lessee having not taken advantage of the option, had the right to leave the rented premises without notice at the expiration of the lease.

Calkins v. Howard, 26 Que. K.B. 91, reversing 50 Que. S.C. 147.

AS TO RENT—DEMAND.

A covenant in a lease, that if the rent is not paid by the month of August (au mois d'août) in any year the lease shall be annulled does not dispense the necessity for the lessor to demand the rent in order to put the lessee en demeure. As such stipulation implies a doubt as to whether the lessee ought to have paid his rental on or before July 31, or during the month of August, the lessee is entitled to the benefit of the doubt.

Gaudreault v. Fournier, 49 Que. S.C. 450.

TENANT RELEASED FROM RESPONSIBILITY FOR ACCIDENT BY FIRE BY REASON OF DEFECTIVE STRUCTURE AND CONSTRUCTION OF PREMISES LEASED, NOTWITHSTANDING STIPULATIONS CONTAINED IN THE LEASE —C.C. 1055.

Notwithstanding a clause in a lease whereby the tenant assumes the obligation to keep the premises in a good state of repair, a tenant in case of a fire destroying the premises is not responsible if it is proved to the satisfaction of the court that the fire resulted from defective construction of the lower tenement on account of the beams running into the chimney.

Lusher v. Foley, 25 Rev. de Jur. 207.

CULTIVATE IN "PROPER AND HUSBANDLIKE MANNER"—MEANING OF.

Coulter v. McCarter, 17 W.L.R. 720, 4 S.L.R. 178.

(§ II B—11)—"TO TURN OVER IN GOOD CONDITION."

Where a tenant in an informal lease was to receive the premises "in the best condition" and undertook "to give up the house in the same condition and repairs," the landlord is entitled to have included in his measure of damages upon the surrender of the premises all damages due to the loss attributed to ordinary wear and tear. In considering whether a covenant by a lessee to surrender the premises at the end of his term "in the best repair" has been broken, that phrase must be taken in relation to the kind of house demised and the condition of repair in which it was at the time of the demise.

Bornstein v. Weinberg, 8 D.L.R. 752, 27 O.L.R. 536.

TO RESTORE IN ORIGINAL CONDITION — BREACH — MEASURE OF DAMAGES.

Breach of covenant by a lessee to restore the demised premises to their original condition, after structural changes had been made by him, renders him liable to the lessor for the estimated costs of restoration regardless of whether the costs were or ever will be actually incurred. [Joyner v. Weeks, [1891] 2 Q.B. 31, followed.]

Buscombe v. Stark, 30 D.L.R. 736, 23 B.C.R. 155, [1917] 1 W.W.R. 204.

(§ II B—12)—AS TO REPAIRS.

Where a lessee, by mise-en-demeure, has demanded the execution of repairs by a lessor, and the lessor, in accordance therewith, has proceeded with the repairs, which, though still unfinished at the date of the commencement of the lessee's action for rescission under art. 1641 C.C. (Que.), are yet completed before the trial thereof, the court has a discretion to refuse rescission.

Consumers' Cordage Co. v. Bannerman, 2 D.L.R. 419.

A covenant to repair which includes keeping the premises in repair is a continuing covenant and a notice to repair is not a waiver once and for all of its breach, but an election not to take advantage of it during the currency of the notice and after the expiry of the notice there is a right of re-entry if the premises continue out of repair. Making large openings in a wall, pulling down and removing part of same in an entire building so as to cause the premises to become a part of two buildings, to be thrown together and used as one, is a breach of the covenant to repair even where the lessee had the right "to maintain, continue, use, build and rebuild such wall," and is not only a continuing breach of the covenant to repair, but also waste. A lessor's notice to repair given on behalf of several trustees if signed by one and adopted by all is sufficient.

Holman v. Knox, 3 D.L.R. 207, 21 O.W.R. 325, 25 O.L.R. 588.

A notice to repair purporting to be given under a lease, which contained a general covenant to repair and a covenant to repair according to notice with a proviso for re-entry in case of breach or nonperformance of covenants may be sufficient, not only as a notice to repair under the lease, but as a notice of re-entry and forfeiture under s. 13 of c. 170 of R.S.O. 1897 (Landlord and Tenant Act), even if such notice

does not require the lessee to make compensation in money for the breach.

Hébert v. Cloutre, 6 D.L.R. 411, 40 Que. 745, 25 O.L.R. 588, 21 O.W.R. 325.

LIABILITY — LESSEE — ROOF OF HOUSE — ICE — DRAINS — DAMAGES — CIVIL CODE.

When a lease stipulates that the lessee shall remove the ice and snow from the roof and shall also keep the pipes in good repair, the lessee is responsible for damages which result from the fact that he had allowed the drains serving to drain the roof to become clogged by debris coming from the roof, and for damages caused in removing the ice with iron instruments.

Klein House Furnishing Co. v. Gabias, 25 Rev. Leg. 219.

TENANT'S COVENANT TO REPAIR — WORN-OUT WATER-CLOSETS — UNSANITARY CONDITION OF PREMISES — NOTICE TO LANDLORD — FAILURE TO REPAIR.

A tenant is not, under the covenant to repair, required to renew worn out and structurally defective closets. [Lester v. Lane and Hesham [1893] 2 Q.B. 212, and Terrell v. Murray, 17 Times L.R. 570, followed. Howe v. Botwood, [1913] 2 K.B. 387, distinguished.] It is not the duty of the tenant to make repairs in the first instance, upon the chance of the landlord repaying him what he expended; he was not compelled to run the risk of expensive litigation.

Buttimer v. Bettz, 26 W.L.R. 705, 6 W. W.R. 22.

(§ II B—13)—REAL PROPERTY—DAMAGES —LESSEE AGREEING TO PROTECT TREES—TREES NOT FENCED—INJURED BY ANIMALS—LESSEE'S AGREEMENT TO "KEEP UP FENCES" AND LESSOR TO SUPPLY MATERIAL THEREFOR — LATTER COVENANT APPLICABLE ONLY TO EXISTING FENCES — LESSOR NOT LIABLE TO SUPPLY MATERIAL FOR FENCES TO PROTECT TREES — LANDLORD SELLING LAND BEFORE ACTION BEGUN — STILL ENTITLED TO BRING ACTION FOR DAMAGES.

A lessee who covenanted with his lessor "to care for, protect and irrigate the trees now growing upon the said land" is liable for damages to a grove of trees injured by his horses and cattle, although the trees were not shut off from the barn by any fence. The lessor's agreement to furnish the necessary material in connection with the lessee's covenant to "keep up fences" refers only to fences existing at the date of the lease. Fences to protect the trees would have to be built by the lessee at his own expense. The lessor may recover notwithstanding that before action begun he had sold the land but had received only $1 on the purchase price.

Pawson v. Tangye, [1919] 1 W.W.R. 888.

(§ II B—14)—COVENANTS AGAINST ASSIGNMENT — RELIEF FROM FORFEITURE, HOW LIMITED.

The Ontario Supreme Court has no power to relieve a lessee of premises against forfeiture of his term on breach by him of his agreement not to sub-let without the written consent of the lessor, which agreement provided that the lessee's right under it should continue only so long as he strictly observed, complied with and performed the terms of the lease, since, by the statute law of Ontario, though the courts have power to relieve against a right of re-entry or forfeiture for breach of a condition or covenant between the landlord and tenant, it expressly excludes the breach of a condition or covenant against subletting or parting with the possession of the leased land.

Curry v. Pennock, 10 D.L.R. 548, 4 O. W.N. 1065, 24 O.W.R. 357, affirming 10 D. L.R. 166.

LEASE OF THEATRE — COVENANT OF LESSEE NOT TO ASSIGN OR SUBLET WITHOUT LEAVE — PROVISO THAT LEAVE NOT TO BE UNREASONABLY WITHHELD — AGREEMENT FOR SALE OF LEASE—POSSESSION TAKEN BY PROPOSED ASSIGNEE—EXECUTION BY LESSEE OF ASSIGNMENT FOR PURPOSE OF TENDERING TO LESSORS FOR CONSENT—BREACH OF COVENANT—"SETTING-OVER" OF PREMISES — SHORT FORMS OF LEASES ACT — FORFEITURE — WAIVER BY ACCEPTANCE OF RENT — PROOF THAT CONSENT UNREASONABLY WITHHELD — EVIDENCE — ONUS — CLAIM BY PROPOSED ASSIGNEE FOR SPECIFIC PERFORMANCE OF AGREEMENT — FAILURE OF — RESCISSION — RETURN OF MONEY PAID — CONDUCT OF PROPOSED ASSIGNEE — MONEY PAID ON CONSIDERATION WHICH FAILED — SOLICITORS — CONTRACT TO REPAY MONEY — CONSIDERATION.

The company, assignees of the lease of a theatre, agreed to sell to G. the lease and the equipment in the theatre for $5,500, payable $1,000 down, $2,000 "on the date of closing," and $2,500 with interest "in six weeks from said date." If the $2,500 was not so paid, the agreement was to become void, and any moneys paid were to be forfeited. G. paid the $1,000 and the $2,000 to S., acting for the firm of S. & Co., solicitors for the company. The lease was expressed to be made under the Short Forms of Leases Act; it contained a covenant on the part of the lessee not to assign or sublet without leave, and there was a proviso that leave should not be unreasonably withheld. The lease was for five years at a rent of $1,800, payable monthly in advance. When the $2,000 payment was made, S. was asked what would be done with the $3,000 in case the lessors' consent to the assignment was not obtained, and he stated that it would be returned, whereupon the payment was made. It was provided in the agreement that G. should take possession on the date of closing and keep an account of all money received by him and paid out until he paid the $2,500; and that the assignment of the lease should remain in the hands of S. & Co., and should not take effect until the $2,500 was paid. As soon as

the agreement was signed, G. went to the theatre and assumed to act as owner, except that he handed over the receipts each day to the company's agent. G. had some altercation in or near the theatre with M., one of the lessors, who had agreed to heat and clean the theatre, and M., before the six weeks were up, wrote a letter to S. & Co. telling them that no consent to an assignment to G. would be given, and that the company would be held liable for the rent. At the end of the six weeks an assignment of the lease, which was executed so that it could be tendered for the lessors' consent, was presented to them; they refused their consent, giving reasons in writing for their refusal:—Held, that, as the assignment was not delivered to G., and was signed merely in order that there should be something formal to submit to the lessors, the mere signature of the paper for such a purpose could not be treated as a breach of the covenant. If there was an assignment by the putting of G. in possession pursuant to the term in the agreement, or a "setting-over" of the premises for the six weeks (see the long form of the covenant in the Short Forms of Leases Act, R.S.O. 1914, c. 116), so that there was a breach of the covenant, the forfeiture was waived by the lessors—they, after G. had announced that he was assignee and had been seen by M. in and about the theatre, having written the letter insisting that the company should continue liable for the rent, and two weeks later accepted the rent for the next month. Acceptance of rent is a waiver of a forfeiture because it recognizes the lease as subsisting. [Fitzgerald v. Barbour, 17 O.L.R. 254, 257, followed.] The onus of proving that the consent of the lessors was unreasonably withheld was upon the company. The company being unable to procure the lessors' assent to the assignment, their claim against G. for specific performance must fail; and G.'s claim against the company for rescission of the agreement and against the company and S. & Co. for the return of the $3,000 must succeed. Conduct on the part of G. which led the lessors to believe that he would be an undesirable tenant afforded the company no defence to a claim for the return of money paid upon a consideration which had failed. S. & Co. were bound by the contract made by S., for good consideration, viz., the payment of the $2,000, to repay the money. [Winter v. Dumergue (1865-6), 14 W.R. 281, 699, followed.]

Grossman v. Modern Theatres, 45 O.L.R. 564.

COVENANT AGAINST ASSIGNMENT.

A clause in a lease of a licensed restaurant that in case the lessee wishes to sell or transfer his establishment he can only do so with the consent of the lessor, is an absolute prohibition against transfer of the lease, and the lessor may refuse his consent without giving any reasons.

Rosconi v. Péladeau, 48 Que. S.C. 356.

COVENANT AGAINST ASSIGNMENT — ASSIGNMENT BY WAY OF SECURITY — REASSIGNMENT.

Where the assignees of a lease by way of collateral security are prepared to release their debt and abandon their security, a re-assignment by them without consent is not a breach of a covenant not to assign or sublet without consent.

Fordham v. Commonwealth Trust Co., 8 W.W.R. 164.

COVENANT AGAINST — SUBLETTING — ACCEPTANCE OF RENT FROM SUBTENANT — WAIVER—ESTOPPEL.

The lessor of a restaurant who imposes a prohibition against subletting can tacitly revoke such prohibition. Consequently, when he has, at the same time, made over to the tenant his license for the sale of liquor, and the tenant sublets to a third party, to whom he makes over the same license, the steps taken by the lessor to get payment from the subtenant of the amount owing by the principal tenant, and his acceptance of the amount paid by the subtenant, are equivalent to a renunciation of the prohibition against subletting.

Demers v. Levesque, 46 Que. S.C. 158.

COVENANTS FOR TAXES—SPECIAL EXCEPTION.

Where a lease contained a printed covenant that the lessee was "to pay taxes" and also a later covenant that he should pay the taxes "on any building that he might hereafter see fit to erect," the former covenant may be struck out on a claim for rectification of the lease in accordance with the proved intention of the parties at the time the instrument was made.

Booth v. Callow, 13 D.L.R. 202, 24 W.L.R. 813, 18 B.C.R. 499, affirming 11 D.L.R. 124, 23 W.L.R. 616, 4 W.W.R. 73.

(§ II B—15)—IMPLIED COVENANTS.

One who leases land for a purpose which does not involve building, cannot build thereon, for the destination of the thing leased is agreed upon, and there is an implied prohibition against using it for any other purpose.

Audet v. Jolicoeur, 5 D.L.R. 68, 27 Que. K.B. 35.

IMPLIED COVENANTS — "ACCESS" CONSTRUED.

A provision in a lease "letting" to a tenant certain rooms in a building and giving him "access" to certain water closets therein, creates the implication that the "access to the water closets is to be in common only with the other tenants and not exclusive."

Allen v. Johnston, 13 D.L.R. 160, 25 W.L.R. 325.

ELEVATOR SERVICE.

Where at the time of leasing of an apartment in an apartment house there is an elevator service therein which is reasonably necessary as a means of access to the apartment, a condition will be implied, in the absence of an express provision in the lease to the contrary, that the elevator service shall be maintained in an efficient way by

the landlord; and damages are recoverable by the tenant for the breach which damages may be set off against the rent.

Macleod v. Harbottle, 11 D.L.R. 126, 24 W.L.R. 54, 4 W.W.R. 136.

IMPLIED COVENANT TO FURNISH HEAT.

A lease of a steam-heated apartment carries with it an implied collateral promise to supply adequate heat. [Hamlin v. Wood, [1891] 2 K.B. 488; Ex p. Ford, [1885] 16 Q.B.D. 305; Lamb v. Evans, [1893] 1 Ch. 218; De Lasalle v. Guildford, [1901] 2 K.B. 215, applied.]

Brymer v. Thompson, 23 D.L.R. 840, 34 O.L.R. 194. [Affirmed, 25 D.L.R. 831, 34 O.L.R. 543.]

HEATING — MOVING PICTURE THEATRE.

In a lease of a building with all its contents, to be used as a moving picture theatre, there is, as in the case of a furnished house, an implied covenant that the premises are fit for that particular use and purpose. Where the letting period covers the winter months, inadequate heating appliances render the building unfit for human habitation, and constitute a breach of the covenant. [Wilson v. Finch Hatton, 2 Ex. D. 336; Smith v. Marrable, 11 M. & W. 5, followed.]

Davey v. Christoff, 28 D.L.R. 447, 36 O. L.R. 123, affirming 26 D.L.R. 764, 35 O.L.R. 162.

A landlord who leases stalls in a private market erected by him is not bound to obtain for his tenants municipal licenses allowing such tenants to carry on their trade therein in the absence of any stipulation to that effect in the leases, but the tenants may compel the municipal authorities by mandamus to grant them such licenses.

Wallenberg v. Merson, 1 D.L.R. 212, 21 Que. K.B. 310.

BUILDING LEASE — LANDLORD'S COVENANT TO PAY FOR BUILDING — PRICE TO BE DETERMINED BY APPRAISAL COMPANY—EX PARTE VALUATION — FAILURE TO DETERMINE PRICE — DECLARATION OF RIGHTS OF PARTIES — COMPANY ACTING AS VALUATOR.

Clarkson v. Plastics, 11 O.W.N. 260.

LEASE OF PART OF BUILDING FOR THEATRE—COVENANT OF LANDLORD TO KEEP DEMISED PREMISES HEATED — BREACH — DAMAGES.

Osborne v. Roos, 12 O.W.N. 185.

PAROL AGREEMENT — TENANCY FROM MONTH TO MONTH — TENANT'S NEGLIGENCE — PERMISSIVE WASTE — LIABILITY OF TENANT — IMPLIED COVENANT.

McDonald v. Hamilton, 9 E.L.R. 395.

LEASE OF DWELLING-HOUSE — IMPLIED OBLIGATION NOT TO USE FOR DIFFERENT PURPOSE—USE AS HOSPITAL.

McCuaig v. Lalonde, 23 O.L.R. 312, 18 O.W.R. 759.

(§ II B—16)—PRESUMPTION AS TO CONDITION OF PREMISES.

A lessee is presumed to have received the premises in good condition, and is obliged to restore them in the same condition; saving his right to prove the contrary (art. 1633, C.C. Que.), this presumption regulates not only the relations between landlord and tenant, but may also be invoked by third parties.

Paquet v. Nor-Mount Realty Co., 28 D. L.R. 458, 49 Que. S.C. 302.

WARRANTY AS TO FITNESS.

In a demise of real property only, a condition or warranty that it is fit for the purpose for which it is intended to be used will not be implied. [Davey v. Christoff, 28 D.L.R. 447, not followed.]

St. George Mansions v. Hetherington, 41 D.L.R. 614, 42 O.L.R. 10.

COVENANT RUNNING WITH LAND — AGREEMENT TO BUILD — ASSIGNMENT — ASSUMPTION OF LIABILITY.

Notwithstanding the general rule that there is no implied covenant by a lessor of an existing building that it is fit for the purpose for which it was known to be intended to be used, the defendant lessors were held bound by their agreement to erect a building for their lessees and were, under the circumstances of the case, bound to make that building suitable for the purposes for which the lessees required it, and the defendant assignees of the lessors were held to have assumed the liability of remedying the defects complained of in consideration of the tenants' relinquishment of their possible right of rescission. Quære as to the liability of the assignees, had they not assumed such obligation.

Tarrabian v. Ferring, [1918] 2 W.W.R. 172, affirming 35 D.L.R. 632, 12 A.L.R. 47, [1917] 2 W.W.R. 381.

AS TO CONDITION OF BUILDING.

A landlord is not liable in damages on the ground of an implied warranty that the building leased was fit for the purpose for which it was to be used. In the absence of an express agreement or warranty in a lease as to the fitness for a particular purpose of the leased building, the tenant must take the building as he finds it, and has no claim against the landlord on an implied warranty. Where a lease for a term of years less than that to which the Land Titles Act is applicable is expressed to be executed pursuant to that Act, is in the form provided thereby, and the words of that form "subject to the covenants and powers implied," are used, it will be held that the parties intended that they should be bound by such obligations as would have attached to them had the lease been one which would, by law, instead of agreement, have been subject to the terms of that Act.

Telfer v. Fisher, 3 A.L.R. 423.

(§ II B—17)—REPAIRS — USE OF PREMISES — TERMS OF LEASE.

A lessor is obliged to make, on the prem-

ises leased the repairs necessary to make them suitable for the purposes for which they are intended to be used, even though the lease provides that the lessee knows them well, and does not require them to be specifically described. The latter can maintain an action to compel the lessor to make such repairs within a fixed time and, on his failure to do so, to be authorized to make them at his expense.

Desautels v. Préfontaine, 42 Que. S.C. 401.

AS TO REPAIRS.

The plaintiffs sued for the costs of repairs to a building which they had leased to the defendant F. F. had assigned the lease to N. & B., who had sublet to F. & L. F. served a third party notice on his assignees, N. & B., who brought in their subtenants, F. & L., as fourth parties. N. & B., the assignees, were afterwards ordered to be made defendants, and the defendant F. obtained an order of indemnity against them. The court found that the building had collapsed because of overloading:—Held that, as the lease had been made pursuant to the Land Titles Act, the defendant F. was liable to the plaintiff on an implied covenant to repair for the cost of putting the building in its former position, that the assignees N. & B. were liable to F. for the same amount, and F. & L., the subtenants, were liable to N. & B. Held, therefore, that the plaintiffs were entitled to judgment against the lessee F., for the amount of the repairs and the plaintiff's costs; that F. was entitled to judgment against the assignees, N. & B., for this amount, and his costs of defence; that the plaintiffs were also entitled to a judgment directly against N. & B. for the amount of the repairs and their costs; that N. & B. were entitled to judgment against their subtenants, F. & L., for the amount of the repairs and for the costs which were applicable to the enforcement of their claim against the latter, N. & B. not being entitled, however, to recover against F. & L., the amount of the plaintiffs' costs recovered against them (N. & B.).

Telfer Brothers v. Fisher, 3 A.L.R. 423.

UNHEALTHY LODGINGS — OFFER TO REPAIR — DEPARTURE OF TENANT — RECIPROCAL RECOURSE — C.C. ARTS. 1612, 1613, 1641.

When a leasehold premises becomes unhealthy by reason of the neglect of the landlord to make the necessary repairs, the tenant should, before quitting the leased premises, ask for the cancellation of the lease, in default of the landlord making the repairs which are judged necessary. If the tenant quits the leased premises on account of the unsanitary condition, without giving the landlord time to make the repairs, he cannot reclaim the rent not yet due without demanding himself the cancellation of the lease.

Dufresne v. Tremblay, 55 Que. S.C. 235.

C. TERMS; HOLDING OVER; RENEWAL.

Renewal of partnership lease to partner after dissolution of firm, see Partnership, VI—25.

(§ II C—20)—TERMS — HOLDING OVER — OCCUPATION BY TENANT AFTER EXPIRY OF LEASE — ACCEPTANCE OF RENT — ESTOPPEL.

Scarborough Securities Co. v. Locke, 6 D.L.R. 897, 4 O.W.N. 228, 23 O.W.R. 239.

RENEWAL OF LEASE — FAILURE TO EXERCISE OPTION — EXCUSE — EXCLUSION BY LANDLORD.

The failure of a tenant during his first term to take advantage of an option for renewal of his lease, is not excused by his wrongful expulsion by the landlord from the demised premises before the expiry of the time for exercising the option.

Gardiner v. Ware, 13 D.L.R. 151, 6 S.L.R. 110, 23 W.L.R. 153, 4 W.W.R. 1356.

HOLDING OVER—RETAINING KEY.

When the movables of a lessee are seized for rent and placed in the care of a judicial guardian, who leaves them where they are, locked up, until after the expiration of the lease, the tenancy is not continued by the holding over, the occupation not being that of the lessee although he had retained the key in his possession.

Renaud v. Pasquini, 52 Que. S.C. 28.

OVERHOLDING TENANT'S ACT — EVICTION—RENT.

In proceedings under the Overholding Tenant's Act, the sole and only question to be considered is whether the tenant is to go out or not. Where the order for the ejection of the tenant, made by the Judge of the County Court, was set aside with costs on appeal, and it was ordered that the tenant's costs be set off against the rent alleged to be due. Held, that the order involved a decision that rent was due and was improperly made and must be set aside with costs.

McKay v. McDonald, 50 N.S.R. 443.

OVERHOLDING TENANTS ACT, R.S.O. (1897), C. 171, S. 2 (2)—DELIVERY OF OCCUPATION SUFFICIENT—JURISDICTION.

Pepall v. Broom, 2 O.W.N. 1275, 19 O.W.R. 512.

AGREEMENT FOR LEASE—POSSESSION—"OPTION" FOR FURTHER TERM — ASSIGNMENT BY LESSEE OF INTEREST UNDER AGREEMENT.

Rogers v. National Drug & Chemical Co., 24 O.L.R. 486, affirming 23 O.L.R. 234.

(§ II C—21)—YEARLY TENANCY — HOLDING OVER — CORPORATION TENANT.

Where a tenant for years under a valid lease continues in possession after the expiration of the term, and pays the monthly rent reserved in the lease, a tenancy from year to year is thereby established, notwithstanding the fact that the tenant happens to be a corporation. [Finlay v. Bristol & Exeter R. Co., 7 Ex. 409; Garland Mfg. Co. v. Northumberland Paper, etc., Co., 31 O.R.

40, distinguished; Pennington v. Taniere, 12 Q.B. 998, followed.]

Young v. Bank of Nova Scotia, 23 D.L.R. 854, 34 O.L.R. 176.

CROPPING LEASE — TENANCY FOR YEAR OR AT WILL.

Mather v. Ross, 30 D.L.R. 286, 33 W.L.R. 735, 9 W.W.R. 1359.

YEARLY TENANCY.

In the case of a lease for one year certain, the tenancy expires by effluxion of time, and notice to quit is not necessary to determine it. A tenancy at will arises only where the letting is for no certain term, but is to continue during the joint will of both parties and no longer. A landlord cannot, by a notice to quit during the currency of a term created by a written lease, convert a tenancy for one year into one at will.

Salesses v. Harrison, 10 E.L.R. 542.

(§ II C—22)—LEASE FOR 14 MONTHS — OVERHOLDING TENANT — RENT PAID MONTHLY — TENANCY FROM YEAR TO YEAR — TAXES IN ARREAR — RENT TO MUNICIPALITY.

When a tenant under a lease for a fixed term of 14 months at a fixed rental payable monthly remains in possession on the ending of the term, and still pays rent monthly he becomes a tenant from year to year. The taxes being in arrear the landlord is considered to have knowledge of this fact, and to have agreed that payments of rent to the municipality be the same as payments to himself. [Right v. Darby (1786), 1 Term. Rep. 159, followed.]

Re Lyons and McVeity, 49 D.L.R. 635, 46 O.L.R. 148.

(§ II C—23)—TENANCY AT WILL — WHAT CONSTITUTES.

The occupation of land under a verbal agreement to pay the taxes thereon as rent until a purchaser is found constitutes a tenancy at will.

East v. Clarke, 23 D.L.R. 74, 33 O.L.R. 624.

TENANT AT SUFFERANCE.

A lessee who is allowed to occupy the leased premises for a certain time after the lease has been terminated by notice, holds under sufferance, and is properly chargeable with rental on a quantum meruit for use and occupation.

Gardner v. Holmes, 38 D.L.R. 156, 24 B.C.R. 416, [1918] 1 W.W.R. 456.

TENANCY AT WILL OR SUFFERANCE.

Article 1608 C.C. (Que.) only establishes a presumption. Occupation by permission or by sufferance causes the existence of a lease to be presumed. But if such occupation can be explained otherwise than by title of the lessee, the presumption of a lease disappears. One who for several years has occupied a house belonging to his brother whose agent he was, without paying any rent, who keeps it in repair at his expense, and even improves it for his benefit, and acquiesces in its sale in which he has an interest, cannot be considered as a lessee of the house, but is only an occupant at his brother's pleasure; he cannot object to a buyer taking possession of the house at the time stipulated in the deed of sale.

Morgan v. Provost, 25 Que. K.B. 425.

(§ II C—24)—RENEWAL — HOLDING OVER.

The lessee is not entitled to a renewal in perpetuity unless the language used in the covenant therefor in the lease expressly or by clear implication shews that the party intended such renewal and, therefore, the provision in the lease permitting the renewal "at the same rental, upon the same terms and conditions in all respects" as provided in the old lease but saying nothing as to any further renewal gives the lessee no right to have inserted in the renewal lease any provision for a further renewal. [The King v. St. Catharines Hydraulic Co., 43 Can. S.C.R. 595, followed.]

Wilson v. Kerner, 3 D.L.R. 11, 3 O.W.N. 769, 21 O.W.R. 477.

RENEWABLE LEASE — SALARY TO BE FIXED — ELECTION OF TENANT — OCCUPATION AFTER END OF TERM — LIABILITY FOR REASONABLE RENT.

A tenant under a lease renewable at his option at a rental to be fixed by arbitrators before the end of the term, who remains in the use and occupation of the premises whilst the arbitration proceedings and his election are pending, and then elects to refuse the renewal term is liable for a reasonable sum for such use and occupation.

Toronto General Hospital Trustees v. Sabiston, 47 D.L.R. 324, 44 O.L.R. 639.

A provision in a lease giving the lessee the privilege of renewal "from year to year at the expiration of any year so long as he may care so to do" does not make the lease renewable perpetually, since the right can only continue while the lessee personally "cares so to do" and can be exercised only while the lessor lives and continues to own the property. Such a provision is not a covenant, and does not bind the land or the heirs, assignees or personal representatives of either party, and is but a personal contract binding the parties alone, neither is such provision so indefinite as to call for the setting aside of the lease. A lease is not void because it provides for perpetual renewal.

Alexander v. Herman, 2 D.L.R. 239, 3 O.W.N. 755, 21 O.W.R. 461.

A notice by a lessee, purporting to exercise an option to renew the existing term, pursuant to a condition in the original lease for a "notice in writing" of exercising such option, is of no legal effect unless it is signed.

Greenwood v. Bancroft, 2 D.L.R. 417, 20 W.L.R. 816, 2 W.W.R. 162.

HOLDING OVER—LIABILITY.

In an action to recover possession of premises brought by the owner against an

overholding tenant, who believed that he was holding under a valid renewal lease, while, as a matter of fact, there was no renewal lease, but only a tentative agreement for a renewal lease between him and the owner's manager, which agreement had not been ratified by the owner, though the court finds that the owner is entitled to judgment for possession of the premises, it is not obliged to give double rental value of the premises during the time the tenant held over, and will not do so where it does not find that the overholding tenant was "conscious that he had no right to retain possession." [Swinfen v. Bacon, 6 H. & N. 846, followed.]

Dickson Co. v. Graham, 9 D.L.R. 813, 4 O.W.N. 670, 23 O.W.R. 749.

OPTION TO RENEW ON NOTICE—PAYMENT OF RENT ON RENEWAL TERM.

Where a rental agreement provides an option of renewal for subsequent years, the acceptance of rent for portions of one of such subsequent years is evidence of the tenancy having been created for that year, apart from the question of its effect as a waiver of an alleged forfeiture through failure to give prior notice as stipulated. [Bishop v. Howard, 2 B. & C. 100, applied.]

R.C. Episcopal Corp. de St. Albert v. Sheppard, 9 D.L.R. 619, 6 A.L.R. 128, 23 W.L.R. 282, 3 W.W.R. 814.

LOSS OF RENEWAL PRIVILEGE BY SURRENDER OF PART OF DEMISED PREMISES.

A covenant for a renewal of a lease is indivisible, and, if the lessee assigns a part of the demised premises, he cannot enforce the covenant for renewal as to the remaining portion; in like manner where the tenant voluntarily surrenders to the landlord a part of the premises demised with privilege of renewal, the renewal privilege is lost as to the remainder of the premises unless provision is made for its retention. [Barge v. Schiek, 57 Minn. 155, followed.]

Howland v. Jones, 15 D.L.R. 769.

STIPULATION FOR TERMINATING, IMPLIED WHEN.

A stipulation in the original lease for one year that either party may terminate at the end of any month of the tenancy applies to the lease from year to year implied on a holding over and payment of the same rent following the one year term and may be taken advantage of by a person to whom the lessor had assigned the reversion during the original tenancy.

Re Rabinovitch and Booth, 19 D.L.R. 296, 31 O.L.R. 88.

LEASE OF CORPORATION—SEAL.

In order to establish a tenancy from year to year, or the tacit renewal of the term, there must be a valid lease for a year at least, and a holding over by consent of the parties, from which the continuance could be implied; a verbal lease for the term of a year, entered into by an official of a nontrading corporation without the corporate seal and not under a by-law, creates no valid tenancy capable of an implied renewal by holding over and the holding over creates no liability except for use and occupation. [Finlay v. Bristol & Exeter R. Co., 7 Ex. 409, followed.]

Richardson v. Urban Mutual Fire Ins. Co., 28 D.L.R. 12, 26 Man. L.R. 372, 34 W. L.R. 586, 10 W.W.R. 733.

RENEWAL—HOLDING OVER.

Where a lease contains a covenant by the lessee to heat at his own expense the upper flat of a building, the ground floor only of which is demised to him, and also contains a guaranty by the lessor that the heating apparatus is in good working condition, and a clause gives the lessee the right of renewal provided no breach or default be made in the lessee's covenants, the observance of the covenant to heat by an assignee of the lessee bound by that covenant is a condition precedent to his right of renewal, and, although the heating apparatus is defective, he forfeits the right if he does not make the best use he could reasonably have been expected to make of the system such as it is. Where a lease demises only the ground floor of a building a covenant by the lessee to heat the upper flat is one which is binding on an assignee of the lessee taking with notice thereof. A holding over must be wilful and contumacious before double damages can be given the lessor. Quære, where a lease demises only the ground floor of a building, is a covenant by the lessee to heat the upper flat one which runs with the land?

Nankin v. Starland, 3 A.L.R. 355.

YEARLY LEASE—COVENANT FOR RENEWAL.

A lease for one year contained the following covenant: "That at the option of the lessee, the term hereby demised shall be renewed for a further term of one year, and so on from year to year at a like rental and on similar terms."—Held, that the existence in fact of a desire for the further lease is all that is essential, and that desire may be indicated by conduct and circumstances, and no notice is necessary. [Brewer v. Conger, 27 A.R. (Ont.) 10, followed.] A covenant for renewal under the same covenants does not include the covenant to renew, but means only a second term, not a perpetuity of lease, and after the second term, the lessee remains on only as tenant from year to year. [Britton v. Foote, 2 Bro. C.C. 636, and Russell v. Darwin, 2 Bro. C.C. (n) 689, followed.]

Hoadley v. Bayntum, 31 W.L.R. 751.

RENEWAL—RENT—VALUATION OF PREMISES — ARBITRATION — EVIDENCE — POSSIBILITY OF PUTTING IN RAILWAY SIDING —ADMISSIBILITY.

Re Toronto General Hospital Trustees and Sabiston, 9 O.W.N. 75.

D. TERMINATION; FORFEITURE.

Surrender and acceptance, see Assignment for Creditors, III B—15.

(§ II D—30)—Lease of premises — One year—Option of continuing—Notice by landlord to quit—Tenant continuing after year—Occupancy under option — Overholding Tenant's Act, R.S.N.S. 1900, c. 174.

The plaintiff leased certain premises to the defendant "to have and to hold . . . from the first day of May for the term of one year next ensuing . . . with the option of continuing the lease from year to year until one or the other give notice in writing to quit 3 calendar months previous to the termination of any year." Prior to the end of the year the plaintiff gave the defendant 3 months' notice to quit; the tenant held beyond the year without giving any notice of his intention to remain. The court held that the defendant must be taken as remaining under his option (of continuing the lease) and was not an overholding tenant, within the meaning of the Overholding Tenant's Act, R.S.N.S. 1900, c. 174. Held, also, that the plaintiff had no right to give the notice he had given.

Laba v. McGovern, 44 D.L.R. 551, 52 N.S.R. 440.

A lease for a term of years in land in which the lessor had only a life estate is terminated by the death of the lessor.

Atkinson v. Farrell, 8 D.L.R. 582, 27 O.L.R. 204.

Rescission—Altering demised premises—Effect on rescission claim.

Rescission of a lease will not be allowed at the instance of the lessee because of the refusal of the municipality to permit the rebuilding of a wooden building in the locality under its building and fire limit by-laws, where it appears that, though he accepted the lease and entered into possession of the premises relying on the lessor's promise made in good faith to see that the lessee got a permit for the alterations which he, the lessee, desired to make, the latter had equal means of knowledge from the outset that it was against a local building by-law to grant a permit for the rebuilding of or extensive alterations to a "frame building," and, nevertheless, went on after refusal of the permit and altered the condition of the premises so that at the time of seeking rescission he was not in a position to give up the premises in the same condition as when he received them, or in a condition, without the expenditure of money, to be available to the lessor.

Ruff v. McFee, 9 D.L.R. 519, 4 O.W.N. 501.

Lessor's failure to improve—Forfeiture of liquor license.

The forfeiture of a liquor license resulting from the failure of a lessor to improve the leased premises in accordance with a municipal regulation, as required by a covenant in the lease, does not in the absence of a provision to that effect, express or implied, put an end to the lease so as to relieve the lessee from liability for rent thereunder. [Hart's Trustees v. Arrol, [1903] 6 Sess. Cas. 36; Grimsdick v. Sweetman, [1909] 2 K.B. 740, followed.]

Vancouver Breweries v. Dana, 26 D.L.R. 665, 52 Can. S.C.R. 134, 9 W.W.R. 3018, affirming 25 D.L.R. 508, 21 B.C.R. 19.

Failure of subject-matter—Liquor license.

The statutory abolition of bar rooms, the business whereof formed the basic consideration when entering into a lease of a hotel, does not amount to such total destruction of the subject-matter as will terminate the lease, on the principle that a contract is discharged when there is a total failure of the subject-matter contracted for; a proviso that the lease shall terminate upon the lessee's failure to secure a liquor license does not extend throughout the whole term of the lease.

Charrier v. McCreight, 33 D.L.R. 689, 11 A.L.R. 270, [1917] 2 W.W.R. 8, affirming [1917] 1 W.W.R. 834.

Short Forms Act.

A lease made in pursuance of the Short Forms of Leases Act (R.S.O., 1914, c. 116) cannot be surrendered by parol agreement.

Re Bagshaw and O'Connor, 42 D.L.R. 596, 42 O.L.R. 466.

Forfeiture—Agreement to assign as distinct from assignment.

A valid assignment of the term is necessary to work a forfeiture under a condition of the lease that the lessee would not assign without leave; an agreement to assign is not enough. [Friary, etc. v. Singleton, [1899] 2 Ch. 261, applied.]

Cornish v. Boles, 19 D.L.R. 447, 31 O.L.R. 505.

Lease of house—Place of prostitution—Reticence of lessor—Cancellation—Que. C.C. 993, 1612, 1616.

When an owner lets a house which was previously occupied by women of ill-fame, and is known in the neighbourhood as a place of prostitution, his reticence on that subject at the time he let the house constitutes deceit towards the tenant, and the latter can demand the cancellation of the lease.

Lorio v. Morgan, 46 Que. S.C. 379.

Unauthorized assignment of lease — Objectionable business.

If a valid and binding assignment of the term is made without the lessor's consent being asked for, although the lease contains a covenant that the lessee "will not without leave assign or sublet, the lessor undertaking that his consent will not be arbitrarily withheld," the effect is to enable the lessor to forfeit the lease and to repossess the premises; but if, before a valid and binding assignment is made (e.g., the delivery of an assignment held in escrow pending the negotiations to obtain the consent), the consent of the lessors is requested, the refusal of such consent can only be justified if the

proposed assignee or the business he is to carry on is found to be objectionable.

McCallum v. Imperial Bank, 22 D.L.R. 203, 7 S.L.R. 333, 7 W.W.R. 981, 30 W.L.R. 343.

PROVISO FOR TERMINATION — NOTICE — ENFORCEMENT — SALE OF LAND — BONA FIDES — PARTIES — ACTION FOR POSSESSION BROUGHT BY LESSOR AND VENDEE AGAINST ADMINISTRATRIX OF LESSEE—INFANT BENEFICIARY—COSTS.

Teasdall v. Dwyer, 9 O.W.N. 330.

ASSERTION OF RIGHT-OF-WAY THROUGH DEMISED PREMISES — EVICTION—TERMINATION OF LEASE — TRESPASS — DESTRUCTION OF BARRIER TO USE OF WAY—ACTION FOR RENT—DEFENCE—COUNTERCLAIM.

Purvis v. Shepherd, 8 O.W.N. 578.

ACTION BY TENANT FOR RESCISSION—MISREPRESENTATION—FAILURE TO PROVE—ACTS OF LANDLORD NOT AMOUNTING TO REPOSSESSION—COUNTERCLAIM FOR RENT.

Robinson v. Shannon, 17 O.W.N. 234.

FIRE—CANCELLATION OF LEASE—REPAIRS—UNKNOWN REASONS—C.C. ART. 1660.

This is a proper case for the application of art. 1660, C.C., in favour of the continuation of a lease, after a partial fire to a store, when only the roof, one window frame, and some window panes have been damaged by the fire, and when the repairs have only continued for 20 days. There must also be taken into consideration in this case the fact that at first the lessee did not intend to cancel his lease, and that it was only after the repairs had been made, and after he had received the key of the store from the proprietor, that he had signified his intention of putting an end to the lease; the evidence, moreover, has established that the fire was not the principal reason which had determined the lessee in his discontinuing his occupation of the leased premises.

Chasienais v. Lebel, 56 Que. S.C. 67.

The quality or extent of disturbance that gives a tenant the right to rescission of a lease is a matter left to the discretion of the court.

Taylor v. Frigon, 44 Que. S.C. 108.

DESTRUCTION OF PREMISES BY FIRE—PRESUMPTION.

When the cause of a fire is unknown, but it is proved that the bookkeeper of the lessee was in the habit of smoking, and putting the ashes from his pipe into a wooden box, the fire having originated at the place where the box was, the lessee has not rebutted the presumption of law against him, and the lease is not cancelled, by force majeure or fortuitous event.

Corbeil v. Costin, 49 Que. S.C. 534.

PROVISION FOR FORFEITURE—FOR KEEPING INTOXICATING LIQUORS FOR SALE — DEFENDANT LANDLORD TOOK POSSESSION—JUDGMENT FOR PLAINTIFF TENANT FOR POSSESSION AND $225 DAMAGES — DEFENDANT FAILED TO PROVE BREACH BY PLAINTIFF.

Walters v. Wylie, 3 O.W.N. 177, 20 O.W.R. 312.

PURCHASER FROM LANDLORD — ACCEPTANCE OF RENT—TENANCY FROM YEAR TO YEAR — TERMINATION — NOTICE — PROOF OF TITLE.

Laporte v. Wilson, 4 O.W.N. 1267, 24 O.W.R. 543.

TERMINATION OF LEASE — RIGHT OF LANDLORD TO POSSESSION.

Standard Clothing Co. v. Saskatchewan Valley Land Co., 17 W.L.R. 544.

(§ II D—31)—ORAL AGREEMENT FOR LEASE—POSSESSION — SURRENDER — ASSIGNMENT BY TENANT FOR BENEFIT OF CREDITORS — PRIORITY — FRAUD — INTENT—CLAIM OF LANDLORD FOR POSSESSION.

A tenant who, being in possession of premises under an agreement for a lease not in writing, surrenders the lease prior to making an assignment for the benefit of creditors, has not made a fraudulent preference or parting with property in fraud of creditors, and the surrender made is sufficient to give the landlord possession of the premises in question, as against the assignee.

Bell v. Chartered Trust & Executor Co.; Chartered Trust & Executor Co. v. Bell, 50 D.L.R. 45, reversing 49 D.L.R. 113, 46 O.L.R. 192.

ACCEPTANCE OF SURRENDER—RECEIVING KEY—RENTING.

Acceptance of the surrender of a tenancy depends on the intention; merely receiving the key or putting up an advertisement for rental is not necessarily an acceptance of the premises by way of surrender.

McBride v. Ireson, 26 D.L.R. 516, 35 O.L.R. 173.

SURRENDER BY OPERATION OF LAW.

The acceptance of a new lease operates by law as a surrender of the old term held under an attornment clause in a mortgage.

First National Bank v. Cudmore and Law Union & Rock Ins. Co. and First National Bank, 34 D.L.R. 201, 10 S.L.R. 201, [1917] 2 W.W.R. 479.

LEASE—TERMINATION—TEMPORARY OCCUPATION—SURRENDER.

Mickleborough v. Strathy, 23 O.L.R. 33, 18 O.W.R. 206.

SURRENDER BY OPERATION OF LAW—ACCEPTANCE OF NEW TENANT.

McKeown v. Lechtzier, 7 W.W.R. 1394.

(II D—32) —TERMINATION OF LEASE — UNTENANTABLE CONDITION OF PREMISES —LESSEE'S COVENANT TO REPAIR—ERECTION OF NEW BUILDINGS—MEASURE OF DAMAGES.

Le Maistre v. Convey, 31 D.L.R. 275.

EVICTION—QUIET ENJOYMENT.

When two tenants occupy different flats of the same building, under leases from the owner, the disturbance caused to the one, by the use of machinery by the other, with the consent of the owner, is not a mere trespass of a third party (art. 1616 C.C. Que.) but amounts to failure by the lessor to give peaceable enjoyment of the premises leased. The lessee has, in consequence, a right of action against him to rescind the lease.

Taylor v. Frigon, 44 Que. S.C. 108.

LESSOR'S FAILURE TO LAY FLOORING WITHIN STIPULATED TIME.

Lessees of a warehouse who take possession thereof under a written lease and a subsequent agreement that the lessor is to place surface flooring within a certain time are not entitled to a rescission of the lease because of the lessor's failure to place the flooring within the time limited or within a reasonable time thereafter. The lessees' only remedy is damages for breach of the agreement.

Canadian Equip. & Supply Co. v. Christie, 8 A.L.R. 359.

EVICTION—QUIET ENJOYMENT—ACTION FOR INDUCING WRONGFUL EVICTION — ABSENCE OF MALICE.

Fritz v. Jelfs, 5 O.W.N. 416.

(§ II D—33)—ACTION FOR RENT—FORFEITURE ALSO CLAIMED—WAIVER OF FORFEITURE — ABANDONMENT OF ACTION — EFFECT.

If in an action for rent forfeiture is also claimed for acts done prior to the date of which the rent claimed became due, the action operates as a waiver of the forfeiture. The abandonment of the claim for rent at the trial cannot reinstate the forfeiture. [Bevan v. Barnett, 13 T.L.R. 310, applied.]

Straus Land Corp. v. International Hotel Windsor, 48 D.L.R. 519, 45 O.L.R. 145.

FORFEITURE, AND WAIVER OF FORFEITURE.

Where a lease contains a covenant not to assign without lessor's consent and an assignment of the lessee's interest in the lease is made, and thereafter the lessor assigns his title, and the lessor's assignee, subsequently learning of the prior assignment by the lessee, accepts rent from the party in possession under the lessee, and later distrained on his goods for other rent, and makes no re-entry, the breach of the covenant not to assign is waived.

Pigeon v. Preston, 8 D.L.R. 126, 22 W.L.R. 894, 3 W.W.R. 694.

A forfeiture for breach of covenant in a lease (except for payment of rent) cannot be enforced by action, or otherwise until after a notice has been served pursuant to s. 20 (2) of the Ontario Landlord and Tenant Act; this provision is general and applies to both positive and negative covenants. [Harman v. Ainslie, [1904] 1 K.B. 698, followed.]

Walters v. Wylie, 1 D.L.R. 208, 3 O.W.N. 567, 20 O.W.R. 994.

A forfeiture in a lease is waived if the lessor elects not to take advantage of it and shews his election either expressly by a statement to that effect to the lessee or impliedly by acknowledging the continuous tenancy, and if after a cause of forfeiture has come to his knowledge he does anything to recognize the relation of landlord and tenant as still subsisting, he is precluded from saying he did not do the act with the intention of waiving the forfeiture. [Evans v. Davis, 10 Ch. D. 747; Moore v. Ulleoats Mining Co., [1908] 1 Ch. 575, approved.]

Holman v. Knox, 3 D.L.R. 207, 25 O.L.R. 588, 21 O.W.R. 325.

BREACH OF COVENANT BY LESSOR—EXCUSES ON EQUITABLE GROUNDS—COURT BOUND TO CONSIDER—RELIEF AGAINST FORFEITURE.

Where the lessor of farm property commits a breach of an express covenant in the lease but raises excuses for the breach on equitable grounds, the court is bound to consider them and in a proper case relieve from forfeiture.

Warner v. Linahan, 46 D.L.R. 31, 14 A.L.R. 432, [1919] 2 W.W.R. 94.

WAIVER OF FORFEITURE — ACCEPTING RENT FROM SUBLESSEE.

Although, under the terms of a lease, the tenant is prohibited from assigning or subletting the premises under penalty of forfeiture, still where he does so to the knowledge of the landlord, the acceptance of rent from the sublessee by the landlord constitutes a waiver of such forfeiture.

R.C. Episcopal Corp. de St. Albert v. Sheppard, 9 D.L.R. 619, 6 A.L.R. 128, 23 W.L.R. 282.

COVENANT — FORFEITURE — RE-ENTRY—IMPROVEMENTS—LIABILITY.

A lease contained a covenant that upon default in the payment of rent, etc., the lessor should have the right to immediately determine the tenancy and re-enter. On June 30, 1915, the lessor (the respondent) addressed a letter to the Mayor and Council of Regina (inter alia) as follows: "As time changes legislation should be enacted to suit conditions to meet demands that are required to cope with the situation. As you are quite well aware that the people who are running the Metropole Hotel are practically out of business, and as this property belongs to me, and as it is almost opposite the City Hall, it would be rather unsightly to have the windows boarded up, as the city has been given power to assist and provide accommodation for the local and traveling public. I am not going to ask you for any assistance further than to allow me to put an addition to the present building in the way of a rest room, sample rooms and any other accommodation I may

see fit in the interests of reopening to the general public as an accommodation. . . ." Held, that this letter, coupled with actual possession of the premises by the respondent from an earlier day in June, and followed by building and repairs begun on July 12 pointed conclusively to a re-entry by the respondent in June or at latest within the first day or two in July, and that the respondent was, on July 8, liable to the lessee for improvements which, under the lease, he agreed to pay for at the expiration of the said term.

Calgary Brewing & Malting Co. v. Williams, 48 D.L.R. 224, 12 S.L.R. 318, [1919] 2 W.W.R. 919, reversing [1919] 1 W.W.R. 653.

FORFEITURE—RETURN OF LESSEE'S DEPOSIT GIVEN IN GUARANTEE.

Where an agreement for a lease to begin as soon as the landlord could prepare the demised premises for the tenant's purposes stipulated that a $500 deposit then made to the landlord was to be held as a guarantee of good faith, on the part of the tenant, that the latter would enter into possession when the premises were ready, such deposit may be ordered to be returned to the tenant when the landlord gave notice that the premises were ready for occupation when they were not in fact ready, and therefore could not by reason of a municipal by-law be used for the lessee's business, if the landlord gave notice of cancellation of the lease before the rental period had begun on the ground of the tenant's breach of covenant in sub-letting a portion of the premises without leave; the landlord under such circumstances could not keep the deposit, and also avoid the lease.

Von Serbinoff v. McCarthy, 15 D.L.R. 180, 26 W.L.R. 54, 5 W.W.R. 659.

RELIEF AGAINST FORFEITURE OF LEASE — NONPAYMENT OF RENT — CHANGE IN TERMS BY USAGE.

A lessee of demised premises is entitled to an order for relief against forfeiture on the ground of nonpayment of rent, under the Laws Declaratory Act, R.S.B.C. 1911, c. 133, s. 2, subs. 14, where it appears that he had been in the habit of paying several months' rent at a time instead of monthly as called for by the lease, with which arrangements the lessor seemed to have been satisfied, that no request for payment was made by the lessor for about 5 months, but instead thereof he served his notice of re-entry, at which time the lessee tendered all the rent then due, but the lessor would not accept it, and where the lessee brings into court all arrears of rent due under the lease. A failure on the part of the lessor to re-enter the demised premises and to declare a forfeiture under the terms of the covenant for nonpayment of rent, does not constitute such a waiver of rights as is contemplated by subs. 17 of s. 2 of the Act, to the effect that no relief shall be granted against forfeiture of a lessee's term where a forfeiture under the covenant in respect of which relief is sought "shall have been already waived out of court in favour of the person seeking the relief," so as to preclude the lessee from maintaining a summons for relief against such forfeiture.

Balagno v. Leroy, 10 D.L.R. 601, 18 B.C.R. 127, 23 W.L.R. 621.

COVENANT OF DOUBTFUL MEANING.

The addition of a public shoe shining business will not be declared a breach of a covenant that demised premises should be used as a "store only," and that no other trade or business should be carried on where, with the consent of the lessor, the lessee conducted a shoe repairing shop on the premises; and a forfeiture of the lease will not be declared under the circumstances, since the true construction of such covenant was doubtful.

Just v. Stewart, 12 D.L.R. 65, 23 Man. L.R. 517, 4 W.W.R. 780, 24 W.L.R. 433.

FORFEITURE — RELIEF AGAINST — SECURITY FOR RESTORATION AT END OF TERM.

A claim of forfeiture of a lease by reason of an alteration made in the building by a tenant to enable him to carry on a business therein of a class not prohibited by the lease, may be relieved against, under the Landlord and Tenant Act (Ont.), by requiring the tenant to give security for the restoration of the building at the end of the lease to its condition at the time the lease was made.

Sullivan v. Dore, 13 D.L.R. 910, 5 O.W.N. 70, 25 O.W.R. 31.

FORFEITURE OF LEASE—STRUCTURAL ALTERATIONS IN BUILDING — STATUTORY NOTICE BY LANDLORD.

A landlord's action to declare a forfeiture of the lease because of structural alterations made in the buildings without his consent by the tenant will be dismissed if a statutory notice of forfeiture has not been given pursuant to the Landlord and Tenant Act, 1 Geo. V. (Ont.) c. 37, s. 20 (2), (R.S. O. 1914, c. 155).

Sullivan v. Dore, 13 D.L.R. 910, 5 O. W.N. 70, 25 O.W.R. 31.

NONPAYMENT OF RENT—RIGHT OF RE-ENTRY FORFEITURE.

The right of re-entry for nonpayment of rent overdue for 15 days (Short Forms of Leases Act, R.S.O., 1914, c. 116, sched. B., No. 12; Landlord and Tenant Act, R.S.O., 1914, c. 155, s. 19) is not defeated by tender or payment of the rent remaining due after the landlord became entitled to the right to forfeit.

Re Bagshaw and O'Connor, 42 D.L.R. 596, 42 O.L.R. 466.

CANCELLATION OF LEASE — UNINHABITABLE HOUSE.

A lessee cannot abandon the house he occupies, and have his lease cancelled, because it has become uninhabitable, without making a formal demand upon his lessor

to make the necessary betterments, unless it is a case of urgency.

Saba v. Duchow, 54 Que. S.C. 53.

MONTHLY TENANCY — NOTICE OF TERMINATION—SUFFICIENCY.

Defendant leased from the plaintiff certain premises at a rental of $50 per month, payable in advance on the first day of each month. On Oct. 23, the defendant gave the plaintiff notice that he would vacate on Nov. 15, to which date the defendant paid rent. He quitted the premises on Nov. 14, but did not return the key to the plaintiff till about Dec. 2. The plaintiff sued for two months' rent, and the action having been dismissed the plaintiff appealed. Held, that the length of notice to quit in the case of weekly and monthly tenancies has not been fixed precisely, but the general principle is that in the absence of special stipulation reasonable notice must be given, and that a notice equal in length to the period of the tenancy is sufficient. A notice to quit must be given so that it will expire on and with the last day of the period of the tenancy.

Baker v. McCurdy, 7 S.L.R. 340.

CANCELLATION BECAUSE IMMORALITY.

The lease of a house for purposes of prostitution is void. It is no defence to an action for cancellation of such lease to allege that the owner herself keeps a disorderly house and that she wishes to retake possession of her immovable with the intention of occupying it for similar purposes.

Paul v. Cousineau, 24 Que. K.B. 264.

(§ II D—34)—RESILIATION.

Where the landlord does not comply with the covenant in the lease to heat the premises, and where the evidence shews that there was no undue interference on the part of the tenant with the heating apparatus, the lessee will be allowed to cancel the lease.

Hoseason v. Lennon, 8 D.L.R. 475.

AGENT.

A general trust company leasing an immovable in administering it for the owner, is only the agent of the latter, and cannot be sued by the lessee for the resiliation of the lease and consequent damages. Such action will be dismissed on inscription en droit.

Berman v. General Trust Co., 51 Que. S.C. 132.

NOTICE.

Where a lease for several years permits the lessee to terminate it in any year by giving notice in writing to the lessor, a verbal notice will be sufficient if the latter receives it without objection and not demanding that it be in writing.

Bélisle v. Labranche, 51 Que. S.C. 289.

RESILIATION—GROUNDS.

A lessor suing for cancellation of a lease can only avail himself of the grounds mentioned in his protest or in his prior mise-en-demeure.

Fauteux v. Beauvais, 49 Que. S.C. 141.

SUBLEASE.

A landlord cannot demand the cancellation of a lease, the eviction of the subtenant, and damages, without placing the principal tenant in default to effect the eviction of the subtenant. Cancellation of the principal lease carries with it the cancellation of the sublease.

Larocque v. Freeman's, 50 Que. S.C. 231.

RESILIATION OF LEASE — DAMAGES — C.C. QUE. 1637.

Although in a lease and hire of things, art. 1637 C.C. (Que.), concerning damages in the case of cancellation of lease, reduces the principle that the party not fulfilling his obligation is liable for all damages resulting from such nonfulfilment, that article nevertheless must be construed according to the circumstances; thus, the rule may vary if the question is about a residence leased for a rather low price, or about business premises, or about a factory leased for a very high rent, or about a lease cancelled in summer time rather than in the fall or the winter. In the present case, the whole year was the basis of the damages awarded.

McGauran v. Bolte, 46 Que. S.C. 513.

CANCELLATION—NEW LEASE TO THIRD PARTY —LIABILITY FOR RENT FOR CANCELLED TERM.

The defendant leased the plaintiff a business premises for 23 months at $500 a month, it being a term of the lease that the first and last months' rent be payable in advance. The plaintiff paid the two months rent and took possession. During the term the parties agreed in writing to cancel the lease and grant a new lease to another person on similar terms. The agreement was carried out, the old lease being cancelled and a new lease given the second lessee, who entered into possession and paid the first and last months' rent in advance. In an action for the recovery of the last month's rent paid by the first lessee:—Held, that the agreement for cancellation of the lease made no provision in respect of the last month's rent, and all the terms of the lease, except as provided for in said agreement, were finally settled by its cancellation.

Perrin v. Antlers Realty Co., 20 B.C.R. 28.

An inscription in review suspends the delay for revision of taxation of a bill of costs. When two causes are joined for trial, enquête and argument in the Superior Court, and there is one inscription in review with a single deposit, only one bill of costs will be allowed in the Court of Review though the Superior Court pronounced separate judgments. In an action by the lessee for resiliation of the lease if the defendant consents to reduce the amount due or accruing due to him for rent from $500 to $200 and consents to the resiliation but with costs against the plaintiff which offer is refused, the cause then continues as commenced and the costs will be those

of an action for $500 as well in the Superior Court as in the Court of Review.

Woodley v. Peloquin Hotel Co., 13 Que. P.R. 257.

An assignment for benefit of creditors by the tenant is not, in itself, a ground for cancellation of a lease. The landlord has no lien on the proceeds of sale of an hotel license following the assignment. The court cannot allow the sale en bloc of the movables, the license and the lease of the insolvent tenant, as it would be impossible to make a precise allotment of the amount for which the landlord has the right to be collocated in preference to the other creditors.

Paul v. Mondon, 13 Que. P.R. 185.

CANCELLATION OF LEASE—AMOUNT OF DAMAGES TO LANDLORD.

Theoret v. Trudeau, 12 Que. P.R. 92.

E. ASSIGNMENT; SUBLETTING.

(§ II E—35)—WHAT CONSTITUTES—BUSINESS MANAGER.

Where the tenant under an agreement amounting to a lease containing a covenant or condition not to sell, mortgage, pledge, sublet, or assign such agreement or license or any interest therein, or to permit any person to have an interest in or use any part of the premises, enters into an agreement with a third party purporting to authorize the latter to act as his business manager and to take the excess over $1,500 of the profits of a business conducted on the premises, and obligating the third party to pay to the tenant in two instalments the sum of $1,500 not necessarily to be derived from the profits of the business, such agreement is substantially a subletting and the tenant is guilty of a breach of the covenant or condition.

Curry v. Pennock, 10 D.L.R. 548, 4 O.W.N. 1065, 24 O.W.R. 357. [See 10 D.L.R. 166.]

PROVISO FOR LEAVE—LEAVE ARBITRARILY WITHHELD—EFFECT.

Under a condition in a lease that the lessee will not "assign or sublet without leave but such leave shall not be wilfully or arbitrarily withheld," the lessee is at liberty to assign without the lessor's consent if, before assigning, he had made application for the consent and the lessor arbitrarily refused in violation of the agreement. [Goodwin v. Saturley, 16 T.L.R. 437, applied.]

Cornish v. Boles, 19 D.L.R. 447, 31 O.L.R. 505.

COVENANT NOT TO ASSIGN—BREACH.

A lessee's covenant not to assign without leave is broken only by a legal assignment for the entire residue of the term. [Gentle v. Faulkner, [1900] 2 Q.B. 267, followed.]

McCallum v. Imperial Bank, 22 D.L.R. 203, 7 S.L.R. 333, 7 W.W.R. 981, 30 W.L.R. 343.

LESSOR'S COVENANT NOT ARBITRARILY TO WITHHOLD CONSENT TO ASSIGN.

The effect of a clause in a lease that the lessor will not arbitrarily withhold his consent to an assignment of the term which the lessee has covenanted not to make without his leave is not to impose an obligation on the lessor to give his consent, but in case it is unreasonably withheld to release the lessee from the obligation of the covenant and to enable him to assign without the lessor's consent. [Andrew v. Bridgeman, [1907] 1 K.B. 198; West v. Gwynne, [1911] 2 Ch. 1, followed.]

McCallum v. Imperial Bank, 22 D.L.R. 203, 7 S.L.R. 333, 7 W.W.R. 981, 30 W.L.R. 343.

ASSIGNMENT TO PROVINCE — ACCEPTANCE — KING'S BENCH ACT.

Under s. 26 (b) of the King's Bench Act, c. 46, R.S.M. 1913, a lease to the Government of Manitoba, or the rent due thereunder, cannot be assigned so as to make the assignment binding upon the Government unless the assignment be accepted in writing by the Provincial Treasurer.

Elliott v. Forrester, [1918] 2 W.W.R. 220.

SUBLEASE — ACCEPTANCE — PRESUMPTION — CANCELLATION — PAROL EVIDENCE — ULTRA PETITA.

If a lessor accepts rent from a subtenant, he is presumed to accept the latter as his tenant, unless it appears that he has not abandoned his rights against the principal tenant. Should the lessor, who has allowed the subletting, sue the principal lessee with attachment for rent and ask the cancellation of the lease, and obtain judgment in his favour, the subtenant occupying the premises with his own furniture has a sufficient interest to oppose that judgment as a third party. An agreement between a lessor and a sublessee, to the effect that the rents of July, August and September, amounting each to over $50, and which were payable in advance, should be paid respectively in the course of the month, may be proven by oral evidence with a commencement of proof in writing in three cheques, one dated July 12 for $125, another dated July 13 for $75, and a third one dated July 25 for $475, given to the lessor on account of the rent of July. A lessor who takes possession of the leased premises and occupies them himself, cannot later sue the lessee for cancellation of the lease and base his action on the rent due for that period of time covering his occupation. When premises are sublet with the consent of the lessor, even if the latter has reserved his recourse against his principal lessee, an action for the cancellation of the lease cannot be brought by him without bringing the sublessee into the case. If the conclusions in an action for attachment for rent asking the cancellation of the lease are taken against the principal lessee only, the sublessee who was occupying the premises with the lessor's consent, not having been called in the case, the court cannot, without decid-

ing "ultra petita" order the expulsion of the sublessee.

Duchess Amusement Co. v. Desmarteau, 27 Que. K.B. 541.

ASSIGNMENT—COVENANT.

An assignee of a lease who stipulates that "if the assignee sells the business which he is actually carrying on he shall have the right to transfer his lease," may, after he has made a voluntary abandonment of his property, transfer his lease and his business, with the approval of his creditors, and of freeing the original lessee of all his obligations to the owner. The original lessee has no right to complain of the abandonment to creditors.

Labonte v. Sicotte, 24 Rev. Leg. 250.

(§ II E—36)—ASSIGNMENT.

If a lease contains a covenant not to assign the lease without the lessor's consent (and that in such event the lessor could re-enter) and such covenant is violated by the lessee, the proper remedy for the lessor is to enter and terminate the lease; and notice to quit at a future date and a distraint made for the rent cannot be said to be evidence of a re-entry, as the lessee was thus recognized as a tenant by the lessor.

Pigeon v. Preston, 8 D.L.R. 126, 22 W. L.R. 894, 3 W.W.R. 694.

ASSIGNMENT OF LEASE—RESTRICTIVE COVENANT AS TO HOTEL—"TIED" HOUSE.

A covenant contained in a document separate from the mortgage given by the owner of the realty upon procuring a loan from a brewing company upon his hotel property whereby such owner and its tenant in occupation of the hotel severally agreed for valuable consideration with the brewing company that neither they nor their assigns would, during a specified period, sell or deal in or allow to be sold or dealt in upon the demised premises any brewing products other than those dealt in by the brewing company, is a covenant running with the land which may be enforced by injunction at the instance of the owner against a purchaser of the lessee's interests in the premises where such purchaser took with notice of such restrictive agreement, although the agreement was subsequent to the making of the lease itself the benefit of which the purchaser had acquired, and although it did not appear that the making of such restrictive agreement was a condition upon which the lease was granted.

Rudd v. Manahan, 11 D.L.R. 37, 5 A.L.R. 19, 4 W.W.R. 350, 24 W.L.R. 246, affirming 5 D.L.R. 565, 21 W.L.R. 929, 2 W.W.R. 798.

COVENANT AGAINST ASSIGNMENT — MAKING LEASE PARTNERSHIP PROPERTY.

A provision in a partnership agreement whereby one partner agrees to assign to the other partner an interest in a lease to be used for the business of the partnership, in consideration of his share of contribution, operates as a mere equitable assignment, and does not constitute a breach of a covenant in the lease against assignment as a ground of forfeiture of the lease.

Herschorn v. St. Mary's Young Men's Society, 25 D.L.R. 102, 49 N.S.R. 260.

WHAT PASSES TO ASSIGNEE—GUARANTY OF RENT.

An assignment by a lessor, of all the rights, powers, title and interest in a lease, with all the benefit and advantage to be derived therefrom, carries with it the benefit of a guaranty contained in the lease for the payment of the rent by the lessee.

West v. Shun, 24 D.L.R. 813, 8 S.L.R. 243, 9 W.W.R. 644, 32 W.L.R. 961.

ASSIGNMENT WITHOUT LEAVE — UNREASONABLE REFUSAL OF LESSOR TO CONSENT—RIGHT TO ASSIGN—DECLARATION—DAMAGES—COSTS.

Childs v. King, 8 O.W.N. 511.

(§ II E—37)—COVENANTS—BREACH—SUBLETTING.

Permitting a real estate dealer to use for his business any portion of a leased store building during the day-time, and to display cards in the windows, without paying rent therefor, or having a key to the premises, is not a breach of a covenant against sub-letting, since he was merely a licensee.

Just v. Stewart, 12 D.L.R. 65, 23 Man. L.R. 517, 4 W.W.R. 780, 24 W.L.R. 422.

SUB-LEASE—CONSENT.

The sub-letting of an immovable by the lessee does not relieve him of his obligations to his lessor, who preserves all his rights and privileges under his lease. Knowledge of the lessor of the sub-lease, and his acquiescence therein in receiving his rent directly from the sub-lessee, is equivalent to a consent in writing to this sub-lease and constitutes a waiver of the prohibition against sub-letting.

Renaud v. Pasquini, 52 Que. S.C. 28.

SUB-LEASE—PARTNERSHIP—QUEBEC LAW.

Where a tenant of a shop had agreed in his lease to garnish the premises with sufficient property to secure payment of the rent, and then forms a partnership with other parties who become the owner of the goods and movables on the premises, the tenant violates his agreement, and the landlord has the right to bring an action to rescind the lease.

Payette v. Payette, 44 Que. S.C. 536.

SUBLEASE—CONSENT.

The following acts by a landlord or by his agent are equivalent to consent in writing to the sub-letting of leased premises: the passing of the sub-lease and its ratification by the principal landlord's own notary, being at the time his agent; the recognition by the latter of the occupant as sub-tenant; sending to the sub-tenant a notice to quit the premises; claiming ownership to improvements made by the sub-tenant. The right of sub-letting with the consent in writing or the approbation of the landlord differs from absolute prohibition to sub-let or to assign the lease; the latter must be

interpreted strictly while the former leaves to the court the decision as to the landlord's consent.

Larocque v. Freeman's, 50 Que. S.C. 231.

COVENANT—WAIVER.

A lessor who stipulates that sub-letting shall not be allowed without his express consent may tacitly waive this stipulation. Waiver may be inferred from the long inaction of the lessor after being aware of the sub-lease, and especially from the fact that he had received without protest rents from the sub-lessee on behalf of the original lessee, these facts constituting an evident acquiescence in the sub-lease.

Learmonth v. Goodman, 49 Que. S.C. 12.

SUB-LEASE.

When a lessee has reserved the right not to consent to a sub-leasing in whole or in part of the property leased for the purposes of living and manufacturing, unless the sub-lessee so offered should be acceptable to him and to his lessors, other parties in the house, the refusal by the lessor to accept the sub-lease for a laundry establishment, for the reason that different inconveniences may result from such an establishment will not be considered by a tribunal as an abuse of a discretionary power thus reserved by the lessor.

Mayer v. David, 18 Rev. de Jur. 6.

LESSEE'S LIABILITY FOR DAMAGES RESULTING FROM UNAUTHORIZED SUB-LEASE — CHINESE LAUNDRY—PRIOR JUDGMENT FOR CANCELLATION.

A lessee who sub-lets a house, notwithstanding sub-letting has been forbidden, to a nondesirable person such as a Chinaman keeping a laundry, is liable for the damages caused by the proximity of such person. Thus he may be ordered to pay to the lessor the loss of rent from a neighbouring lessee and the attorney's costs in the action to cancel the lease of the latter, his own expenses of moving and the cost of disinfection. These damages can neither be considered too remote nor as unforeseen. The lessee in such case cannot set up against such demand for damages, as res judicata, a prior judgment between the same parties granting to the lessor the cancellation of the lease with damages for the balance of the rent up to the end of the year and a reservation for the future rent.

Mayer v. David, 47 Que. S.C. 516.

SUBLEASE.

A sub-lease by a tenant of premises occupied for a number of years as a furrier's shop and residence, to a sub-tenant, as a restaurant with rooms to let, does not amount to using them for a purpose contrary to the evident intent for which they were leased (art. 1624 C.C. Que. s. 1). Hence, it affords no ground for an action by the owner to rescind the principal lease.

Latreille v. Beaumier, 44 Que. S.C. 476.

When the lease of a shop contains a prohibition to sublet, it is violated by the tenant if he forms a partnership to take over his business and carry it on in the premises; so doing amounts to a sublease, and the landlord has a right action to rescind the lease.

Payette v. Payette, 44 Que. S.C. 536.

(§ II E—38)—SUB-LETTING—CONSENT IN WRITING—COVENANT NOT TO ASSIGN—LETTER OF CONSENT BY AGENT.

A consent in writing by the lessor to a sub-letting for which such consent is necessary under a covenant not to sub-let without leave may be effectually shewn by a letter of consent written by the lessor's agent in his own name but stating that it is given on behalf of the principal.

Brown v. Toothills, 20 D.L.R. 584, 7 W. W.R. 318.

III. Rights and liabilities of parties.

A. IN GENERAL.

(§ III A—40)—NUISANCE—FACTORY—NEGLIGENCE.

The noise, odour and vibrations resulting from the operation of a sausage factory, not attributable to any negligence, will not render a lessee, who rented the premises for such purpose, liable to the lessor for the damage resulting therefrom.

Pasquini v. Mainville, 37 D.L.R. 130, 52 Que. S.C. 22.

LIABILITY OF TENANT—DAMAGE FROM FREEZING.

A tenant who brings something to rented premises which is liable to cause damage to the property unless proper precautions are taken, is liable for the resulting damage where such precautions have not been taken.

Conklin v. Dickson, 38 D.L.R. 692, 40 O.L.R. 460.

LEASE OF FARM BY MOTHER TO SON—ACTION FOR BREACHES OF COVENANTS—FAILURE TO PROVE BREACHES—IMPROVEMENTS—FINDINGS OF FACT OF TRIAL JUDGE.

Léonard v. Léonard, 15 O.W.N. 169.

CROPS—AGREEMENT—FORFEITURE OF LEASE—RIGHTS AND LIABILITIES OF PARTIES.

McKay v. Sexsmith, 20 D.L.R. 986; 29 W.L.R. 210.

SALE OF PROPERTY—DESTRUCTION OF BUILDINGS BY PURCHASER—RIGHTS OF TENANT—C.C. (QUE.) ART. 1053.

Where a lessee occupies a lot in good faith, under a lease legally given or not, and built upon it, the subsequent buyer of the property cannot, without the authority of the court, demolish this building and expose the goods stored in it to destruction. Where a verbal lease is admitted by the parties to it, a third party cannot deny its existence on the ground that such a lease cannot be proved by witnesses, unless fraud or collusions is alleged.

Mongrain v. Canadian Carbonate Co., 46 Que. S.C. 534.

The lease of a coachhouse and yard, for instruction in gymnastics, at the rear of a dwelling-house, with a living-room in the

latter, does not entitle the lessee to cause his pupils to pass through the house to reach the premises leased. Oral evidence of an agreement between the parties according such right of passage is not admissible. If the lease is silent on the point the lessee has a right to enjoy the leased premises and use them as he had previously done, according to the necessities of his business when these were known to the lessor, and in the manner in which he had enjoyed them at the date of the lease, and oral evidence of these conditions was admissible.

Roumageon v. Chêne, 41 Que. S.C. 178.

The obligation of the lessee to make improvements on the immovable lease is an essential condition of the emphyteutic lease. Hence, the lease of a lot for a term of 99 years with no other conditions than "to pay the rent and taxes, maintain the fences and refrain from cutting down the trees," is not emphyteutic especially if it contains a provision that either party may terminate it on giving to the other twelve months' notice. It cannot, then, give the lessee a right to bring an action negatoire nor to formulate conclusions accessoires for indemnity in such action. The offer or proposal by one party to an action to cease litigation, which is refused, involves no admission and is not binding on him.

Larue v. Chateau Frontenac Co., 41 Que. S.C. 193.

LIABILITY OF TENANT — FIRES — PRESUMPTION.

A tenant is liable for the damages sustained by the proprietor of the leased premises caused by the destruction thereof by fire unless he produces evidence, to the satisfaction of the court, in rebuttal of the presumption of fault on his part which the law imposes upon him under art. 1629, C.C. (Que.). The fact that, during a high wind blowing against the side of the building, hot ashes have been kept in a wooden receptacle near trellis-work of old dry wood, at the place where the fire originated, is sufficient to establish the liability of the tenant.

Appleton v. Reynolds, 50 Que. S.C. 343.

AS TO SIGNS AND POSTERS.

A lessee has the right to put on the building, which he occupies under the lease, the signs necessary to his trade. He can also allow posters to be put on the walls of the house and of its outhouses and draw benefits from them; but such right applies only to temporary posters and not to permanent ones. Besides, he has to take into account the rights to bill-sticking conceded by the lessor in which he has acquiesced.

Asch v. Haney, 49 Que. S.C. 131.

LIABILITY OF LANDLORD AS FAR AS HEATING THE PREMISES—"MISE EN DEMEURE."

A cotenant is obliged to heat the apartments which he occupies as a merchant and which is situated immediately below an apartment that he rents to another tenant, in such a way that the apartment of the second is suitable for persons to live in.

St. Germain v. Rubin, 25 Rev. de Jur. 140.

DISTRESS.

A lessor is justified in resorting to seizure if the lessee, in place of merely taking away his movables for the purpose of having them repaired, removes them for the purpose of quitting the premises and of paying no rent therefor.

Learmonth v. Quebec Furniture Co., 52 Que. S.C. 55.

When a lease contains a clause that the lessee shall at its expiration deliver up the premises in the same condition as they were in when he received them, accidents by fire excepted, the liability of the parties, in case of fire, is determined according to the principles contained in arts. 1053–4, C.C. (Que.). The lessee is guilty of negligence when the fire is caused in attempting to thaw out water pipes, by an inexperienced person, by the use of a gasolene lamp or torch, and he is liable to the owner for the damages suffered thereby. It does not amount to a fortuitous event.

Ecclésiastiques du Séminaire de Saint Sulpice v. Frothingham, 51 Que. S.C. 214.

FIRE—PRESUMPTION.

In case of fire on leased premises, if the lessee does not rebut the presumption that it was caused by his fault he is liable for the injury caused to the lessor by the loss of the rent.

Learmonth v. Quebec Furniture Co., 52 Que. S.C. 55.

TENANT'S RIGHTS—LEASE OF HEATED APARTMENTS.

Roumageon v. Greenberg, 40 Que. S.C. 426.

LEASE TO ATHLETIC ASSOCIATION—JUDGMENT AGAINST MEMBERS FOR RENT.

Pears v. Stormont, 3 O.W.N. 56, 20 O.W.R. 23.

PLACE FOR SALE OF PROVISIONS—CONTRAVENTION OF BY-LAW—RECOURSE OF LESSEE.

Merson v. Wollenberg, 40 Que. S.C. 283.

(§ III A—41)—AGREEMENT TO SUPPLY WATER FREE.

A condition in a lease for business purposes of premises connected for water supply from the city main and furnished with a sink and lavatory equipment, that the water is to be free to the tenant, is not a warranty by the lessor that under all circumstances water shall be supplied to the tenant, but it does obligate the landlord not to lessen the supply which the tenant ordinarily received and needed for the purpose of his business, either by the landlord's own act or by the act of other lessees claiming under him.

Howell v. Armour, 9 D.L.R. 125, 6 S.L.R. 25, 3 W.W.R. 832, 23 W.L.R. 68.

BURSTING OF HOT-WATER PIPES—LIABILITY OF LESSEE.

A lessee of a house is not responsible for the damages caused by the bursting of the

hot-water pipes on account of the frost, when it is caused by the defects in the heating apparatus and in the construction of the house.

Davidson v. King, 48 Que. S.C. 392.

(§ III A—42)—Status of plaintiff as ratepayer—Tenant—Liability for taxes.

Rochford v. Brown, 25 O.L.R. 206, 20 O. W.R. 591.

(§ III A—43)—Breach of covenant to repair—Measure of damages—Rent—Eviction.

A landlord's breach of covenant to repair will render him liable to the tenant for all damages naturally resulting from the breach; but unless amounting to a total eviction it is no defence to a claim for rent.

Gordon v. Sime, 37 D.L.R. 386, 44 N.B.R. 535.

"Tenant's repairs"—Consequential damages—Liability.

Neglect to make "tenant's repairs" (art 1635, C.C. Que.) in that portion of the building which he occupies renders a tenant liable for damage from such neglect to occupants of other portions.

Paquet v. Nor-mount Realty Co., 28 D.L.R. 458, 49 Que. S.C. 302.

As to repairs.

A tenant who has not covenanted or agreed to make repairs is entitled to compensation for making repairs on demised premises only when made at the request of his landlord.

Burgoyne v. Mallett, 5 D.L.R. 62, 21 W.L.R. 566.

Written lease—Formal demand—Testimonial proof—C. 6, arts. 1067, 1070, 1233, 1614.

No tenant of a house in virtue of a written lease can claim damages from the owner because of the bad state of the house which he occupies, without summoning him to make the necessary repairs. This formal demand should be in writing since the lease itself is in writing.

Desloover v. Mansfield, 25 Rev. Leg. 155.

As to repairs.

Where a lease contains a covenant by the lessee to repair, but no provision as to notice to the tenant to repair, the landlord is not bound to give the tenant notice to repair before doing the repairs himself and proceeding to recover the cost. A collapse of the floors of a building, due to overloading, is not an accident or other casualty within the meaning of the exception in s. 55 (b) of the Land Titles Act.

Telfer v. Fisher, 3 A.L.R. 423.

Knowledge of want of repair—Cancellation of lease.

A lessee of a house, which he well knows has been inhabited, who takes possession in spite of its age and dilapidations, has none the less the right to insist upon the necessary repairs when new dilapidations caused by the age of the house or by faults of construction augmented to the old delapidation, render the house uninhabitable. The refusal of the lessor to repair, gives the lessee the right to take proceedings for cancellation of the lease.

Lair v. Simonovitch, 45 Que. S.C. 341.

Protection of drains to prevent flooding—Duty of tenant.

It is not a defect in construction to protect by a cage, the opening of a drain soil pipe on the roof of a building, even when the neglect to keep it free and clear from refuse would cause the flooding of the roof. It is the duty of the tenant to attend to this clearing.

Cooper v. Holden Co., 48 Que. S.C. 455.

Quiet enjoyment—Repairs.

Where a lessee is unable to claim damages under his lease on account of partial destruction of the leased premises by fire, the lessor is nevertheless bound to procure peaceable enjoyment of the premises for the lessee during the whole term of the lease and, for such purpose, he is obliged to make the necessary repairs with diligence.

Ruthman v. Massé, 25 Que. K.B. 193.

Repairs—Hidden defects—Sublease.

A tenant who has been notified, or has reason to suspect, that the walls of the building are not solid, who neglects to have them examined, cannot plead ignorance of such hidden defects in order to justify the demolition of the building, without being responsible towards his subtenant; this is neither an unforeseen circumstance nor vis major. Works absolutely necessary to be done on a building in order to remove defects in construction which affect its solidity are not repairs which are charged upon the tenant in the absence of a special agreement to that effect. The obligation undertaken by a sublessor, to make repairs for the benefit of his sub-tenant, does not discharge the principal lessor from liability in respect to the hidden defects in the building, even in regard to sub-tenants who are in occupation of the leased premises.

Larocque v. Freeman's, 50 Que. S.C. 231.

Repairs—Time for making—Payment of rent.

Where a lessor agrees to make repairs without specifying any time within which they are to be made, it is understood that the repairs should be completed on the date when the tenant takes possession. A provision to make all necessary repairs, without reduction of rent, and finished within reasonable time, as well as art. 1634, C.C. (Que.) apply only to repairs which become necessary during the term of the lease, and, when the lessee can take possession only after completion of the repairs, he is not bound to pay the rent except from such time as he may have been able to occupy the leased premises.

Royal Trust Co. v. White, 50 Que. S.C. 277.

Repairs—Delay.

When a lease stipulates that the owner

shall have a reasonable delay to make extensive necessary repairs the delay of 40 days in art. 1634, C.C. (Que.) does not apply. The repairs of a wall warped and about to fall must be made with haste.

Lippé v. Dupont, 52 Que. S.C. 20.

APPARENT DEFECTS—INJURIES—LIABILITY.

A lessor, who stipulates in a lease that he shall not be bound to make any repairs, even those required by law if they are not mentioned in the lease, is not responsible for damages sustained by the lessee from a fall on a stairway in an outhouse, on which a step was in bad repair, the lease making no mention of repairs to this stairway. Besides, the condition of the step cannot be deemed a hidden defect, and the lessee should not have exposed himself to the danger which he might have foreseen.

Barry v. Quinlan, 24 Rev. Leg. 126.

COVENANT — ROOF — RAIN PIPES — FORCE MAJEURE—DAMAGES.

An unusual storm, but not an extraordinary one, which can be foreseen and its disastrous effects prevented by ordinary means, is not force majeure or a fortuitous event. The owner of an immovable is responsible for the maintenance of down pipes which conduct rain water. A clause in a lease that "the lessor will not be bound to make any repairs whatsoever, not even the greater repairs which the law requires of lessors," does not apply to a case where repairs are necessary to a roof which shelters several lessees occupying different floors of the house. In an action for damages caused to merchandise, an application by the defendant, in the course of the proceedings, that an examination and valuation of the depreciation be made, should be granted, but if, at such period, the merchandise had changed its condition, the application is properly refused.

Genereux v. Bonnet, 24 Rev. Leg. 319.

REPAIRS—DRAIN PIPE—ROOF—LATENT DEFECTS.

The defects, which a person visiting the premises to be rented cannot ascertain de visu, constitutes a latent defect; and the tenant is not obliged to report it to the proprietor. The tenant is not obliged to repair the pipe which drains the roof of the house he occupies, unless these repairs have been rendered necessary by his fault and negligence.

Vyse v. Stephens, 24 Rev. Leg. 222.

(§ III A—44)—AS TO POSSESSION—LANDLORD'S FAILURE TO DELIVER—PRIOR TENANT FAILING TO VACATE — DAMAGES, HOW LIMITED.

The damages against the lessor for failure to deliver possession to the lessee may be limited to the advance rent paid if the lessee for a new term is shewn to have taken his lease subject to the present tenant vacating and to the new tenant arranging for possession.

Sanofosky v. Harris, 19 D.L.R. 325.

RIGHTS AND LIABILITIES OF PARTIES—AS TO POSSESSION—LANDLORD'S CONTRACTOR—SCOPE OF EMPLOYMENT—DAMAGES.

That a building contractor for the erection of a large block for the defendant covering the location of the leased building and adjoining lands had razed the building, in the course of the operations contracted for, is evidence that what he did was authorized by the defendant so as to establish a claim for damages brought by a tenant who had been wrongfully dispossessed by such act.

Hart v. Brown, 19 D.L.R. 728, 8 A.L.R. 444.

AS TO POSSESSION.

The refusal of a lessee to make a cash payment for personal property purchased from a lessor under an agreement apart from a lease, as he agreed to do, does not justify the former's refusal to let the lessee into possession of the demised premises.

Wood v. Saunders, 3 D.L.R. 342, 21 W.L.R. 195.

INABILITY OF LESSORS TO GIVE POSSESSION OF DEMISED PREMISES — VALIDITY OF CONTRACT — FORMER TENANT REFUSING TO GIVE UP POSSESSION—ACTION BY LESSEE FOR SPECIFIC PERFORMANCE—DECLARATION — REVERSION — RIGHT TO RECEIVE RENT OF PREMISES—DAMAGES—CANCELLATION OF LEASE.

Keeley v. Reaume, 12 O.W.N. 342.

(§ III A—44a)—AS TO IMPROVEMENTS.

Where a lease of a coal mining property provides that, at the expiration of the term, the value of the improvements added to the property by the lessee, in the way of plant, machinery, mining appliances and other betterments, shall be appraised with reference to the amount and character of the work which they were intended to perform and will be able to perform when and after the appraisement is made, and, upon the expiration of the term, a new lease is made, whereby that appraisement is waived, and it is provided that, upon the expiration of the term granted by the new lease, the lessor shall pay to the lessee, on appraisement, the value of the improvements added to the property by the lessee, in the way of plant, machinery, mining appliances and other betterments, etc., during the period of the former lease as well as of the new lease, but that no stope, shaft, tunnel, gangway, breast, manway, airway, support, work or fixed apparatus, constructed, made or used underground, shall be considered improvements or betterments so as to be subject to valuation and payment as aforesaid, except such as shall be of actual value to the lessor in the future operation of any such stope, etc., at the expiration of this lease, the word "operation" must be taken to mean the operation of the mine by the use of such stope, etc., so that all stopes, etc., which are of use for the future operation of the mine, are to be considered as improvements and to be appraised

at their value as improvements added to the property, which means the property as leased, and not as returned to the lessor, so that those stopes, etc., which are simply the result of taking out coal, will probably have added nothing to the value of the property, but will rather have depreciated it, by reason of the removal of the coal of greater value than the cost of their construction; and for the purpose of the appraisement the two terms of the tenancy may be treated as one continuous term, and the property to be considered as being affected by improvements may be taken as it existed at the commencement of the first lease.

Re Canadian Anthracite Coal Co. and McNeill, 4 D.L.R. 784, 4 A.L.R. 355, 2 W.W.R. 638, 21 W.L.R. 682.

B. As to fixtures and property on premises.

Rights of parties to crops, void lease, see Levy and Seizure, I—18.

(§ III B—45)—Party wall—Demolition—Damages.

The lessee of a house, whose owner, without any right, has made use of the wall of a neighbouring building as if it was a party wall, has no remedy in damages against his neighbour if the latter demolishes this wall which belongs to him, taking necessary precautions. The remedy of the lessee, in such case, is against his lessor.

Goldberg v. Lavut, 53 Que. S.C. 508.

Drains and sewers—Duty of tenant.

When a tenant leaves the rented premises, he should turn off the water and drain the water out of the pipes; if he neglects this precaution, he is liable for the damages that may be caused to the owner through the breaking open of the pipes and the flooding of the house. The tenant is also responsible for the cleaning, if he leaves it in a malodorous condition.

Commercial Properties v. Compagnie Leduc, 54 Que. S.C. 392.

Buildings burned—Liability.

The defendant, C. was tenant of the plaintiff from year to year, determinable on notice. His servant, P., after replenishing a fire in a stove went out leaving the drafts improperly checked and a quantity of inflammable fats close at hand and no one to watch it. A fire resulted and the buildings were burned. In an action by the landlord for damages it was held that the fire was an accidental one.

Paul v. Currah, 12 S.L.R. 278, [1919] 2 W.W.R. 359.

Trade fixtures—New tenant purchasing interest of former tenant — New lease to new tenant—Further assignment of tenancy—Assignment by tenant for benefit of creditors—Right of assignee to fixtures.

Where parties purchased a tenant's interest in leased premises including trade fixtures, and shortly thereafter took a new lease of the premises from the owner, and the trade fixtures passed through the hands of a number of tenants through assignments or "reorganizations," and the last tenant made an assignment for the benefit of creditors to the defendant who gave a disclaimer, it was held that the fixtures belonged to the defendant and that he had the right to remove them within the three months' delay given by s. 55 (1) of the Creditors' Trusts Deeds Act. The court found that there was never any formal surrender of lease; such surrender as there was was by operation of law only; the circumstances bringing the case within the exception suggested in Leschallas v. Woolf, [1908] 1 Ch. 641.

Wintemute v. Taylor, [1919] 2 W.W.R. 882.

Lease and fixtures—Transfer to incorporated club—Keeping liquors for sale—Evasion of statute.

The King v. Byng, 44 N.S.R. 524, 18 Can. Cr. Cas. 344, 9 E.L.R. 215.

(§ III B—47)—Building contract—Liability of lessee.

While a lessee may not be personally liable on a building contract authorized by his lessor, the personal liability of the lessee will nevertheless attach to orders for work personally given by him.

Orr v. Robertson, 23 D.L.R. 17, 34 O.L.R. 147.

Payment for buildings—Mode of valuation.

Covenants contained in separate leases on adjoining lots providing the payment for the improvements thereon by the lessor upon the expiration of each lease, in an amount ascertained by valuators, does not authorize a valuation of the improvements on the several lots as an entirety, but the value must be ascertained of the improvements on each lot separately.

Irwin v. Campbell, 23 D.L.R. 279, 51 Can. S.C.R. 358, reversing 32 O.L.R. 48.

Ground lease — Buildings of tenant — Lessor to pay for buildings at end of term—Fixtures or things—Provisos—Arbitration.

Re McConkey Arbitration, 43 D.L.R. 732, 42 O.L.R. 380.

Buildings.

A covenant in a lease of a water lot that the lessor should, at its expiration, pay the lessee the value of "buildings and erections put up for manufacturing purposes" by the latter, includes not only a building erected thereon but earth and stone used to support and stiffen a crib work foundation upon which the building stood, in order to prevent vibration incident to the use of machinery therein. A substructure necessary to uphold and keep useful for manufacturing purposes the buildings and erections constructed upon them is itself an "erection" or "building" for the purpose of compensation by the landlord under the provisions of a ground lease whereby the landlord on electing not to renew is obliged to compen-

sate the lessee for the "buildings and erections" placed by the latter on the land demised.

St. John v. Gordon, 3 D.L.R. 1, 46 Can. S.C.R. 101, 11 E.L.R. 177.

CHANGE OF FORM OF THE THING LEASED—ERECTION OF BUILDINGS THAT OBSCURE THE LIGHT.

Vidal v. Cauchon, 41 Que. S.C. 1.

(§ III B—49)—INJURY TO CROPS.

One who leases property for a portion of the crop grown has an equitable interest in such crop, and may maintain an action against a third party for damage thereto.

Tennant v. Rhineland, 38 D.L.R. 271, 28 Man. L.R. 302, [1918] 1 W.W.R. 70.

Where a tenant is to pay as rent a one-third interest in the crops, the property in such one-third interest is in the tenant until the division of the crops is made.

Anderson v. Scott, 8 D.L.R. 816, 22 W.L.R. 876, 3 W.W.R. 609.

CROPS.

A lease for five years of land in which the lessor had a life estate only was held to have been put an end to by the death of the lessor during the term; but the wheat then sown and in the ground became emblements belonging to the lessee; and these being purchased from the lessee by the plaintiffs, the executors of the lessor, the defendant, the remainderman, became liable to them for their conversion. No so, however, the straw and manure on the farm at the determination of the lease. By the terms of the lessee's covenant, these were to be kept and utilized on and for the land, and were not the property of or removable by the lessee: the straw and manure, as "accessories of the soil" passed to the remainderman with the land freed from the demise. [Gardner v. Perry, 2 O.W.R. 681, not followed.]

Atkinson v. Farrell, 8 D.L.R. 582, 27 O.L.R. 204.

Plaintiff claimed the right, under 8 Anne, c. 14, s. 1, to have the year's rent paid by the sheriff out of the crops seized:—Held, that to entitle a landlord to such right there must be a real lease and the rent reserved must be a real bona fide rent and not an excessive one and there should be shewn an intention of the parties to create a real tenancy at a real rent and not merely, under colour and pretence of a lease to give the mortgagee additional security, and that the verdict should be against the plaintiff on the issue in this case. [Hobbs v. Ontario Loan and Debenture Co., 18 Can. S.C.R. 483, and Imperial Loan v. Clement, 11 Man. L.R. 428, followed.]

Stikeman v. Fummerton, 21 Man. L.R. 754.

FARMING ON SHARES—ONUS ON TENANT TO ACCOUNT FOR LANDLORD'S SHARE OF CROPS — ASSIGNMENT BY LANDLORD OF BENEFIT OF LEASE.

Lott v. Given, 19 W.L.R. 713.

(§ III B—51)—MANURE.

Where a lessee of a term for years in land in which the lessor had only a life estate, covenants not to remove from the premises, but to use and spend thereon, the straw and manure made upon the land, the straw and manure do not become emblements on the death of the lessor and the consequent termination of the lease, but belong to the remainderman, as "accessories of the soil." [Gardner v. Perry, 6 O.L.R. 269, disapproved.] In a farm lease there is an implied provision, unless the contrary is expressed, that the tenant will till and manure in a good husbandlike and proper manner, and will spend, use and employ in a proper husbandlike manner, all the straw and manure which shall grow, arise or be made thereon, and will not remove or permit to be removed from the premises any straw or manure.

Atkinson v. Farrell, 8 D.L.R. 582, 27 O.L.R. 204.

(§ III B—53)—PERSONAL PROPERTY.

A collusive sale will not put an end to a tenancy under a lease under a stipulation whereby the lease was to terminate upon a sale of the demised premises.

Wood v. Saunders, 3 D.L.R. 342, 21 W.L.R. 195.

C. LIABILITY OF LANDLORD FOR DEFECTIVE OR DANGEROUS PREMISES.

(§ III C—55)—COVENANT AGAINST LIABILITY.

A lessor's covenant to supply steam for heating demised premises does not give him such possession and control of the heating system and radiators as to render him liable to a tenant as on an implied covenant to keep the premises in repair, for the fall of a radiator that was insecurely fastened to the ceiling, where the lease expressly negatived the lessor's duty to repair, and also relieved him from liability for all damages occasioned by defects in or accidents to any part of the heating plant or service. A lessor of unfurnished premises is not answerable for damages occasioned his tenant by reason of the defective condition thereof where the former did not covenant to keep them in repair, but expressly stipulated for freedom from responsibility for damages from such cause, and where the lease contained an acknowledgment that the tenant had examined the premises, and that no representations as to their condition or as to repairs had been made by the lessor. [Robbins v. Jones, 15 C.B.N.S. 221; Lane v. Cox, [1897] 1 Q.B. 415; Cavalier v. Pope, [1906] A. C. 428, and Chappell v. Gregory, 34 Beav. 250, followed.]

McIntosh v. Wilson, 14 D.L.R. 671, 23 Man. L.R. 653, 26 W.L.R. 91, 5 W.W.R. 644.

APARTMENT HOUSE — TENANTS — RIGHT TO USER OF HALLWAY—MEANS OF ACCESS FOR FRIENDS AND GUESTS—DANGEROUS OPENINGS—LIABILITY OF LANDLORD.

The tenants of suites in an apartment

house have the right of user of the hallway leading to their apartments not as mere licensees but as a right appurtenant to their tenancy; and their friends and guests using the same as a means of access are entitled to the same protection from dangerous openings left in the floor of the hallway insufficiently protected.

Wallich v. Great West Construction Co., 20 D.L.R. 553, 24 Man. L.R. 646, 29 W.L.R. 41, 6 W.W.R. 1404.

LIABILITY OF LANDLORD FOR DEFECTIVE OR DANGEROUS PREMISES.

The proprietor of a building which burns down owing to a defect in construction (e.g. a single brick chimney, one side of which is placed right along wood), which by law he is bound to know, is responsible in damages to his boarders for the value of their effects destroyed as a result of such fire.

Gervais v. Costello, 8 D.L.R. 510, 43 Que. S.C. 305.

RESPONSIBILITY OF LESSOR FOR ACCIDENT RESULTING FROM DECAY AND FALLING DOWN OF BUILDINGS—C.C. (QUE.) 1055, 1612, 1614—WANT OF REPAIRS—ORIGINAL DEFECT IN CONSTRUCTION.

Dubreuil v. Aboud, 18 Rev. de Jur. 301.

(§ III C—60)—TO THIRD PERSONS GENERALLY.

Breach by a tenant of a municipal by-law, requiring all wells to be fence-guarded or kept covered except when in use, by the "owner or occupant," does not render the equitable owner of the fee liable either for the penalty under the by-law or for damages for the tenant's neglect to comply therewith.

Love v. Machray, 1 D.L.R. 674, 22 Man. L.R. 52, 1 W.W.R. 925, 20 W.L.R. 505.

BY-LAW — PROTECTION AGAINST FIRE — INTERPRETATION — NOT APPLICABLE TO OTHER ACCIDENT.

A by-law of the city of Vancouver and the legislative authority to make it "for causing all lands, buildings, and yards to be put in other respects in a safe condition to guard against fire and other dangerous risk and accident" (Vancouver Incorporation Act (1886), c. 32, s. 142, ss. 54 as amended by statutes of 1887, c. 37, s. 17) and by-law 941, s. 37, in part as follows: "Shall have all public halls, stairways and passageways properly lighted," must be considered only with reference to fire protection and cannot be invoked in case of an accident not being referable to a fire.

McKinlay v. Mutual Life Ass'ce Co., 43 D.L.R. 259, 26 B.C.R. 5 at 14, [1918] 3 W.W.R. 1002, affirming 26 B.C.R. 5.

DEFECTIVE ELEVATOR—INJURY.

A landlord is not responsible for injuries resulting from the defective condition of an elevator upon premises in possession of a tenant, even though from time to time he sent his engineer to repair it, and although at the time of the demise, the elevator was out of repair or in a dangerous condition

Trainshi v. C.P.R., 25 B.C.R. 497, [1918] 2 W.W.R. 1034, 25 B.C.R. 536, [1918] 3 W.W.R. 281.

WARRANTY — DAMAGES — LESSEES' KNOWLEDGE.

Although a lessor may be liable for damages caused by reason of defects in the thing rented, which prevents or diminishes its use, the lessee has no remedy in damages when the defects are apparent and the lessee knew of them before taking the lease.

Villecourt v. Blais, 53 Que. S.C. 115.

(§ III C—63)—LEASE—SUBLEASE—DEFECTIVE PREMISES—INJURY TO PROPERTY OF SUBTENANT—RIGHTS OF PARTIES.

A lease under the Short Forms of Leases Act, R.S.C. 1914, c. 116, contained a clause under which the owner agreed to heat the demised premises "during all lawful working days to a reasonable extent." The lessor was not to be responsible for damages "during necessary repairs to the heating plant, nor if the parties under contract with the lessor to heat said building fail to do so, until he shall have received reasonable notice from time to time of the conditions, and shall have taken over the heating of the said building himself and shall have had a reasonable opportunity of remedying such conditions." The lessees sublet part of the premises to the plaintiff, who suffered damages through the freezing of the water pipes between Saturday and Monday morning during an unusually cold period. Held, that the sublessee did not incur any liability to the owner on the covenant of his immediate landlord to "repair, reasonable wear and tear only excepted," but took subject to the obligation of such immediate landlord, and had no right to look to the owner to repair any part of the demised premises. He and his immediate landlord took the premises as they were and were not entitled to damages for loss sustained owing to the defective condition of the premises. [Rylands v. Fletcher, L.R. 3 H.L. 330, distinguished.]

Hess v. Greenway, 48 D.L.R. 630, 45 O.L.R. 650.

(§ III C—65)—INJURY TO TENANT—USE OF FIRE-ESCAPE—DRYING CLOTHES.

There is no implied invitation or license to use a fire-escape for any other purposes than that for which it was intended, and a landlord is not liable for injuries sustained by a tenant by falling through an unrailed opening of a fire-escape while drying clothes thereon.

Thyken v. Excelsior Life Ass'ce Co., 34 D.L.R. 533, 11 A.L.R. 344, [1917] 2 W.W.R. 772.

TO TENANT'S EMPLOYEES—ICY ENTRANCE—CONDITION OF DOORS.

A landlord is not liable to an employee of a tenant of rooms in a building for injuries sustained in consequence of the jamming of an outdoor at the entrance to the building by ice on the approach thereto, of which landlord had no knowledge; an un-

wieldy door, otherwise properly constructed, is not a defect.

Erickson v. Traders' Building Assn., 31 D.L.R. 344, 27 Man. L.R. 209 at 218, [1917] 1 W.W.R. 272, affirming 26 D.L.R. 221, 27 Man. L.R. 209, 33 W.L.R. 372, 9 W.W.R. 989.

CONDITION OF PREMISES.

When a lease contains no express declaration that the leased premises are in perfect order, the lessee, who executed it after he entered into possession without any protest, may, in an action based on deteriorations to the premises, give evidence as to the condition in which they were when his occupation began.

David v. Bacon, 52 Que. S.C. 42.

(§ III C—70)—DUTY AS TO REPAIRS—DEFECTS—FLOODING—VIS MAJOR.

A lessor is obliged to provide against defects in the leased premises which prevent the enjoyment by the lessee, even those that are hidden (art. C.C. Que. 1614), but is not liable for damages through defects of which he was ignorant when the lease was made unless they have afterwards been made known to him, and he has neglected to make repairs, or they were known or ought to have been known to the lessee at the making of the lease. To establish the defence of vis major or the act of God, it is not necessary that the event should never have happened before, it is sufficient that its happening could not have been reasonably expected.

Bénard v. Hingston, 39 D.L.R. 137, 56 Can. S.C.R. 17, affirming 32 D.L.R. 651, 25 Que. K.B. 512.

REPAIRS—REMOVAL—DAMAGES.

Where a lessee of business offices sues in damages for injury resulting from improvements to the building, which compelled him to move his offices elsewhere, he cannot include in his damages the money he spent in publishing his new address throughout the province and elsewhere. An amount large enough to publish it locally is sufficient.

Le Credit Canada v. Waterman, 24 Rev. Leg. 406.

DEFECTIVE YARD—INJURY TO CHILD.

A tenant bound under a lease to make tenant's repairs, and under which the lessor is relieved from making any repairs whatever, has no cause of action against the landlord for injuries to her infant child caused by its tripping over a loose board in the floor of a yard used in common by all the tenants.

Brown v. Lamarre, 32 D.L.R. 738, 25 Que. K.B. 492.

(§ III C—72)—LEAKAGE IN SEWER PIPE—FAILURE TO REPAIR—LIABILITY OF LANDLORD.

Where a landlord leases a house to several tenants, he retains such control over the premises as to render him liable for damages caused by failure to repair a leak in a sewer pipe in the apartment of a tenant, in an upper flat, which causes damage to the tenant of a shop on the ground floor of the premises.

Brown v. Garson, 42 N.B.R. 354.

DUE TO FAILURE TO REPAIR.

Where the structure of a building, consisting of several tenements, requires a drain-pipe to draw off rain water from the roof of a part of it, the obligation of keeping it in order is primarily in the landlord. In answer, therefore, to a claim for damages by one of the tenants, caused by leakage of water that should have been carried off by the pipe, he cannot set up the defence that it was blocked by refuse or other matter thrown into it by the other tenants, "a trespass by third parties not pretending to have any right upon the thing leased (art. 1616, C.C. Que.)" for which he is not liable.

Cooper v. Holden Co., 44 Que. S.C. 525.

WANT OF REPAIR—DAMAGE TO TENANT'S GOODS BY FLOODING—ABSENCE OF COVENANT AND OF STATUTORY DUTY TO REPAIR—IMPLIED WARRANTY OF FITNESS—MISREPRESENTATION—COLLATERAL WARRANTY—AUTHORITY OF WARRANTOR.

Miles v. Constable, 11 O.W.N. 89.

(§ III C—73)—DEFECTIVE WATER SYSTEM—LEAKAGE.

Leakages of water occurring frequently through the ceiling from the upper to the lower floors of a building which was occupied by various tenants, but over which the proprietors had sole control of the construction and maintenance of the water system, may raise a presumption that there was a defect in maintenance for which the proprietors may be held liable in damages to their tenants, although the place was not rendered untenantable.

Alberta Loan & Investment Co. v. Bercuson, 21 D.L.R. 385.

(§ III C—80)—LIABILITY OF LANDLORD FOR DEFECTIVE PREMISES—FALL OF WATER TANK.

A landlord is liable for the damage caused a tenant by the unexplained collapse of a water tank on the roof of the demised building, although it was placed there for the latter's benefit.

Wolff v. Mackay, 12 D.L.R. 750.

HABITABLE CONDITION—EFFECTS STOLEN.

If at the time of entry on leased premises, especially if immediately after work has been completed by the lessor, the walls of a dwelling-house need to be papered or whitewashed, the lessee may, upon refusal of the lessor to do so, cause this work to be done and recover the cost of it from the owner. When a house is not habitable, either because the lessor has not made the necessary repairs or while he is actually making them, and the lessee, while not inhabiting the premises, has placed in them his furniture without locking it up, he has no remedy in damages against the owner

if the furniture is lost or stolen in the meantime.

Fauteux v. Beauvais, 49 Que. S.C. 141.

DAMAGE CAUSED BY RODENTS—RESILIATION OF LEASE.

The owner of a house leased as a private residence is liable for damages caused to the lessee by the rats which infest the leased premises, and the lease can be cancelled if the house has become unhabitable on this account, provided that the lessee is not in fault and has made every effort to destroy or banish them.

Bigonesse v. Bouchard, 48 Que. S.C. 406.

(§ III C—81)—ALTERATION OF BUILDING—LANDLORD'S CONSENT — ALTERATIONS NOT AUTHORIZED—DAMAGES.

The consent of a landlord to the tenant changing the external front of a building by making a one-store entrance with one door, does not authorize the tenant to make a two-store entrance with two doors—and although the value of the building may be increased, the landlord is entitled to damages for the unauthorized change.

Straus Land Corp. v. International Hotel Windsor, 48 D.L.R. 519, 45 O.L.R. 145.

(§ III C—84)—APARTMENT HOUSE—TENANTS NOTORIOUSLY UNFIT—DAMAGE TO OTHER TENANTS — LIABILITY OF LANDLORDS.

If a landlord of an apartment house leases apartments to persons notoriously unfit to be trusted with the care of same, e.g., because of drunken habits, the landlord may be held liable under Quebec law for damage caused the other tenants thereby, e.g., where the drunken tenant allows the water to overflow so that the rooms below are flooded.

Yonge v. Vineberg, 20 D.L.R. 137, 45 Que. S.C. 318.

D. AS TO RENT.

As preferential claim under Winding-up Act, see Companies, VI F—357.

Priority as to rent under attornment clause, see Levy and Seizure, III C—50.

Validity of agent's guaranty for rent, see Guaranty, I—2.

(§ III D—95)—DATE OF RENT—MEMORANDUM.

The words of a writing creating a tenancy prevail over any contrary indication afforded by the dates for the payment of rent.

McKay v. McDonald, 30 D.L.R. 609.

COVENANT—INSOLVENCY—FORFEITURE.

A provision in a lease that six months' rent shall become payable in advance in the event of the lessee's insolvency or his assignment for creditors is enforceable against the lessee if the tenancy had that period to run; it cannot be relieved against, as a penalty or forfeiture, where the lessor was compelled to lease the premises for the unexpired term at a reduced rent.

Cristall v. McKernan, 35 D.L.R. 452, 11 A.L.R. 593, [1917] 2 W.W.R. 1063.

REDUCTION IN RENT—FLOODING—VIS MAJOR.

A lessor who has been deprived of the use of a portion of the leased premises, by flooding through vis major, is entitled to a diminution of rent.

Hingston v. Bénard, 32 D.L.R. 651, 25 Que. K.B. 512. [Affirmed, 39 D.L.R. 137, 56 Can. S.C.R. 17.]

REPUDIATION OF LEASE—LANDLORD'S REMEDY.

On the repudiation of a lease by a lessee the lessor may recover damages therefor, his remedy not being limited to the enforcement of the payment of rent as it falls due.

Pulford v. Loyal Order of Moose, 14 D.L.R. 577, 23 Man. L.R. 641, 25 W.L.R. 868, 5 W.W.R. 452, reversing 9 D.L.R. 804.

AS TO RENT.

Where there is a proviso in a lease that if any of the goods of the lessee shall be at any time during the term seized and taken in execution by any creditor of the said lessee, the then current and next ensuing year's rent shall immediately become due, the landlord cannot give himself any rights under the proviso by procuring the seizure of the tenant's goods either by an execution of his own or that of another.

Jarvis v. Hall, 8 D.L.R. 412, 4 O.W.N. 232, 23 O.W.R. 282.

IN CASE OF ASSIGNMENT FOR CREDITORS.

Under a lease for a term of years containing a provision, that if the lessee make an assignment, three months' future rent should become due and payable and the lessor be at liberty to terminate the lease, does not entitle the lessor to rank as a creditor for the remainder of the term, above three months' if he does not terminate the lease.

Gardner v. Newton, 29 D.L.R. 276, 26 Man. L.R. 251, 23 W.L.R. 949, 10 W.W.R. 51.

RIGHTS AND LIABILITIES OF PARTIES—AS TO RENT—ACTION FOR—EFFECT OF LEVYING DISTRESS.

The plaintiff in an action for rent will not be nonsuited because of a distress levied before bringing action and held unsold when the action was begun, where the goods seized were sold some time before the trial and the defendant advised of the amount realized, so that he was fully aware of the sum claimed as remaining unpaid.

McKeown v. Lechtzier, 15 D.L.R. 15, 24 Man. L.R. 295, 5 W.W.R. 778, 26 W.L.R. 264. [Affirmed, 20 D.L.R. 986, 24 Man. L.R. 295 at 307.]

LIABILITY OF SUBLESSEE—TENDER.

A lessee sued for rent by his lessor has an action in warranty against his sublessee who has agreed to pay to the original lessor the rent due by the original lessee and discharge the latter. A tender of rent due for the last two months of a lease, made on the condition that the creditor gives a complete and final discharge, is irregular and illegal.

Renaud v. Pasquini, 52 Que. S.C. 28.

"RENTABLE VALUE"—CROPS.

In ascertaining what is the rentable value for a particular year of a farm rented for one third of the crops, in a locality where it is impossible to find a tenant who will pay a money rental, one can only take the result of the harvest for that year, whatever it was, and divide it by 3. "Rentable value," as the expression is used in the statute (6 Geo. V. (Man.), c. 21), means the gross amount for which the land can be rented without deducting anything for taxes paid by the mortgagee. If the statute had used the expression "net rentable value," the taxes would have to be deducted from the gross rent or income.

Holmes v. Barnett, 27 Man. L.R. 558, [1917] 2 W.W.R. 881.

RENT OF PLANT AT SUM PER DIEM—COMPUTATION OF DAYS—INCLUSION OF SUNDAYS.

The plaintiff rented to the defendants a certain plant; the rental stipulated in the written agreement was $62 per day, "to start immediately on outfit leaving main line and to run each and every day until the work is complete;"—Held, (Clute, J., dissenting), that, in computing the number of days to be paid for, Sundays were to be included. The provision in the contract "one day to constitute ten hours" was for the purpose of determining what should be paid in the event of the plant being worked longer than ten hours. [Gibbon v. Michael's Bay Lumber Co., 7 O.R. 746, followed.] Per Clute, J.:—Where a contract is open to two constructions, one of which contravenes a public statute and the other does not, it should be assumed that the parties did not intend to commit a breach of the law. The provisions of the agreement shewed that whatever days or parts of days were to be paid for were those days on which work could be done.

Perry v. Brandon, 32 O.L.R. 94.

RENT OF HOUSE OF ILL FAME—RIGHT OF RECOVERY—IMMORAL CONTRACT.

A lessor or proprietor has no right of action under an agreement for the rent or occupation of a house rented or occupied for purposes of prostitution.

Balthazar v. Quilliam alias Jackson, 23 Que. K.B. 46.

RENT OF FARM PAYABLE BY YIELDING PART OF CROP—DISTRESS FOR RENT—SEIZURE—AGREEMENT—SALE OF GRAIN—DIVISION OF PROCEEDS — ACCOUNTS — BALANCE.

Tocher v. Thompson, 28 W.L.R. 634.

LEASE OF FARM—RENT—EXCHANGE—INTERPRETATION—C.C. ART. 1013.

The rent stipulated in a lease dated September 11, 1916, of a cultivated estate, in which it is declared that the rent "shall be payable during the first part of March" without saying if the payment shall become due during the first part of March, 1917, or only after the harvesting of the first crop of the lessee, is not payable in advance and only becomes due in March, 1918.

St. James v. Perrier, 25 Rev. Leg. 238.

A lease in which it is stipulated that the rent shall be payable by monthly instalments of which the first shall become due on the first of the month, gives to the tenant the whole of the first day of each month, up to the hour of midnight, for the payment of the rent, for the preceding month.

Tourneur v. O'Sullivan, 50 Que. S.C. 274.

LEASE—RIGHT OF LESSEE TO PURCHASE DEMISED LANDS—FORFEITURE BY NONPAYMENT OF RENT—RECOVERY OF AMOUNT OF RENT.

Canada Co. v. Goldthorpe, 4 O.W.N. 1003, 24 O.W.R. 331.

TERM FOR PAYMENT—LAST DAY.

Decary v. Poulis, 12 Que. P.R. 211.

(§ III D—98a)—RESERVATION OF RIGHT TO SELL—TERMINATION.

A right reserved to the lessor in a lease "to sell the demised premises at any time, subject to the right of the lessee to the crops sown prior to sale," includes by implication the right to terminate the lease on a sale being made although the lease itself did not expressly declare that a sale should have that effect.

Wood v. Saunders, 3 D.L.R. 342, 21 W.L.R. 195.

(§ III D—99)—INCOMPLETE LEASE—SURRENDER OF POSSESSION.

If the agreement for a lease is one of which specific performance will be ordered, the tenant holding under such agreement is not merely a tenant from year to year, but stands in the same position as to liability as if the lease had been executed; so where the tenant had not been given possession of all of the premises in pursuance of the agreement and the landlord would in consequence be disentitled to specific performance, the tenant may repudiate the agreement, and, on doing so promptly and vacating the premises, will not be liable for rent except for the time of his actual occupation.

Crichton's v. Green, 23 D.L.R. 345, 8 S.L.R. 79, 8 W.W.R. 224, 30 W.L.R. 702.

APPORTIONMENT — RETAKING POSSESSION—NOTICE OF RELETTING.

Section 4, c. 156, R.S.O. 1914, declaring all rent to accrue from day to day, and to be so apportionable has changed the common law rule by which rent was not due in respect of an intermediate broken period: and under the statute the landlord may recover rent up to the time when he re-entered on his acceptance of the tenant's surrender when the latter gave up possession and gave the landlord notice to that effect. [Harteup v. Bell, Cab. & El. 19, and Elvidge v. Meldon, 24 L.R. Ir. 91, followed; Hall v. Burgess, 5 B. & C. 332, distinguished.]

Where the landlord is notified by his

tenant that the latter has given up the demised premises, and the landlord desires to preserve his claim against the tenant under the lease and at the same time relet, he should notify the tenant that he is reletting on such tenant's account.

Crozier v. Trevarton, 22 D.L.R. 199, 32 O.L.R. 79.

RENT—DISTRESS—AFTER RETAKING POSSESSION.

A stipulation in a lease that, on breach of covenant by the lessee, three months' accelerated rent may be forthwith distrained for as "rent in arrear," and that the term may be forthwith forfeited, does not entitle the lessor to both remedies concurrently; the two remedies are necessarily repugnant to each other, and if the landlord elects to forfeit the term, he loses his right to distrain as for three months' rent in arrear, in the absence of any clause authorizing the lessor to keep the term in existence for the purpose of making a distress (as to which the continuance of the term is essential under Manitoba law) and at the same time to declare it forfeited in other respects.

Stanley v. Willis, 16 D.L.R. 549, 24 Man. L.R. 192, 6 W.W.R. 498, 27 W.L.R. 791.

A tenant is not liable for rent of demised premises after he has been evicted therefrom by his landlord.

Shepherd v. Ross, 4 D.L.R. 432, 21 W. L.R. 259.

AFTER RETAKING POSSESSION—AFTER SURRENDER BY TENANT.

A tenant who surrendered demised premises at the middle of a month, and at the same time gave notice of the termination of the tenancy, is liable for a full month's rent.

Burgoyne v. Mallett, 5 D.L.R. 62, 21 W. L.R. 566.

RENT—AFTER SURRENDER OF PREMISES.

Where a lessor, as a consideration of a settlement agreement in respect of an action by a lessee for the cancellation of a lease, agreed to accept as tenant for the remainder of the term, a third person, who was in possession of the demised premises by permission of the lessee, and from whom the lessor afterwards accepted payments of rent, as tenant for the remainder of the term, the original lessee is released from liability for rent subsequently accruing, notwithstanding that the new tenant did not execute as agreed a new lease which he was willing and had offered to sign, where the omission to submit a new lease to be signed was wholly due to the lessor's neglect, and the latter had retained the benefits he had received upon the settlement of the original lessee's action.

McKeown v. Lechtzier, 15 D.L.R. 15, 24 Man. L.R. 295, 5 W.W.R. 778, 26 W.L.R. 264. [Affirmed, 20 D.L.R. 986, 24 Man. L.R. 295, at 307, 28 W.L.R. 558.]

ABANDONMENT OF PREMISES.

A lessor who, before the expiration of his lease, abandoned the premises but paid the rent for the full term, has a right of action to recover from his lessor the rent received under a new lease for the unexpired portion.

Vallerand v. Lachance, 43 Que. S.C. 526.

ACTION FOR RENT—TENANT ABANDONING PREMISES—WANT OF REPAIR—RIGHT TO RENT — COUNTERCLAIM — DAMAGES — ABSENCE OF COVENANT TO REPAIR.

Scott v. Parade, 15 O.W.N. 441.

(§ III D—100)—PART OF CROPS.

A tenant is not in default in the payment, as rent, of part of the crops raised on demised premises, because of his failure to deliver them, on demand of his landlord, in a manner different from that specified in the lease.

Shepherd v. Ross, 4 D.L.R. 432, 21 W. L.R. 259.

Plaintiff leased certain land to one Jack under lease providing that the rent was to be one-third of the crop grown upon the land during the term, to be delivered on the day of threshing, the threshing to be done on or before the 1st of November in every year. The defendant, as execution creditor of Jack, having seized the crop after it had been threshed, an interpleader issue was directed, on the trial of which judgment was given for the defendant. On appeal:—Held, under the terms of the lease the rent was due when threshed, and the crop having been seized after threshing the landlord's share had been vested in him. The rent being expressed to be one-third the crop, this was a certainty, because the amount threshed could be ascertained, and there being a fixed standard and prices for grain, the amount of rent could easily be ascertained. That the protection afforded to landlords by the provisions of 8 Anne, c. 14, applies to rent payable otherwise than in money, it being well recognized that while rent must always be a profit, it need not be payable in money.

Foster v. Moss, 4 S.L.R. 421.

RENT PAYABLE BY SHARE OF CROPS—ASCERTAINMENT OF QUANTITIES.

Malfaire v. Schultz, 18 W.L.R. 407.

RENT PAYABLE BY SHARE OF CROP—RENT REDUCIBLE TO SPECIFIC SUM OF MONEY —8 ANNE CH. 14—SEIZURE OF GRAIN BY EXECUTION CREDITOR—CLAIM OF LANDLORD.

Foster v. Moss, 17 W.L.R. 174.

FARMING ON SHARES—DIVISION OF CROP—ACCOUNTING FOR GRAIN STORED.

Findlay v. Falconer, 17 W.L.R. 167.

LEASE EXECUTED AS SECURITY FOR PAST INDEBTEDNESS AND FUTURE ADVANCES—SHARE OF CROP RESERVED AS RENT.

Stikeman v. Fummerton, 16 W.L.R. 502.

(§ III D—101)—RIGHT OF SUBLESSOR.

A lessee, who has sublet or transferred his lease and who sues his sublessee, cannot require the latter to pay him the rent due if he has not himself paid it; he can

only ask that the sublessee be obliged to pay it to the principal lessor and give him a discharge, and in default pay him a corresponding indemnity.

Lapointe v. Original Salvador Co., 49 Que. S.C. 243.

(§ III D—105) — PREFERENTIAL LIEN — ACCELERATION CLAUSE—DISTRESS.

In case of an assignment for the general benefit of creditors, a landlord is only entitled, under s. 38 (1) of the Landlord and Tenant Act (R.S.O. 1914, c. 155), to a preferential lien for arrears of rent "for" the period of one year next preceding and for the three months following the assignment, despite an acceleration clause in a lease providing that in case of events which happened rent for a longer period should become due and payable. The landlord's right to distrain is not taken away.

Alderson v. Watson, 28 D.L.R. 588, 35 O.L.R. 564. [See also 31 D.L.R. 259, 36 O.L.R. 502.]

PRIORITIES — EXECUTION CREDITORS—ACCELERATION CLAUSE.

Under 8 Anne, c. 14, the rent for which the landlord is granted priority over execution creditors must not only be due, but must be in arrear at the time of the sheriff's seizure; an acceleration clause in the lease whereby the current year's rent should immediately become "due and payable" and the term become forfeited on the lessee's goods on the demised premises being seized or taken in execution, does not give this priority for the accelerated rent, as it would not be in arrear under the statute of Anne until the day following the day when it became due.

Sawyer-Massey Co. v. White, 21 D.L.R. 454, 8 S.L.R. 108, 8 W.W.R. 493, 30 W.L.R. 873.

CROP-SHARING LEASE—MORTGAGEE AND EXECUTION CREDITORS.

Where a mortgage of farm land gives to the mortgagee the right on default of payment to enter into possession, to collect the rents and profits and to make a lease of the land at such rent as the mortgagee thinks proper, it is competent for the mortgagee to enter into possession and to make a crop-sharing lease to the mortgagor who thereby waives service of a formal notice under s. 93 of the Land Titles Act, Sask., and the share of the grain to which the lessor is entitled under such lease is a valid preferential claim for rent under the Landlord and Tenant Act, 8 Anne, c. 14, as against execution creditors of the tenant mortgagor. [Foster v. Moss, 4 S.L.R. 421, applied; Smith v. National Trust Co., 1 D.L.R. 698, 45 Can. S.C.R. 618, distinguished.]

Rollefson v. Olson, 21 D.L.R. 671, 8 S.L.R. 143, 8 W.W.R. 481, 31 W.L.R. 157.

TENANT'S ASSIGNMENT FOR CREDITORS — STATUTORY LIEN OF LANDLORD—LIMITATIONS.

Under the Landlord and Tenant Act, R.S.O. 1914, c. 155, s. 38, the landlord, in case of an assignment by the tenant for the benefit of creditors, has a statutory lien upon goods available for distress, independent of actual distress or possession, for the amount of rent due, but limited to the period of one year next preceding and for the three months following the assignment. [Lazier v. Henderson, 29 O.R. 673; Tew v. Toronto Savings & Loan Co., 30 O.R. 76, followed.]

Re Fashion Shop, 21 D.L.R. 478, 33 O.L.R. 253.

LANDLORD'S LIEN.

Where a sheriff's sale under a writ of execution against the tenant, with the assent of the landlord, is held upon the demised premises, the landlord himself becoming the purchaser, he is entitled, notwithstanding such assent, to offset his claim for rent against the claim for the purchase price of the goods, and is not driven to an action on the case against the sheriff. [Green v. Austin, 3 Camp. 260, distinguished.]

Ingraham v. McKay, 8 D.L.R. 132, 46 N.S.R. 518, 12 E.L.R. 225.

LANDLORD'S LIEN FOR RENT—C.C. (QUE.)—ART. 1623.

Holstein v. Knopf, 10 D.L.R. 843, 19 Rev. Leg. 374, 44 Que. S.C. 49.

ASSIGNMENT FOR CREDITORS—PREFERENTIAL LIEN FOR RENT—"EXECUTION OF ASSIGNMENT."

In s. 38 of the Landlord and Tenant Act, R.S.O. 1914, c. 155, providing that in case of an assignment for the general benefit of creditors by a tenant the preferential lien of the landlord for rent shall be restricted to the arrears of rent during the period of one year next preceding and for 3 months following the "execution of the assignment," the words quoted are used in their strict legal sense, and mean the completion of the deed of assignment by delivery as well as by signing and sealing. Where a deed of assignment was signed and sealed by the assignor on the day on which a month's rent in advance was due, but was not completed nor intended to be completed by delivery to the assignee until the following day, and was not actually completed until the day next after that, it was held (the month's rent not having been paid), that rent was in arrear at the first moment of time of the day after the gale-day; and, there never having been any intention that the deed should be handed to the assignee until after the commencement of business on that day, there were arrears when the deed was "executed," and the landlord was entitled to a preferential lien for 4 months' rent; the rule as to disregarding fractions of a day having no application in such a case.

Re Metropolitan Theatres; Magee Real Estate Co.'s Claim, 40 O.L.R. 345.

LESSOR'S LIEN—FRAUDULENT REMOVAL OF EFFECTS—FOLLOWING—DELAY.

A lessee, his surety, or any other person, who had fraudulently removed effects subject to the lessor's lien in order to carry them to some other place, cannot take advantage of the expiration of the delay mentioned in art. 1623 C.C. (Que.) for the exercise of a saisie-gagerie by the right to follow the effects; the new owner alone can do so.

Brunet v. Raynault, 49 Que. S.C. 228.

LANDLORD'S LIEN—NOTICE.

Either legal notice served upon the landlord as to the proprietorship, by a third person, of goods on the premises of a tenant, or knowledge of the landlord that such is the case, will be sufficient to deprive the landlord of his privilege upon these goods. Where a property changes hands and the lease in force at the time when such a notice was given has expired, and a new proprietor leases the property and the same tenant remains in possession, the new proprietor being wholly ignorant of the existence of any such notice, the privilege of the new proprietor is not affected, and a new notice must be given.

Harbour Commissioners of Montreal v. Mathurin, 49 Que. S.C. 272.

LIEN OF LESSOR.

A lessee who agrees by his lease not to remove from the leased premises the movables which secure the past or future rent, cannot remove a portion of his movables even when he apparently leaves enough to secure the lessor.

Vanier v. Bonenfant, 48 Que. S.C. 363.

LIEN FOR RENT—INSOLVENCY.

The lien of the lessor is a real right of pledge, a jus in re on the effects placed in the house, whether under a lease in authentic form, a lease sous seign prive, a verbal lease, or one expressed or implied. It follows that if the lessee fails to perform any of his obligations, even though no rent should be due, the lessor can seize the effects, in the case of insolvency, when the lessee loses the benefit of the term. Between the lessor and lessee, art. 2005 C.C. Que. respecting the extent of the lien, does not apply; and when it is agreed in a lease made to a stock company that on default in paying the rent or fulfilling certain other obligations the lessor will have the right to claim the balance of the rent up to the end of the term he can claim by privilege all the balance of rent agreed for if the company is put in liquidation.

Paré v. Warwick Pants Mfg. Co., 47 Que. S.C. 60.

SAISIE-GAGERIE — PRIORITIES — INTERVENTION.

When a lessor has taken a saisie-gagerie against his lessee for rent, and subsequently a third party owner of the effects seized causes them to be revendicated and a new guardian appointed, the lessor himself, and not only the first guardian, has a right to intervene in this latter cause and demand that the movables seized be returned to him to satisfy his privileged claim.

Sonenblum v. Insenga, 47 Que. S.C. 111.

ASSIGNMENT BY TENANT FOR BENEFIT OF CREDITORS—LANDLORD'S CLAIM FOR FUTURE RENT—CLAIMS OF CREDITORS—DISTRIBUTION OF INSOLVENT ESTATE—PRIORITIES — LANDLORD AND TENANT ACT, R.S.O. 1914, c. 155, s. 38—DAMAGES — COSTS — INJUNCTION — JUDGMENT.

Alderson v. Watson, 9 O.W.N. 90.

LIEN FOR—INVALID LEASE—COMPANY.

Where a monthly tenancy of a building owned by a director is attempted to be created at a meeting of directors where the only directors present are the owner director and another, and the company goes into possession of the premises, the owner director cannot distrain, nor by reason of distress gain priority in a subsequent winding-up.

Re D. & S. Drug Co., Donald's Claim, 10 W.W.R. 612.

(§ III D—110)—DISTRESS FOR RENT—CONDITIONAL SALE AGREEMENT—SEIZURE AND SALE OF GOODS BY LANDLORD.

Section 4 of the Act respecting distress for rent and extra judicial seizures, R.S.S. c. 51, does not impair the right of a landlord to distrain on goods on the premises in the possession of the tenant under a conditional sale agreement. It only restricts the landlord's right as to the extent of the interest in the goods which he can sell. There is nothing in the Act which takes away the right of the landlord to distrain upon and seize and impound the goods for the purpose of selling that interest.

Theatre Amusement Co. v. Reid, 46 D.L.R. 498, [1919] 2 W.W.R. 63, reversing [1919] 1 W.W.R. 482.

AGREEMENT—LEASE FOR PERIOD — OPTION TO PURCHASE AT END OF LEASE—RENT PAYABLE AT END OF TERM—DISTRESS FOR RENT DURING TERM—ILLEGALITY.

By an agreement between a town corporation and a manufacturing company the corporation gave the company a five years' option to purchase land leased to it for that period for manufacturing purposes—an annual rental was to be paid at the end of the term if the purchase was not completed, or pro rata at any earlier period at which the option was relinquished. Before the expiration of the five years, the company sold some of its machinery and was preparing to sell the balance when the corporation distrained for rent due under the agreement, and the contents of the factory were seized and sold. The court held that as the company had not relinquished the option there was no rent due and that the distress was illegal.

Cobourg v. Cyclone Wover Wire Fence Co., 44 D.L.R. 34, 57 Can. S.C.R. 289.

DISTRESS — PRIORITIES — "MORTGAGE FROM TENANT."

A chattel mortgage by one who became a tenant after the mortgage was executed is not a mortgage "from a tenant," within the meaning of s. 4, c. 34, Con. Ord. 1898, and the goods are not liable for distress for rent. [Re Calgary Brewing & Malting Co., 25 D.L.R. 859, followed.]

Abbott v. Dahle, 33 D.L.R. 207, 10 A.L.R. 460, [1917] 1 W.W.R. 1303.

MORATORIUM—WAR RELIEF ACT.

Distress for rent is a "proceeding" within the prohibitory provisions of the War Relief Act (Man. 5, Geo. V., c. 88, s. 2, as amended by 6 Geo. V., c. 122).

Nicholson v. Gregory, 31 D.L.R. 235, [1917] 1 W.W.R. 304.

PARTITION WALL—CLOSED DOOR—OBSTRUCTION—RIGHT OF TENANT TO REMOVE—RIGHT TO DELEGATE AUTHORITY — DISTRESS FOR RENT.

A tenant has the right to remove an obstruction placed by him against a door in the wall between the premises occupied by him and the adjoining premises, and may permit the landlord's bailiff to do so, and after such removal the entry by the bailiff being without a breaking a distress for rent is legal. [Gould v. Bradstock, 4 Taunt. 562, 128 E.R. 450, applied.]

McKay v. Douglas, 44 D.L.R. 570, 57 Can. S.C.R. 453, reversing 40 D.L.R. 314.

MORATORIUM—VOLUNTEER AND RESERVISTS —CORPORATION.

The Vounteers and Reservists Relief Act (Alta.) applies to a distress under a lease created before the passing of the Act although possession was taken afterwards; but the protection afforded by the statute does not extend to a distress against the goods of a corporation of which the volunteer is the principal shareholder.

Re Hulbert & Mayer, 31 D.L.R. 330, 11 A.L.R. 239, [1917] 1 W.W.R. 380.

CHATTEL MORTGAGE—INTERPLEADER.

Under s. 5 of the Distress Act, R.S.M., 1913, c. 55, "crops and grain" are not excepted from distress for rent in favour of a person claiming under execution or attachment against the tenant; nor are goods and chattels other than crops and grain on the premises of a tenant excepted in favour of a person whose title is derived from the tenant; but such goods and chattels on the premises subject to a mortgage given by a third party, from whom the tenant has acquired the equity of redemption, are excepted from distress, in favour of the mortgagee.

Enright v. Little, 30 D.L.R. 578, 27 Man. L.R. 80, [1917] 1 W.W.R. 123.

CONSTRUCTIVE SEIZURE — PRIORITY—LIQUIDATOR.

A verbal arrangement between the local agent of a corporation tenant and the landlord's agent collecting the rent, that the furniture should remain on the premises until the rent was paid and that meanwhile the landlord will not enforce the power of sale or distress with respect thereto, and the landlord keeping the furniture locked up on the premises, the arrangement having been made prior to the winding-up order against the tenant, of which neither parties had knowledge at the time, constitutes constructive seizure and distress which will entitle the landlord to hold the furniture for the rent as against the liquidator. [Wood v. Nunn, 5 Bing. 10; Cramer v. Mott, L.R. 5 Q.B. 357, applied.]

National Trust Co. v. Leeson, 26 D.L.R. 422, 9 A.L.R. 245, 33 W.L.R. 587, 9 W.W.R. 1132.

APPORTIONMENT ACT.

A proviso in a lease that "if any Act preventing the sale of intoxicating liquors should come into force during the currency of this lease the rental to be paid shall be determined by arbitration" applies only to rent falling due after the happening of the event, and the landlord has the right to distrain for rent payable in advance, though for a term which includes some time after the Act came into force. The Apportionment Act, R.S.O. 1914, c. 156, does not apply to rent payable in advance.

Re Little and Beattie, 34 D.L.R. 217, 38 O.L.R. 551.

LANDLORD AS PURCHASER—APPRAISEMENT.

In a sale under a distress for rent the landlord cannot become a purchaser; the sale is also void for want of appraisement as required by s. 7 of the Distress Act (R.S.B.C. 1911, c. 65, as amended in 1915, c. 18).

Shore v. Wilson, 35 D.L.R. 293, 23 B.C. R. 33.

IRREGULARITY—LANDLORD AS PURCHASER.

A clerical irregularity in a warrant of distress, or the landlord's bidding at the sale, does not invalidate the distress ab initio; the principle that a landlord cannot be a purchaser affects only the title and not the proceedings.

Gordon v. Sime, 37 D.L.R. 386, 44 N.B.R. 535.

MORTGAGE.

The right of distress is not an incident of a mortgage unless created by special covenant. When exercised as a remedy it has the effect of suspending the debt distrained for until the sale.

Fawell v. Andrew, 34 D.L.R. 12, 10 S.L.R. 162, [1917] 2 W.W.R. 400. [Amended to correct a mistake as to costs, 36 D.L.R. 408, 10 S.L.R. 320, [1917] 3 W.W.R. 174.]

ILLEGAL ACT BY BAILIFF—LANDLORD'S LIABILITY.

A landlord's warrant to his bailiff to distrain for arrears of rent does not authorize the latter to commit an illegal act, and trespass committed thereunder by the bailiff, not at the instance or for the ben-

eft of the landlord, does not import any liability in trespass against the latter.

Ritchie v. Snider, 17 D.L.R. 31, 28 W.L.R. 735.

LANDLORD'S AUTHORITY TO BAILIFF — AS GOVERNING LANDLORD'S LIABILITY.

The landlord who has merely authorized a lawful distress for rent is not liable for the seizure by his bailiff of goods not subject to distress unless he has in some way confirmed such seizure.

Goldberg v. Rose, 19 D.L.R. 703.

STIPULATION TO KEEP UP STOCK—ENFORCEABILITY, INJUNCTION.

A provision in a lease whereby the tenant, a retail merchant, binds himself to keep on the demised premises at all times goods enough to cover four months' rental under distress will not be specifically enforced by the court, and an injunction restraining the tenant from reducing his stock will be refused on the ground that the court would, contrary to practice, thereby be assuming to superintend the execution of the stipulation from day to day during the tenancy. [Phipps v. Jackson (1887), 56 L.J. Ch. D. 550, applied.]

Hill v. Fraser, 18 D.L.R. 1, 7 A.L.R. 464, 29 W.L.R. 458, 7 W.W.R. 131.

TRESPASS IN EXECUTING.

Where there has been an abandonment of a seizure under a landlord's distress warrant it will not constitute a defence to an action for trespass based on a subsequent removal of the goods, especially where the right to a fresh distress, if any, had expired.

Ritchie v. Snider, 17 D.L.R. 31, 28 W.L.R. 735.

FORFEITURE.

The provisions of the Imperial Statute, 8 Anne, c. 18 (Landlord and Tenant Act), allowing a distress for rent to be made within six months after the determination of the lease, do not apply where the tenancy has been put an end to by forfeiture thereof under a notice of forfeiture for breach of conditions given by the landlord under the terms of the lease.

Stanley v. Willis, 16 D.L.R. 549, 24 Man. L.R. 192, 27 W.L.R. 791, 6 W.W.R. 498.

PRIORITY OF LANDLORD—ACCELERATION OF RENT—8 ANNE. C. 14, S. 1.

A clause in a lease providing that if the lessee's goods on the land liable to distress should at any time be seized or taken in execution, then the current years' rent should immediately become due and payable, does not entitle the lessor to claim a year's rent in priority to the execution creditors under 8 Anne, c. 14, s. 1.

Sawyer-Massey Co. v. White, 7 W.W.R. 671.

WRONGFUL SEIZURE — DAMAGES — INJUNCTION.

Wright v. Fitzpatrick, 16 D.L.R. 883, 27 W.L.R. 738.

DISTRESS.

Under R.S.S. c. 51, s. 4, providing that a landlord shall not distrain for rent on the goods and chattels of any person, except the "tenant or person who is liable for the rent," the landlord cannot distrain upon the goods of a sub-tenant for rent due from the original lessee.

Anderson v. Scott, 8 D.L.R. 816, 6 S.L.R. 8, 22 W.L.R. 876, 3 W.W.R. 609.

DISTRESS FOR RENT—COSTS OF DISTRESS—POUNDAGE CHARGES.

A sheriff acting as the landlord's bailiff in a distress for rent is not entitled to poundage or commission under the Distress Act, R.S.B.C. 1911, c. 65, where all that he does after distraining the goods is to hold possession of them for a day; his lawful charges are in such case the fee for levying and for a man in possession. Where the tenant distrained upon for rent settles the claim and cost by payment before the expiration of the limited time for which the goods must be held before the landlord can legally proceed to a sale thereof, such payment by the tenant is not equivalent to a resale by the landlord or his bailiff to the tenant so as to entitle the landlord's bailiff to a commission in the nature of poundage upon their value.

Bancroft v. Richards, 9 D.L.R. 77, 18 B.C.R. 38, 23 W.L.R. 73, 3 W.W.R. 825.

INVALIDITY OF SEIZURE AND SALE—DETINUE.

Barlow v. Breeze, 31 D.L.R. 280, [1917] 1 W.W.R. 270.

PROCEEDS OF DISTRESS — PRIORITIES — ASSIGNEE FOR CREDITORS—MORTGAGEE.

Alderson v. Watson, 31 D.L.R. 259, 36 O.L.R. 502. [See also 28 D.L.R. 588, 35 O.L.R. 564.]

EFFECT OF NONCOMPLIANCE WITH STATUTE.

Under the Distress Act, R.S.M. 1913, c. 55, a party distraining is to give a copy of demand and of all costs and charges of the distress to the person whose goods are seized, but failure to comply with this statutory provision does not make the distress illegal, although it may render irregular the sale of the goods distrained.

McDermott v. Fraser, 23 D.L.R. 430, 25 Man. L.R. 298, 8 W.W.R. 196.

ILLEGAL DISTRESS—LIABILITY OF LANDLORD AND BAILIFF.

An action for illegal distress should be brought against the bailiff who committed the act complained of, and not against the landlord, unless it be shewn that the latter authorized the wrongful act or sanctioned and ratified it after it came to his knowledge, or unless he chooses to take upon himself without inquiry the risk of any irregularity which the bailiff may have committed and to adopt all his acts.

Zarr v. Confederation Life, 22 D.L.R. 97, 8 S.L.R. 159, 31 W.L.R. 18, 8 W.W.R. 365.

DISTRESS FOR RENT—EXCESSIVE SEIZURE—LIABILITY OF LANDLORD.

Seigman v. Miller, 25 D.L.R. 805, 9 W. W.R. 729.

DISTRESS FOR RENT—RIGHTS OF CHATTEL MORTGAGEE.

Re Calgary Brewing & Malting Co., 25 D.L.R. 859, 9 W.W.R. 563, 33 W.L.R. 68.

PROPERTY OF WIFE—NOTICE.

A wife separated as to property can properly give to a lessor the notice mentioned in art. 1622, C.C. (Que.) when she is the owner of the effects of a house rented by her husband and occupied by both.

Royal Trust Co. v. Keating, 48 Que. S.C. 516.

LOSS OF DISTRESS—SALE UNDER EXECUTION.

Where the property had been sold, there was nothing in the sheriff's hands upon which the distress could be made.

Douglas v. Vivian, 20 D.L.R. 919, 7 S.L. R. 80, 7 W.W.R. 59.

EFFECT OF WINDING-UP RESOLUTION.

A landlord is not deprived of his right to distrain nor of his right to priority upon the goods of a tenant company by winding-up resolution.

Re Calgary Furniture Store, 9 W.W.R. 1.

SALE OF GOODS DISTRAINED FOR RENT—DUTY TO SECURE BEST PRICE OBTAINABLE—EXCESSIVE DISTRESS — EVIDENCE OF VALUE—LANDLORD BIDDING AT SALE—DAMAGES.

A landlord who proceeds to sell the goods of his tenant distrained upon for rent is bound to endeavour to secure the best price obtainable for them.

Where it appeared from the evidence that the distress was excessive; that the goods, taken at cost price, were worth $500; that they were disposed of for a sum much below their actual value, and that the landlord himself was a purchaser at the sale, and subsequently disposed of the goods so purchased at a private sale, the court declined to interfere with the judgment entered by the Trial Judge in plaintiff's favour for $300 damages.

Duchemin v. McKay, 52 N.S.R. 225.

QUEBEC PRACTICE.

A plaintiff who, in an action for rent, proceeds by way of saisie-gagerie only exercises his right. If he makes a mistake he incurs only the penalty of costs. Failure to make a demand for payment of the rent prior to the action does not necessarily imply malice on the part of the plaintiff if, in proceeding by an action for cancellation of the lease and for damages, the defendant has given him reason to believe that he would have refused to pay if it had been legally demanded.

Bourbeau v. Guillemette, 52 Que. S.C. 224.

PROCEDURE — DISTRESS — DECLARATION DEPOSITED IN COURT OFFICE — EXTENSION OF SUMMONS — PARTIAL REMOVAL OF MOVABLES—RENT NOT EXIGIBLE—DISTRESS PRESERVED—C.C.P. (ARTS. 175, 909, 952, 953, 954, 1153).

When the plaintiff in a summary action accompanied by distress summoned the defendant to appear in an extension to an intervening day, he preserved the right to complete his summons by leaving a copy of the declaration with the defendant himself or in the office of the court within the three days which follow the legal notice of the brief. If the defendant suffers any prejudice by reason of this mode of procedure, the court can order a new notification where a tenant has removed part of his effects and is on the point of removing the rest, the lessor has the right to exercise at the same time at his option the ordinary distress and the distress by right consecutively.

In the case one or the other of these measures can be adapted as a preservative measure, although no rent is due, for the sole reason of preserving the security of the landlord for future terms of rent.

Poulin v. Larueche, 28 Que. K.B. 458.

DISTRESS—APPRAISEMENT — DAMAGES FOR ILLEGAL DISTRESS.

A sale of goods upon a distress for non-payment of rent is illegal under 2 W. & M. c. 5, s. 2, if there has not been an appraisement of the goods by two sworn appraisers, and the tenant will be entitled to recover the real value of the goods: i.e., their full value to him, less the rent and expenses.

Dewar v. Clements, 20 Man. L.R. 212.

DISTRESS—GOODS OF THIRD PERSONS—NOTICE TO LANDLORD.

A landlord is presumed to know that the goods of travelers in a hotel, articles sent to a workmen's premises to be repaired there or to an auctioneer to be sold there, are not upon the leased premises except "transiently or accidentally" (art. 1622, C.C. Que.). It is not so, however, with regard to things delivered to the tenant for trial, or with a promise of sale, or in virtue of a sale with a suspensive condition and with retention of the right of ownership; these latter are subject to the privilege of the landlord unless the third person who owns them has given notice to the landlord of his right to the ownership of such articles, or if the landlord has acquired knowledge of such fact. From the time when the third person, owner of movables which furnish the leased house, has given notice to the landlord of his right of ownership in such movables, the privilege of the landlord ceases.

Hyatt v. Herlihy, 50 Que. S.C. 163.

EXEMPTION — RENUNCIATION — GOODS OF THIRD PERSON.

A tenant may verbally renounce the privilege of exemption from the seizure of

goods and furniture with which he has furnished the premises leased, even as to movable effects of which he would not become owner until after the payment of the price thereof, if the third party owning them has not informed the landlord of his rights therein. The owner, not having notified the landlord of his rights therein, cannot plead that the renunciation had been made in fraud of his rights.

Viel v. Decelles, 50 Que. S.C. 297.

LIABILITY FOR ILLEGAL ATTACHMENT — MALICE—DAMAGES.

There is malice in the act of a lessor who, without previously claiming his rent, proceeds to have the effects of his lessee seized by way of attachment for rent, whilst a suit is pending against the lessee for the cancellation of the lease. A lessee whose effects have been seized in virtue of an illegal attachment for rent is entitled to claim from the seizing party real and vindictive damages.

Bourbeau v. Guillemette, 53 Que. S.C. 194.

SALE OF GOODS — LIABILITY — DAMAGES.

A lessor cannot, because his lessee has abandoned his house, without legal process, enter the leased premises, take away goods which he finds there, and sell them to another. If he does so, he must reimburse the lessee the value of the goods, less the rent due and the damages sustained by him, which he can set off by virtue of his privilege of lessor, against the goods sold.

Tie Tie v. Desnoyers, 54 Que. S.C. 348.

GOODS OF SUBTENANT — EXCESSIVE DISTRESS — SALE OF GOODS DISTRAINED — AMOUNT REALIZED MORE THAN SUFFICIENT TO PAY RENT — FINDING OF FACT OF TRIAL JUDGE — DISTRESS FOR TAXES — PAYMENT BY HEAD TENANT — RIGHT TO DISTRAIN GOODS OF SUBTENANT — RIGHT OF SUBTENANT TO SURPLUS PROCEEDS OF SALE — LEAVE TO AMEND — REFUSAL.

Mundey v. Reid, 11 O.W.N. 238.

LEASE — OPTION OF PURCHASE — RELINQUISHMENT — DISTRESS FOR RENT — CHATTELS SEIZED BOUGHT IN BY LANDLORD — PROPERTY NOT PASSING — DAMAGES — LOSS OF CREDIT FROM WRONGFUL SEIZURE — NOMINAL DAMAGES — COSTS.

Cyclone Woven Wire Fence Co. v. Colbourg, 13 O.W.N. 236, reversing 12 O.W.N. 364.

GOODS SOLD CONDITIONALLY — BAILMENT.

Where the property in goods passes to the purchaser, but subsequently by express verbal arrangement goes back to the vendor, but the goods are left on the premises of the purchaser as bailee for the vendor, the former having the right to take and pay for such of them as he may have occasion to use in his business, the title to such goods is derived by purchase from the purchaser within the meaning of R.S. S. 1909, c. 51, s. 4, and they are liable to be taken to satisfy a claim for rent on the part of the landlord of the purchaser.

Libby v. Laird, 10 W.W.R. 473.

SUM OF MONEY NAMED IN WARRANT — ACCELERATION CLAUSE IN LEASE—WAIVER OF — EXCESSIVE DISTRESS — DAMAGE — CHATTEL MORTGAGE.

Hayden v. Thompson, 10 O.W.N. 442.

ACCELERATION CLAUSE — SEIZURE— ILLEGALITY — REMEDY — INJUNCTION — TERMS.

Farr v. Kert, 11 O.W.N. 122.

DISTRESS — APARTMENT SUITE — "BREAKING IN" — "OUTER DOOR."

A door connecting a suite of rooms occupied exclusively by a tenant in an apartment house with a hall used in common by the tenants of different suites in the building and leading to the main entrance to the building is an "outer door" which may not be broken open by a landlord in making a distress for rent.

Welch v. Kracovsky, [1919] 3 W.W.R. 361.

ACTION BY SUBTENANT FOR WRONGFUL DISTRESS — ACCELERATION OF RENT — ABANDONMENT OF PREMISES.

Choderker v. Harrison, 20 Man. L.R. 727.

DISTRESS FOR RENT — POUND BREACH — JUSTIFICATION — GOODS IN CUSTODIA LEGIS.

Haszard v. Sterns, 9 E.L.R. 321.

MOVABLES ON LEASED PREMISES—FRAUDULENT REMOVAL — SEIZURE BY LAW — LANDLORD'S LIEN.

When the movables on leased premises are secretly and fraudulently carried away by a third party, the time for executing a writ of saisie-gagerie runs only from the day on which the removal was made known to the landlord who must execute it within 8 days otherwise he forfeits his lien and is without remedy against such third party.

Lallemand v. Harne, 39 Que. S.C. 218.

CONDITIONAL SALE — DISTRESS BY LANDLORD OF VENDEE — RESTRICTION TO INTEREST OF VENDEE.

Miller v. Angus, 19 W.L.R. 545.

DISTRESS FOR RENT — FINDING OF JURY — DISTRESS CONSIDERED A TRESPASS.

Summers v. Blair, 19 O.W.R. 714.

DISTRESS—APPRAISEMENT.

The validity of a seizure under distress for rent is not affected by the want of an appraisement.

Independent Lumber Co. v. David, 19 W.L.R. 387.

(§ III D—111)—RENT PAYABLE IN GRAIN — DEFAULT — JUDGMENT — EXECUTION — REMOVAL OF CROP — WAGE CLAIMS — PREFERENCE.

Apart from the effect of taking judgment for the rent as a bar to distress, the landlord cannot distrain in respect of a rental stipulated to be payable in grain to a certain value, if, on the tenant's default in paying the crop rental, he takes judgment

for the money equivalent and issues execution upon which the crop is removed from the land and sold; nor has he preference on the proceeds as against wages claims against the debtor filed against the money realized by the sheriff in the plaintiff's action, such money not being distrainable for rent.

Douglas v. Carrington, 20 D.L.R. 919, 7 S.L.R. 80, 29 W.L.R. 90, 7 W.W.R. 59.

E. RE-ENTRY; RECOVERY OF POSSESSION.

(§ III E—115)—RE-ENTRY — VOLUNTEERS AND RESERVISTS ACT.

The mortgagee of a lease has the right to recover possession of the premises upon default of his lessee, notwithstanding the premises were occupied by the lessee together with a person in active service, entitled to the benefits of Volunteers and Reservists Relief Act, who was not a party to the action.

Armstrong v. Bradburn, 33 D.L.R. 625, 11 A.L.R. 388, [1917] 2 W.W.R. 28, reversing [1917] 1 W.W.R. 854. [See also 36 D.L.R. 306.]

The defendant B. and one T. were lessees of certain premises. These they mortgaged by a sublease to the plaintiff, B. remaining tenant of a part of the premises. He formed a joint stock company, retaining himself 97 out of 100 shares, and the company became tenant of the part of the premises he occupied. In June, 1916, the company sold all its assets, not including its leasehold interest, to B. who assumed all its liabilities. In 1915 he volunteered for military service, and, the Volunteers and Reservists Act (Alta., 1916 c. 6) applies to him. In an action against the Bradburn Co. for possession it was held that in 1917 Bradburn himself was in actual physical possession along with the defendant company, and that, as B. was not a party to the action, no order could be made against him. An appeal was allowed (33 D.L.R. 625), but B. was permitted to appear and defend, which he did. That B. was not in possession for himself, but for the Bradburn Co., and the action ends, therefore, upon a question of fact, not of law.

Armstrong v. Bradburn, 36 D.L.R. 306, 11 A.L.R. 388, [1917] 2 W.W.R. 867.

MECHANIC'S LIEN — SALE OF PROPERTY — REGISTRATION OF TITLE OF PURCHASER — REFUSAL OF LESSEE TO GIVE UP POSSESSION — ALLEGATION OF FRAUD — RIGHTS OF PARTIES.

First National Investment Co. v. Thoroddur Oddson; & First National Investment Co. v. Leifur Oddson, 48 D.L.R. 732, [1919] 3 W.W.R. 591.

ABANDONMENT OF DEMISED LANDS — RE-ENTRY BY LANDLORD — LIABILITY FOR.

Where a tenant, under a crop-sharing lease, moved from the lands before the expiration of his term, on failing to obtain a cancellation of his lease, and left some of his chattels thereon, substantial damages for a subsequent entry and taking possession by the landlord will be refused him where, after the re-entry and before the expiration of his term, the tenant removed all of his chattels and his servant from the land and abandoned it to the landlord, who subsequently occupied it without objection from the tenant, particularly where no claim was made to oust the landlord or to re-enter in continuance of the term.

Lamb v. Thompson, 11 D.L.R. 612, 24 W.L.R. 404.

RECOVERY OF POSSESSION — SUMMARY PROCEEDINGS.

Disputed questions of fact cannot be determined on an originating summons issued under Sask. r. 600 for the summary recovery of possession from an overholding tenant, since amended r. 583 (Sask. rr. of 1911) does not extend to proceedings under the former rule; but where the alleged agreement relied upon in answer by the tenant and disputed by the landlord is found not to be binding upon the landlord for lack of formal execution, the officer hearing the application may dispose of same on the question of law so raised.

Sun Electrical Co. v. McClung, 12 D.L.R. 758, 25 W.L.R. 43, 4 W.W.R. 1350.

Alberta r. 469 (Judicature Ord. Rules), under which summary proceedings by way of originating summons may be taken to recover possession from an overholding tenant, does not authorize the court to fix or order payment of a sum to be paid for use and occupation of the premises during the overholding period.

Wallace v. Day, 6 D.L.R. 281, 5 A.L.R. 1, 22 W.L.R. 22, 2 W.W.R. 846.

It is the statutory duty of a County Court Judge to determine whether or not a tenant is wrongfully holding against the landlord upon an application under Part III. of the Landlord and Tenant Act, 1 Geo. V. c. 37 (overholding tenants) and such duty is not fulfilled by dismissing the application without any specific finding of fact. [Re St. David's Co. and Lahey, 7 D.L.R. 84, 4 O.W.N. 32, approved.] If, upon an appeal by the landlord from the dismissal of his summary application for an order of possession against an alleged overholding tenant under the Landlord and Tenant Act (Ont.), the Appellate Court is of opinion that the matters in question shall be disposed of in an action and not summarily, it may vacate the order of dismissal and leave the plaintiff to his remedy by action and direct that the costs of the summary proceedings and appeal be costs in the action if brought within a time limited by the order.

Re Dickson and Graham, 8 D.L.R. 928, 27 O.L.R. 239.

RE-ENTRY — BREACH OF COVENANT.

Fetherston v. Bice, 31 D.L.R. 554, [1917] 1 W.W.R. 224.

PURCHASER OF REVERSION — RIGHTS OF — "RENT ACCRUING" AS DISTINCT FROM "RENT ACCRUED DUE."

A purchaser of the reversion does not in Ontario (differing from the English law under the Conveyancing Act, 1911, Imp.) acquire a right of re-entry for a breach of a lessee's covenant to pay rent which took place before the conveyance of the reversion. [Cohen v. Tannar, [1900] 2 Q.B. 609, applied; Rickett v. Green, [1910] 1 K.B. 253, distinguished.] Rent accruing due is an incorporeal hereditament but rent which has accrued due is a mere chose in action which does not pass to a purchaser of the reversion unless expressly assigned to him.

Brown v. Gallagher, 19 D.L.R. 682, 31 O.L.R. 323.

RECOVERY OF TENEMENT—SECTION 50 COUNTY COURTS ACT—OCCUPANCY AS SERVANT, NOT TENANT.

On a summons for recovery of possession of a cottage, defendant took a preliminary objection on the ground that his occupancy was as "servant" and not as "tenant." Objection sustained.

McNeeley v. Carey, 7 W.W.R. 689.

SUBLETTING TO DISORDERLY TENANT — EFFECT.

Alliance Immobilière v. Picard, 16 D.L.R. 82, 20 Rev. Leg. 243, 20 Rev. de Jur. 182.

CLAIM FOR MESNE PROFITS.

Possession and payment of rent are not sufficient acts of part performance to support an alleged parol lease where there has been no change in possession or in the amount of the rent and the former tenancy, being from month to month, would have continued indefinitely until terminated by notice. In an action for the recovery of land, mesne profits accruing since the date when the defendant's possession became unlawful are recoverable as damages for trespass, notwithstanding that there is no relationship of landlord and tenant between the plaintiff and defendant.

Griffin v. Brunton, 6 W.W.R. 1034.

PURCHASER OF GENERAL ASSIGNEE AND INSOLVENT DEBTOR — SUMMARY EJECTMENT — RIGHT TO REMEDY.

Defendant in possession of an hotel property under an agreement to purchase, after paying part of the purchase money, assigned all his property to the sheriff for the benefit of his creditors. After the assignment, the sheriff allowed the defendant to remain in possession and the owner having died, the sheriff, as assignee of the defendant under a resolution of his creditors, obtained the title from the estate of the owner and sold at public auction all his interest as assignee to the plaintiff:—Held, that the relation of landlord and tenant did not exist between the plaintiff and the defendant, and plaintiff could not recover possession by summary ejectment.

Sweeney v. DeGrace, 42 N.B.R. 344.

OVERHOLDING TENANT — MORTGAGOR — REPOSSESSION.

A County Court Judge has no authority under Part III. of the Landlord and Tenants Act, R.S.O. 1914, c. 155, to make a summary order for the issue of a writ of possession against a mortgagor in possession, at the instance of one whose only claim to possession is as one of several mortgagees.

Re Mitchell and Fraser, 38 D.L.R. 597, 40 O.L.R. 389.

LIABILITY FOR FORCIBLE EJECTMENT.

When a lessee refuses to leave the premises after the expiration of the lease, the lessor has the right to proceed in ejectment according to art. 1624 C.C. (Que.) but he has no right to take the law in his own hands and forcibly eject the lessee, if he does so he is responsible and may be condemned to pay damages.

Sabbath v. Libercent, 24 Rev. de Jur. 71.

JURISDICTION OF MASTER.

A Master in Chambers has no power to make an order, under originating notice, for the delivery up of possession of land by an overholding tenant.

Macdonald v. Georgiades, 34 W.L.R. 964

(§ III E—116)—LIABILITY FOR WRONGFUL RE-ENTRY—NOMINAL DAMAGES.

Re-entry by a lessor, under the provisions of a covenant in the lease, by reason of the breach of that covenant by the lessee in giving a mortgage upon the chattels on the demised premises, is wrongful if the lessor does not first comply with the requirements as to notice contained in s. 20 (c) Landlord and Tenant Act, R.S.O. 1914, c. 155; for such wrongful re-entry the lessor is liable in damages to the lessee, but, by reason of his breach of covenant, the lessee is only entitled to nominal damages.

Greenwood v. Rae, 30 D.L.R. 796, 36 O.L.R. 367.

SUMMARY PROCEEDINGS TO DISPOSSESS — TENANT "WRONGFULLY HOLDING."

Under the Landlord and Tenant Act (Ont.) 1 Geo. V. c. 37, it is the duty of a County Court judge, in summary proceedings brought to dispossess the tenant, to determine whether the tenant "wrongfully holds" against the right of the landlord, even if he considers it a case which might better be disposed of in a substantive action and not summarily.

Howland v. Jones, 15 D.L.R. 769.

RE-ENTRY.

In an action to enforce a forfeiture, the court will upon proper terms grant relief even in the case of intentional breach of covenants, and substitute money compensation for forfeiture.

Walters v. Wylie, 1 D.L.R. 208, 3 O.W.N. 567, 20 O.W.R. 994.

ATTACHMENT IN RECAPTION—PRESCRIPTION.

Prescription does not run in the case of impossibility to act. So when an attachment in recaption, taken on the last day of

delay granted by law, can be executed only on the following day because the defendant refused to open his doors, the new lessor cannot take advantage of the expiration of that delay to have the attachment annulled.

Renaud v. Aumais, 49 Que. S.C. 40.

RECOVERY OF POSSESSION BY LANDLORD — RENT — ACCOUNT — PAYMENT INTO COURT — COSTS.

Clarey v. Miskell, 9 O.W.N. 477.

ACTION BY LANDLORD FOR POSSESSION AND FOR USE AND OCCUPATION — STATUTE OF LIMITATIONS.

O'Connell v. Kelly, 19 O.W.R. 950.

LEASE — BREACH — ACTION TO RECOVER POSSESSION — DAMAGES.

Holman v. Knox, 3 O.W.N. 151, 20 O.W.R. 121.

(§ III E—117)—NOTICE TO QUIT—WAIVER.

If a tenant pay money as rent accrued after the expiration of a notice to quit, and the landlord accept it as such, this is conclusive evidence of a waiver of the notice.

Smith v. Smith, 40 D.L.R. 509, 52 N.S. R. 196.

NOTICE TO QUIT.

In the absence of a statutory requirement as to the length of notice for the termination of a tenancy from month to month, only a reasonable notice of intention to terminate the tenancy is necessary. [Jones v. Mills, 10 C.B.N.S. 788, followed.] A half month's notice of termination of a tenancy from month to month is reasonable, where the landlord knew the tenant was looking for a cheaper place because he could not afford to pay the rent the former demanded, and will be sufficient in the absence of a statutory requirement of a longer notice.

Burgoyne v. Mallett, 5 D.L.R. 62, 21 W. L.R. 566.

WRIT OF POSSESSION—WRITTEN DEMAND.

Under s. 3 of the Overholding Tenants Act (R.S.N.S. 1900, c. 174) a written demand for possession must be made on the tenant before the County Court can have jurisdiction to grant the landlord a writ of possession; mere notice to quit is not sufficient.

McKay v. McDonald, 30 D.L.R. 609.

(§ III E—118)—LIFE ESTATE.

Where a lease for a term of years of land in which the lessor had only a life estate has terminated by the death of the lessor, the wheat previously sown by the tenant and in the ground at the time of death of lessor becomes emblements and belongs to the tenant or his assignee, as against the remainderman,

Atkinson v. Farrell, 8 D.L.R. 582, 27 O. L.R. 204.

AGREEMENT TO CROP LAND ON SHARES — TENANCY CREATED — RIGHT TO HARVEST CROP.

An agreement to crop land on shares without anything being agreed between the parties as to when the tenancy shall cease entitles the tenant to only such use and occupation as is necessary to put in and harvest crop, the share of the crop is not an annual rent, which makes the tenancy one for a year.

Fletcher v. Lyons, 48 D.L.R. 365, [1919] 3 W.W.R. 381.

CROPS.

Where the cause of forfeiture of the term is complete, the bringing of an action places the landlord in the position of having made a re-entry upon the date when the action was commenced, and, therefore, the plaintiffs having re-entered, the term was at an end, and the defendant had no longer any right to remain on the land. The defendant having remained on the land after action brought, he was liable in damages as for holding over. In connection with the determination of the question of whether there was any sale of the land to defendant (which on the facts was decided adversely to the defendant), the actions of the defendant in the preparation of a statement of the rent due, and failing to make any comment on the plaintiffs' statement as to their intention to sell the land to him at a time when he claimed to be the owner, should be taken as strong evidence that in fact no sale had at that time been made.

Nichol v. Nelson, 4 S.L.R. 315.

F. LIABILITY OF TENANT TO LANDLORD FOR INJURIES TO REVERSION.

(§ III F—119)—LIABILITY TO ASSIGNEE OF LESSOR.

The assignee of a reversion has a right to enter the premises leased by his assignor, for condition broken, where such right is expressly reserved to the original lessor in the lease and the condition upon which the right is exercisable has happened.

Curry v. Pennock, 10 D.L.R. 166, 4 O. W.N. 712, 23 O.W.R. 922. [Affirmed, 10 D.L.R. 548, 24 O.W.R. 357.]

LESSEE OF WATER LOT FOR MOORING PURPOSES ONLY — SALE OF SAND.

The lessee of a water lot, whose covenants restricted his use of the demised premises to a mooring place for boats, has no right to remove sand therefrom for the purpose of sale, where such would constitute a substantial injury to the reversion. [Lewis v. Godson, 15 O.R. 252; and Tucker v. Linger, 21 Ch.D. 18, distinguished.]

Toronto Harbour Commissioners v. Royal Canadian Yacht Club, 15 D.L.R. 106, 29 O.L.R. 391.

FIRE — PRESUMPTION — OCCUPATION — TIMBER LICENSE.

A deed of sale, of the right to cut timber, which gives the purchaser the gratui-

tous use of a building with a shed as a camp for his employees and his animals during the progress of the work, is not a lease nor a contract which makes the purchaser liable for the loss of the building by fire by virtue of the presumption arising from art. 1629, C.C. (Que.). The fact that a person leaves some tools in a house that he has occupied does not constitute a continuation of such occupation.

Mackenzie v. Boston Last Co., 52 Que. S.C. 324.

LAND TITLES (TORRENS SYSTEM).

I. GENERALLY.
II. FIRST REGISTRATION.
III. TRANSFERS; MORTGAGES, LEASES, ETC.
IV. CAUTIONS; CAVEATS AND ADVERSE CLAIMS.
V. LAND CERTIFICATES; TITLES.
VI. PLANS.
VII. PROCEDURE.
VIII. ASSURANCE FUND.

Crown patents, see Public Lands; Mines and Minerals.

Possessory titles, see Adverse Possession.

As affecting vendor and purchaser, see Vendor and Purchaser.

As to mechanic's liens, see Mechanics' Liens.

Annotations.

Restrictions in contract of sale as to user of land: 7 D.L.R. 614.

(Torrens system): caveat; parties entitled to file caveats; "caveatable interests:" 7 D.L.R. 675.

Caveats; priorities acquired by filing: 14 D.L.R. 344.

Mortgages; foreclosing mortgage made under Torrens system; jurisdiction: 14 D.L.R. 301.

Interests of vendors and mortgagees affected by moratorium: 22 D.L.R. 865.

I. Generally.

As affected by moratory Acts, see Moratorium.

Possessory and prescriptive titles, see Adverse Possession; Easements; Waters.

Patents, claims, see Public Lands; Mines and Minerals.

Nature of estates, see Wills; Deeds.

Sufficiency of title, see Vendor and Purchaser.

(§ I—10)—LIS PENDENS — CROWN GRANT TO LAND ATTACKED — CLOUD ON TITLE — REGISTRAR OF TITLES — DISCRETION AS TO REGISTERING TITLE.

A certificate of lis pendens registered against lands, in an action in which the Crown grant of such lands is attacked, is not a charge within the meaning of the Land Registry Act (R.S.B.C. 1911, c. 127) but is a cloud on the title to such land, and the Registrar of Titles properly exercises the judicial discretion conferred on him by the Land Registry Act in refusing to issue an indefeasible title until such cloud is removed.

E. & N.R. Co. v. Granby Consolidated Mining, Smelting & Power Co., 48 D.L.R. 279, [1919] 3 W.W.R. 331, restoring 41 D.L.R. 335, 25 B.C.R. 447, [1918] 2 W.W.R. 626.

DUTIES OF REGISTRAR — CERTIFICATES OF TITLE — FAILURE TO ENDORSE EXECUTIONS — DISSIMILARITY IN NAMES.

The duties of the registrar of land titles in matters of registration are not merely ministerial, but are judicial to a limited extent; in the exercise of his discretion as to the identity of persons from a substantial similarity in names he must confine himself to the spirit of the statute in accordance with a reasonable protection of creditors' interests; and the fact that a writ of execution is designated by the initial letter of the Christian name and the title registered in the full name, but the surnames and addresses being alike, does not justify an assumption as to a dissimilarity of persons so as to relieve him from liability for his failure to endorse upon a certificate of title a memorandum of the writ. [Sievell v. Haultain, 4 S.L.R. 142, distinguished.]

Borbridge v. Borland, 24 D.L.R. 147, 8 S.L.R. 190, 31 W.L.R. 805, 8 W.W.R. 1151.

DUTIES OF REGISTRAR — DISCRETION — LEGALITY OF INSTRUMENTS.

The statutory duty of the Registrar of Titles in respect of registration of instruments is not merely ministerial, but carries with it a certain amount of discretion which he may exercise in order to ascertain the legality of instruments, and the apparent right or title of parties seeking their registration. [Manning v. Commissioner, etc., 15 A.C. 195, followed.]

Re Land Registry Act and Shaw, 24 D.L.R. 429, 22 B.C.R. 116, 32 W.L.R. 85, 8 W.W.R. 1270.

GOVERNMENT SURVEYS CONCLUSIVE, WHEN—B.C. OFFICIAL SURVEYS ACT.

The conclusive effect of government surveys under s. 2 of Official Surveys Act, R.S.B.C. 1911, c. 220, will not be extended to apply to a case in which a landowner selects his own surveyor, although the survey notes are received by the government officials.

Seippel Lumber Co. v. Herchmer, 18 D.L.R. 237, 19 B.C.R. 436, 28 W.L.R. 952, 7 W.W.R. 333.

GRANTEE'S PRIVITY WITH PREDECESSOR — SCOPE AND EFFECT.

A grantee of lands is not bound under the doctrine of privity by the action of his predecessor in title when such action is taken later than the conveyance to the grantee.

Seippel Lumber Co. v. Herchmer, 18 D.L.R. 237, 19 B.C.R. 436, 28 W.L.R. 952, 7 W.W.R. 333.

LAND ACTS — AMENDMENTS — EFFECT ON CASE LAW.

The doctrine of Wilkie v. Jellett (26 Can. S.C.R. 282) has not been affected by any of the amendments of the Land Titles Act.

Union Bank v. Lumsden Milling and Grain Co., 8 S.L.R. 263, 7 W.W.R. 979.

LIS PENDENS — CLOUD ON TITLE — DISCRETION.

A certificate of lis pendens registered against lands, in an action in which the Crown grant of such land is attacked, creates a cloud upon the title to such land; the registrar of titles properly exercises the judicial discretion conferred on him by the Land Registry Act, R.S.B.C. (1911), c. 127, s. 116A (as amended by 4 Geo. V. (1914), c. 43, s. 66), in refusing to issue an indefeasible title until such cloud is removed. [Re Land Registry Act and Shaw, 24 D.L.R. 429, followed.]

Re Land Registry Act; Re Granby Consol. Mining & Smelting Co., 41 D.L.R. 335, 25 B.C.R. 447, [1918] 2 W.W.R. 626.

COMPANY — WINDING UP — TRANSMISSION OF LAND.

Re Land Titles Act; Yorkton Gas Co.'s Case, [1918] 3 W.W.R. 15.

LEASE — RENEWAL — CROWN GRANT.

The plaintiff company, holder of the renewal of an original timber lease, brought action for a declaration that a Crown grant held by the defendant company for a portion of the land within the timber area (and issued to the defendant's assignors subsequently to the original lease prior to the renewal thereof) is void or in the alternative that it is subject to the rights of the plaintiff conferred by the leases. Section 105 of the Land Registry Act (B.C.) recites that "Instruments executed before and, taking effect before July 1, 1905, transferring, charging, dealing with, or affecting land or any estate or interest therein, unless registered before the said date (except a leasehold interest in possession for a term not exceeding 3 years) shall not be receivable by any court or any registrar or examiner of titles as evidence or proof of the title of any person to such land, as against the title of any person to the same land." The plaintiff submitted in evidence the original lease and the renewal thereof, they not having been registered. Held, that the section is not intended to apply where a party is not attacking the title to the land but is merely endeavouring to obtain a decision from the court as to the effect of an easement in respect of the land, and that although the leases could not be received as evidence of the plaintiff's title so as to oust the defendant's title, they may be received as evidence of the plaintiff's right to enter upon the lands and cut timber thereon during the term of the lease; further, that the plaintiff was entitled to a declaratory judgment that the Crown grant was subject to the plaintiff's antecedent lease and any renewals thereof.

North Pacific Lumber Co. v. British American Trust Co., 23 B.C.R. 332.

LAND TITLES ACT — BUILDING RESTRICTIONS IN REGISTERED TRANSFER — MODIFICATION — ORDER UNDER R.S.O. 1914, c. 126, s. 99 (2) — CONSENTS — "BENEFICIAL TO THE PERSONS PRINCIPALLY INTERESTED" — EVIDENCE.

Re Jackson, 16 O.W.N. 69.

LAND SITUATE OUT OF PROVINCE — SPECIFIC PERFORMANCE.

Section 62 (2) of the Land Titles Act as amended in 1916 does not apply to proceedings taken in respect of lands situated outside Alberta, nor does it prevent a vendor from obtaining a judgment for specific performance.

Fort George & Fraser Valley Land Co. v. Wilson, [1917] 2 W.W.R. 351.

II. First registration.

See Registry Laws.

Description of land, correction, see Judgment, I G—55.

(§ II—20)—STATEMENT UNDER S. 32 OF THE ARREARS OF TAXES ACT CONTAINING PARCELS DESCRIBED ACCORDING TO AN UNREGISTERED SUBDIVISION—STATEMENT NOT REGISTRABLE.

Re Land Titles Act, [1919] 1 W.W.R. 529.

FIRST REGISTRATION — OBJECTION TO — ORDER OF DISCONTINUANCE IN PREVIOUS ACTION AS BAR.

Notwithstanding that an objection to an application to bring land under the Land Titles Act, 1 Geo. V. c. 181 (Ont.), by a person claiming an interest in the land adverse to the applicant, is not an "action" within the meaning of the Judicature Act, R.S.O. 1897, c. 51, 3 Geo. V. c. 19, R.S.O. 1914, c. 56, it is for the master of titles to determine whether or not the effect of an order made in a prior action brought by the objector pertaining to the land purporting to bar "any further action which may be brought by the plaintiff for the same cause of action" was a bar to the right to raise the objection in the land titles proceedings as constituting res judicata.

Re Woodhouse, 14 D.L.R. 285, 5 O.W.N. 148, 25 O.W.R. 117, reversing, in part, 10 D.L.R. 759, 24 O.W.R. 619.

FIRST REGISTRATION — FAILURE TO ESTABLISH LEGAL OR EQUITABLE TITLE.

Under the Land Titles Act R.S.S. 1909, c. 41, an applicant is not entitled to be registered as owner where he fails to establish that he has any estate either legal or equitable in the land in question. In Saskatchewan, a master of titles has no jurisdiction, on a reference to him by a registrar, to pass upon and direct the registration of a title which depends for its va-

lidity solely on the application of equitable doctrines, since a purely equitable claim not evidenced by any document cannot be made effective until a court of competent jurisdiction has declared the claimant entitled to an interest in the land.

Re French, 11 D.L.R. 379, 7 S.L.R. 1, 23 W.L.R. 940, 4 W.W.R. 461.

FIRST REGISTRATION — DUTY OF REGISTRAR TO ASCERTAIN CORRECT ACREAGE.

The duty imposed on the registrar of land titles by s. 44 of the Territories Real Property Act, R.S.C. 1886, c. 51, relating to the issuance of first certificates of title, to issue a certificate "with any necessary qualifications" does not require him to ascertain whether the acreage mentioned in the certificate is correct, or else to omit it altogether.

Burden v. Registrar of Land Titles, 13 D.L.R. 813, 6 A.L.R. 255, 25 W.L.R. 460, 5 W.W.R. 122.

CROWN—SEED GRAIN LIEN.

The Crown is bound equally with individuals by the provisions of the Land Titles Act (ss. 43, 44, c. 24, of 1906, Alta.), and where the necessary proceedings have not been taken to make a seed grain lien effective under the Seed Grain Act (c. 21 of 1908), a bona fide purchaser without actual notice of such lien is protected.

Johansson v. Cronquist, 38 D.L.R. 508, 12 A.L.R. 225, [1917] 3 W.W.R. 1029.

CAVEAT FOR SEED GRAIN—CROWN LANDS.

A rural municipality cannot file a caveat against Crown lands for money advanced for seed grain.

Re Land Titles Act (Sask.), [1918] 3 W.W.R. 13.

TITLES—TRANSFER—TRUST.

A transfer setting out terms of trust may be registered, although the trusts, except in the case of executors and administrators, must be disregarded by the registrar, and the public generally need not be concerned with them.

Re Land Titles Act and Allan (Alta.), [1918] 1 W.W.R. 440.

NOTICE OF TRUST — PERSONAL REPRESENTATIVE—MORTGAGE—VALIDITY.

Although the Land Titles Act, R.S.S., c. 41, provides generally that no entry shall be made upon a certificate of title of any notice of trust an exception has been made in the case of land held by a personal representative, and where land is registered in the name of a personal representative as such, the registrar should not register a mortgage thereof made by such representative in his personal capacity, and the fact that such a mortgage is given registration does not render it valid. Where the representative becomes the beneficial owner of the land the mortgage should be held good as between him and the mortgagee.

Western Trust Co. v. Olson, 11 S.L.R. 418, [1918] 3 W.W.R. 811.

LEASE — CORPORATION — MORTGAGEE IN POSSESSION — SERVICE OF NOTICE — AFFIDAVIT OF ATTESTATION — SUFFICIENCY — COVENANT TERM.

A lease of a special area, such as a basement, ground floor, second floor, may be registered, provided there is a certificate from a Saskatchewan surveyor that the premises are actually part of a lot. Such a lease may not be registered if made by a corporation claiming to be a mortgagee in possession unless proof be given the registrar that the owner and other parties interested have been served with the notice of intention to exercise the power to enter into possession. [Rollefson v. Olson, 21 D.L.R. 671, distinguished.] When the notary public before whom the affidavit of attestation of the witness to a lessee's signature has been sworn has not affixed his notarial seal thereto, the affidavit is defective and useless. A covenant in a lease made by a mortgagee in possession as to the termination of the lease upon the mortgagee's right to possession being determined held not to render the term uncertain or invalidate the lease for registration purposes.

Re Land Titles Act; Re Northern Crown Bank (Sask.), [1918] 1 W.W.R. 421.

POWER OF ATTORNEY — GENERAL WORDS AS COVERING DISCHARGE OF MORTGAGE — AFFIDAVIT OF ATTESTATION NOT IN PROPER FORM — AFFIDAVIT SWORN IN THE FIELD, FRANCE.

Re Land Titles Act; Power of Attorney (Sask.), [1918] 2 W.W.R. 947.

POWER OF ATTORNEY — REVOCATION OF AND NEW POWER IN ONE INSTRUMENT — REGISTRATION OF.

Re Land Titles Act (Sask.), [1918] 3 W.W.R. 139.

AGREEMENT FOR SALE—CANCELLATION OF—FINAL ORDER FOR—REGISTRATION OF.

Re Land Titles Act; Avelsgaard's Case (Sask.), [1918] 2 W.W.R. 946.

REGISTRATION OF CROWN GRANT—INACCURATE PLANS — IRRIGATION—RIGHT-OF-WAY.

The registrar has power to refuse registration of a grant from the Crown where there is no description in the grant other than that furnished by a plan, inaccurate and not executed by a qualified surveyor. A certificate of title may be issued for an irrigation right-of-way. If the Department of the Interior do not give any description in a grant other than that dependent on a plan attached thereto, the registrar should obtain from the patentee a duplicate of the plan attached to the grant.

Re Inaccurate Plans, 7 W.W.R. 124.

REGISTRATION OF LIS PENDENS—REMOVAL OF LIS PENDENS — LAND TITLES ACT, SS. 32, 148.

There is no statutory authority for the registration of any certificates of lis pendens other than form No. 6 provided for in

s. 23 of the Mechanics' Lien Act, c. 150, R.S.S. 1909, and the proper method of removing the memorandum of lis pendens improperly registered is by proceeding under s. 148 of the Land Titles Act.

Re Removal of Lis Pendens, 6 W.W.R. 570.

REGISTRATION OF MORTGAGE — MORTGAGE DEED WITH TRUST DEED ATTACHED.

A mortgage with a trust deed attached and incorporated therein, such trust deed containing a power of attorney from the mortgagor to the mortgagee, is registrable under the Land Titles Act.

Re Registration of Mortgage, 5 W.W.R. 1189.

III. Transfers; mortgages; leases; etc.

Implied covenant of transferee to pay mortgage debt, see Mortgage, III—48.

Assignment of charge or mortgage, state of account, see Mortgage, 10—53.

Purchase money judgment, see Execution, I—11.

Foreclosure, personal judgment, see Execution, I—2; Mortgage, VI A—70.

(§ III—30)—MORTGAGES — UNDER REAL PROPERTY ACT—FORECLOSURE.

Since 1 Geo. V. (Man.), 1911, c. 49, the only way in which a Torrens system mortgage made under s. 99 of the Real Property Act, R.S.M. 1902, c. 148, can be foreclosed and the title of the mortgagor divested to the mortgagee is by a proceeding in the land titles office under ss. 113, 114 of the Act, and not by the ordinary foreclosure action and final order of foreclosure applicable to lands not under the Torrens system. [Smith v. National Trust Co., 1 D.L.R. 698, 45 Can. S.C.R. 618; and National Bank of Australasia v. United Hand-in-Hand Co., 4 A.C. 391, followed.]

Re Alarie and Frechette, 14 D.L.R. 298, 23 Man. L.R. 628, 25 W.L.R. 648, 5 W.W.R. 257.

UNREGISTERED AGREEMENT OF PURCHASE.

Section 104 of the Land Registry Act, R.S.B.C. 1911, c. 127, providing that no instrument purporting to transfer land "shall pass any estate or interest either at law or in equity in such land until the same shall be registered" under the Act, is construed strictly as a registration section and will not bar a purchaser of land under an unregistered agreement of purchase from claiming compensation under s. 394 of the Municipal Act, R.S.B.C. 1911, c. 170, from a municipality expropriating such land.

Jackson v. North Vancouver, 14 D.L.R. 16, 4 W.W.R. 1208.

REGISTRATION OF JUDGMENTS AND ORDERS—EXEMPLIFICATIONS.

Under s. 102 of c. 24 of the Alberta Land Titles Act, 1906, and Alberta r. 265, exemplified copies of judgments and orders of a court may be accepted for registration by the registrar of the land titles office; but if made by a judge as persona designata the originals themselves must be registered.

Arnold v. National Trust Co., 13 D.L.R. 195, 7 A.L.R. 58, 24 W.L.R. 889.

MORTGAGES AND CHARGES — IRREGULARITY AFFECTING REGISTRATION.

The fact that an informal charge, which should not have been received for registration under the Land Titles Act (Sask.) because not in the form prescribed, was in fact received by the registrar and entered of record, does not give it the effect of a mortgage under the Act.

Shore v. Weber, 11 D.L.R. 148, 24 W.L.R. 343.

CROWN LEASE—DELIVERY DIRECT TO LESSEE —REGISTRATION—EFFECT OF ALBERTA LAND TITLES ACT—ASSIGNMENT.

Since s. 26, subs. (1) of the Alberta Land Titles Act, 1906, applies only to grants in fee, a lease of lands made by the Minister of the Interior, under s. 38 of c. 20, of the Dominion Lands Act (7 & 8 Edw. VII.), is registrable in the land titles office, notwithstanding it was sent direct to the lessee instead of to the registrar. A lease of land containing quarriable stone, issued by the Minister of the Interior, under s. 38, c. 20, of the Dominion Lands Act (7 & 8 Edw. VII.), although not in the form of a grant, is registrable as such under s. 2 (v) of c. 24 of the Alberta Land Titles Act, 1906. A lease of lands made by the Minister of the Interior, and accompanied by an assignment that had been duly registered in the Department of the Interior, is registrable in the land titles office, under c. 24 of the Alberta Land Titles Act, 1906.

Re Land Titles Act, 11 D.L.R. 673, 7 A.L.R. 32, 24 W.L.R. 385.

TRANSFER—TIME OF DEPOSIT FOR RECORD.

When a registrable transfer in due form from the registered owner of lands is handed in to the registrar of titles together with the duplicate certificate of title of such owner pursuant to the provisions of s. 20 of the Land Titles Act, 6 Edw. VII. (Alta.) c. 24, such transfer takes priority from the time of such deposit as recorded in the official "day book," although the entry upon the official record or certificate of title is not made concurrently by the registrar because of pressure of work in his office; and the registrar is not entitled to endorse upon the new certificate of title issued to such transferee any memorandum of executions received against the transferor in the interim.

Re Sinclair; Re Bell & Registrar of Titles, 9 D.L.R. 123, 6 A.L.R. 111, 23 W.L.R. 286.

TRANSFERS—MORTGAGES—LEASES.

Where real property is mortgaged by an instrument executed in accordance with the Real Property Act, R.S.M. 1902, c. 148, known as the Torrens or "New System" registry law, it can be transferred by the mortgagee to a purchaser from him

only in the manner prescribed by statute. [National Bank of Australia v. United Hand-in-Hand Co., 4 A.C. 391, applied.] Mortgages of land which is subject to the Torrens or "New System" form of registration in Manitoba are permitted only in the form specified by the registration statute (the Real Property Act, R.S.M. 1902, c. 148), and the direction in the statutory form which permits of "special covenants" being added thereto is insufficient to cover an added power of sale or other stipulation whereby the mortgagor authorizes the mortgagee to execute an assurance or transfer of the mortgaged property and extinguish the mortgagor's title thereto; such a power of sale or stipulation is not in strictness a "covenant" even if framed as a covenant, and is not within the scope of the statutory form or consistent with the statutory provision.

Smith v. National Trust Co., 1 D.L.R. 698, 45 Can. S.C.R. 618, 21 W.L.R. 97.

One who gave her husband an unregistered transfer of her land duly executed by her and duly attested for registration in order that he could deposit the same with a third person as security for the price of certain property purchased by the husband from such third person, but retained her duplicate certificate of title, cannot afterwards be permitted to shew to the prejudice of such third person, that she had no intention of parting with her title to the land and she will be required at the suit of such third person, after the husband has transferred the land to him in part payment of the debt so secured, to deliver up the certificate in order to complete the record of title in favour of such transferee. [Rimmer v. Webster, [1902] 2 Ch. D. 163, applied.]

Acme Co. v. Huxley, 1 D.L.R. 860, 4 A.L.R. 63, 20 W.L.R. 133, 1 W.W.R. 681.

Where a certificate of title was issued under Land Titles Act of Saskatchewan to the administrator or executor as such, and he is one of the parties beneficially interested in the property, the practice for passing the administrator's interest to him when he is entitled to be clothed with it absolutely in his own name is to file in the land titles office a transfer from the administrator or executor as such to himself personally.

Re Lockhart, 1 D.L.R. 754, 20 W.L.R. 413.

The effect of s. 135 of the Alberta Land Titles Act, 6 Edw. VII., c. 24, is that a person dealing with a registered owner is not affected by any outstanding interest of which he has no notice, nor of any interest of which he has notice, unless, with such notice, he does something which constitutes fraud. There is no reason in law why a transfer under the Act should not be executed in blank, with authority to the person to whom it is handed, or to anyone else, to fill in, under certain instructions, the name of the so-called transferee, who, in reality, is the person to whom the registrar is to be requested to issue a new certificate of title. Where one has advanced money on the security of an agreement to give a transfer of land registered under the Act, and the transfer is executed and delivered, and the transferee then receives notice of an agreement of sale made by the transferor after the execution and delivery of the transfer, he is nevertheless entitled to register his transfer, and obtains thereby a good title as against the holder of the agreement of sale. A transfer under the Act is not a deed of grant. It does not pass the title, and its practical effect is little or nothing more than a mere order to the registrar by the holder of the registered title to transfer the title to somebody else.

Arnot v. Peterson, 4 D.L.R. 861, 4 A.L.R. 324, 21 W.L.R. 153, 2 W.W.R. 1.

FORECLOSURE OF MORTGAGE — PERSONAL JUDGMENT.

A personal judgment for the mortgage debt registered by a mortgagee in the course of foreclosure proceedings will not prevent him from registering the fee under the decree absolute without first discharging the judgment.

Scottish Temperance Life Assn. v. Registrar of Titles, Vancouver, 36 D.L.R. 152, 24 B.C.R. 232, [1917] 3 W.W.R. 30.

ASSIGNMENT OF MORTGAGE—JUDGMENT.

A district registrar is justified in refusing to register an assignment by a mortgagee, except as subject to a prior registered judgment against the mortgaged lands.

Re Land Registry Act; Re Mandeville, Hagman v. McIntosh, 36 D.L.R. 292, 24 B.C.R. 137, [1917] 1 W.W.R. 1522.

TRANSFER—REGISTRATION—CERTIFICATE OF TITLE—UNREGISTERED CLAIM.

The registration of a transfer of lands under the Land Titles Act (Alta.) will not enable the transferee, on obtaining his certificate of title, to set up the latter to defeat an unregistered claim under the transferor's contract of sale of a portion of the lands subject to which the transferee in fact took his title under his own agreement of purchase, although not disclosed in the registered transfer or in the certificate of title.

McDonald v. Leadlay, 20 D.L.R. 157.

TRANSFERS—TAX DEED — LIMITATIONS OF TIME UNDER OLD AND NEW SYSTEMS.

The limitations of time within which deeds of land sold for taxes must be registered to preserve their priority (R.S.O. 1897, c. 224, s. 204, and R.S.O. 1897, c. 136, s. 91) are applicable to registrations under the Registry Act and not to registration under the Land Titles Act (Torrens system); the purchaser at a tax sale of land registered under the Torrens system must lodge a "caution" or register his tax deed

to avoid being cut out by a transfer made by the registered owner.

Re Lord and Ellis, 19 D.L.R. 809, 30 O.L.R. 582.

EXECUTION — WHEN REGISTRABLE — LAND TITLES ACT.

Young v. Blagdon, 18 D.L.R. 798, 7 W.W.R. 1186.

MORTGAGES—NOTICE OF FORECLOSURE—REGISTRATION—LAND TITLES ACT (SASK.)

This was a petition to the Master of Titles from the refusal of the registrar to register a Notice of Exercising Power of Sale on the ground of the mortgagee being the registered owner of the land in question. The petitioners were mortgagees of the lands in question and, as administrators of the estate of the deceased mortgagor, registered owners of the property. The estate being insolvent, the petitioners, after vainly endeavouring to sell the lands, attempted to register a Notice of Intention of Exercising Power of Sale under their mortgage. It was held by the Master of Titles that there seemed to be nothing in the law or practice to prevent a mortgagee from exercising his rights under the mortgage, even where he is an administrator of the estate of the deceased mortgagor, also that the circumstances of the case (i. e., the responsible position held by the petitioners as Official Administrators), warranted the Registrar in consenting to register the Notice of Intention to Exercise the Power of Sale. [Tennant v. Trenchard, L.R. 4, Ch. 537, distinguished, as applying to a Trustee, not an Administrator.]

Re Standard Trust Co., and the Registrar of the Humboldt Land Registration District, 6 W.W.R. 1308.

ABORTIVE SALE OF MORTGAGED PREMISES—SUBSEQUENT SALE BY PRIVATE CONTRACT.

Where a public auction sale of mortgaged premises has proved abortive and the mortgagee, without the authority of the registrar disposes of the property by a private sale, such private sale may be subsequently validated by the registrar, who may dispense with notice to the registered owner, if reasonably satisfied that the latter has no beneficial interest in the mortgaged lands.

Re Sale of Mortgaged Premises by Private Contract, 5 W.W.R. 1328.

HOMESTEAD ACT—AGREEMENT.

The object of the Act respecting Homesteads (c. 29, 1915, Sask.) was the protection of the wife's interest in the homestead of her husband. The amendment (s. 5, c. 27) of 1916 was to meet the case of a false certificate of affidavit where the Act had been prima facie complied with. Where the land comprised in an agreement of sale and the vendor at the time of signing the agreement is unmarried the agreement is not invalid because it is not accompanied by the required affidavit. The agreement is valid as between the parties and may be enforced upon completion of the affidavit necessary to enable it to be registered.

Lett v. Gettins, 43 D.L.R. 247, 11 S.L.R. 439, [1918] 3 W.W.R. 614, affirming [1918] 2 W.W.R. 881.

TRANSMISSION OF LAND UNDER MARRIAGE CONTRACT—APPLICANT A WIDOW—ADMINISTRATION IN ANOTHER PROVINCE—NECESSITY OF ADMINISTRATION IN SASKATCHEWAN OR RESEALING.

Re Land Titles Act (Sask.), [1918] 3 W.W.R. 347.

TRANSFER OF LAND UNDER MORTGAGE SALE AND ORDER CONFIRMING—REGISTRATION OF—ORDER PURPORTING TO VEST LAND IN PARTY OTHER THAN TRANSFEREE UNDER THE SHERIFF'S TRANSFER.

Re Land Titles Act; Re Transfer (Sask.), [1918] 2 W.W.R. 951.

MORTGAGE — PARTIAL DISCHARGE — DISCHARGE OF LAND ONLY—REGISTRATION.

Re Land Titles Act (Sask.), [1918] 2 W.W.R. 937.

COAL LEASE — IMPROPER REGISTRATION — SETTING ASIDE.

The registrar has no right under the Land Titles Act (Alta.) to register a mineral lease where the lessor does not appear to be the registered owner, and if so registered, it may be set aside by anyone whose interest in the property is affected.

Greig v. Franco-Canadian Mortgage Co., 23 D.L.R. 860, 32 W.L.R. 280, 9 W.W.R. 22. [Reversed on another point, 29 D.L.R. 260, 10 A.L.R. 44.]

TRANSFER OF MORTGAGE—APPARENT TITLE—POWER OF ATTORNEY.

An assignment of a mortgage to himself by the donee of a power of attorney, without proof of acquiescence by the donor, does not establish a prima facie title, and the registrar of titles will be justified in not receiving such instrument for registration.

Re Land Registry Act and Shaw, 24 D.L.R. 429, 22 B.C.R. 116, 32 W.L.R. 85, 8 W.W.R. 1270.

STATEMENT OF CONSIDERATION—POWERS OF REGISTRAR.

There is nothing in the law, common or statutory, which compels a statement of the true consideration to be expressed in a transfer of land or transfer of mortgage any more than there was for the statement of such consideration in the common law indenture of deed, and a registrar cannot refuse registration to an instrument on the ground that no consideration is stated therein.

Re Registration of Transfer of Mortgage, 9 W.W.R. 491.

CONSIDERATION FOR MORTGAGE—SUFFICIENCY.

The consideration "and of the said indebtedness and of the sum of one dollar" is sufficient to satisfy the requirements of the Land Titles Act and the office proced-

ure under said Act, and in making the memorandum of the mortgage the consideration should be stated as one dollar and further consideration. The consideration stated in the abstract should be one dollar and further consideration.

Re Mortgage Consideration, 9 W.W.R. 194.

TRANSFER OF HOMESTEAD — AFFIDAVIT — POWERS OF REGISTRAR.

Though transfers of an interest in a homestead must contain the affidavit of the transferor in Form C, yet no duty seems to be cast on the registrar to see that no mortgage is registered unless it is executed in the method provided, and it is very dangerous for the registrar to attempt to apply personal information or knowledge (e.g., as to the marriage of the transferor) which he may have outside of his official records, excepting possibly where this is necessary for the prevention of fraud in the protection of his records.

Re Registration of a Mortgage, 9 W.W.R. 21.

ASSIGNMENT FOR CREDITORS—HOMESTEAD—CONSENT OF WIFE.

An assignment for the benefit of creditors is not a transfer of land provided for in s. 5 of the Homestead Act so as to render it necessary to obtain the signature of the wife of the transferor or an affidavit in Form C in the schedule to the Homestead Act.

Re Assignment for Creditors, 9 W.W.R. 209.

POWER OF ATTORNEY — ASSIGNMENT FOR CREDITORS—DISCRETION OF REGISTRAR AS TO SUFFICIENCY.

A power of attorney authorizing the attorney to make an assignment for the benefit of creditors of all the assets of the debtor is a sufficient power of attorney to include in the assignment any land belonging to the debtor, and the registrar has no duty in regard to the determination whether such assignment or the extension agreement containing the power of attorney is void or voidable.

Re Power of Attorney, 9 W.W.R. 180.

TRANSFER OF LAND OF ADJUDGED LUNATIC —LETTERS OF GUARDIANSHIP — ORDER OF COURT AUTHORIZING SALE.

The registrar is justified in refusing a transfer of land registered in the name of a person who has legally been declared a lunatic and for whom a guardian has been appointed by the court, unless the proper order of the court authorizing the sale and transfer is produced. Letters of guardianship should be filed in the general register.

Re Polgreen, 7 W.W.R. 1184.

MORTGAGE—ASSIGNMENT.

The assignee of an assignee of the holder of a registered mortgage may have his title registered without the necessity of registering the first assignment.

Re Land Registry Act and Standard Trust Co., 22 B.C.R. 538, 10 W.W.R. 877.

MORTGAGE IN FORM PRESCRIBED BY SHORT FORMS ACT—INABILITY TO REGISTER—DEED OF ASSIGNMENT FOR BENEFIT OF CREDITORS—REGISTRATION OF—PRIORITIES—R.S.O. 1914, c. 126, s. 30 (2) 45, 115—FORM OF JUDGMENT—RECTIFICATION OF RECORDS—DECLARATION OF TRUST COSTS.

MacDonald v. Tew, 32 O.L.R. 262.

REQUIREMENT OF AFFIDAVIT—MORTGAGE BY ASSIGNEE OF PURCHASER OF SCHOOL LANDS FROM CROWN.

Under s. 100 of the Land Titles Act, 1917, the test whether a mortgage can be filed is whether it is accompanied by an affidavit in form E. If the mortgagor is unable to make such affidavit the registrar cannot file the mortgage. A mortgage before issue of grant by an assignee of the purchaser of school lands from the Crown was held not registrable.

Re The Land Titles Act, [1919] 1 W.W.R. 713.

TRANSFER OF MORTGAGE — SHOWN BY ITS TERMS TO BE INTENDED AS SECURITY—SHOULD NEVERTHELESS BE REGISTERED AS A TRANSFER OF MORTGAGE RATHER THAN AS MORTGAGE OF MORTGAGE.

Re The Land Titles Act, [1919] 1 W.W.R. 504.

LAND ACTS—TRANSFER—REGISTRATION OF —DESCRIPTION OF TRANSFEREE BY HER HUSBAND'S NAME—TRANSFER FROM ADMINISTRATOR—ORDER BY "JUDGE OF A COURT OF COMPETENT JURISDICTION"—SECTION 146 (2) C. LAND TITLES ACT.

A transfer wherein the transferee is described by her husband's name with the addition of the word "Mrs." is defective and should not be accepted by the registrar. A local Master in Chambers is not a judge of a court of competent jurisdiction within the meaning of clause (c) of subs. 2 of s. 146 of the Land Titles Act.

Re Land Titles Act, Weightman's Case, [1919] 1 W.W.R. 44.

(§ III—31)—MORTGAGE—FORGED TRANSFER —REMEDY—ASSURANCE FUND.

A mortgagee taken in good faith and for value from a registered owner upon a forged transfer constitutes a valid charge on the land which will not be set aside at the instance of the true owner in prejudice of the rights of the mortgagee; the remedy of the former is in compensation from the assurance fund under the Act for a sum sufficient to discharge the mortgage. [Re Adams, etc., 20 D.L.R. 293, distinguished.]

Brown v. Broughton, 24 D.L.R. 244, 25 Man. L.R. 489, 31 W.L.R. 583, 8 W.W.R. 889.

FORGED TRANSFER—RIGHTS OF SUBSEQUENT TRANSFEREES.

Where a person forges in favour of himself a transfer of lands, no estate or interest is thereby conveyed, and subsequent transferees, not being bona fide purchasers

for valuable consideration without notice of the forgery, stand in no better position.

Shetler v. Foshay, 8 S.L.R. 174, 31 W.L.R. 181, 8 W.W.R. 852.

(§ III—32)—Sale of closed highway—Refusal to register title—Invalid by-law.

The giving of the statutory notice under the Municipal Act, R.S.O. 1914, c. 192, s. 475, of intention to close a part of the highway by municipal by-law, is a condition precedent to a valid by-law; and a purchaser from the municipality of the closed portion of the highway in a tract registered under the Land Titles Act (Ont.) may be refused registration of his title where the notice published by the municipality was radically defective.

Re Rogers, 22 D.L.R. 590, 7 O.W.N. 717.

Nonregistrable instrument—Charge on land—Agreement to execute mortgage—Departure from form.

Re Rumely and Registrar of Saskatoon, 17 W.L.R. 160.

Charge on lands on soldier settlement Board form no. 15—Security taken for advances made to entrant before issue of patent—Not registrable in land titles office.

Re Land Titles Act, Huntley's Case, [1919] 1 W.W.R. 530.

(§ III—33)—Charges—Registration of—Priority—Date of application—Land Registry Act (R.S.B.C. c. 127).

Under s. 73 of the Land Registry Act (1911, R.S.B.C., c. 127) a judgment registered in the Land Registry Office on an application made after the date of execution of a mortgage, but before the application for the registration of the mortgage, takes priority over the mortgage.

Bank of Hamilton v. Hartery, 45 D.L.R. 638, 58 Can. S.C.R. 338, [1919] 1 W.W.R. 868, affirming 43 D.L.R. 14, [1918] 3 W.W.R. 551, sub nom. Bank of Hamilton v. Hartney.

(§ III—34)—Filing deed after application for certificate of title under Real Property Act—Unregistered prior conveyance.

Re Stanger and Mondor, 20 Man. L.R. 280, 16 W.L.R. 53.

(§ III—35)—Mortgages—Foreclosure orders made by Master of Court.

A foreclosure order or a vesting order made by a Master of the Alberta Supreme Court is an "order of a court" within the exception of s. 102 of the Land Titles Act, 6 Edw. VII. (Alta.) c. 24, as to attestation by a witness for the purpose of recording against lands.

Re Land Titles Act, 11 D.L.R. 190, 7 A.L.R. 30, 24 W.L.R. 384, 4 W.W.R. 685. [Explained in Arnold v. National Trust Co., 13 D.L.R. 195, 24 W.L.R. 889.]

Sale of land under order of court—Right to possession—Time for—Order confirming sale—Land Titles Act.

Stevens v. Ullerich, 17 W.L.R. 568.

(§ III—36)—Mortgage—Abortive public sale—Subsequent private sale—Power of registrar.

After an abortive sale at public auction a mortgagee applied to the registrar to confirm a proposed sale by private contract. Held, that the registrar had no power to require, as a condition of his approval, that the mortgagee file a release of the personal covenant to pay.

Union Bank v. Boggs, 51 D.L.R. 706, 12 S.L.R. 400, [1919] 3 W.W.R. 578.

Foreclosure—Personal judgment—Duty of registrar.

A registrar cannot require, as a condition of registering an order absolute for foreclosure, that the mortgagee should vacate his personal judgment and give an undertaking not to proceed thereon. In such case the duty of the registrar is confined to making an endorsement on the certificate stating what encumbrances it was subject to, and that it was based on an order absolute.

Re Land Registry Act; Re Scottish Temperance Life Ass'ce Co. (B.C.) [1917] 1 W.W.R. 666.

IV. Cautions; caveats and adverse claims.

Assignment of agreement of sale, caveat, notice, see Vendor and Purchaser, II B—5.

Execution, priority of liens, see Execution, I—8.

Lien for improvements upon land under mistake of title, see Liens, I—1.

(§ IV—40)—Caveats—Lis pendens—Who may file—Assignee of land contract—Assignment without vendor's approval.

An interest sufficient to permit the filing of a caveat or lis pendens is not acquired by an assignment from a vendee of an interest in a contract for the sale of land, where the assignment contravened a condition of the agreement prohibiting its assignment without the approval of and countersigning by the vendor; and providing that, in the absence of such approval, no agreement, condition or relations between the vendee and his assignee or other person acquiring title or interest from or through the vendee, should preclude the vendor from conveying the land to the vendee on the surrender of the agreement and payment of the remainder of the purchase-money.

Atlantic Realty Co. v. Jackson, 14 D.L.R. 552, 18 B.C.R. 657, 26 W.L.R. 15, 5 W.W.R. 535.

Caveats—Filing in land titles office—Priority.

Of two persons each acquiring interests from a common source in the same land under unregistered contracts for its sale,

the one first filing a caveat in the land titles office will, under the Land Titles Act, Alta. 1906 (6 Edw. VII.), c. 24, relating to the filing of caveats, be entitled to priority in the absence of fraud even though he may have had notice of the other's equitable interests in the land.

Stephens v. Bannan, 14 D.L.R. 333, 6 A. L.R. 418, 25 W.L.R. 557, 5 W.W.R. 201.

CAVEAT—MORTGAGEE OF INTEREST UNDER PURCHASE CONTRACT.

Where the interest of transferees of rights under a land purchase agreement are disclosed in a caveat filed under the Real Property Act, R.S.M. 1902, c. 148, by a subsequent assignee thereof to whom such transferees had assigned their interests as security for advances, the vendor in an action to declare the original purchaser in default and to forfeit and rescind the right of purchase, must do more than make the original purchaser and such caveator parties by original action; he must join the intermediate transferees who would according to the caveat have equities against the caveator so that claims for relief over can be made between the defendants in the same action.

Watson v. Cadwallader, 14 D.L.R. 526, 23 Man. L.R. 760, 26 W.L.R. 1, 5 W.W.R. 549.

CAVEAT — MORTGAGE NOT REGISTRABLE — MISDESCRIPTION OF LAND — SUBSEQUENT ENCUMBRANCES.

The rights of a mortgagee under a mortgage which, by reason of a mistake in the description of a part of the land conveyed, is not registrable under the Land Titles Act, R.S.S. 1909, c. 41, may be protected against subsequent encumbrances by the filing of a caveat.

Reeves v. Stead, 13 D.L.R. 422, 25 W.L. R. 37, 4 W.W.R. 1353.

CAVEAT AS TO BUILDING RESTRICTION NOT MENTIONED IN TRANSFER.

Where a contract of sale of lands provided that the vendee would use the property only for a specified purpose (e.g., for the erection of a church) and further provided that upon complete payment of the purchase money and surrender of the contract a transfer would be made to the vendee subject to the original reservations by the Crown and to a reservation of minerals, without further mention being made in the contracts as to the building restriction, and a transfer was thereupon made without mention therein of the building restriction, the vendor cannot afterwards enforce the stipulation of the contract as to the use to be made of the property by filing and continuing a caveat claiming an interest therein on behalf of the vendor against his vendee as registered owner to prevent the use of the property for other purposes as an easement attaching to the land; the court will discharge the vendor's caveat under such circumstances.

Re Jamieson Caveat; Re G.T.P. Development Co., 10 D.L.R. 490, 6 S.L.R. 296, 23 W.L.R. 921, 4 W.W.R. 475, affirming on different grounds 7 D.L.R. 611, 5 S.L.R. 313, 22 W.L.R. 193, 2 W.W.R. 1068.

CAVEATS — LAND PURCHASE CONTRACT — STIPULATION AGAINST TRANSFER WITHOUT CONSENT.

An order continuing a caveat registered under the Land Titles Act against one lot of a tract of land will not be made, where the applicant merely holds a subcontract for the sale of that one lot and where it appears that the applicant's vendor purchased the entire tract under an agreement for the sale thereof from the registered owner, which agreement contained a provision prohibiting an assignment of the agreement of sale unless such assignment should be for the entire interest of the original purchaser and should be approved and countersigned by the original vendor, and the applicant claimed as to a part interest only and never received such approval from the original vendor, and the entire tract of land subsequently by intermediate assignments, but before the filing of the applicant's caveat, came without notice into the hands of one who did secure the approval of the registered owner to the sale to him and also his approval to the various mesne assignments; and this notwithstanding that such final purchaser of the entire block did not himself record a caveat until after the caveat had been filed by the applicant.

Re Green, 9 D.L.R. 301, 6 S.L.R. 6, 23 W.L.R. 57.

CAVEATABLE INTEREST—SOLICITOR'S LIEN.

An attorney's or solicitor's right of lien upon the client's papers remaining in his custody for the balance of his costs does not give him a caveatable interest in or against the lands described in a transfer obtained of Alberta lands for the costs of obtaining same.

Waters v. Campbell, 14 D.L.R. 448, 7 A.L.R. 298, 25 W.L.R. 838, 5 W.W.R. 410.

CAVEAT—RIGHT TO FILE—MORTGAGE NOT IN STATUTORY FORM.

An instrument intended as security on land for a past indebtedness, being in effect a mortgage, will not support a caveat or constitute a valid security, unless made in the form prescribed by s. 87 of the Land Titles Act, R.S.S. 1909, c. 41.

Imperial Elevator & Lumber Co. v. Olive, 15 D.L.R. 103, 6 S.L.R. 142, 26 W.L.R. 193, 5 W.W.R. 628.

One who first acquires the right to purchase land and files a caveat in the land titles office, is entitled to priority over a person claiming to be a subsequent purchaser.

Edgar v. Caskey, 4 D.L.R. 460, 5 A.L.R. 245, 21 W.L.R. 444, 2 W.W.R. 413.

A caveat registered in respect of an option for the purchase of land which was executed on the Lord's Day, contrary to Con. Ord. N.W.T., 1898, c. 91, s. 3, as pre-

served by the Lord's Day Act, R.S.C. 1906, c. 153, s. 16, may be vacated and set aside.

Fallis v. Dalthaser, 4 D.L.R. 705, 4 A.L.R. 361, 21 W.L.R. 171, 2 W.W.R. 132.

Priority is not acquired by the filing of a caveat by one who became interested in land under an agreement for its purchase after an execution had been lodged and registered against it in the land titles office. [Wilkie v. Jellett, 26 Can. S.C.R. 282, distinguished.]

Re Price, 4 D.L.R. 407, 5 S.L.R. 318, 21 W.L.R. 299, 2 W.W.R. 394.

A caveat will not lapse where the notice given for that purpose by the registrar to the caveator recited that it was sent out under the provisions of s. 141 of the Land Titles Act, which, however, did not relate to caveats, since the notice was not such as was required by s. 130 of the Act in order to terminate a caveat.

Re Caveat, 3 D.L.R. 590, 21 W.L.R. 575, 2 W.W.R. 523.

Section 97 of the Alberta Land Titles Act, 6 Edw. VII., c. 24, dealing with registration by way of caveat, applies only as between persons claiming under the same root of title, and, for this purpose, each fresh certificate of title constitutes a new root of title.

Arnot v. Peterson, 4 D.L.R. 861, 4 A.L.R. 324, 21 W.L.R. 153, 2 W.W.R. 1.

The plan filed by a railway company pursuant to the Railway Act (Can.) as a preliminary to expropriation proceedings for a right-of-way, is an instrument under which the railway company claim to be interested in the property within s. 125 of the Land Titles Act, R.S.S. 1909, c. 41, and although itself not registrable under that statute, it will support the registration of a caveat by the company.

Re Moosecana Subdivision, and G.T.P. Branch Lines, 7 D.L.R. 674, 3 W.W.R. 387.

Section 84 of the Land Titles Act, 6 Edw. VII. (Alta.) c. 24, providing among other things that any person claiming to be interested under certain instruments specifically mentioned, "or otherwise howsoever in any land," may cause to be filed with the registrar a caveat against the registration of any person as transferee does not restrict the registration of a caveat only to claims founded upon some written document, and the words "or otherwise howsoever" in the section aforesaid which follow the descriptions of interests which may be protected by the recording of caveat are broad enough to cover a claim by a member of a partnership composed of himself and the owners of certain land in which he claimed an interest in as an asset of the partnership, though the partnership was not evidenced by any writing.

Re MacCullough and Graham, 5 D.L.R. 834, 5 A.L.R. 45, 21 W.L.R. 349, 2 W.W.R. 311.

EXECUTIONS.

The effect of s. 77 of the Land Titles Act (Alta.), as amended by c. 3 (40), 1917, is that writs against lands already filed in a Land Titles Office for a particular land registration district bind any lands within that registration district, though not within the judicial district of the sheriff to whom the writ is directed, which belonged to the execution debtor at the date of the Act coming into force, or which are subsequently acquired by him while the writ remains in force.

Lee v. Armstrong, 37 D.L.R. 738, 13 A.L.R. 160, [1917] 3 W.W.R. 889.

CAVEAT ORDERS—BY WHOM SIGNED.

An order continuing a caveat under the provisions of the Land Titles Act (R.S.S. 1909, c. 41) made by the Master in Chambers, cannot be signed by the Chambers clerk. The Master in Chambers, being persona designata under the Act, cannot delegate his duties to anyone else.

Re Johnson Caveat, 29 D.L.R. 39, 9 S.L.R. 293, 34 W.L.R. 1168, 10 W.W.R. 1219.

AGREEMENT FOR SALE—SUBSEQUENT SALE AND TRANSFER—FRAUD—SPECIFIC PERFORMANCE.

The fraud referred to in ss. 42, 104, 135, 106 of the Land Titles Act (Alta.), is actual fraud, or dishonesty of some sort, not constructive or equitable fraud.

Ross v. Stovall, 45 D.L.R. 397, 14 Alta. L.R. 334, [1919] 1 W.W.R. 673, reversing 13 A.L.R. 521.

A caveat is an "instrument" within the meaning of the Land Titles Act (Sask.) and when properly lodged prevents the acquisition or bettering or increasing of any interest in the land legal or equitable, adverse to or in derogation of the claim of the caveator, at all events as it exists at the time the caveat is lodged. A caveat which describes the lands against which it is filed, with reasonable certainty, and which enables the registrar to identify the land, but omits to give the number of the certificate of title as required in the statutory form, is a sufficient compliance with the Land Titles Act, R.S.S. 1909, c. 41, s. 126 (6 Edw. VII., c. 24, s. 137), which is intended for the guidance of registrars and should be construed as directory only.

McKillop v. Alexander, 1 D.L.R. 586, 20 W.L.R. 850, 45 Can. S.C.R. 551, 1 W.W.R. 871.

COMPENSATION BY WAY OF DAMAGES FOR FILING OR CONTINUING CAVEAT WITHOUT CAUSE—ENFORCEMENT—BY ACTION—COUNTERCLAIM—LAND TITLES ACT (ALTA.), S. 94.

Denis v. Morinville, 34 D.L.R. 724, [1917] 2 W.W.R. 323.

RESTRICTIVE BUILDING COVENANTS — DISCHARGE OF.

A restrictive covenant as to the use of the property contained in an agreement for the sale of lots stipulating its continuance during the currency of the contract will cease to be effective immediately upon the issue of a transfer to the land on the sur-

render of the contract, and a caveat thereof lodged at the land titles' office will be discharged. [Re Jamieson Caveat, 10 D.L.R. 490, followed.]

Roaf v. G.T.P. Town & Development Co., 24 D.L.R. 750, 8 S.L.R. 272, 31 W.L.R. 893, 8 W.W.R. 1156.

G.T.P. Development Co. v. Moose Jaw Securities, 24 D.L.R. 752, 31 W.L.R. 892.

REGISTRATION OF FORECLOSURE ORDER — VALIDITY—SIGNATURE OF JUDGE.

Fitzgerald v. Mayo, 24 D.L.R. 898, 8 S.L.R. 228, 31 W.L.R. 795, 8 W.W.R. 1338.

CAVEAT BASED ON REGISTERED MECHANICS' LIEN.

A caveat based upon a registered mechanics' lien is an idle instrument within the meaning of the dictum of Prendergast, J., in Re Ebbing, 2 S.L.R. 167, at pp. 170, 171, and is not a registrable instrument under s. 125 of the Land Titles Act.

Re Caveat on Mechanics' Lien, 9 W.W.R. 648.

LIS PENDENS.

There is no authority for the registration of a certificate of lis pendens in the Land Titles Registry, other than Form No. 6 under the Mechanics Lien Act.

Re Lis Pendens, 7 W.W.R. 1217.

SOLICITOR'S LIEN.

A solicitor's lien for professional services rendered and disbursements advanced in foreclosing a mortgage, is insufficient whereon to found a caveat.

Re Registration of a Caveat, 8 W.W.R. 866.

REGISTRATION OF AGREEMENT EXTENDING TIME FOR PAYMENT OF MONEYS SECURED BY CHARGE—NECESSITY FOR EXECUTION BY OWNERS OF CHARGE—R.S.O. 1914, c. 126, s. 138, RULES 27, 28, 29, 30, 33.

Re Reid and Gooderham, 8 O.W.N. 534.

CAVEAT—RESERVATIONS IN CONTRACT OF SALE—REMOVAL OF CAVEAT—PERPETUATION.

The C.P.R. Co. sold to Vancise land under contract, which provided that the purchaser upon payment of the contract price, the performance by him of the conditions of the sale, and the surrender by him of the contract, should be entitled to a transfer "in fee simple freed and discharged from all encumbrances," but subject to certain reservations including a strip or strips of land for railway or irrigation purposes whenever and wherever the company might desire, the company, however, to return proportionate amounts of purchase money to the purchaser. After payment in full and the surrender by the purchaser of his contract the company lodged a caveat which after reciting the provisions of the agreement claimed an interest in the land "under and by virtue of the reservations contained in said agreement for sale," and forbade the registration of any transfer or other instrument except subject to the said claim. The transfer executed by the company excepted and reserved unto the company all coal, petroleum and valuable stone which might be found to exist within, upon or under the land, together with full power to work the same, and was also made subject to the caveat. The Master in Chambers having directed the caveat to be perpetually continued, the purchaser Vancise appealed. Held, that the purchaser was not entitled to an order for the summary removal of the caveat in view of the terms of the agreement for sale, but that the Master had erred in making the caveat perpetual, and that the appeal should be allowed to the extent of giving the appellant liberty to bring such action as he desired to determine his rights under the agreement and transfer.

Re Vancise, 10 S.L.R. 292.

CAVEAT—MARRIED WOMEN'S HOME PROTECTION ACT.

All the conditions respecting the registration of a caveat under the Land Titles Act are not by implication part of the Married Women's Home Protection Act; a caveat filed under the latter Act is required to conform only to the express requirements of that Act. The affidavit required by s. 85 of the Land Titles Act to be attached to or upon a caveat is necessary only with respect to a caveat filed under the authority of the previous s. 84.

Russell v. Russell, 12 A.L.R. 111, [1917] 3 W.W.R. 549.

EXECUTION.

A registered owner of lands gave a transfer and his duplicate certificate of title to an intended transferee. The transferee did not register the transfer for a considerable time. Prior to such registration, a writ of execution was registered against the lands. Held, that the transferee was entitled to have the execution removed as a cloud upon his title. [Union Bank v. Lumsden Milling Co., 23 D.L.R. 460, 8 S.L.R. 263, distinguished.]

Schlosser v. Colonial Investment & Loan Co., 9 S.L.R. 382, [1917] 1 W.W.R. 1045.

CAUTIONS—CAVEATS AND ADVERSE CLAIM.

Section 97 of the Land Titles Act, which provides that "registration by way of a caveat . . . shall have the same effect as to priority as the registration of any instrument under this Act," can only mean that a caveator who registers his claim under an agreement to purchase thereby obtains priority for his claim over any other purchaser who registers his claim by way of caveat at a subsequent time, in the same way as a mortgagee who registers his mortgage first acquires priority over one who registers his afterwards; and the section applies to the case where the vendor of both the competing caveators is not the registered owner but only entitled to a transfer from the registered owner as well as to the case where the vendor is the registered owner. Where an action for a declaration of right to the conveyance of lands is defended by subsequent caveators on the

ground that at the time of the plaintiff's agreement to purchase there was an action pending between the vendor and the subsequent caveators in which the vendor sought specific performance of an earlier agreement to purchase, specific performance being decreed and a time fixed for payment, but it appears that the subsequent caveators have allowed the time to elapse within which they were entitled to redeem under the judgment they, in order to defeat the claim of the prior caveators, must shew such facts as would at least against the vendor entitle them to specific performance, and, in the absence of such a shewing, they will not be allowed an extension of time for payment and their caveats will be discharged.

Brooksbank v. Burn, 3 A.L.R. 351.

APPLICATION TO TERMINATE CAUTION — STATUS OF APPLICANT—TRANSFEREE OF REGISTERED OWNER—RULES MADE UNDER AUTHORITY OF S. 138 OF 1 GEO. V. C. 28—R.24—FORM 21.

Re Dakter and McGregor, 13 O.W.N. 291.

CAVEAT—RESERVATION OF MINERALS—RULE AGAINST PERPETUITIES — LAND TITLES ACT, S. 125.

Re C.P.R. Caveat, 10 W.W.R. 10.

CAVEATS—TIME FOR FILING—LAST DAY FALLING ON SUNDAY.

Re Beufert and Hunter, 26 W.L.R. 405.

MECHANICS' LIENS—VOLUNTEERS' AND RESERVISTS' ACT — REGISTRAR SENDING NOTICE TO LIEN-HOLDER TO TAKE PROCEEDINGS.

A registrar of land titles is justified in registering a request and sending out the notice to a lien-holder required by s. 24 of the Mechanics' Lien Act without requiring proof that the lien-holder is a volunteer or reservist under c. 7 of 1916.

Re The Land Titles Act, [1919] 1 W.W.R. 584.

CAVEAT—DOMINION LANDS ACT, S. 27 (3)—CERTIFICATE IN FORM J.—TRANSFER BY HOLDER THEREOF—CAVEAT BASED THEREON—NOT CAPABLE OF REGISTRATION—LAND TITLES ACT, S. 128.

A Registrar of land titles is justified in rejecting a caveat based on an unregistered transfer given by the holder of certificate in Form J. of the Dominion Lands Act.

Re Land Titles Act, [1919] 1 W.W.R. 400.

CAVEAT—SALE OF LAND—ASSIGNMENT CREATING AN INTEREST IN LAND SUFFICIENT TO SUPPORT CAVEAT.

An instrument which contained an assignment by a vendor of a certain sum being part of the moneys payable under an agreement of sale and, for more effectuating the same, also an assignment of the said agreement of sale and the land in question, was held to be of such a nature that it created an interest in the land sufficient to support a caveat under The Land Titles Act. And, although the land was transferred by the vendor to one of the purchasers who in turn transferred it to strangers, the said sum not having been paid, the title was subject to the caveat. [Grace v. Kuebler, 39 D.L.R. 39, distinguished.]

Drewry v. Cowie, [1919] 2 W.W.R. 388.

MORTGAGE—NOTICE OF INTENTION OF EXERCISING POWER OF SALE—SERVICE ON COVENANTOR—MERGER.

Re Cocovenantors and Merger, [1917] 1 W.W.R. 1084.

MORTGAGE — REGISTRAR'S DUTY — LIS PENDENS.

After the registration by a mortgagee of notice of intention to exercise his power of sale, the registrar has no duty to consider or deal with any informal notice of misrepresentation on the part of the mortgagee regarding the consideration in the mortgage on which the proceedings are being taken before him, and he is justified in allowing the proceedings to continue until stopped by the order of the court except where he might feel himself unable to move until the disputed question should be settled by the court. The registration of a lis pendens has not the effect of an injunction in stopping mortgage proceedings before the registrar.

Re Registration of Lis Pendens, [1917] 1 W.W.R. 302.

LIS PENDENS AS CAVEAT—NOTICE—REGISTRATION OF ASSIGNABILITY.

The registration of a certificate of lis pendens against lands is similar in its effect to the registration of a caveat under the Land Registry Act, R.S.B.C. 1911, c. 127, and its registration prevents any disposition by the registered owner in derogation of the claim of the party registering the certificate until that claim has been satisfied or disposed of. [Alexander v. McKillop, 45 Can. S.C.R. 551, 1 D.L.R. 586, applied.] The provision of the Land Registry Act, R.S.B.C. 1911, c. 127, as to registration of a certificate of lis pendens operates for the benefit of intending purchasers who might, in its absence, innocently deal with the registered owner and be bound (without any notice) by judgment delivered in the action then pending. The provision in the Land Registry Act, R.S.B.C. 1911, c. 127, for the registration of a certificate of lis pendens as a charge does not imply that it shall constitute a "charge" as that term is interpreted by the Act, and the registration does not create any assignable interest in the lands.

Robinson v. Holmes, 17 D.L.R. 372, 5 W.W.R. 1143.

LAND ACTS—REGISTRATION OF LIS PENDENS.

The question of the sufficiency of a claim to an interest in land as the foundation for a lis pendens, where the title to the lands is in question, ought not to be dealt with upon an interlocutory application. The decision in re Removal of Certificate of lis pendens, 5 W.W.R. 794, does not affect the validity of a lis pendens registered prior thereto.

Forrester v. Lafontaine, 6 W.W.R. 574, 27 W.L.R. 702.

CAVEAT—AGREEMENT TO GIVE MORTGAGE.

Yockney v. Thompson, 16 D.L.R. 854, 50 Can. S.C.R. 1, 6 W.W.R. 1397, affirming 14 D.L.R. 332, 23 Man. L.R. 571, 25 W.L.R. 602, which affirmed 8 D.L.R. 776, 23 Man. L.R. 571, 23 W.L.R. 863, 3 W.W.R. 591.

PRIVILEGE—NOTICE OF REGISTRATION—WAIVER—SUBSEQUENT OWNER—TRANSFER—RIGHT OF ACTION—C.C. ART. 2013 B.

The notice of registration of a privilege is for the proprietor only, and said proprietor can waive it. Though a privilege registered upon a property has been transferred as collateral security, the right of action of the transferor still exists, and can be continued in his name.

Lavoie v. Desrosiers, 46 Que. S.C. 405.

CAVEATS—MORTGAGES ON UNPATENTED LAND.

Re Mortgages on Unpatented Lands, 16 D.L.R. 881, 6 W.W.R. 676.

CAVEATS—FORM—SUFFICIENCY UNDER STATUTE—DESCRIPTION.

The provisions of s. 85 of the Alberta Land Titles Act, 1906, read with form W thereof, as to the description of lands to be given by caveators, are merely directory and intended for the guidance of registrars, and a caveat lodged thereunder, which enables the registrar to identify the land affected, is sufficient if the interest claimed is stated with reasonable certainty although in some particular not in strict compliance with the prescribed form. [McKillop v. Alexander, 1 D.L.R. 586, 45 Can. S.C.R. 551, followed; Wilkie v. Jellett, 2 Terr. L.R. 133, 26 Can. S.C.R. 282, applied.] The provision of s. 85 of the Land Titles Act of Alberta, requiring the insertion in a caveat of the caveator's name and addition, is sufficiently met where the information so intended by the statute to be given can be definitely gathered by reading with the caveat the affidavit accompanying and verifying it. [McKillop v. Alexander, 1 D.L.R. 586, 45 Can. S.C.R. 551, applied.]

Merchants Bank v. Hastie, 16 D.L.R. 793, 7 A.L.R. 90, 27 W.L.R. 764, 6 W.W.R. 506.

CAUTIONS, CAVEATS AND ADVERSE CLAIMS—EQUITABLE MORTGAGES—MAY SUPPORT CAVEATS THOUGH NOT REGISTRABLE, WHEN.

A document in the form of a promissory note to which is added a clause whereby the maker as the registered owner of lands under the Land Titles Act, Sask., for valuable consideration "encumbers" lands specifically described for the benefit of the payee with the amount which he has promised to pay, will support a caveat filed by the payee in respect of the equitable mortgage which such document creates, although the document not being in the form prescribed by the Land Titles Act is in itself not capable of registration as a mortgage under the Act. [Wilkie v. Jellett, 26 Can. S.C.R. 282, applied; Re Ebbing, 2 S.L.R. 167; Gaar Scott v. Giguere, 2 S.L.R. 374; Gilbert v. Reeves, 4 S.L.R. 97; Shore v. Weber, 11 D.L.R. 148, distinguished.]

Imperial Elevator v. Olive, 19 D.L.R. 248, 7 S.L.R. 395, 29 W.L.R. 339, 6 W.W.R. 1562, varying 15 D.L.R. 103, 6 S.L.R. 142, 26 W.L.R. 193, 5 W.W.R. 628.

CAVEATS — BASIS FOR — NOTICE — INSTRUMENT.

A document in the form of a promissory note containing a clause whereby the maker stated to be the registered owner in fee simple of land described purports, in consideration of the debt and the extension of time for paying it, to encumber the land for the benefit of the payee for the amount of the debt, may be sufficient to base a caveat under the Land Titles Act, Sask., to enforce a lien on the land. [Imperial Elevator v. Olive, 19 D.L.R. 248, followed.] An unregistered transfer under the Land Titles Act, Sask., creates only an equitable estate, and the prior registration of a valid caveat in respect of an informal charge made by the transferor before the making of the transfer will prevent the bettering or increasing of any interest in the land adverse to the equitable estate of the caveator, although the transferee purchased in good faith and without notice of the informal charge; but the transferee may be subrogated to the mortgagee's rights under a registered mortgage prior to both the informal charge and the sale transaction where he paid off and obtained a discharge of such mortgage as part of the purchase money. [McKillop v. Alexander, 1 D.L.R. 586, 45 Can. S.C.R. 551, and Wilkie v. Jellett, 26 Can. S.C.R. 282, followed.]

Coast Lumber Co. v. McLeod, 20 D.L.R. 343, 7 S.L.R. 382, 29 W.L.R. 357, 7 W.W.R. 113.

CAVEATS—FILING IN LAND TITLES OFFICE—PRIORITY—MORTGAGE BASING CAVEAT—NONREGISTRATION—SUBSEQUENT REGISTRATION OF MORTGAGE—BASING CAVEAT—MERGER — EFFECT ON INTERMEDIATE REGISTRATIONS.

A caveat filed in respect of a registrable mortgage, which latter and the transfer on which the mortgagor's title depended, the registrar declined to receive without production of the duplicate certificate of title is by virtue of s. 97 of the Land Titles Act, Alta., as effective for the period of the caveat as if the mortgage itself had been registered; and, from the time of filing such caveat, it prevents the acquisition or the bettering or increasing of any interest in the land adverse to or in derogation of the claim of the caveator as it then existed. [Stephens v. Bannan, 14 D.L.R. 333, and McKillop v. Alexander, 1 D.L.R. 586, 45 Can. S.C.R. 551, applied.] The discretion allowed to the registrar under s. 97 of the Land Titles Act (Alta.) to allow the withdrawal of a caveat and the substitution therefor of the registrable instrument on which it was based was not intended as a mode of disposing of substantial rights where there are interme-

diate registrations; the registrar will properly decline to make the substitution where questions of the validity of the caveat may be raised by persons who have subsequently entered claims on the register. A merger does not take effect against the intention of the parties, and where it is plain that the subsequent registration of the mortgage referred to in a caveat based on same was with the intention of retaining the priority secured by the caveat, the mortgage will not merge the caveat so as to vest a better title in the mortgagee under an intermediate mortgage than he had when he registered subject to such caveat.

Muller v. Schwalbe, 19 D.L.R. 19, 8 A.L.R. 125, 30 W.L.R. 472, 7 W.W.R. 817.

(§ IV—41)—Manitoba Real Property Act — Caveat — Certificate of title subject to caveat.

Pearson v. O'Brien, 11 D.L.R. 175, 22 W.L.R. 703, 4 W.W.R. 342, affirming 4 D. L.R. 413, 22 Man. L.R. 175, 20 W.L.R. 510, 1 W.W.R. 1026.

(§ IV—42)—Lapsing—Continuation.

A caveat will lapse where the caveator, after proper lapsing notice had been given the caveator by the registrar, obtained a void order under s. 130 of the Land Titles Act from a Judge of the District Court acting as a Local Master, which he was without jurisdiction to grant, extending for more than 30 days the time for the lapsing of the caveat. As an application for the continuance of a caveat under s. 130 of the Land Titles Act is neither an action nor a proposed action, therefore power to grant an order for that purpose cannot be delegated by the Judges of the Supreme Court to Local Masters, as it does not come within the authority conferred upon the former to make rules delegating their powers to Local Masters in respect to action brought or proposed to be brought in their respective districts.

Re Caveat, 3 D.L.R. 590, 21 W.L.R. 575, 2 W.W.R. 923.

Continuation of caveat.

A caveat under the Land Titles Act (Sask.) by a railway company in respect of their location plan for a right-of-way filed under the Railway Act (Can.) will be continued only upon the company proceeding under the Railway Act with the expropriation of the lands.

Re Moosecana Subdivision, and G.T.P. Branch Lines, 7 D.L.R. 674, 3 W.W.R. 387.

(§ IV—43)—Specific performance — Notice of rescission—Date.

Where the vendor has sued for specific performance of an agreement for sale of lands in Alberta where titles are shewn of record under the Land Titles Act, and he has had a reasonable time to get in and register a title in himself to the lands in question, it is not necessary that the purchaser thereafter giving notice of rescission because of the vendor's lack of a registered title shall fix in such notice a definite date in advance at which the transfer must be forthcoming or he would repudiate. [Halkett v. Dudley, [1907] 1 Ch. 590, distinguished.]

Krom v. Kaiser, 21 D.L.R. 700, 8 A.L.R. 287, 31 W.L.R. 742, 8 W.W.R. 239, reversing 18 D.L.R. 226, 7 A.L.R. 467.

Caveat—Married woman—Affidavit.

Section 85 of the Land Titles Act (Alta.), which requires that all caveats with the exception of a caveat filed by the registrar under s. 100 must be supported by an affidavit of good faith, applies to a caveat filed by a married woman under the Married Woman's Home Protection Act (Alta. 1915, c. 4).

Russell v. Russell, 42 D.L.R. 52, 57 Can. S.C.R. 1, [1918] 2 W.W.R. 672, reversing 12 A.L.R. 111.

Caveat—Homesteads—Patent.

A caveat under an Act respecting homesteads may be filed against Dominion land for which the patent has not yet been issued.

Re Land Titles Act; Graham's Case (Sask.), [1918] 2 W.W.R. 943.

Discharge of caveat—Homestead—Jurisdiction of Master.

The Master in Chambers has jurisdiction to order the discharge of a caveat registered in the land titles office under s. 6 of An Act Respecting Homesteads, c. 29, 1915.

Re Land Titles Act (Sask.), [1918] 2 W.W.R. 940.

Caveat—Reservation of mines and minerals in.

Re Land Titles Act (Sask.), [1918] 2 W.W.R. 939.

Caveat—Right to registration of—Extent of duty of registrar.

Re Land Titles Act; Re Holland Canada Mortgage Co. (Sask.), [1918] 3 W.W.R. 345.

Real property—Caveat—Filing of caveat based on mortgage before registration of grant from Crown — The Land Titles Act, 1917, ss. 100, 128.

Acceptance by registrars before registration of the grant from the Crown of Caveats based upon a mortgage, approved so long as the caveat is accompanied by affidavit complying with form E in the second schedule to the Land Titles Act, 1917.

Re Land Titles Act; Canada Life Ass'ce Cos. Case, [1919] 2 W.W.R. 47.

(§ IV—45)—Caveat—Petition of caveator.

Re Cass and Canada Traders, 20 Man. L.R. 139, 15 W.L.R. 194.

(§ IV—46)—Agreement for sale—Registration as caveat—Interest in land—Land Titles Act (Alta.).

An "interest in land" is created in favour of the purchaser by an agreement for sale which cannot be registered except by way of caveat under the Land Titles Act

(Alta.), or by a mortgage, whether registered or not.

Setter v. The Registrar, 20 D.L.R. 166, 8 A.L.R. 191, 30 W.L.R. 256, 7 W.W.R. 901.

(§ IV—47)—Judgments and executions—Encumbrancers—Land Titles Act—Expiration of execution.

Evans v. Postill, 3 A.L.R. 141.

V. Land certificates; titles.

(§ V—50)—Free from encumbrances—Reservations—Caveat.

Under an agreement to transfer land in fee simple free from all encumbrances, subject to certain reservations, the transfer may be made subject to caveat for the reservations; but the caveat must not be made perpetual and is only to be continued until the rights of the transferee are determined by an action. [Re Grand Trunk Pac. R. Caveat, 10 D.L.R. 490, 6 S.L.R. 296; Roaf v. G.T.P.R., 24 D.L.R. 750, 8 S.L.R. 272, distinguished.]

Re C.P.R. Co. Caveat and Land Titles Act (Sask.), 36 D.L.R. 317, [1917] 3 W.W.R. 170.

Lien—Seed Grain Act.

Section 44 of the Land Titles Act is not overridden or modified by an Act respecting Seed Grain, c. 21, 1908. A bona fide purchaser for value who has obtained a clear certificate of title without notice is not affected by a subsequent charge by the Crown under the said Seed Grain Act.

Johansson v. Cronquist, 38 D.L.R. 508, 12 A.L.R. 225, [1917] 3 W.W.R. 1029.

Mortgage—Foreclosure—Purchaser from mortgagee — Certificate of title — Opening foreclosure—Rights of parties.

A purchaser, from a mortgagee who has acquired a certificate of title under the Saskatchewan Act (1909), R.S.S. c. 41, is entitled to rely upon the effect given by s. 65 of the Act, the certificate of title of his vendor. Where the vendor acquired title by foreclosure, and it is sought to open up the foreclosure and permit redemption, the purchaser is entitled to be added as a party to the application, with leave to bring such evidence, and take such steps as he may be advised against opening up the foreclosure. [Campbell v. Holyland, 7 Ch. D. 166, distinguished.]

Credit Foncier Franco Canadien v. Redekope, 46 D.L.R. 225, [1919] 2 W.W.R. 158, reversing [1919] 1 W.W.R. 494.

Priorities—Equitable mortgage—Execution.

The creation of an equitable mortgage of land by the deposit of a certificate of title and the execution of a transfer, both by way of security, followed by the registration of a caveat, alleging the deposit of the certificate and the execution of the transfer, do not entitle the mortgagee to a certificate of title free from the encumbrance of executions registered subsequent to the date of transfer. [Traunweiser v. Johnson, 23 D.L.R. 70, Adanac Oil Co. v. Stocks, 28 D.L.R. 215, distinguished.]

Quebec Bank v. Royal Bank, 28 D.L.R. 235, 9 A.L.R. 435, 34 W.L.R. 137, 10 W.W.R. 218.

Assignee for creditors — Executions — Mortgages—Priorities.

The object of s. 9 of the Assignment Act (R.S.S. 1909, c. 142) declaring an assignment for the benefit of creditors to take precedence over all executions not completely executed by payment, and the general purpose of the Act, is to provide for the distribution of the assets of the insolvent without priority, except in so far as any creditor may have obtained a priority prior to the assignment, but the assignee is not entitled to receive a certificate of title free from such executions where, in so doing, it would in effect give to mortgagees subsequent to the executions a greater claim than they would have had at the time of the registration of the mortgages. [Re Brooks, 2 S.L.R. 504, distinguished; Edmonton Mortgage Co. v. Gross, 3 A.L.R. 500, followed.]

Lutz v. Dominion Trust Co., 27 D.L.R. 83, 9 S.L.R. 138, 34 W.L.R. 172, 10 W.W.R. 418.

Transfers—Execution creditors.

A transfer from an unpaid vendor in pursuance of an agreement for sale made prior to the registration of an execution, but deposited after such registration, can only be registered under the Land Titles Act subject to the right of the execution creditor.

Adanac Oil Co. v. Stocks, 28 D.L.R. 215, 11 A.L.R. 214, 33 W.L.R. 864, 9 W.W.R. 1521.

Certificates—Application for—Omission to notify all parties in interest—Fraud—Effect of validity.

Where the mortgagee knows that his mortgagor's title under court proceedings was obtained by the omission to bring in as a party a person known to claim the lands under an unregistered transfer free from the mortgage in question, the Land Titles Act, R.S.S. 1909, c. 41, does not afford protection to the mortgagee for any advances made by him subsequently to getting notice of such facts, although the mortgage had been registered before the notice; making any further advances after the receipt of the notice is committing a fraud on the purchaser with the unregistered title and to the extent of such advances the mortgagee is not a bona fide mortgagee. For the holder of a mortgage to refrain from giving notice of his foreclosure proceedings to a person of whose unregistered claim as a purchaser through the mortgagor he had notice, as well as of the fact that such person believed, on information furnished by a former holder of the mortgage, that it had been paid off, and the taking of a foreclosure order by failure to disclose such unregistered interest to the court is a fraud on the court for which the certificate of title issued to a

party to such fraud may be cancelled under the Land Titles Act.

Robinson v. Ford, 19 D.L.R. 572, 7 S.L.R. 443, 7 W.W.R. 747, varying 14 D.L.R. 360, 25 W.L.R. 669, 5 W.W.R. 542.

FORGED TRANSFER—LAND CERTIFICATE BASED THEREON — EFFECTIVENESS OF, HOW LIMITED.

No estate or interest passes under a forged transfer purporting to be made under the Land Titles Act (Alta.), apart from the consideration of what effect may be given to a certificate of title based thereon in favour of a bona fide purchaser for value. The cancellation of a certificate of title on the registration of a forged transfer is not a cancellation under the Land Titles Act, and, so long at least as the registered title remains in the transferee named in the forged transfer, or in some one having no better standing, the owner in fraud of whom the certificate has been cancelled (but not under the Act) upon the recording of the forged transfer is entitled to the land.

Re Adams and McFarland, 20 D.L.R. 293, 6 W.W.R. 1077.

Though a mortgage in proper form is handed in for registration at the same moment as the transfer of title to the mortgagor under the Land Titles Act (Sask.), it cannot be actually registered until after the title has been officially transferred of record under that Act (Torrens title system), and therefore it must be received subject to executions already on file in the land titles office.

Rogers Lumber Co. v. Smith, 8 D.L.R. 871, 22 W.L.R. 899, 3 W.W.R. 697.

OWNER UNDER TITLE BY ADVERSE POSSESSION —CANCELLATION OF OLD CERTIFICATE.

Notwithstanding the provisions contained in ss. 44, 104 of the Alberta Land Titles Act, 1906, c. 24, land held under a registered title is not exempt from the operation of the Statute of Limitations in force in Alberta, and a person who entered on land and had been in adverse possession for the statutory period acquires a title to the land which cannot be attacked by the registered owner in whose name a certificate of title stands; the entry of the name of the new owner upon the register is not provided for in the Land Titles Act, and will not be ordered by the court, nor will the certificate of title of the former owner be ordered to be cancelled.

Wallace v. Potter, 10 D.L.R. 594, 6 A.L.R. 83, 24 W.L.R. 262, 4 W.W.R. 738.

DEED IN FRAUD OF CREDITORS—CANCELLATION OF CERTIFICATE—SALE OF LAND IN SATISFACTION OF CREDITORS' CLAIMS.

On holding void a voluntary conveyance of a debtor's property which has been registered in the land titles office, the court cannot order the cancellation of the grantee's certificate of title, but merely the sale of the land in satisfaction of the claim of the grantee's creditors.

Holmes v. Holmes, 13 D.L.R. 155, 6 S.L.R. 171, 24 W.L.R. 720, 25 W.L.R. 9.

TITLE TO CROPS—RIGHTS OF LESSEE UNDER CROPPING LEASE.

A growing crop of wheat, or other product of the soil not produced spontaneously, is a chattel interest which may be claimed against the transferee of the title to the land under the Land Titles Act (Sask.), by the tenant or licensee under an agreement made with the transferor for cropping land on shares; if the agreement constituted a lease it is within the exception of s. 66 of the Land Titles Act, but if not a lease, the person put in possession under the cropping agreement would hold a license with an interest entitling him to go upon the land for the purpose of harvesting the grain and removing same to the elevator in conformity with this agreement, and such interest and parol evidence of notice to the transferee and of the latter's acceptance thereof as a term of his purchase may be shewn notwithstanding the production by the transferee of a certificate of title in which the crop agreement was not mentioned. [Marshall v. Green, 1 C.P.D. 35, applied; Wood v. Lang, 5 U.C.C.P. 204, distinguished.]

Gardner v. Staples, 21 D.L.R. 814, 8 S.L.R. 149, 30 W.L.R. 860, 8 W.W.R. 397.

FORGED TRANSFER—CANCELLATION.

A certificate of title procured upon a forged transfer, although prima facie valid, may be set aside under s. 58 of the Real Property Act (Man.), and a new certificate issued to the true owner.

Brown v. Broughton, 24 D.L.R. 244, 25 Man. L.R. 489, 31 W.L.R. 583, 8 W.W.R. 889.

EASEMENTS.

A certificate of title should not be issued for an easement, but it should be protected by a memorandum on the certificate relating to the servient tenement, and where the dominant tenement is apparent, also upon the certificate relating thereto.

Re Easements, 8 W.W.R. 171.

SUBSEQUENT RESALE BY VENDOR—RIGHT TO POSSESSION.

One L., the owner, sold a quarter section of land to the defendant under agreement, payable by instalments. Subsequently, L., claiming to have cancelled the sale to the defendant because of nonpayment of instalments, resold the land to the plaintiff, giving the plaintiff a transfer therefor, which the plaintiff registered and obtained certificate of title. The defendant, between the execution of the transfer and the issue of certificate of title, executed and lodged for registration a caveat which the registered on the same day that the certificate of title issued. The plaintiff caused the registrar to serve on the defendant notice of lapse of caveat unless a judge's order continuing the same was produced, and no judge's order being produced the caveat lapsed and was struck off the title. The defendant continued in possession of the land:—Held, that the plaintiff's certificate of title was conclusive evidence that the

plaintiff was the owner of the land and was entitled to possession thereof.

Cloutier v. Loiselle, 8 S.L.R. 249, 33 W.L.R. 111, 9 W.W.R. 684.

LAND CERTIFICATES.

A certificate of ownership or a certificate of title, while conclusive evidence of title for purposes of transfer, is not necessarily conclusive in the hands of a registered owner who has acquired same by mistake or accident, although, semble, a sale by such person would create in the purchaser an estate absolutely conclusive. Where, therefore, the L. Co. purchased from M. certain land the bounds of which on the ground were well known by the vendor and the purchaser, but the actual registry description being unfamiliar to them, and in the transfer M. included a lot of land in which he had parted with an equitable interest, although he still retained the legal estate:—Held, in an action by the equitable owner of the land aginst the L. Co., that the certificate of title of the L. Co. was not conclusive; that the L. Co. had not intended to purchase, nor had M. intended to sell this particular lot; that, therefore, on the ground of mutual mistake or accident the certificate granted in respect to this lot, then still in the name of the L. Co., should be cancelled. Semble, the jurisdiction of the court over contracts of sale or other dispositions of land where certificate of title has been granted, whether on the ground of fraud, accident, mistake or otherwise, has not been taken away or in any way interfered with by the provisions of the Land Titles Act.

Ott v. Lethbridge Brewing & Malting Co., 3 A.L.R. 210.

TAX SALE DEED.

There being no valid objection to the title, an owner of land under a tax sale deed is entitled to registration as owner in the absolute fee register. On a subsequent application for an indefeasible title the registrar cannot refuse an indefeasible title on the mere ground that the root of title is a tax sale.

Ex parte Lamson, 21 B.C.R. 507.

"ACTION FOR RECOVERY OF LAND."

An action for the establishment of title only, not claiming possession, is not an "action for the recovery of land" and the certificates of title are not a bar to such action under s. 104 of the Land Titles Act (Alta.).

Sutherland v. Spruce Grove, 43 D.L.R. 280, 14 A.L.R. 284, varying [1918] 3 W.W.R. 152. [See 44 D.L.R. 375, 14 A.L.R. 292, [1919] 1 W.W.R. 281.]

TITLE OF TAX-SALE PURCHASER—SERVICE OF NOTICE—HOMESTEAD.

Except in those cases wherein the interest of the person to be served is shewn to be under $200, personal service of notice of an application by a tax-sale purchaser for title should be made in all cases where personal service is possible. The memoranda of liability of a homestead to forfeiture to the Crown in right of the Dominion and of the lien of a colonization society, both of which have been acquired under s. 44, c. 54, R.S.C. 1886, must follow on a title granted to a tax-sale purchaser and it is, therefore, immaterial whether notice is given to the Minister of the Interior or to the colonization society of such purchaser's application for title.

Re Land Titles Act (Sask.), [1918] 2 W.W.R. 959.

TAX SALE—RIGHT OF PURCHASER TO APPLY FOR TITLE—RIGHT OF APPLICANT TO ACCEPT SERVICE OF NOTICE FOR REGISTERED OWNER—NECESSITY OF SERVICE OF NOTICE ON PERSONS WITH UNREGISTERED INTERESTS—RIGHT OF SOLICITOR TO APPLY FOR TITLE FOR HOLDER OF TAX-SALE CERTIFICATE—EFFECT OF ISSUE OF CERTIFICATE OF TITLE—RIGHTS OF TAX-SALE PURCHASER.

Re Land Titles Act; Re Arrears of Taxes Act (Sask.), [1918] 1 W.W.R. 364.

TAX SALE—ARREARS OF TAXES ACT, C. 21, 1915 — APPLICATION FOR TITLE—LAND NOT YET UNDER LAND TITLES ACT—SERVICE ON INTERESTED PARTIES—PROCEDURE TO BE FOLLOWED BY REGISTRAR — LAND TITLES ACT — REFERENCE TO MASTER OF TITLES—NECESSITY.

Re Land Titles Act; Re Arrears of Taxes Act (Sask.), [1918] 1 W.W.R. 414.

ARREARS OF TAXES ACT, C. 21, 1915, S. 22—NOTICE OF REDEMPTION—REGISTRATION OF WITHOUT CHARGE.

Re Land Titles Act; Re Arrears of Taxes Act (Sask.), [1918] 2 W.W.R. 949.

ARREARS OF TAXES ACT—SALE—APPLICATION BY PURCHASER FOR TITLE—DEATH OF REGISTERED OWNER—PROOF OF DEATH — DIRECTIONS FOR SUBSTITUTIONAL SERVICE.

Re Land Titles Act (Sask.), [1918] 3 W.W.R. 143.

TAX SALE — PURCHASER THE REGISTERED OWNER—REMOVAL FROM TITLE OF MEMORANDUM OF TAX SALE — WAYS OF CLEARING TITLE.

Re Land Titles Act (Sask.), [1918] 3 W.W.R. 346.

COSTS—TAX-SALE APPLICATION FOR TITLE—INSTRUCTIONS — ATTENDANCES — APPLICATION—LETTERS—SETTLEMENT FEE.

Re Land Titles Act; Re Moosomin Land Registration District (Sask.), [1918] 1 W.W.R. 416.

ARREARS OF TAXES ACT—CERTIFICATE OF TITLE—CROWN LAND.

The registrar should refuse an application under the Arrears of Taxes Act for a certificate of title to land, the title to which is vested in the Crown.

Re Land Titles Act; Re Lakeside (Sask.), [1918] 1 W.W.R. 461.

TAX SALE DEED—REGISTRATION—NOTICE—JUDGMENT CREDITORS—INSOLVENT.

On an application to register a tax-sale

deed, service of notice under s. 137B of the Land Registry Act, R.S.B.C., 1911, c. 127, upon judgment creditors is not required where the executrix of the owner has filed a declaration of insolvency.

Re North Vancouver, [1918] 1 W.W.R. 626.

ARREARS OF TAXES ACT, 1915, C. 21—TAX SALE OF LAND OF COMPANY — SHAREHOLDER A VOLUNTEER—RIGHT OF TO PROTECTION AGAINST TRANSMISSION TO TAX-SALE PURCHASER.

Re Land Titles Act; Re Arrears of Taxes Act (Sask.), [1918] 2 W.W.R. 934.

ARREARS OF TAXES ACT, 1915, C. 21 — REMOVAL OF MEMORANDUM OF TAX SALE —PAYMENT OF TAXES DIRECT TO MUNICIPALITY—COSTS OF TAX-SALE PURCHASER — STATEMENT OF — METHOD OF OBTAINING—SECTION 48.

Re Arrears of Taxes Act (Sask.), [1918] 2 W.W.R. 935.

ARREARS OF TAXES ACT, C. 21, 1915, S. 47—APPLICATION FOR TITLE—SUBSTITUTIONAL SERVICE—LAND TITLES ACT S. 156.

Re Land Titles Act; Re Arrears of Taxes Act (Sask.), [1918] 2 W.W.R. 938.

ARREARS OF TAXES ACT, C. 21, 1915, S. 48 — APPLICATION FOR TITLE — PAYMENT OF INTEREST—DATE FROM WHICH INTEREST RUNS.

Re Land Titles Act; Re Arrears of Taxes Act (Sask.),[1918] 2 W.W.R. 942.

ARREARS OF TAXES ACT, C. 21, 1915 — STATEMENT UNDER S. 45 — REGISTRATION OF—LACK OF STATEMENT UNDER S. 32.

Re Land Titles Act; Re Arrears of Taxes Act (Sask.), [1918] 2 W.W.R. 944.

ARREARS OF TAXES ACT, C. 21, 1915 — APPLICATION FOR TRANSMISSION BY ASSIGNEE OF TAX-SALE PURCHASER—RIGHT OF CAVEATOR TO STAY PROCEEDINGS.

Re Land Titles Act; Dickenson's Case (Sask.), [1918] 2 W.W.R. 948.

CERTIFICATE OF TITLE TO EXECUTOR—ADMINISTRATION DE BONIS NON — DUTY OF REGISTRAR.

In spite of the provisions of the Land Titles Act (Sask.) which forbids recognition of trusts, the interpretation of s. 111 given by the courts and by the well settled practice in the Land Titles Office gives the words in that section: "And the registrar shall grant to the executor and administrator as such a new certificate of title," a meaning which is in effect a recognition, in cases of devolution, of the trust upon which the title was issued. On the decease of an administratrix duly registered, the registrar should require the production of letters of administration de bonis non of the intestate, and should not make transmission of the registered land to the executrix of the administratrix.

Re Administration De Bonis Non, 5 W.W.R. 1328.

UNPAID TAXES — CERTIFICATE TO MUNICIPALITY—DUTY OF REGISTRAR.

In issuing a certificate of title to lands the taxes on which have not been paid, under s. 321 of the Rural Municipality Act, the registrar must assume that the treasurer of the municipality has duly carried out his duties under s. 319 of that Act, and cannot withhold a certificate of title in favour of the municipality, even where he considers that such duties have not been properly carried out.

Re Registration of Certificate of Title to Municipality, 5 W.W.R. 1328.

(§ V—51)—CERTIFICATE—"INTERESTS" AND CLAIMS.

Pearson v. O'Brien, 11 D.L.R. 175, 22 W.L.R. 703, 4 W.W.R. 342, affirming 4 D.L.R. 413, 22 Man. L.R. 175, 20 W.L.R. 516, 1 W.W.R. 1026.

(§ V—53)—FRAUD WHICH WILL AFFECT REGISTERED TITLE.

The fraud which will prevent a purchaser for value from relying upon his registered title, under the Land Titles Act (Alta.) 1906, c. 34, as against unregistered rights of a prior vendee must be actual fraud as distinct from mere constructive or equitable fraud; such actual fraud is disclosed where the purchaser so registering has notice of the existence of an unregistered interest and knows that the transaction he is making will have the effect of injuring or destroying that interest. [Assets Co. v. Mere Roihi, [1905] A.C. 176, 210, and Syndicat Lyonnais du Klondyke v. McGrade, 36 Can. S.C. R. 251, at 266, followed.]

Sydie v. Saskatchewan & Battle River Land & Dev. Co., 14 D.L.R. 51, 6 A.L.R. 388, 25 W.L.R. 570, 5 W.W.R. 194.

CERTIFICATE OF TITLE OBTAINED BY FRAUD—DEPOSIT WITH BANK AS SECURITY.

Fialowski v. Fialowski, 19 W.L.R. 644.

CERTIFICATE OF TITLE—RESALE BY MORTGAGEE AS REGISTERED OWNER—INNOCENT PURCHASER FOR VALUE WITH CERTIFICATE OF TITLE—RIGHT OF MORTGAGOR TO OPEN UP FORECLOSURE.

Richards v. Thompson, 18 W.L.R. 179.

(§ V—55)—SALE OF LOT TO PLAINTIFF—CONVEYANCE NOT REGISTERED—SALE OF LOT TO DEFENDANT—DEFENDANT'S LOT BY MISTAKE DESCRIBED BY NUMBER OF PLAINTIFF'S LOT—LAND BROUGHT UNDER THE ACT—DEFENDANT REGISTERED AS OWNER OF PLAINTIFF'S LOT—RECTIFICATION OF REGISTER—POWERS OF COURT, R.S.O. 1914, c. 126, s. 115.

Perry v. Vise, 47 D.L.R. 718, 45 O.L.R. 117.

VI. Plans.

Negative covenant, easement, building restriction, reference to plan, see Vendor and Purchaser I C—13.

(§ VI—60)—Application to cancel part of plan—Subdivisions Act, 5 Geo. V. 1914, Sask., c. 9—Consent of Minister of Highways—Land Titles Act, 8 Geo. V. 1917, Sask., 2nd Sess., c. 18, s. 80.

Before part of a plan containing streets and lanes, registered under the Land Titles Act may be cancelled, the consent of the Minister of Highways must be obtained.

Re Subdivisions Act; Re Asquith Townsite, 50 D.L.R. 172, [1920] 1 W.W.R. 1.

Plans.

A plan registered under s. 79 of the Saskatchewan Land Titles Act is the official description of the property and cannot be altered or amended, after registration, except by a judge's order under subs. 2 of s. 80 of that Act. The plan is for the purpose of shewing the boundaries of lots staked out in town plots and to provide a short and convenient description of the same, and is for registration, so that thereafter the lots are described according to that plan, and it becomes the official description of the property. The plan provided for under s. 76, to the effect that the registrar may require anyone transferring land to furnish him with a plan having the several measurements of the land to be transferred marked thereon and certified by a Saskatchewan land surveyor, is only for the information of the registrar, to enable him to see upon the plan how the piece of property in question is laid out and that its boundaries do not conflict with any other parcel of land, but is not for registration. A transfer of a part of a lot, for which lot a plan has been already registered with the registrar as required by s. 79, does not of itself constitute an alteration of the plan and does not require an alteration of the plan by a judge's order under subs. 2 of s. 80 of the Act. Where land is subdivided by a registered plan under s. 79, and a corner lot is shewn as fronting on a certain street with a side street as one of its lateral boundaries, a new plan of subdivision of such lot is not required on a sale of the middle portion thereof fronting upon the side street only, but a conveyance or transfer may be recorded as of such part of the lot, with or without an easement of right-of-way over the remaining portions.

Re Application of the Moose Jaw Securities, 8 D.L.R. 322, 5 S.L.R. 354, 22 W.L.R. 463, 5 W.W.R. 216.

Plans — Alteration — Subdivision of land into city lots.

The Plans Cancellation Act, R.S.B.C. 1911, c. 179, does not apply to require a judge's order under that Act where the larger blocks of land, under a prior registered plan, are merely to be subdivided by another plan.

Re Land Registry Act and Canada Realty Syndicate, 12 D.L.R. 740, 4 W.W.R. 744.

Plans — Subdivision — Document affecting only part of lot.

A mortgage covering only a part of a lot designated in a registered subdivision plan may be registered under s. 100 of the Land Registry Act, 1911, c. 127, where accompanied by a map or sketch shewing the portion affected, without filing a plan of resubdivision under s. 90 making such part a separate parcel thereunder.

Ex parte Williams, 14 D.L.R. 831, 18 B.C.R. 248.

Plans—Effect of registration if any transfer made thereunder.

The effect of subs. 2 of s. 124 of the Land Titles Act, 1906 (Alta.), c. 24, is that a plan of subdivision, when once properly registered is binding on everybody if a sale, mortgage, encumbrance or lease has been made according to it, unless and until it is cancelled or amended in whole or in part by a judge's order.

Rowland v. Edmonton, 20 D.L.R. 36, 6 W.W.R. 1498, 8 A.L.R. 1. [Reversed on another point 21 D.L.R. 33, 50 Can. S.C.R. 520, 31 W.L.R. 33, 8 W.W.R. 20.]

Subdivision plans and surveys.

A plan of subdivision should not be registered without the approval and signature of incumbrancers, notwithstanding the Surveys Acts, s. 14, subs. 7.

Re Registration of Plans, 9 W.W.R. 180.

(§ VI—61)—Plans—Sale of portion—Land adapted for subdivision.

A sale agreement in respect of a portion of a block of vacant land as to which there is no approved or registered subdivision plan within the purview of the Land Registry Act, R.S.B.C. 1911, c. 127, s. 90, may be registered in the "Register of charges" on a description of the portion by metes and bounds accompanied by a surveyor's sketch not designating such portion by any lot number, and this notwithstanding a prior attempt to subdivide the property which failed for want of approval by the municipal council if the proposed plan of subdivision so rejected is not referred to either in the description or in the survey accompanying such sale agreement.

Ryan v. District Registrar, 16 D.L.R. 259, 19 B.C.R. 165, 26 W.L.R. 982, 5 W.W.R. 1253.

VII. Procedure.

(§ VII—70)—First registration—Procedure—Crown grant—Description of riparian lands.

Upon an application, under a Crown grant of lands, to register title to a portion of certain numbered lots or parcels thereof, the Registrar of Titles is without jurisdiction (either under the Land Registry Act, R.S.B.C. 1911, c. 127, or otherwise, to compel the applicant as a condition precedent to registration to acknowledge that the river bed and the lake bed are not included in the grant by way of amplifying the description.

Gardiner v. District Registrar, 16 D.L.R. 575, 19 B.C.R. 243, 27 W.L.R. 536, 6 W.W.R. 407, affirming 13 D.L.R. 790, 25 W.L.R. 429, 5 W.W.R. 99, sub nom. Re Land Registry Act.

PROCEDURE — ORDERS OF MASTERS OF SUPREME COURT—AUTHORITY OF DISTRICT JUDGE.

A Master of the Supreme Court of Alberta has no jurisdiction as such to make orders under the Land Titles Act, 6 Edw. VII. (Alta.), c. 24, which by the terms of the statute are to be made by "a judge." A District Court Judge as such has jurisdiction under the Land Titles Act, 6 Edw. VII. (Alta.), c. 24, to make any order which the statute authorizes a "judge" to make where there is no limitation in the particular section to indicate that only a Judge of the Supreme Court shall have the power. Orders made by a judge as persona designata under the Land Titles Act, 6 Edw. VII. (Alta.), c. 24, including orders made under that heading by a District Court Judge, are within the exception of s. 102 of that statute as to attestation of instruments by a subscribing witness.

Re Land Titles Act, 11 D.L.R. 190, 7 A.L.R. 30, 24 W.L.R. 384, 4 W.W.R. 685.

RECTIFICATION OF REGISTER—STRIKING OUT REGISTRATION OF VOID PATENT.

The registration under the Land Titles Act, R.S.O. 1897, c. 138, 1 Geo. V. c. 28, R.S.O. 1914, c. 126, of a Crown land patent, the issuance of which was obtained by fraud, does not prevent the subsequent rectification of the record by the court under s. 119 of the Act, in favour of a prior patentee, whose patent was previously registered, and to whom a certificate of title was issued, the descriptions of the land in two patents not being identical.

Zock v. Clayton, 13 D.L.R. 502, 28 O.L.R. 447, reversing 6 D.L.R. 205, 3 O.W.N. 1611.

AUTHORITY OF DISTRICT JUDGE—APPEALS AND REFERENCES — PERSONA DESIGNATA —FILING AFFIDAVITS.

The provisions for appeals and references to a Judge of the Supreme Court of Alberta under s. 112, 113 of the Land Titles Act, 1906 c. 24, as amended by s. 15 of the Act to amend the Statute Law, 1908 c. 20, are to be construed strictly, and such appeals do not lie to a District Judge; nor has a district judge any jurisdiction to order the correction of a certificate of title. All the material upon which any order is made by a judge as persona designata under the Land Titles Act, 1906 (Alta.), c. 20, should be directed to be filed along with the order itself in the land titles office. [Re Land Titles Act (No. 1), 11 D.L.R. 190, explained.]

Arnold v. National Trust Co., 13 D.L.R. 195, 7 A.L.R. 58, 24 W.L.R. 889, 4 W.W.R. 1113.

PROCEDURE.

Where a municipal corporation, instead of proceeding by way of by-law, attempts to close a highway by mere resolutions of the council, and applies under the Land Titles Act (Alta.), for an order for the registration thereof as a by-law, the application will be refused. [Subs. 7, s. 26, Land Titles Act, 6 Edw. VII. (Man.), c. 24, as enacted by s. 19, c. 5, 1907 (Alta.), construed.]

Re Bassano, 7 D.L.R. 601, 3 W.W.R. 189.

Where an application by the registered owners of certain land for an order vacating the registration of a caveat against it which application was refused upon the hearing and instead the court, upon the ground that the owners' title should not remain subject to the caveat for any longer time than was actually necessary, ordered the caveator to commence an action to establish his claim to set it down for trial at the sitting of the next month following that in which the order was given and to proceed to trial at such sittings and further directed that if the caveator made default in complying with this order in any respect, the owners might apply ex parte for an order for the removal of the caveat which would be granted by the court upon satisfactory proof of such default.

Re MacCullough and Graham, 5 D.L.R. 834, 5 A.L.R. 45, 21 W.L.R. 349, 2 W.W.R. 311.

The Land Titles Act, 1 Geo. V. (Ont.), c. 28, s. 88, requiring that the practice or procedure on, and incidental to, a case stated or on an issue directed for the determination of a question arising in the office of the Master of Titles shall be the same as on a special case or on an issue directed in an action, makes a respondent a necessary party and an application for registration as the owner of land is not entitled on an ex parte motion to obtain an order of the court to determine a question of such character.

Re Hewitt, 3 D.L.R. 156, 3 O.W.N. 902.

A registrar cannot under s. 124 of the Land Titles Act, R.S.S. 1909, c. 41, register a tax transfer and issue a certificate of title upon a tax sale that was confirmed by a Judge of the District Court.

Nicholson v. Drew, 3 D.L.R. 748, 5 S.L.R. 379, 21 W.L.R. 189, 2 W.W.R. 295.

A reference in a certificate of title to city lots, issued under the Land Titles Act, to a plan recorded in the land titles office, thereby incorporates such plans into the description contained in the certificate so as to make it a part thereof. [Grasett v. Carter, 10 Can. S.C.R. 105, followed.]

Smith v. Saskatoon, 4 D.L.R. 521, 5 S.L.R. 218, 21 W.L.R. 868, 2 W.W.R. 756.

Where, by reason of a misdescription of the land, a mortgage given by a vendee under an executory contract could not be validly deposited in the land titles office for record on the completion of the mortgagor's title by the issue of a certificate of title, and the mortgagees consequently filed a caveat against the mortgagor's property as correctly described claiming to charge the same

upon such defective mortgage, such mortgagees have lost priority over executions filed thereafter and before the issue of the certificate of title if they voluntarily discharged the caveat and accepted a new mortgage at the time when the transfer was made from the registered owner to their mortgagor the mortgagees' proper recourse was to have taken action to have their original mortgage reformed and recorded in conformity with their caveat instead of discharging the same.

Rogers Lumber Co. v. Smith, 8 D.L.R. 871, 22 W.L.R. 899, 3 W.W.R. 697.

CAVEATS — APPLICATION TO DISCHARGE — SUMMARY PROCEEDINGS.

An application to discharge a caveat may be proceeded under the Land Titles Act in a summary way if no objection to the proceedings is taken before the Local Master.

Roaf v. G.T.P. Town & Development Co., 24 D.L.R. 750, 8 S.L.R. 272, 31 W.L.R. 893, 8 W.W.R. 1156.

G.T.P. Development Co. v. Moose Jaw Securities, 24 D.L.R. 752, 31 W.L.R. 892.

STAY OF PROCEEDINGS—MORATORIUM.

The stay of proceedings authorized by subs. 18 of s. 62a of the Land Titles Act, as amended by s. 15, c. 3, 1916, is to be granted not as a matter of right, but as a matter of discretion; it, therefore, cannot be granted on the ground that the proceedings which are sought to be stayed are prohibited by the Volunteers and Reservists Relief Act, c. 6, 1916.

Re Land Titles Act; Re Anderson mortgage to Canadian Mortgage Ass'n, 11 A. L.R. 242, [1917] 1 W.W.R. 828.

VIII. Assurance fund.

(§ VIII — 80) — ASSURANCE FUND — RECOVERY FROM—ERRONEOUS STATEMENT OF ACREAGE IN CERTIFICATE OF TITLE.

One who purchases land on an acreage basis in reliance on an erroneous statement thereof in the seller's certificate of title, is not entitled to recover for a deficiency from the assurance fund created under s. 108 of c. 24 Alta., 1906, where such error was not due to any mistake of the registrar in issuing the certificate, but to a mistake in the original survey and Crown patent, which had crept into subsequent certificates of title; since what the registrar certified was not the quantity of land but its title.

Burden v. Registrar of Land Titles, 13 D.L.R. 813, 6 A.L.R. 255, 25 W.L.R. 460.

ASSURANCE FUND.

Where, on the faith of an abstract of title which, by reason of the failure of the registrar to note on the certificate of title the filing of a seed grain lien under the Seed Grain Act of 1908, shewed a clear title, the plaintiff purchased land at a mortgage foreclosure sale and received from the court a clear certificate of title thereto, the fact that he did not make a special search for liens of such nature, which became binding on the land from the time they were filed, does not amount to negligence sufficient to prevent him recovering from the assurance fund the amount he was compelled to pay to free the land from such lien.

Canada Life Ass'ce Co. v. Registrar of Assiniboia Land Registration District, 3 D.L.R. 810, 5 S.L.R. 208, 21 W.L.R. 469, 2 W.W.R. 522.

Under subs. 3 of s. 137 of the Land Titles Act, R.S.S. 1909, c. 41, damages for the registration of a void tax transfer may be recovered out of the assurance fund by the owner of the property, but not against the tax purchaser who had obtained registration of such tax title and had taken out a certificate of ownership which was transferred bona fide for value to a third party to whom a certificate of title had been issued.

Nicholson v. Drew, 3 D.L.R. 748, 5 S.L.R. 379, 21 W.L.R. 189, 2 W.W.R. 295.

AGREEMENT FOR SALE—MORTGAGEE—CAVEAT —ASSURANCE FUND—MISTAKE OF REGISTRAR—LIABILITY—PARTY TO FRAUDS —ACTION AGAINST—DAMAGES.

A mortgagee under a mortgage from a purchaser under an agreement of sale who, being unable to register the mortgage itself, files a caveat in respect thereof in the Land Titles Office, is entitled to compensation from the Assurance Fund for the loss sustained by reason of the Registrar's error in recording the caveat against the wrong lot; but he must first prosecute an action under s. 105 of the Act against the party who fraudulently took advantage of the error, and who was thereby enabled to defeat the mortgage; the last-mentioned action is a special one for damages, and it is not sufficient that action had been brought and judgment and execution obtained without result against the same party on his covenant contained in the unregistered mortgage upon which the caveat was founded.

Setter v. The Registrar, 20 D.L.R. 166, 30 W.L.R. 256, 7 W.W.R. 901, affirming on other grounds, 18 D.L.R. 789, 6 W.W.R. 1116.

ASSURANCE FUND — REGISTRAR NECESSARY PARTY WHEN.

The Registrar of Land Titles is a necessary party to a case stated by private parties for the opinion of the court as to the liability of the assurance fund upon admitted facts.

Re Adams and McFarland, 20 D.L.R. 293, 6 W.W.R. 1077.

A registrar being forbidden to receive and register any instrument not accompanied by a certificate of title, a mortgage is not properly produced for registration until such certificate is produced by the mortgagor or his agent, and although the mortgage may have been in the office at the time the title was received it was improperly there, and could not be deemed to be so in the possession of the registrar as

to place any obligation upon him to register it upon receipt of the title.

Hall v. Registrar of Land Titles, 4 S.L.R. 244.

RECOURSE AGAINST FUND—LACHES—TAX SALE.

The owner of lands sold for school taxes in 1908 and then registered in the name of the purchaser is debarred from an action in 1916 against the assurance fund under s. 110 of the Land Titles Act. Further, the owner of the land was guilty of laches.

Blackstock v. Registrar of North Alberta Land Registration District, [1917] 2 W.W.R. 938.

ASSURANCE FEES—NUMBER OF CERTIFICATES OF TITLE.

Assurance fees should be computed in the same way whether one or more certificates of title are to be issued on the registration of a transfer because these assurance fees are based on the valuation of the land transferred, i.e., on the total valuation of the land contained in the transfer, irrespective of the number of certificates of title to be issued on the registration of such transfer.

Re Assurance Fees, 9 W.W.R. 521.

LARCENY.

See Theft.

LATERAL SUPPORT.

See Adjoining Owners; Party Wall.

EXCAVATIONS—CHANGING STREET GRADE.

The right to lateral support of land is not infringed until actual damages are suffered by reason of the withdrawal of the support, and a falling in of an insignificant quantity of the soil without any consequent special damage will not sustain an action based in damages only and not for an injunction. [Blackhouse v. Bonomi, 9 H.L.C. 503, applied.]

Forster v. Medicine Hat, 17 D.L.R. 391, 28 W.L.R. 685, 6 W.W.R. 548.

EXCAVATION—USE OF EXPLOSIVES—DAMAGE TO ADJOINING OWNER—LIABILITY.

The owner of land who uses explosives in the usual way for the purpose of excavating rock for the foundation of a house is bound to exercise all reasonable care and is responsible for damage to an adjoining occupant due to the use of extra heavy blasts.

Brown v. Garson, 42 N.B.R. 354.

EXCAVATIONS—INJURY TO ADJOINING LAND BY EXCAVATIONS—DEPRIVATION OF LATERAL SUPPORT—GREAT EXPENSE OF RESTORATION—DAMAGES IN LIEU OF MANDATORY INJUNCTION—FULL COMPENSATION—COSTS.

Ramsay v. Barnes, 5 O.W.N. 322, 25 O.W.R. 289.

LEASE.

See Landlord and Tenant; Mines and Minerals.

Annotation.

Covenants for renewal: 3 D.L.R. 12.

LEGACY.

See Wills; Executors and Administrators.

DEVOLUTION OF ESTATES ACT—PERSONALTY INSUFFICIENT—LIABILITY OF REALTY.

By the Devolution of Estates Act (R.S.S. 1909, c. 43, s. 21) land in Saskatchewan shall descend to the personal representative and be distributed as if it were personal estate; if the personal estate is insufficient to pay legacies for which no fund is provided these must be paid out of the undisposed of real property.

Re Stewart Estate, 42 D.L.R. 512, 11 S.L.R. 332, [1918] 2 W.W.R. 1090.

LEGAL PROFESSION.

See Solicitors.

LEGAL TENDER.

See Tender; Payment.

LEGISLATURE.

Legislative powers, see Constitutional Law.

LETTERS PATENT.

See Companies.

Patents of land, see Public Lands; Mines and Minerals.

LEVY AND SEIZURE.

I. WHAT PROPERTY SUBJECT.
- A. In general.
- B. Property in custody of law.

II. MODE AND SUFFICIENCY; RETURN.

III. RIGHTS AND LIABILITIES GROWING OUT OF LEVY.
- A. Of officer levying.
- B. Of others.
- C. Priorities.

IV. BOND FOR RELEASE OF.

See also Execution; Attachment; Garnishment.

Distress, see Landlord and Tenant; Mortgage; Chattel Mortgage; Bills of Sale; Taxes; Homestead exemption from.

I. What property subject.

A. IN GENERAL.

(§ I A—1)—RIGHT OF CONTRACTOR'S CREDITORS—MATERIALS LEFT BY CONTRACTOR ABANDONING WORK — CONTRACTEE'S RIGHT TO USE.

Where the right to use the plant and materials left by a contractor in finishing a job abandoned by him, is, by the terms of the contract, merely personal to the contractee, which he cannot transfer to another contractor employed by him to complete the work, such property is subject to seizure on execution against the defaulting contractor.

Uplands v. Goodacre, 13 D.L.R. 187, 18 B.C.R. 343, 25 W.L.R. 71, 4 W.W.R. 1297, affirming 12 D.L.R. 407, 3 W.W.R. 827.

MONEY ON PERSON—AMOUNT.

A bailiff levying under a writ of execution has no right to seize money upon the defendant's person. He cannot seize a greater sum than ordered under the writ.

Clark v. St. Aubin, 9 Que. S.C. 271.

SEIZURE AND SALE OF IMMOVABLE.

A debtor ordered in an action in declaration of hypothec, to abandon the property, who does not do so and thus becomes a personal debtor, cannot oppose the seizure of the property by the creditor on the ground that the latter has not previously discussed his movable effects. Such creditor is exempted from doing so by art. 614 C.C.P. In all cases where the seizure has not to be made at the defendant's domicile or in his presence, no demand of payment is required. At any rate, if such a formality were necessary, its omission could justify the nullity of the seizure only if the seized party suffered prejudice therefrom, and provided he tenders and deposits the amount claimed in the writ of execution.

Brien v. Robert, 54 Que. S.C. 309.

ALIMENTARY ALLOWANCE.

Alimentary allowances gratuitously bestowed by third parties are nonseizable, but not the revenue obtained by the beneficiary by alienating his property.

Matts v. Marcotte, 14 Que. P.R. 341.

(§ I A—2)—SEIZURE — OPPOSITION — BUTCHER SHOP—CHATTELS—TRADER—QUE. C.P. 598, PAR. 10.

A lamp, a cash register and a furnace and its pipes furnishing a butcher's shop must be left to him as "tools, implements, or other chattels ordinarily used in his trade," if, at the time of a seizure made at his place, he selects those chattels from other ones of which the value does not exceed $200. One who temporarily ceases to exercise his trade or business does not, for that reason, lose his quality as trader.

McPhail v. Tessier, 46 Que. S.C. 404.

(§ I A—4)—LAND—TITLE—POSSESSION.

When the seizure of immovable property has been made super non possidente, but super domino, it is only the person who was in possession thereof animo domini who has the right to question the seizure or to demand the nullity of the adjudication. In order to be in possession animo domini it is not sufficient merely to be the holder of the immovable; it is necessary that it should be possession in good faith, in virtue of a title sufficient to transfer the property, of which the faults are not known.

Lafortune v. Vézina, 25 Que. K.B. 544, reversing 48 Que. S.C. 254. [Reversed in 41 D.L.R. 208, 56 Can. S.C.R. 246.]

(§ I A—9)—SIMULTANEOUS SEIZURE OF MOVABLES AND REAL ESTATE—OPPOSITION BY WIFE—QUE. C.P. 12, 614, 651, 729—QUE. C.C. 1585.

The seizure and sale of the movable effects should take place before the seizure of real estate, although both may, nevertheless, be seized simultaneously. Where the wife opposed the distress, and the plaintiff thereupon declared that he admitted the opposition and ordered the sheriff to proceed against the real property, the defendant cannot stop the seizure by mentioning some movable effects belonging to him and supposed to have a larger value than the debt. Such a contention is frivolous and the opposition will be dismissed.

Gauthier v. De Sambor, 16 Que. P.R. 185.

(§ I A—10)—MINING CLAIMS, UNPATENTED—EXIGIBILITY.

The interest of a mining claimant in an unpatented claim duly recorded under the provisions of ss. 34, 35, 53, 59, 64 of the Mining Act, 8 Edw. VII. (Ont.), c. 21, R.S.O. 1914, c. 32, is exigible for a judgment debt due by the claimant. [McPherson v. Temiskaming Lumber Co., 9 D.L.R. 726, [1913] A.C. 145; and Glenwood Lumber Co. v. Phillips, [1904] A.C. 405, applied.]

Clarkson v. Wishart, 13 D.L.R. 730, [1913] A.C. 828, 24 O.W.R. 937, reversing 6 D.L.R. 579, 27 O.L.R. 70, 22 O.W.R. 901.

TIMBER CLAIMS — CROWN TIMBER ACT (ONT.)—TIMBER SEVERED BEFORE EXECUTION—TIMBER SEVERED AFTER EXECUTION.

Where timber has been cut and is lying on the land of a debtor on the date of an execution against him, such timber is subject to seizure under the Execution Act of Ontario, 9 Edw. VII. c. 47, although the debtor is operating under a license obtained under the Crown Timber Act, R.S.O. 1897, c. 32. The rights of a licensee are such an interest in lands as to be exigible under the Execution Act to the effect that a "writ of execution shall bind the goods and lands against which it is issued, from the time of the delivery thereof to the sheriff for execution." [C.P.R. Co. v. Rat Portage Lumber Co., 10 O.L.R. 273, disapproved; Glenwood Lumber Co. v. Phillips, [1904] A.C. 405, 70 L.J.P.C. 62, 20 Times L.R. 531, applied.] Timber cut by a licensee subsequent to the date of an execution against him is attachable under the execution, notwithstanding that the cutting had been made by an assignee or transferee to whom, in the interval between the laying on of the execution and the cutting of the timber, the licensee had transferred his rights, unless such transfer was made in good faith and for valuable consideration and without notice on the part of the transferee of the writ having been delivered to the sheriff and remaining unexecuted.

McPherson v. Temiskaming Lumber Co., 9 D.L.R. 726, [1913] A.C. 145, 23 O.W.R. 458, reversing 3 O.W.N. 36.

(§ I A—14)—HYPOTHEC—CHOSE IN ACTION.

Debts assigned or immovables conveyed as collateral security are not property belonging to the debtor which can be discussed as provided by art. 2066 C.C. (Que.). It must actually be his property

and not what he may acquire by litigation. There is no hindrance to offering for discussion immovables hypothecated, apparently for more than their value even if they belong to the debtor himself.

Maher v. Shorey, 15 Que. R.R. 52.

(§ I A—15)—Immovables.

A seizure made on a defendant of immovables under sequestration is a seizure on the possessor thereof animo domini and as such is valid. Failure to publish in the newspapers of the locality within which the immovables are situated the legal notices of the sale of such immovables does not per se justify the annulling of the sale, but only makes the sheriff responsible for the damages resulting therefrom; nevertheless such omission may be evidence of fraudulent connivance between the parties which the court will carefully consider on an allegation of fraud.

Savoie-Guay v. Deslauriers; Rose v. Savoie-Guay Co., 7 D.L.R. 205, 21 Que. K. B. 560.

Contestation of an opposition to seizure —Misnomer.

Gross v. Millman, 19 D.L.R. 900.

Immovables.

A life annuity constituted by the donor of an immovable in his own favour and guaranteed by hypothec is seizable.

Matts v. Marcotte, 14 Que. P.R. 341.

(§ I A—17)—Machinery—Carriage—Opposition—Pre-emption of instance—Rejection of motion—C.C. art. 379—C.C.P. art. 284, 651, 654.

It does not follow that an attachment is frivolous on its face, and as such can be rejected on motion, from the fact that the opponent has already made in the same case a similar attachment which has been declared barred by limitation. An attachment for seizure and sale of certain machinery, tools and materials and a carriage, founded on the following circumstances, (1) with regard to the first objects, they had been placed in the factory of the opponent for perpetual keeping and had become immovable by intention (b) as to the carriage it belonged to a third party to the knowledge of the person seizing and had been left at the home of his proprietor for storage, it is not futile on the face of it, and can not be rejected on motion.

Healy v. Saguenay Mills, 25 Rev. Leg. 396.

(§ I A—18)—Seizure of crop—Joint interest.

A crop cannot be seized under execution as against the rights of a claimant to a share of the crop for money advances.

International Harvester Co. v. Jacobsen, 24 D.L.R. 632, 11 A.L.R. 122, 9 W.W.R. 87, 32 W.L.R. 332.

Crops of lessee—Seizure by creditors of lessor.

Cotton v. Boyd, 24 D.L.R. 896, 8 S.L.R. 229, 31 W.L.R. 797.

Crops — Landlord and tenant — Void lease.

The crops of a lessee, in which the lessor had no interest, cannot be seized under execution against the lessor, even if the tenant held possession under a lease void under s. 31 of the Dominion Lands Act.

Holford v. McDonald, 33 D.L.R. 315, 10 A.L.R. 506, 11 A.L.R. 143, [1917] 1 W.W. R. 1358.

Crops—Vendor and purchaser.

Where an agreement for the sale of land provides that, in case the vendor becomes entitled to cancel the contract, he shall, without prejudice to his rights thereafter to cancel the same, have the right to enter into and possess any improvements on the land, including growing crops, and to apply the net receipts therefrom upon the contract, the taking possession by the vendor under said terms of the contract will prevent the goods so possessed from being exigible under writs of execution against the purchaser. Where such a purchaser has rented the land on a crop payment plan notice by the vendor to the tenant to pay to the vendor the rental share of the crop and an undertaking by the tenant to so pay the vendor is a taking possession under the contract.

Crown Lumber Co. v. McKenzie, 10 W.W. R. 1370.

(§ I A—20)—Registered letters.

A registered letter addressed to the debtor can be seized under a writ of saisie-gagerie. The court may order the letter to be opened and if it contains a cheque payable to the defendant or to bearer will permit it to be indorsed by the plaintiff's attorney. The bank at which the cheque is payable may safely pay it with such indorsement if a copy of the order authorizing the payment is attached.

Gallant v. Grayson, 13 Que. P.R. 339.

B. Property in custody of law.

(§ I B—25)—Keeping sheriff's officer in possession.

Where a sheriff has made a valid seizure of the goods of an execution debtor it is not necessary, in order to retain possession, for a sheriff to put a person on the premises for the purpose of holding the goods, as against those who have notice of the seizure. But in order to make a valid seizure it is necessary for the sheriff or his bailiff (a) to be upon the premises where the goods are, or so close thereto that if his authority to seize is disputed by one in actual possession he is in a position to lay hands on the goods; (b) to intimate an intention of seizing the goods.

Dodd v. Vail, 10 D.L.R. 694, 23 W.L.R. 903, 4 W.W.R. 291, affirming 9 D.L.R. 534, 23 W.L.R. 62, 3 W.W.R. 796.

II. Mode and sufficiency; return.

(§ II—30)—Return.

Where an execution creditor duly placed his execution in the hands of the sheriff,

who, instead of proceeding regularly to sell under the execution the effects of a liquor business belonging to the execution debtor, placed his bailiff in possession of the business itself with directions to take over the daily receipts thereof as a going concern, and where such receipts were actually turned over by the cashier every day to the sheriff, the legal construction of the daily taking over of the money by the sheriff is that each such taking over was a levy thereon under the execution.

Re Hunter, 8 D.L.R. 102, 4 O.W.N. 451, 49 C.L.J. 72, 23 O.W.R. 692.

EXTRA-JUDICIAL SEIZURES ACT — SALE — TITLE—RIGHT OF APPEAL — JURISDICTION OF MASTER.

On an application under the Extra-judicial Seizures Act, 1914, c. 4, for an order for sale, the fact that the question of title is enquired into without objection does not give a right of appeal. The sole question for consideration on such an application is whether, assuming the goods to have been rightfully seized, a removal and sale is advisable considering the state of the market and the primary object of avoiding undue loss to the debtor. Adverse claimants are in the same position and have the same remedies as though the Act had not been passed. A Master in Chambers has jurisdiction in any judicial district in the province.

Re Extra-judicial Seizures Act, Re Canadian General Electric Co.; Re Wener and Pollard, 12 A.L.R. 141, [1917] 2 W.W.R. 1003.

SEIZURE AND SALE OF REAL ESTATE—DESCRIPTION OF PROPERTY—ABANDONMENT—COSTS—C.C.P. ART. 555, 705—RULES OF PRACTICE NO. 59.

As a general rule the sheriff charged with executing a writ of execution (de terris) is required before proceeding to the seizure to summon the defendant to point out his immovable goods and to present himself at the places where they are situated in order to effect the seizure of them; but there is an exception to this in the case of an immoveable abandoned at law. In the case of execution by the plaintiff for the cost due his solicitor if it does not appear in the fiat, or the writ of execution, or in the report of the sheriff that the plaintiff has obtained the consent of the solicitor, the seizure is irregular and illegal in respect of these costs only.

Tasse v. Rouillard, 25 Rev. Leg. 33.

SEIZURE BY SHERIFF—SALE—OPPOSITION.

A sheriff seizing movable and immovable effects of a defendant may proceed and sell the immovables if the sale of the movables is stopped by an opposition to withdraw. A debtor who files an opposition to annul against the seizure of his property advertised for sale by the sheriff, asking the latter to proceed with the previous seizure and sale of certain movables which he indicates, cannot later file another opposition to annul against the seizure and sale of those movables on the ground that the seizure of the immovables was still pending, and that the movables indicated by him could not be seized by the sheriff in virtue of the same writ. Such an opposition may be struck out on motion as frivolous.

Gauthier v. de Sambor, 53 Que. S.C. 511.

OWNERSHIP—CONDITIONAL SALE.

A defendant cannot make an opposition to a seizure of movables, on the ground that he is not the proprietor of them, but that they belong to the plaintiff himself, who seized his own property. A stipulation in a sale of movables that the buyer is "not to receive title to said property until the full amount (price of sale) has been paid" is a condition in favour of the plaintiff, and for his protection, which can be waived by the latter, and is not one which can be invoked by the buyer on his behalf.

Maxwell v. Keith, 54 Que. S.C. 120.

REVENDICATION — GUARDIAN — POSSESSION—ORDER OF COURT—RULE NISI.

A voluntary guardian of goods under seizure who is ordered, by judgment of the court, to deliver these effects to one of the parties, is without interest to contest the rule nisi issued against him on the ground of irregularity and illegality, if he does not contest the order of the court addressed to him or the sufficiency of the security ordered to be given by the party entitled to the possession of the goods.

Genzer v. Alliance Films Co., 54 Que. S.C. 32.

OPPOSITION A FIN DE DISTRAIRE—TITLE.

Where, in an opposition a fin de distraire to a seizure of movables, the opposant declares that he bought the goods at a bailiff's sale, the opposition, even if the opposant's title is defective, should not be rejected on motion, but only upon a contestation after issues joined between the parties.

Canadian Consolidated Rubber Co. v. Seidman, 24 Rev. Leg. 104.

ORDER OF SALE OF CHATTELS.

A bailiff, when putting up seized chattels for sale, is not bound to follow the order in which they figure in the minutes of the seizure.

Ducharme v. Hénault, 44 Que. S.C. 243.

SERVICE ON DEBTOR—DESCRIPTION—PLACE OF SALE.

The court, in an action by a saisi, may set aside the judgment ordering the seizure and sale of an immovable without first realizing from the movables. The omission of the sheriff to serve the procès-verbal of seizure on the debtor, in compliance with art. 707, C.C.P., is a ground for annulling the order. The exact description of the immovables in the notices of the sale is also a formality required on pain of nullity. The sale of the immovables at a place

other than that provided for by law is absolutely illegal and void.

Bernard v. James Bay & Eastern R. Co., 26 Que. K.B. 531.

MODE AND SUFFICIENCY—SEIZURE OF GRAIN —CUSTODY AND POSSESSION.

Where a bailiff notifies an owner that he has seized grain and leaves the warrant with him and takes a bond for the delivery to the sheriff of the grain seized, such seizure is a legal seizure. Although effectual and continuous possession of property seized should be secured by a bailiff, yet as against persons who have notice of the seizure it is not necessary for the sheriff to put a man into possession in order to hold goods of which he has made a valid seizure. [Dixon v. McKay, 21 Man. L.R. 762, followed.]

Little v. Magle, 29 W.L.R. 596, 7 W.W.R. 224.

(§ II—31)—CROPS—ABANDONMENT.

[Little v. Magle, 7 W.W.R. 224, dissented from: Dixon v. McKay, 21 Man. L.R. 762, explained.]

Corona Lumber Co. v. Brereton, [1917] 1 W.W.R. 706.

(§ II—32) — SHERIFF'S SALE OF EXEMPT PROPERTY—NULLITY.

A sheriff's sale under execution of property claimed exempt under ss. 17, 18, Homestead Act, R.S.B.C. 1911, c. 100, is not merely an irregular exercise of legal powers but an unlawful act in defiance of statute and void, and can confer no title thereto upon the purchaser.

Fletcher v. Pendray, 27 D.L.R. 637, 22 B.C.R. 566, 34 W.L.R. 310, 10 W.W.R. 444.

SUFFICENCY OF RETURN.

A sheriff's return of nulla bona to an execution is a sufficient compliance with r. 365, of the Judicature Ord. (con. ord. 1898, c. 21, Sask.), to permit a levy upon and sale of land under the writ.

Re Price, 4 D.L.R. 407, 5 S.L.R. 318, 21 W.L.R. 299.

OPPOSITION—INSOLVENCY.

An opposition for payment will be rejected on motion, if there is no allegation therein that the defendant was insolvent at the time plaintiff obtained judgment declaring his seizure binding, or that plaintiff had knowledge of defendant's insolvency at the date of the opposition.

Eastern Townships Brick & Mfg. Co. v. Giasson, 17 Que. P.R. 410.

INSUFFICIENT RETURN — GUARDIANSHIP — NOTICE OF SALE.

Minutes of proceedings which do not state that the defendant has been required to provide a guardian, when no guardian has, in fact, been named; which do not declare, moreover, that the defendant has been required to sign, or has signed, the minutes which have only been signed by the bailiff himself outside of the dwelling of the defendant, and long after the seizure, are absolutely void. The seizure is only complete when the minutes are drawn up and signed with a notice of sale for a fixed date. Where a sale which commenced on a Saturday was not finished that day, and a copy of the minutes was only given to the defendant on the following Monday, notice of sale cannot be given the next day at the door of the church. The above mentioned irregularities render void the proceedings of the bailiff who seized, and they can be set aside on motion.

Dion v. Proulx, 46 Que. S.C. 272.

III. Rights and liabilities growing out of levy.

A. OF OFFICERS LEVYING.

(§ III A—35)—SHERIFF ABANDONING POSSESSION.

After a valid seizure has been made by the sheriff, the question whether or not the sheriff has abandoned possession of the goods seized is always a question of fact.

Dodd v. Vail, 9 D.L.R. 534, 23 W.L.R. 62, 3 W.W.R. 796. [Affirmed, 10 D.L.R. 694, 23 W.L.R. 903, 4 W.W.R. 291.]

(§ III A—40) — ASSISTANT BAILIFF—RESISTING—CRIME—JUSTIFICATION.

An assistant bailiff is a "peace officer" and "person in the lawful execution of process against goods" within the meaning of s. 169, Cr. Code, and it is a crime to resist him; it is no justification that the property seized belonged to others, since the true owner could have asserted his right by interpleader. A County Court bailiff has power to appoint an assistant to act for him, and to make lawful seizure under an execution issued to the bailiff.

The King v. Polsky, 31 D.L.R. 294, 27 Man. L.R. 271, [1917] 1 W.W.R. 451.

AUTHORITY OF SHERIFF—CROPS—HARVESTING—NEGLIGENCE.

A sheriff seizing standing crops under a fi. fa. has no right to incur expense in harvesting and threshing them without the authority of the execution creditor; the authority may be implied. It is not negligence of the sheriff in having the threshing done in the winter instead of the spring, at a greater cost, in anticipation of probable damage to the crops from the spring thaw.

Sturgeon v. Henderson, 37 D.L.R. 54, [1917] 3 W.W.R. 56.

NEGLIGENCE OF BAILIFF—LIABILITY.

A bailiff in Alberta, although subject to the instructions and orders from the sheriff of the district, is appointed by the Government of the province and the sheriff is not responsible for negligence or misconduct by such bailiff.

Great Northern Ins. Co. v. Young, 32 D.L.R. 238, 11 A.L.R. 166, [1917] 1 W.W.R. 886.

ABANDONMENT OF POSSESSION BY OFFICER LEVYING.

A bailiff will be deemed to have abandoned the possession of seized goods if after

seizure he permits the owner to transport and sell the goods, upon promising to pay the bailiff a portion of the proceeds.

Corona Lumber Co. v. Brereton, 32 D.L.R. 528, 27 Man. L.R. 370, [1917] 1 W.W.R. 706.

FI. FA.—COSTS OF EXECUTION.

A sheriff seizing goods under a writ of fieri facias is only entitled to costs of the execution until such time as he receives notice of an assignment for the benefit of creditors.

Baker v. Richards, 40 D.L.R. 351, 25 B.C.R. 397, [1918] 2 W.W.R. 902.

SALE OF LOGS UNDER EXECUTION—QUANTITY—LIABILITY OF SHERIFF—ESTOPPEL—NEGLIGENCE—DAMAGES.

Failure to give the notice of a sheriff's sale under fi. fa., as required by r. 557, or a defect in the notice, does not invalidate the sale to an innocent purchaser. A sheriff may not be entitled to recover his costs of the action from the plaintiffs, if his duties were performed in a loose manner.

Maple Leaf Lumber Co. v. Caldbick, 40 O.L.R. 512, reversing 34 D.L.R. 766, 39 O.L.R. 201. [See 38 O.L.R. 205.]

BAILIFF—PUBLIC OFFICER—NOTICE.

A bailiff, who receives an opposition to withdraw at the sale of certain movable effects seized by him and who ignores it and proceeds to the judicial sale of those effects, is liable for damages to the owner of the effects. A bailiff is not a public officer and has no right to a notice of action, according to s. 88, C.C.P.

Hart v. Rochon, 53 Que. S.C. 253.

RIGHTS GROWING OUT OF LEVY—OF OFFICER LEVYING — SALE — JUDGMENT — STATUTE OF LIMITATIONS.

If an execution is issued and levied on land during the period of limitation, the sale may be held afterwards, although an action or proceeding to recover on the judgment would be barred by the 20-year period after its recovery by virtue of R.S.N.S. 1900, c. 167, s. 22.

Rateau v. Ball, 15 D.L.R. 574, 47 N.S.R. 488, 14 E.L.R. 10.

EXECUTION—SALE OF MORTGAGE—DUTY OF SHERIFF—PRICE.

Pease v. Tudge, 19 D.L.R. 158, 7 S.L.R. 219, 30 W.L.R. 198, 7 W.W.R. 804.

BAILIFF — GUARDIANSHIP — COSTS — QUE. C.P. 621, 622, 624, 628, 669.

Although a bailiff cannot appoint himself as guardian of the effects seized by him and on that ground claim costs of guardianship, yet, if he does not find any guardian, he may remove the effects and keep them in his custody until a solvent guardian is offered him, or until he can himself find a solvent one; and in such a case he is entitled to claim the disbursements he has incurred in putting the effects into a safe place, and also the value of his services.

Chaperon v. Coulombe, 46 Que. S.C. 472.

LIABILITY OF CONSTABLE—JUSTIFICATION.

Where an execution is issued by a stipendiary magistrate after the lapse of one year without the affidavit required by s. 32, c. 160, R.S.N.S. 1900, but is otherwise within the jurisdiction of the magistrate and in regular form, a seizure by a constable under such warrant is a mere ministerial act, and will afford absolute justification to the officer executing it. [Sleeth v. Hurlbert, 25 Can. S.C.R. 620, 628; Morse v. James, Willes 122, 128, followed.]

Law v. Lovell, 25 D.L.R. 37, 49 N.S.R. 282.

SEIZURE OF REGISTERED MORTGAGE—POWER OF SHERIFF.

The sheriff has no power to seize and sell a registered mortgage of lands, his duty being to hold it as security for the amount due under the writ with power to sue for the recovery of the amount secured when the time for payment shall arrive.

Channel v. People's Home Co., 9 W.W.R. 169.

BAILIFF'S COSTS.

The defendant as bailiff for the plaintiff made certain extrajudicial seizures, and retained out of the moneys realized a certain sum as his costs. The plaintiff alleged that the sum so retained was in excess of the defendant's proper costs, and made application under R.S.S. 1909, c. 51, s. 3, as amended, for an order requiring the defendant to pay to the plaintiff a sum not exceeding treble the amount of the money taken by the defendant in excess of his proper costs:—Held, that in the absence of a special contract, the defendant was not entitled to the charge made by him of a 5 per cent commission on the amount collected, and that the defendant was entitled only to the costs allowed by the schedule to the Act, that it was in the discretion of the judge as to what sum, not exceeding treble the amount of money taken contrary to the provisions of the Act, the defendant should be ordered to pay, and under the circumstances the defendant was ordered to pay only the actual amount wrongly retained, together with the costs of the application.

Northern Trusts Co. v. Buie, 9 S.L.R. 242, 34 W.L.R. 285.

POWERS OF BAILIFF.

A writ of execution de terris addressed to the sheriff of a district may be executed by any of his bailiffs.

St. Lawrence Flour Mills Co. v. Charbonneau, 18 Que. P.R. 244.

EXCESSIVE SEIZURE.

A bailiff who sells the chattels seized to an amount he believes necessary to satisfy the writ, but which turns out upon the subsequent taxation of costs of guardianship, to be in excess of what was required, is guilty of no fault that involves liability for damages.

Ducharme v. Hénault, 44 Que. S.C. 242.

LEASE—EVICTION.

One who is appointed judicial guardian of movables, seized by him under a writ of execution, cannot expel the lessee of a shop containing the goods on the ground (a) that he has assumed the responsibilty for the custody of the goods seized; (b) that the premises have been leased contrary to a prohibition against subletting, and the lessee illegally occupies them. This is an application of the principle that no one is permitted to take the law into his own hands. In such case the expelled lessee has a right to damages.

Gravel v. Lacombe, 52 Que. S.C. 289.

IMMOVABLES—SALE BY SHERIFF—HIGHEST BIDDER—DEPOSIT—C.C.P. ART. 749, 750.

In the case of sale of immovables by sheriff to the highest bidder, the court may at the request of a creditor of the defendant order the sheriff to demand a deposit from each bidder conforming to arts. 749, 750, C.C.P. The judgment which orders this deposit is a final judgment of which there is an appeal "de plano."

St. Germain v. Salhani & Rabinovitch, 25 Rev. Leg. 144.

DISTRESS — LIABILITY FOR SERVICES — EMPLOYEE OF SHERIFF.

A person employed by a sheriff in connection with a distraint by a landlord, compelled to use the sheriff or sheriff's officer, can have no claim against the person directing distraint, in the event of the sheriff not remunerating him for his services.

Weaver v. McGregor, [1917] 2 W.W.R. 795.

B. OF OTHERS.

(§ III B—45)—MONEY REALIZED FOR COSTS —NECESSITY OF HOLDING FOR DISTRIBUTION.

Money realized on an execution, although for costs only, must be held by the sheriff for 3 months and advertised, under s. 25 of the Executions Act, R.S.M. 1902, c. 58, which provides that at the end of that period such money, together with any other money realized on other executions against the defendant, shall be then distributed rateably among such persons as may have unsatisfied executions in force in the sheriff's hands.

Thompson v. Brethour, 14 D.L.R. 229, 23 Man. L.R. 590, 25 W.L.R. 615, 5 W.W.R. 379.

OF OTHERS.

An opposition to the writ of execution itself, before any seizure is effected, is premature and will be dismissed. An opposition to annul only lies after the seizure has been actually effected.

Courchesne v. Talbot, 4 D.L.R. 668, 41 Que. S.C. 241.

SEIZURE OF PARTNER'S GOODS UNDER WRIT AGAINST FIRM.

A partner, whose goods are illegally seized under a writ directed against the partnership, cannot claim damages for the illegal seizure where instead of opposing the seizure he pays the debt and costs thereof.

Lavigueur v. Paquet Co., 47 Que. S.C. 151.

EXECUTION CREDITOR.

A judgment creditor whose judgment is executed by seizure of his debtor's movables is obliged to give up possession of a movable seized which he knows to be the property of a third person. For failure to do so he is liable for the damages caused to the owner by the judicial sale of his property. Such damages, in default of other proof, consist of the price paid by the purchaser.

Computing Scale Co. v. Desrosiers, 44 Que. S.C. 10.

EXECUTION CREDITORS.

The relation of principal and agent does not arise between a seizing creditor and the bailiff entrusted with the execution of the writ. The former is therefore not liable in damages for the acts of the latter.

Ducharme v. Hénault, 44 Que. S.C. 242.

(§ III B—46)—EXECUTION OR ATTACHMENT CREDITORS.

Where the defendant, an alleged absconding debtor, moves summarily under the Supreme Court Rules (N.S.) to set aside a process issued against him, if originally the circumstances of the case at the time the process was issued were such as to warrant the bona fide belief that the defendant was absconding from the province, the process will not, under the summary jurisdiction of the court, be set aside even though the defendant has returned to the province and shews that he had had no intention of remaining out of it, but if the defendant's property has been attached unwarrantably he will be left to his action therefor. [Hunt v. Soule, 1 N.S.R. 206 (ed. 2), followed.]

Ernst v. Slawenwhite, 7 D.L.R. 238.

LIABILITY FOR ACTS OF BAILIFF.

A bailiff is a ministerial officer and not a servant or agent of the plaintiff. The latter when resorting to his services is not liable for any délits that he may commit in the course of his work.

Bourbeau v. Guillemette, 52 Que. S.C. 224.

(§ III B—49)—PURCHASER AT SHERIFF'S SALE.

The failure to shew, on an application to confirm a sale of land by the sheriff under an execution, that the sale was held at the hour specified in the notice of sale, vitiates the proceedings.

Re Price, 4 D.L.R. 407, 5 S.L.R. 318, 21 W.L.R. 299, 2 W.W.R. 394.

An unpaid vendor of immovables sold at sheriff's sale is an interested party and has the right to have such sale set aside if the due formalities have not been complied with. The formalities required by law regarding proceedings at sheriff's sale are of public order and the violation thereof entails

the annulling of such sale at the instance of any interested party.

Savoie-Guay Co. v. Deslauriers; Rose v. Savoie-Guay Co., 7 D.L.R. 205, 14 Que. K.B. 560.

PURCHASER AT SHERIFF'S SALE.

In view of s. 9 of the Creditors' Relief Act (R.S.S. 1909, c. 63), entitling execution creditors to share rateably in the proceeds realized on a sale, where a notice of sale of land by the sheriff under an execution stated that the property was to be sold subject to "existing encumbrances filed thereon as disclosed by the records," and there was at the time of the sale in addition to the execution under which the sale was to be had, a lis pendens and 2 prior executions of record, the words "existing encumbrances" must be taken not to include the prior executions unless an express agreement to the contrary is otherwise shewn, as the seizure and sale under execution is a seizure on behalf of all creditors entitled to share under that statute.

Griese v. Walker, 9 D.L.R. 807, 23 W.L.R. 709, 4 W.W.R. 77.

C. PRIORITIES.

Of mortgagee in possession over seizure for taxes, see Chattel Mortgage, II A—7.

(§ III C—50)—SEIZURE UNDER EXECUTION —RIGHTS OF ASSIGNEE FOR CREDITORS.

Where a sheriff, under s. 13 of the Execution Act (B.C.), seizes money in specie belonging to the execution debtor, but instead of holding the same for 30 days in like manner as where goods have been levied upon and sold, forthwith pays the money over to the execution creditor, an assignee for creditors under the Creditors Trust Deeds Act, R.S.B.C., c. 13, to whom the debtor made an assignment immediately after such execution creditor got his money has no status to sue for the money on behalf of all creditors as it no longer belonged to the execution debtor after the sheriff had taken possession of same; nor had the assignee the right to sue for the enforcement of claims which other execution creditors within the 30 day period might have had against the fund or against the sheriff under the Creditors Relief Act, R.S.B.C. c. 60.

Adam v. Richards, 22 D.L.R. 509, 21 B.C.R. 212, 8 W.W.R. 701.

EXECUTION—RENT—ATTORNMENT CLAUSE.

A claim for rent by way of interest under an attornment clause in a mortgage has priority over the claim of an execution creditor.

Sturgeon v. Henderson (Man.), 37 D.L.R. 54, [1917] 3 W.W.R. 56.

PRIORITIES.

Where the goods of a tenant are seized upon the demised premises and sold under execution, the sheriff, in order to give a good title, must first apply the proceeds in satisfaction of the landlord's claim for rent, by virtue of the Creditor's Relief Act, R.S. N.S. 1900, c. 172.

Ingraham v. McKay, 8 D.L.R. 132, 46 N.S.R. 518.

SEIZURE OF CONTRABAND—CUSTOMS—DEPOSITARY—RIGHTS AND REMEDIES.

When a customs collector seizes goods used for contraband, and deposits them in the hands of a person to whom he entrusts them, their owner has no right to seize them by attachment in revendication, so long as the first seizure is pending. The depositary may, in defence to the owner's attachment in revendication, plead the fact of the deposit, and allege that the collector's seizure was made legally, without alleging an exception of another's right and an inscription in law asking to strike out the allegations of the plea referring thereto will be dismissed.

Girard v. Godin, 54 Que. S.C. 263.

PRIORITIES.

A debtor who has been compelled to pay the claim of his foreign creditor is discharged from liability not only towards the latter, but also as against the latter's creditors in the Province of Quebec, and cannot be obliged, by way of seizure by garnishment to pay it a second time. When the seizing creditor has been made aware of the action taken by the foreigner and been put en demeure to take conservatory proceedings in consequence, it does not matter that his seizure was made between the date of the foreigner's judgment and the satisfaction thereof.

Fraser v. Beyers Allen Lumber Co., 44 Que. S.C. 322.

DECLARATION OF TIERS—LACOMBE ACT.

Where there are several seizures against the same defendant the first seizing creditor is preferred to those coming later. If the defendant deposits the seizable part of his salary under the provisions of the Lacombe Act he is not subject to any further seizing of the same salary. If the court can order the tiers-saisi to retain possession of the amount of the note which he owes to his creditors that can only be in the case in which the said note contains words which prohibit its transfer or shew the intention to make it nontransferable or non-negotiable, or when the seizing creditor does not offer the tiers-saisi good and sufficient security against his being troubled in the future with respect to the payment of the said note.

Rugg v. Clarke, 18 Que. P.R. 74.

REVENDICATION—POSSESSION—CREDITORS.

In the case of seizure in revendication, if the plaintiff during the proceedings obtains possession of the property seized by furnishing security, the creditors of the plaintiff have their recourse by execution against the said property before the decision of the cause. The right of retention invoked by the defendant in his plea is no obstacle to this. An opposition to annul made by the plaintiff in these circumstances will be dis-

missed upon motion, as being taken with the object of improperly delaying the sale.

Rugg v. Clarke, 18 Que. P.R. 65.

COLLUSIVE JUDGMENT FOR RENT.

A creditor caused immovables of his debtor to be seized. The latter filed an opposition, which was dismissed. A third party, the lessor of the debtor, in collusion with him, fraudulently and irregularly obtained against the same debtor a judgment for rent due and maintaining a saisie-gagerie and a lessor's lien. It was held that the first creditor could proceed by opposition by third party to have the illegal judgment obtained by the lessor quashed.

Lapointe v. Original Salvador Co., 49 Que. S.C. 243.

BONA FIDE PURCHASER—CHANGE OF POSSESSION.

Rule 478 as to actual and continued change of possession under a bill of sale is not applicable, where the execution debtor has never had the goods in his possession and the purchaser had the goods in his possession at the time of the purchase.

Bank of Toronto v. Austin, 10 W.W.R. 799.

IV. Bond for release of.

(§ IV—55)—ABANDONMENT OF SEIZURE BY TAKING BOND—PRIORITIES—BONA FIDE PURCHASER—GARNISHING CREDITOR.

The sheriff's bailiff seized under execution 85 acres of wheat crop, in stock. He then took from the judgment debtor a bond without sureties, the condition of which was that the sheriff should be permitted by the judgment debtor to enter upon the premises and retake the goods when required. The bailiff thereupon left the premises and did nothing further. The wheat was sold to an elevator company who bought without notice of the foregoing facts. Before the purchase money was paid over it was attached by a garnishing order issued in an action at the suit of C against the judgment debtor. In an interpleader issue between the sheriff and C. it was held that the seizure had been abandoned. [Little v. Magle, 29 W.L.R. 596, distinguished.] Held, also, that the elevator company had acquired a good title to the wheat. Rule 478 (Sask.). [Dixon v. Mackay, 21 Man. L.R. 762, followed.] In order to maintain his seizure the sheriff must retain actual and continued possession until sale. [Ackland v. Paynter, 8 Price 95; Blade v. Arundel, 1 M. & S. 711, followed.] Held, also, that the bond did not constitute actual and continued possession by the sheriff. [Dodd v. Vail, 9 D.L.R. 534, 23 W.L.R. 62 and 903, distinguished.]

Nicoll v. Canadian Bank of Commerce, 31 W.L.R. 667.

LIBEL AND SLANDER.

I. WHO LIABLE.
II. WHAT ACTIONABLE.
A. In general.
B. Charging lewdness, bad character, crime, etc.
C. Damaging business; social standing.
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F. What constitutes a publication.
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Annotations.

Examination for discovery in defamation cases: 2 D.L.R. 563.

Repetition; lack of investigation as affecting malice and privilege: 9 D.L.R. 73.

Repetition of slanderous statements; acts of plaintiff inducing defendant's statement; interview for purpose of procuring evidence of slander; publication and privilege: 4 D.L.R. 572.

Separate and alternative rights of action; repetition of slander: 1 D.L.R. 533.

Church matters when privileged or libellous: 21 D.L.R. 71.

I. WHO LIABLE.

Measure of damages, see Damages, III H — 155.

(§ I—1)—NEWSPAPER—PROPRIETOR AND PUBLISHER.

A publishing company which is both proprietor and publisher of a newspaper, substantially complies with s. 15 of the Libel and Slander Act (1913, Alta., c. 12, 2nd sess.) by inserting a notice at the head of the editorials: "The . . . published at . . . by the . . . publishing company."

Scown v. Herald Publishing Co., 40 D.L.R. 373, 56 Can. S.C.R. 305, [1918] 2 W.W.R. 118, affirming 38 D.L.R. 43, 12 A.L.R. 127.

COMPENSATION OF INJURY.

When two persons are injured and the injuries are their mutual acts, there is compensation of injury, and neither has any recourse at law. There is thus compensation of injury if one party accuses the other of being a "perjurer," a "bandit" and a "dishonourable man," and the other replies that the first party is a "prostitute."

Vousounara v. Kautsoginapoulos, 53 Que. S.C. 383.

SLANDER—MINOR SON—FATHER'S LIABILITY C.C. QUE. 1053, 1054.

A father is not responsible for his minor son's acts and dealings when it is impossible for him to control him, and when he is unable to foresee his son's words or acts, the son having had a good education and being, usually, reserved.

Biron v. Toupin, 46 Que. S.C. 523.

(§ I—9)—REPETITION—MATTERS OF PUBLIC NOTORIETY.

That the libellous statements were matters of public notoriety in the community

previous to their publication may properly be pleaded in mitigation of damages.

Robert v. Herald Co., 10 D.L.R. 21.

II. What actionable.

A. In general.

(§ II A—10)—What constitutes special damages—Postponement of marriage—Charging engaged man with being married.

The postponement of the plaintiff's marriage as the result of a slanderous statement regarding him constitutes special damage sufficient to support an action for slander. To untruly state to the father of the plaintiff's fiancée that it is reported that he is a married man, with the intention that the parent should act thereon in order to protect his daughter, which he did by repeating the report to her, is a reflection on the honour of the plaintiff and the honesty of his intentions sufficient to support an action for slander if special damages are shewn. [Speight v. Gosnay, 60 L.J.Q.B. 231; Gillett v. Bullivant, 7 L.T. (O.S.) 490; and Derry v. Handley, 16 L.T.N.S. 263, followed.]

Bordeaux v. Jobs, 14 D.L.R. 451, 6 A.L.R. 440, 25 W.L.R. 894, 5 W.W.R. 481.

Newspaper — Corruption — Political influence.

To charge a newspaper with selling its influence to any political party and therefore binding itself in a manner to deceive the public, by publishing what may be contrary to the honest convictions of its management, tends to bring such newspaper into a contempt with the public and result in damages and is therefore actionable.

Albertan Publishing Co. v. Munns, 41 D.L.R. 422, 13 A.L.R. 533, [1918] 2 W.W.R. 761.

Abusive language — Meeting of school commissioners.

Where, in a meeting of school commissioners to deliberate upon the question of improvement of a school house, one of them, in the heat of discussion, addressing the chairman, said to him, "You have no heart or honour to let the children suffer," but without intention of attacking the chairman's character, a confession of judgment by such commissioner for $20 as reparation should be accepted.

Dufresne v. Belly, 53 Que. S.C. 335.

Affront to a race.

There is no individual right of action for affronts directed to persons collectively, when the individual persons, as in the case of a race, are so numerous that the defamation cannot injure any one in particular, or cause a personal wrong to any one.

Germain v. Ryan, 53 Que. S.C. 563.

Newspaper — Innuendo — Freemasonry —Appeal—Question of fact.

The publication in a newspaper of an article tending to defame an author and suggesting that he was a Freemason, in a centre of Roman Catholic population, is a libel. A pretence of criticizing literary work does not justify attacks upon the character and upon the person of the one who wrote them. The court, when taking a libellous article into consideration, ought not to attach too much importance to the grammatical sense of the writing of the articles, but ought rather to estimate the effect it has had upon the minds of the readers. When an article is, on its face, libellous, and obviously refers to the plaintiff, it is not necessary to prove the innuendo alleged in the statement of claim. The question of knowing whether a Court of Appeal can vary a judgment of a Trial Court upon a question of fact, or upon the amount of damages accorded, is not a question of law, it is only a rule of discretion, although the courts in several cases have held the opposite view.

Brunelle v. Girard, 23 Que. K.B. 427.

Jury—Question of libel or no libel.

Hepburn v. Beattie, 16 B.C.R. 209.

Slander—Defamatory language—Statements by public functionary—Privilege — Presumption against malice.

Montreal Light, Heat & Power Co. v. Clearihue, 20 Que. K.B. 529.

Intention to injure—Special damages.

One who, being aware of the inferior quality of the goods of another, discloses the facts to third persons without intent to injure the owner, incurs no liability towards the latter, especially when the truth of the statement was acknowledged. In an action for slander, evidence of special damage is not admissible unless specially alleged.

Cloutier v. Demers, 39 Que. S.C. 492.

(§ II A—13)—Person defamed—Certainty of reference.

The certainty of the person upon whom the imputation is laid in an alleged slanderous utterance must be shewn by the complaining party; it is not sufficient to support a slander action that some of the persons who were present understood them to refer to the plaintiff, if such be not a plausible and reasonable inference from the circumstances proved in evidence.

Contant v. Ducharme, 10 D.L.R. 230.

Defamatory charges directed against a race—Rights of individual members.

In a libel action, if the writing alleged to be libellous contains no defamatory allegation in respect to individuals, but only a dissertation more or less violent and passionate as to the philosophical, social or religious opinion ascribed to a corporation, a religious sect, or an association, it is not defamatory. A writing attacking a Jewish population composed of 75 families in a population of 80,000 persons, in terms which would be libellous if addressed to an individual, is not addressed to an assemblage numerous enough to be lost in the number, and should be considered as defamatory. In this case one of the members of this

Jewish body may bring an action for damages against the author of the libel.

Ortenberg v. Plamondon, 24 Que. K.B. 69, reversing 14 D.L.R. 549.

(§ II A—14)—Libel—Newspaper—Innuendo—Bank's winding up—Purchaser of deposits—Good faith—Public interest — Quantum of damages — Que. C.C. 1053.

A newspaper which complains of the slowness with which the winding-up of an insolvent bank takes place, and which accuses the persons who bought the depositors' deposits of having interfered with the winding-up in order to induce the depositors to sell their deposits for less amounts, commits a libel even if no name is mentioned, and even if the newspaper did not even know who had bought the deposits. A newspaper which publishes false facts or insinuations cannot plead good faith or public interest. The Court of Appeal will not intervene as to the amount of damages granted by the Trial Court in a case of libel except, as in the case of a jury verdict, when the amount is so high that there is a presumption that the judge has been mistaken, or has been influenced by undue reasons.

La Patrie v. Deserres, 23 Que. K.B. 535.

B. Charging lewdness, bad character, crime, etc.

(§ II B—15)—Trial—Verdict for defendant—Plaintiff not damaged—Plaintiff entitled to nominal verdict—Interference of appellate court.

Where in an action for slander a jury has brought in a verdict for the defendant on the ground that the plaintiff has suffered no damage, an appellate court will not interfere with such verdict on the ground that the plaintiff is entitled to a verdict for nominal damages. [Wilson v. London Free Press, 45 D.L.R. 503, followed.]

Alteman v. Ferguson, 47 D.L.R. 618, [1919] 2 W.W.R. 976.

Where the words of an alleged libel are capable of the criminal meaning charged in the innuendo, although the words would not be libellous per se, the action brought thereon "involves" a criminal charge within the meaning of a statute (9 Edw. VII., c. 40, s. 12 (2)), restricting the class of cases in which security for costs may be ordered against the plaintiff in favour of a newspaper publisher.

Duval v. O'Beirne, 1 D.L.R. 78, 3 O.W.N. 513, 20 O.W.R. 884.

What actionable — Persons defamed — Charging tendency to publish "pretended clerical scandals."

To publish falsely in a newspaper that a named contributor to another newspaper "never fails to make use of an occasion to reveal pretended clerical scandals" amongst the clergy of the Roman Catholic Church is libellous.

Desaulniers v. "L'Action Sociale," 20 D.L.R. 566.

Opprobrious words—Woman—Excessive damages—New trial.

Words contained in letters written to the employer of a young woman, referring to her as "slut," "carrion," "dog," "if this woman controls you body and soul," though capable of a defamatory meaning in their ordinary popular sense, were not under the circumstances capable of being understood as imputing to her unchastity or immoral conduct; an award of $15,000 as her damages for the libel is unreasonable and excessive, and ground for a new trial.

Quillinan v. Stuart, 30 D.L.R. 381, 36 O.L.R. 474.

Unchastity—Nominal damage.

In an action for slander imputing unchastity to a young girl, only nominal damages can be recovered where no special damage has been proved (Libel and Slander Act, R.S.O. 1914, c. 71, s. 19 (1)). Special damage from repetition of the slander for which the defendant is not responsible is too remote. [Review of authorities.]

Stewart v. Sterling, 42 D.L.R. 728, 42 O.L.R. 477.

Words in letter, whether capable of being read in a defamatory sense—Verdict—General damages for two libels—Justification of one—Necessity for separation—Mistrial—New trial.

Leonard v. Wharton, 17 O.W.N. 127.

Words imputing criminal offence — Housebreaking—Injury to property—Criminal Code, s. 539—Failure to shew actionable wrong—Finding of jury—Nonsuit—Costs.

Bissonnette v. Pilon, 16 O.W.N. 153.

Words imputing criminal offence—Failure to establish actionable wrong—Finding of jury—Nonsuit—Costs.

McMillan v. Pilon, 16 O.W.N. 154.

Charging moral and physical degeneracy.

A newspaper which publishes that the plaintiff "has all the characteristics of moral and physical degeneracy," that he has "all the symptoms of insanity which the police should watch over, and that the Government should cause him to be examined by experts," is guilty of an injurious, malicious, and defamatory libel.

Fournier v. Soleil Pub. Co., 47 Que. S.C. 45.

Charging violation of liquor laws.

It is slanderous to charge a person with committing a breach of the liquor laws for which he may suffer corporal punishment by way of imprisonment.

Richards v. Anderson, 10 W.W.R. 893.

(§ II B—18)—Charge of illegal marriage—Right of action by children.

A charge that a man and his wife lived in

a state of concubinage presupposes the illegitimacy of their children, and will entitle such children to maintain an action for libel regardless of whether it is true or not.

Chiniquy v. Begin, 24 D.L.R. 687, 24 Que. K.B. 294, reversing 20 D.L.R. 347, and varying 7 D.L.R. 65, 41 Que. S.C. 26.

CONSPIRACY—ACTION FOR CONSPIRING TO CHARGE PLAINTIFF WITH BEING THE FATHER OF A BASTARD — ACTION NOT MAINTAINABLE WITHOUT ALLEGATION OF SPECIAL DAMAGE—SLANDER—MOTION TO SET ASIDE STATEMENT OF CLAIM—LEAVE TO AMEND—COSTS.

Gibson v. McDougall, 17 O.W.N. 157.

(§ II B—20)—CHARGING THEFT OR MISAPPROPRIATION.

Pickels v. Lane, 11 D.L.R. 841.

RECLAIMING AN ANIMAL — JUSTIFICATION —C.C. ART. 1053.

A person who, in good faith, without intending to do wrong, in recovering his animal, which he finds in the hands of a third party, declares that he who sold it to the latter had taken it from his home without any right, and who then causes an attorney's letter to be written to this vendor demanding him, under pain of action, to explain how he came to be in possession of the animal, cannot be sued for damages on account of this. He was exercising his right as owner in reclaiming his property, and his words were relevant.

Warwick v. Guay, 55 Que. S.C. 473.

(§ II B—22)—SLANDER — WORDS CHARGING WOMAN WITH UNCHASTITY — LIBEL AND SLANDER ACT, C. 12, 1913 (2ND SESS.) S. 17 — PREVIOUS UTTERANCE OF SAME SLANDER TO ANOTHER — EVIDENCE OF — ADMISSIBILITY — SPECIAL DAMAGES.

Under s. 17 of the Libel and Slander Act, c. 12, 1913 (2nd sess.) (Alta.) a female plaintiff is entitled to judgment in an action for slander although the words relied on do not directly charge any act of sexual intercourse, if they do charge an invitation to such acts. In an action for slander evidence is admissible that the defendant previously uttered to the witness the same slander as that made the basis of the action. Loss of the association and hospitality of friends has been held special damages in an action for slander.

Mitchell v. Clement, 14 A.L.R. 248, [1919] 1 W.W.R. 183.

SLANDER — "ROBBED THE CITY" — EXPLANATION BY OTHER WORDS.

Ward v. McBride, 24 O.L.R. 555.

LEWDNESS—VARIANCE—AMENDMENT.

In an action for slander, if the words (lewdness of woman) proved convey practically the same meaning as the words laid, the variance will be held immaterial or else the judge will amend. [Ecklin v. Little, 6 T.L.R. 366, followed.]

Hahn v. Gettel, 33 W.L.R. 97, 9 W.W.R. 686.

C. DAMAGING BUSINESS; SOCIAL STANDING.

(§ II C—25) — CHARGING CANDY MAKER WITH KEEPING UNSANITARY FACTORY.

A charge that the plaintiff's candy factory was found by a public health inspector to be in an unclean and unsanitary condition, and that the destruction of a large quantity of candy was ordered, setting out a purported statement of particulars supplied by the inspector, is libellous, irrespective of whether the plaintiff was charged with being guilty of a criminal offence; such charge is defamatory both of the plaintiff and of his business.

Lumsden v. Spectator Printing Co., 14 D.L.R. 470, 29 O.L.R. 293.

CHARGE OF OBTAINING OTHER'S LANDS BY POLITICAL INFLUENCE.

A publication charging a trading company with having used political influence for the purpose of procuring legislation giving it possession to lands in derogation of what, to its knowledge, were the property of the publisher of the charges, is an imputation calculated to injure the corporation in its business, and therefore actionable.

Price v. Chicoutimi Pulp Co., 23 D.L.R. 116, 51 Can. S.C.R. 179, affirming 22 Que. K.B. 393.

PHYSICIAN.

To say of a physician that he aggravates diseases to make money, and to say "are you not afraid of having your throat cut by Dr. G——, when you allow yourself to be operated on by him," constitutes slander.

Gagnon v. Cusson, 24 Rev. Leg. 233.

(§ II C—29)—AS TO CHATTEL MORTGAGE.

The publication without malice, by a mercantile agency to its subscribers, of a true extract from a register kept by virtue of an Act of a Provincial Legislature, which was open to inspection by the public, for the purpose of giving to the subscribers information which the agency bona fide believed to be true, is privileged, and an action for libel in respect of such publication will not lie, although the extract purported to shew that the plaintiff had given a chattel mortgage when it should have shewn only a lien note given on the purchase of chattels. [Fleming v. Newton, 1 H.L.C. 363; Searles v. Scarlett, [1892] 2 Q.B. 56; and Annaly v. Trade Auxiliary Co., 26 L.R. Ir. 11, 304, followed. Williams v. Smith, 22 Q.B.D. 134, and Macintosh v. Dun, [1908] A.C. 390, distinguished.] If what is published is not a true extract from the public record, even although it is furnished by the government official in charge, it is not privileged: [Reis v. Perry, 64 L.J.Q.B. 566.]

Smith v. Dun, 21 Man. L.R. 583.

(§ II C—37)—CHURCH MATTERS — ECCLESIASTICAL CENSURE.

An action does not lie against a church bishop merely because of his ecclesiastical direction to his congregation not to deal with a certain excommunicated member of the church where the statement is not defamatory.

Heinrichs v. Weins, 21 D.L.R. 68, 32 W.L.R. 30. [Affirmed, 23 D.L.R. 664, 8 S. L.R. 153, 30 W.L.R. 854, 8 W.W.R. 373.]

BOARD OF TRUSTEES OF THE COLLEGE OF DENTAL SURGEONS — PROFESSIONAL ETHICS — PUNITIVE AND EXEMPLARY DAMAGES.

The members of the Board of Governors of the College of Dental Surgeons have right of action against a newspaper which published an untrue and defamatory libel impugning their professional honour. It is not necessary to prove special damages.

Ibbotson v. L'Autorite, 25 Rev. de Jur. 322.

PHYSICIAN — WORDS IMPUTING DISCREDITABLE CONDUCT.

Sandwith v. Cowper, 4 S.L.R. 12, 17 W.L.R. 1.

SLANDER — WORDS USED "LUNATIC AT LARGE" — ABSENCE OF PROOF OF DAMAGE.

Bootham v. Smith, 19 O.W.R. 147.

D. WORDS ABOUT OFFICIALS OR CANDIDATES.

(§ II D—40)—SLANDER — WORDS OBJECTIONABLE PER SE — CHARGING ALDERMAN WITH WANT OF INTEGRITY.

Without proof of special damage an action for slander will lie for words spoken of a city alderman, imputing to him want of integrity not merely in principle and inclination, but in the exercise of his office, irrespective of whether he could be ousted from office if the truth of the slander were established.

Minchin v. Samis, 12 D.L.R. 137, 6 A.L.R. 157, 24 W.L.R. 739, 4 W.W.R. 891.

While fair and honest criticism is no tort, yet criticism, if it imputes base and sordid motives unwarranted by the facts, even if the writer bona fide believes them to be true, is not fair comment. There was nothing shewn which would entitle the defendant to claim privilege, but even if such privilege existed it had been abused, in that the communication was made to persons not interested in the matter in question.

Caswell v. Law, 4 S.L.R. 265.

(§ II D—41)—OF LEGISLATIVE OFFICER.

A publication by a newspaper falsely charging a member of a legislature with using his public office in furtherance of his personal or private interests, is defamatory and libelous.

Culligan v. The Graphic, 37 D.L.R. 134, 44 N.B.R. 481.

Although a municipal councillor, as a candidate for re-election, is liable to legitimate criticism of his acts while in office, it is not permissible to attack his honour and stigmatize him as a "dishonest man" not only in his private but also in his public life, because as president of the finance committee he had certified a pay list containing the names of workmen who had never claimed their wages and had approved accounts already paid, when it is proved that these errors were more properly attributable to the municipal officers and that the municipal councillor had acted in good faith and had received no benefit.

Lingley v. Gass, 26 Que. K.B. 156, reversing 48 Que. S.C. 297.

(§ II D—46)—CANDIDATES.

A charge that a candidate for the office of municipal councillor appealed from an assessment of his property on the ground that it was excessive, and that he afterwards sold it for an amount greater than for what it was assessed, which was described as "another of his hold-up games," is not actionable per se. A charge that a candidate for the office of municipal councillor had "held the town up for an exorbitant price" for property required by the town for a public street, does not imply a criminal act, and is not actionable per se.

Holland v. Hall, 3 D.L.R. 722, 3 O.W.N. 1304, 22 O.W.R. 209.

WHEN UTTERED BY CLERGYMAN.

A parish priest who solicits a ratepayer not to vote for a certain person because he, as parish priest, knows things about such ratepayer which he is unable to divulge, meaning that he is not a man of integrity or good moral character, and not worthy to hold a responsible public position, is guilty of slander, and liable in damages.

Daly v. Chenier, 39 D.L.R. 326, 24 Rev. Leg. 114.

ELECTION PETITION.

A petitioner if prudent and without malice is allowed freedom to state grounds of complaint relevant to the issue. Upon an action of damages by the respondent upon such petition, against the petitioner, the burden of proof falls upon the plaintiff who, as complaining of an injury, is bound to prove the truth of such injury.

Barre v. Depelteau, 25 Rev. de Jur. 72, 25 Rev. Leg. 65.

E. PRIVILEGED COMMUNICATIONS.

(§ II E—50) — LIABILITY — QUALIFIED PRIVILEGE TO THE PRESS — CONDITION NECESSARY TO INVOKE.

L'Evenement Publishing Co. v. Letourneau, 11 D.L.R. 851, 22 Que. K.B. 152.

PRIEST—CONFESSIONAL.

A priest, being like all other citizens under the jurisdiction of the civil courts, when suing his curé for damages alleges that the defendant has said to a number of persons at the confessional that in voting for the plaintiff to be mayor of the parish they had committed a mortal sin, menacing them with refusal of absolution if they should not consider the vote as a mortal sin and confess it as such, these persons having afterwards repeated these words in public to the detriment of the plaintiff, establishes prima facie a good right of action, and an inscription en droit filed against this action will be dismissed. By a privileged communication it is not necessarily meant that the author of injurious acts would not be responsible on account of a

special circumstance; it merely signifies that the presumption of malice which results from the fact that the words are injurious in themselves disappears in the case of a privileged communication, and that a person who complains of the words is obliged to rebut the presumption by positive proof.

Lefebvre v. Jobin, 52 Que. S.C. 492.

The qualified privilege of the press in England in respect to publishing accounts of public meetings exists in virtue of express laws dating from the years 1881 and 1888 made for the United Kingdom of Great Britain and Ireland only. It cannot be invoked in the Province of Quebec, where no such legislation has yet been adopted, though the other provinces have introduced it.

Maille v. Publishing Co. of Canada, 43 Que. S.C. 397.

PRIVILEGED OCCASION—ABUSE OF PRIVILEGE.

Byers v. McDonald, 4 S.L.R. 58, 16 W.L.R. 370.

(§ II E—55)—EXCESS OF PRIVILEGE.

Where, in an action for libel, the occasion is privileged, and there is evidence to go to the jury on the question of malice, if the jury simply finds that the statement was in excess of the privilege only, there must be judgment for the defendant, since a mere excess of privilege is not necessarily evidence of malice.

Winnipeg Steel Granary & Culvert Co. v. Canada Ingot Iron Culvert Co., 7 D.L.R. 707, 22 Man. L.R. 576, 22 W.L.R. 387, 3 W.W.R. 356.

REPETITION OF HEARSAY WITHOUT INVESTIGATION — EXCESS OF PRIVILEGE.

A plea of privilege is not sustained by reason of relationship where the defendant wrote his brother an anonymous letter repeating allegations of adultery which he had heard concerning the latter's wife without making any inquiries about the credibility of his informers or to ascertain whether or not they had any sinister motives in formulating or circulating such a report.

Hertlein v. Hertlein, 9 D.L.R. 72, 22 W. L.R. 959, 3 W.W.R. 752.

EXCESS OF PRIVILEGE — LETTER TO LEGISLATURE.

In an action of damages for libel, privilege does not exist, even when the occasion is privileged, if dishonest acts are charged against the plaintiff without any other object than that he wished to attack the defendant. Thus, a letter addressed to the members of the Legislative Assembly, opposing the adoption of a law concerning an association, and containing sentences injurious to the officers of the association, is not privileged if such accusations are false and malicious. An officer of the association who, although not mentioned by name, is specially aimed at by the letter, has, personally, a right to claim damages from the author of the libel, and the action need not be taken in the name of the association or of its board of directors.

Fontaine v. Potvin, 46 Que. S.C. 495.

(§ II E—58)—AS TO MAGISTRATE OR OFFICER WITHOUT INTENDING TO BASE A CHARGE.

Where the jury finds that defamatory words were spoken to a magistrate without intention of basing a criminal charge on the facts disclosed, the communication is not privileged.

Sonier v. Breau, 3 D.L.R. 184, 41 N.B.R. 177, 10 E.L.R. 391.

PUBLICATION PRIVILEGED — STATEMENT TO SOLICITOR OF PLAINTIFF IN HIS CHARACTER OF SOLICITOR.

Schelking v. Cromie, 47 D.L.R. 704, [1919] 3 W.W.R. 539.

A written communication to the secretary-treasurer of a municipality to bring to the attention of the council the sale of intoxicating liquor, and designating a certain person who was suspected of practising it, a letter in the same sense to the curé of the parish, and a notice to the suspected person forbidding him to sell liquor to the writer's brother-in-law or son, are not libellous when made in good faith without malice and with probable cause. The fact that the suspected person had been prosecuted for selling liquor and acquitted does not negative probable cause.

Vézina v. Moise, 44 Que. S.C. 30.

(§ II E—59)—RECKLESS STATEMENTS — ABSENCE OF BELIEF IN TRUTH OF.

Where slanderous statements are known by the defamer to be untrue, or he makes them recklessly not caring whether they were true or false, the qualified privilege which would otherwise attach because of a common interest in the subject-matter of the inquiry, is not available as a defence in slander.

Rudd v. Cameron, 4 D.L.R. 567, 26 O.L.R. 154, 21 O.W.R. 860.

(§ II E—60)—THEFT — DAMAGES — GOOD FAITH — PROBABLE CAUSE — PRIVILEGED OCCASION — C.C., ART. 1053.

The defendant, a merchant in the country, was awakened twice during the night by the plaintiff wishing to buy intoxicating beverages. In the morning the defendant held that the window frame of his store had been forced open and that someone had stolen from him beer, eggs, money, and a cheque for $57. He declared that he suspected the plaintiff of having stolen it. He imparted his suspicions to the manager of the bank who was his business adviser. In these circumstances the defendant acted with probable cause and in a privileged case. He is not responsible for damages to the plaintiff.

Jacques v. Joharghi, 25 Rev. Leg. 248.

(§ II E—65)—COURSE OF DUTY OR BUSINESS.

The delivery of a letter to be typed is publication when the occasion is not privileged and the letter does not concern the ordinary course of business in which the

typist is employed. A communication in writing on an occasion of qualified privilege is not privileged if on its face it is clearly in excess of the occasion.

Quilliman v. Stuart, 35 D.L.R. 35, 38 O.L.R. 623.

COURSE OF DUTY—CONSTABLE—PUBLICATION.

The publication of a slander in the course of an effort to ferret out a crime is not privileged on the part of a person who believed he was a constable, and acting as such, if in fact he was not a constable.

Trafton v. Deschene, 36 D.L.R. 433, 44 N.B.R. 552.

IN COURSE OF DUTIES OR BUSINESS.

A physician has the privilege of prescribing to his patients remedies which he deems proper and also of advising them to have them made preferably in one drug store than in another, as long as he acts in good faith, without malicious intent, and if he gives such advice only because he is convinced that his prescriptions will be better filled in the drug store which he designates. The presumption of malice which arises from words apparently injurious, disappears before a proof of circumstances which establish good faith and justification of the one who has maintained them.

Aumont v. Cousineau, 18 Rev. de Jur. 271.

(§ II E—69)—STATEMENTS BY MANAGER AS TO CONDUCT OF EMPLOYEE.

Statements made by the manager of a store to parents in answer to their inquiries as to the grounds of the dismissal of their daughter, that she had sent goods home from the store without charging them, which implied theft, are privileged communications from which no actual malice can be inferred, and, therefore, not actionable slander.

Matheson v. Brown, 24 D.L.R. 844, 49 N.S.R. 198.

(§ II E—74)—LANDLORD AND TENANT.

Where it appeared in a proceeding permitted by s. 5 of the Collection Act, R.S. N.S. 1902, c. 182, to be instituted by a judgment creditor for an examination of the financial condition, etc., of the judgment debtor, the debtor being in this case one against whom judgment had been rendered in an action of slander, that the debtor had called at a house owned by him for the purpose of collecting the rent then due and of giving the tenant notice to quit because he had heard that the conduct of the inmates was giving the house a bad name and he told the tenant what he had heard and demanded an explanation and in the altercation that followed between the parties in the presence of the tenant's wife and daughters, the debtor uttered the slander for which the judgment was entered against him against one of the tenant's daughters, but in all the discussion, he made no statement irrelevant to the subject he demanded to be explained, the occasion is a privileged one, and if no ill-will or malice in fact on the part of the debtor is shewn and no issue as to privilege or malice was raised in the action in which the judgment was recovered, an order for the committal of the debtor is not warranted as for a wilful and malicious tort under subs. 1 (f) of s. 27 of the Collection Act, enacting that if in cases of tort it appears to the officer charged with the examination of the judgment debtor that the tort was wilful, he may commit the debtor to gaol.

Henn v. Smith, 6 D.L.R. 48, 11 E.L.R. 1.

(§ II E—77)—WHEN TESTIFYING — BEFORE COMMISSION.

The immunity of witnesses in judicial proceedings from liability for statements made therein is not a statutory one but is founded upon a rule of law declared by the courts and based upon grounds of public policy and convenience. Such immunity extends to a witness before a commission appointed under the authority of a statute to inquire into some matter properly cognizable, if such evidence be pertinent to the inquiry, even though the Act under which the commission is appointed and the method of its appointment are open to sound legal objection. No action will lie for an alleged slander uttered by a witness while giving evidence before a commissioner appointed by the Lieut.-Gov.-in-Council under c. 2, 1908 (Alta.).

Georgeson v. Moodie, 38 D.L.R. 105, 12 A.L.R. 358, [1917] 3 W.W.R. 997.

If a witness abuses his position as such in order to injure the parties to the case or third parties, either by perjuring himself or by making statements which do not relate to the matter in issue or to the questions which are put to him, he commits a fault provided against by art. 1053, C.C. (Que.).

Carrington v. Russell, 4 D.L.R. 675, 42 Que. S.C. 71.

WORDS USED BY WITNESS.

The privilege, invoked by the defendant in an action claiming damages for libel, that the alleged libelous expressions were spoken or written by him in his capacity of witness at a trial, is not absolute and depends on circumstances which should be pleaded and proved. Therefore, preuve avant faire droit will be ordered on the claim of such privilege.

Honan v. Parsons, 13 Que. P.R. 363.

MATTER CONTAINED IN PLEADINGS.

There can be no libel in pleadings in the regular course of justice, if the allegations, however defamatory, be material and made with reasonable cause.

Forget v. Belleau, 26 Que. K.B. 58.

(§ II E—78)—WORDS USED IN PLEADINGS.

Where allegations in a written pleading are relevant to the issues of the case and are made with reasonable and probable cause and without malice and are relied on in good faith and under the belief that they are true, and the correctness thereof can only be ascertained at the trial, such al-

legations are privileged, and even should the court come to the conclusion that they have not been proven, no action will lie against the party making such allegations.

Martin v. Madore, 3 D.L.R. 441, 731, 18 Rev. de Jur. 481.

(§ II E—80)—Fair comment — Charging corruption.

No action for libel will lie against a newspaper which makes fair and reasonable comments upon prevalent evil conditions, provided they do not exceed the bounds of legitimate criticism, and do not impute personal knowledge and corrupt intention.

Bulletin Co. v. Sheppard, 39 D.L.R. 339, 55 Can. S.C.R. 454, [1917] 3 W.W.R. 279, reversing 27 D.L.R. 562.

(§ II E—82)—Municipal officer — Alleged libel — Judge's charge—General verdict — Interpretation of.

Where in an action for damages for libel of a municipal officer the trial judge explained the meaning of s. 5 of the Libel and Slander Act (R.S.O. 1914, c. 71), and charged them that the words were capable of a defamatory meaning and that it was their duty to find whether the words had, in fact, a defamatory meaning, and, if so, to assess damages, and the jury brought in a general verdict "for the defendant." The jury must be taken to have found either that the words were not libelous or that, if they were libelous, the damages were too trifling to warrant a verdict for the plaintiff; in either case the Appellate Court should not set aside the verdict or order a new trial. [Sydney Post Publishing Co. v. Kendall, 43 Can. S.C.R. 461; Lumsden v. Spectator Printing Co., 14 D.L.R. 470, 29 O.L.R. 293, distinguished.]

Wilson v. London Free Press Printing Co., 45 D.L.R. 503, 44 O.L.R. 12.

Municipal officers.

Where the defendant company, who were engaged in manufacturing and selling certain articles used principally by municipalities, finding their business interests imperilled by the unlawful acts of plaintiff company, their rivals, who had issued a circular and sent it to municipal secretary-treasurers, reeves, and councillors in various provinces, calling their attention to the fact that it was unlawful for the company to pay commissions directly to these officers on any future sales to their municipalities but leaving it to these officers to select local agents to represent the company in making sales to the municipalities, sends out a circular letter to the same officers and to others calling attention to plaintiff's circular and intimating that it would be difficult for an honest rival to compete with one who used such a circular or did the acts which the circular suggests and that hundreds of honourable secretary-treasurers and councillors have spurned the graft, the sending of such circular by defendants is a privileged communication.

Winnipeg Steel Granary & Culvert Co. v. Canada Ingot Iron Culvert Co., 7 D.L.R. 707, 22 Man. L.R. 576, 22 W.L.R. 387.

F. What constitutes a publication.

(§ II F—85)—Evidence of publication.

There is evidence of publication of a libel where it appears that the pamphlet containing the libellous words has come into the hands of codefendants.

Lucas v. Ministerial Assn., 31 D.L.R. 200.

The question as to whether a slander has been published or not is one of fact, and where the trial takes place without a jury, the Trial Judge's finding will not be reversed on appeal unless the Appellate Court has a "firm conviction of error."

Wickens v. McConkey, 7 D.L.R. 602, 2 W.W.R. 946, affirming Alta. Supreme Court.

What constitutes publication.

One who, finding that slanders concerning him are being circulated, and not knowing who is responsible, places the matter in the hands of a detective agency, but does not tell or ask them to go to any particular person, may recover damages for a publication of the slanderous statements to employees of the detective agency. [King v. Waring, 5 Esp. 15, and Smith v. Wood, 3 Camp. 323, distinguished.] The fact that the slanderous utterance was spoken by the procurement of the plaintiff is not material to the question of publication or no publication. [Duke of Brunswick v. Harmer, 14 Q.B. 185, applied.]

Rudd v. Cameron, 8 D.L.R. 622, 27 O.L.R. 327, 23 O.W.R. 469, affirming on different grounds, 4 D.L.R. 567, 26 O.L.R. 154.

III. Actions; defences.

A. In general.

Relevancy of evidence as to meaning of libel, innuendo, fair comment, see Discovery, IV—32.

Relevancy of evidence as to authorship of libellous letter in newspaper, see New Trial, II—7.

(§ III A—95)—Newspaper libels — Security for costs — Sufficiency of affidavit.

An affidavit by the defendant in an action for a newspaper libel stating his belief, after diligent inquiry, that the plaintiff is not possessed of property sufficient to answer the costs of the action, sufficiently meets the onus probandi to establish the negative as to the plaintiff's pecuniary liability under s. 12 of the Libel and Slander Act, R.S.O. 1914, c. 71, and will entitle him to an order for security for costs. [Paladino v. Gustin, 17 P.R. (Ont.) 553, distinguished.]

Augustine Automatic Rotary Engine Co. v. "Saturday Night," 24 D.L.R. 767, 34 O.L.R. 167.

Newspaper — Sufficiency of notice — Misnomer — Specifying statements.

A mere misnomer of the defendant in a notice to a newspaper under the Ontario Libel and Slander Act (R.S.O. 1914, c. 71,

s. 8), the notice describing the defendant as a "publishing" instead of a "printing" company, is not so misleading as to vitiate the notice; but where the notice merely sets out the date of the issue of the newspaper containing the alleged libel, indicating the article by quoting its heading, without "specifying the statements complained of," as required by the Act, it is insufficient and the action will be dismissed upon the defence of want of notice.

Pohlman v. Herald Printing Co. of Hamilton, 48 D.L.R. 361, 45 O.L.R. 291, reversing 15 O.W.N. 215.

DAMAGES — CONFESSION OF JUDGMENT — REFUSAL TO ACCEPT.

In an action for damages for defamatory libel, the plaintiff has a right to adduce evidence to re-establish her good name and reputation, and is justified in refusing to accept a confession of judgment which denies all the allegations in the action; after notice of her refusal to accept the confession, if no defence is filed, the plaintiff may proceed ex parte to prove her claim as if no confession had been filed.

Robichon v. Monfette, 32 D.L.R. 466, 25 Que. K.B. 528.

APOLOGY — NOTICE — NAME OF PUBLISHER OR PROPRIETOR.

Section 15 of The Libel and Slander Act, c. 12, 1913 (2nd sess.) which provides that no defendant shall be entitled to the benefit of ss. 7 and 13 thereof (which prohibit actions for libel against a newspaper until after service of notice upon it demanding an apology and the lapse of sufficient time to permit the printing of such apology and limit the time within which such actions may be begun to 3 months after knowledge of the publication of the libel), "unless the name of the proprietor and publisher and address of publication is stated either at the head of the editorials or on the first page of the newspaper," held to have been complied with by the following notice at the head of the editorials in the defendant's newspaper: "Published at Calgary, Canada, by the Herald Publishing Company, Limited." Section 15 contemplates one natural or artificial person or partnership that is both publisher and proprietor, and the stating of the name of the publisher, as it was stated in this case, is a stating of the name of the proprietor as well, and therefore, a compliance with the section.

Scown v. Herald Publishing Co., 38 D.L.R. 43, 12 A.L.R. 127, [1917] 3 W.W.R. 25. [Affirmed, 40 D.L.R. 373, 56 Can. S.C.R. 305, [1918] 2 W.W.R. 118.]

A notice under s. 5 of the Libel Act (R.S.M. 1913, c. 113), addressed to "The Winnipeg Telegram Printing Company, Limited," instead of to "The Telegram Printing Company, Limited," is a sufficient compliance with the Act if it in fact reaches the latter company and it is given thereby the opportunity to apologize which it is the purpose of the statute to secure. [Burwell v. London Free Press, 27 O.R. 6; Benner v. Mail Printing Co., 24 O.L.R. 507, not followed.]

Knott v. Telegram Printing Co., 39 D.L.R. 762, 55 Can. S.C.R. 631, [1917] 3 W.W.R. 335, affirming 32 D.L.R. 409, 27 MAN. L.R. 336, [1917] 1 W.W.R. 974.

NEWSPAPER — RETRACTION BY — DELAY IN RETRACTING — EFFECT AS TO DAMAGES.

A newspaper sued for libel is not entitled to a dismissal on publishing a retraction several weeks after action brought and offering to pay the costs; the plaintiff may thereupon inscribe for proof and have his damages assessed in default of further plea.

Desaulniers v. "L'Action Sociale," 20 D.L.R. 566.

EXEMPLARY DAMAGES — APOLOGIES — QUE. C.C. 1053.

In the case of slander that may give rise to an action for exemplary damages, apologies made to the offended person are considered, according to doctrine and jurisprudence, as an extinction of the action for slander.

Pare v. Madore, 46 Que. S.C. 427.

ACTIONS—DEFENCES.

In an action for libel contained in a newspaper, the defendant may, independently of Lord Campbell's Act, 6 & 7 Vict. c. 96, and as in any other action brought to recover a debt or damages, defend by paying money into court by way of satisfaction, but the payment cannot be accompanied by a defence denying liability, although the defendant can, if he admits that he published the alleged libel and that the words are defamatory, pay money into court and at the same time deny the innuendoes or some of the innuendoes alleged. Where the statement of claim in a libel action alleges 3 distinct libels alleging innuendoes in each case and the defendant pleads payment into court, and as to two of the libels admits their publication and defamatory meaning but denies the innuendoes, and as to the third libel admits only its publication and alleges that the words are not libellous and are incapable of a defamatory meaning, the defence does not indicate with sufficient clearness that the plea of payment into court applies only to the 2 libels first mentioned and such plea will be stricken out with leave to the defendant to amend so as to make, if he so wishes, the plea refer to the two first mentioned libels only.

Parks v. Edmonton Journal Co., 3 A.L.R. 359.

DISCOVERY — NEWSPAPER — DISCLOSURE OF CONTRIBUTORS.

In a libel action against a newspaper which assumes full responsibility for what it publishes, the court should not, except under special circumstances, compel it to disclose the name of its contributors or informants.

De Schelking v. Cromie, [1918] 3 W.W.R. 1038.

SLANDER—SPECIAL DAMAGE.

The fact that as a result of the words complained of people have avoided the plaintiff, is not special damage as will support an action for slander where the words are not in themselves actionable. [Weldon v. De-Bathe, 14 Q.B.D. 339, applied.]

Ball v. Donnelly, [1918] 3 W.W.R. 55.

SLANDER — ACTION FOR, TRIED WITHOUT JURY — NO ACTUAL DAMAGE SUSTAINED — SMALL SUM ASSESSED AS DAMAGES — LUMP SUM ALLOWED FOR COSTS.

Garrison v. Eastwood, 15 O.W.N. 273.

JURY TRIAL — VERDICT FOR PLAINTIFF "WITHOUT DAMAGES" — LIBEL AND SLANDER ACT, R.S.O. 1914, c. 71, s. 5.

De Luca v. Hare, 13 O.W.N. 450.

(§ III A—96)—If the statement complained of as libel is a privileged communication, then, to make it libellous, there must be actual as distinguished from legal malice. In an action for libel, where the occasion is privileged, in order to justify a verdict for plaintiff the jury must expressly find malice. It seems that even the demeanour of a party on the witness stand is an element for consideration on the question of the existence of malice.

Winnipeg Steel Granary & Culvert Co. v. Canada Ingot Iron Culvert Co., 7 D.L.R. 707, 22 Man. L.R. 576, 22 W.L.R. 387, 3 W.W.R. 356.

NECESSITY OF PROVING MALICE.

In a slander action, while the plaintiff might, to remove privilege, and establish malice, on the trial give evidence of publications of the alleged slander, not mentioned in the particulars, yet it did not follow that an affirmative answer to the questions put to him on an examination for discovery would have established malice; but they might have been intended to secure information as to publications on occasions not privileged, on which the plaintiff might bring another action, and such questions will not be permitted. In determining the question of malice the matter in question is the defendant's belief in the truth of the matters alleged at the time of the publication, and not at the time of the examination, so questions so framed as to cover present belief are not proper questions relevant to the issue.

Klenman v. Schmidt, 4 S.L.R. 366.

(§ III A—98) — NECESSITY OF DISCLOSING NAMES OF PARTIES PRESENT.

The plaintiff in an action claiming damages for defamation is not obliged to disclose the names of the persons present if he states that such persons will be used as witnesses. If the plaintiff claims both actual and exemplary damages he may be directed to give the particulars as to each class.

McPartland v. Russell, 13 Que. P.R. 306.

(§ III A—99)—ACTION AGAINST NEWSPAPER—NOTICE—PLEADING.

Failure of the plaintiff in a libel action against a newspaper, in reply to a plea setting up want of notice as required by s. 8 (1) of the Libel and Slander Act (R.S.O. 1914, c. 71), to allege noncompliance with s. 15 (1) which disentitles the defendant from the benefit of such defence unless the name of the proprietor or publisher is stated in the paper, is not an admission of such compliance; where the plea alleges compliance, the same is not admitted by the absence of denial in the replication.

Dingle v. World Newspaper Co., 45 D.L.R. 226, 57 Can. S.C.R. 573, reversing 43 D.L.R. 463, 43 O.L.R. 218.

NEWSPAPER — PUBLICATION — FAILURE TO GIVE NOTICE BEFORE ACTION — LIBEL AND SLANDER ACT, R.S.O. 1914, c. 71, s. 8 — "DEFENDANT" — EDITOR — PUBLISHER—RELEASE.

Redmond v. Stacey, 14 O.W.N. 73.

LIBEL ACTION AGAINST NEWSPAPER—NOTICE OF ACTION—SUFFICIENCY.

Benner v. Mail Printing Co., 24 O.L.R. 507, 3 O.W.N. 56, 20 O.W.R. 21.

B. WHO MAY RECOVER.

(§ III B—100) — PERSON LIBELED REPRODUCING LIBEL.

A journalist who is libeled in a newspaper and who reproduces the libellous article in his own paper with comments, does not thereby abandon his right to sue for damages, but this reproduction increases the publicity of the libel, for which the defendant cannot be held responsible.

Fournier v. Soleil Pub. Co., 47 Que. S.C. 45.

SLANDER ACTION — HUSBAND AND WIFE COPLAINTIFFS.

In an action for slander with respect to the wife, there is no objection to her being a coplaintiff, and an inscription in law asking the dismissal of the action, as far as she is concerned, will be dismissed.

Lefebvre v. Roberge, 16 Que. P.R. 270.

LIBEL ON PARENTS — ACTION BY CHILDREN.

Children cannot maintain an action for damages in consequence of a libel on their parents.

Frigon v. Massicotte, 42 Que. S.C. 445.

C. DEFENCES; JUSTIFICATION.

(§ III C—105)—JUSTIFICATION.

It is no justification to plead to an action for libel that the deceased was a Roman Catholic priest and that according to the Roman Catholic religion he could never marry, and any marriage contracted by him was null and void; attacks on the deceased's theories and opinions might be matters of public interest, but statements as to his private life are not. The fact that the writer did not know that the deceased he has libelled had left children still living is an aggravation and not a mitigation of a libel charging that the deceased had not been legally married.

Chiniquy v. Bégin, 7 D.L.R. 65, 41 Que. S.C. 261. See also 24 D.L.R. 687.

CONSPIRACY — DEFENCES — MITIGATION — FAIR COMMENT — PARTICULARS.

Foster v. Maclean, 31 D.L.R. 250, 37 O.L.R. 68, varying 10 O.W.N. 101.

MUNICIPAL COUNCIL—APPLICATION FOR HOTEL LICENSE — DISCUSSION — C.C. ART. 1053.

The fact of saying that a former hotel keeper, an owner of a temperance hotel in a place where prohibition exists, has bought intoxicating beverages for $66.24 does not mean that he has acquired this beverage to sell without license, and does not constitute an injury. A municipal councillor, called to decide on a request for a license before the council, which is a question of public interest, has the right to take account of information which he obtains, and of discussing the question publicly and freely; if he does so in good faith, without malice and with probable cause, he does not incur any civil responsibility.

Desjardins v. Beaucage, 25 Rev. Leg. 309.

JUSTIFICATION — PARTICULARS — AFFIDAVIT.

Where the defendant, in an action for slander, pleads justification, he must state in his plea, or in particulars delivered to supplement the plea, the facts upon which he relies for justification; and, until such particulars are given, the defendant is not entitled to examine the plaintiff for discovery. The plaintiff is not bound to make affidavit of denial before he call upon the defendant for particulars. [Zierenberg v. Labouchere, [1893] 2 Q.B. 183; Arnold & Butler v. Bottomley, [1908] 2 K.B. 151, followed.] Where an order was made requiring the defendant to deliver particulars of a plea of justification, and the particulars delivered did not comply with that order, an order was made setting aside the particulars delivered, with liberty to the defendant to deliver new particulars, verified by his oath that they "are to the best of his belief true and as full and accurate as he can make them, in view of the knowledge he now has."

Henneforth v. Maloof, 42 O.L.R. 36.

NEWSPAPER — PLEADING — STATEMENT OF DEFENCE — SERIES OF LETTERS FROM CORRESPONDENTS — PROVOCATION.

Allan v. Record Printing Co., 15 O.W.N. 134.

DEFENCE OF FAIR COMMENT — ERROR IN JUDGE'S CHARGE INDUCED BY DEFENDANT —MISTRIAL — DAMAGES — NEW TRIAL —COSTS.

Jackes v. Mail Printing Co., 7 O.W.N. 677.

DEFENCE — PAYMENT INTO COURT.

A tender cannot be pleaded as a defence to a claim for unliquidated damages. Under order 22, r. 1, of the Nova Scotia Judicature Act, a defendant cannot plead payment into court with a defence denying liability in an action for libel.

Hardwick v. Kinney, 11 E.L.R. 583.

DEFENCES — JUSTIFICATION — NOTORIETY OF FACTS TO PUBLIC — AMENDMENT — C.C. ART. 1053; C.C.P. 191, 522.

In an action of damages for slander, the notoriety of facts stated by the defendant and mere repetition of current rumors, may be pleaded as mitigation of damages, and these allegations cannot be rejected on inscription in law. When in an action of damages for slander the declaration mentioned certain time and place where the defamatory words were spoken, the plaintiff cannot amend his declarations to substitute another time and place, as this would be materially altering the charge against the defendant. Conversation with the chief of police, at the court house, during a notorious trial wherein the defendant in good faith merely repeats accusation against the plaintiff already known to the public by the evidence adduced in the trial, by publications in newspapers, and by public rumors, does not amount to an injurious or slanderous statement and is privileged.

Carrington v. Mosher, 46 Que. S.C. 484.

PARTICULARS—DISCOVERY.

In an action for libel a plea of justification was made without stating full particulars thereof and defendant's solicitor obtained from the plaintiff's solicitor an undertaking to produce the plaintiff for examination for discovery and plaintiff's solicitor obtained from defendant's solicitor 2 postponements of the time of said examination and while the second period was current plaintiff's solicitor took out a summons for particulars and the defendant's solicitor took out a summons to compel plaintiff's solicitor to fulfil his undertakings. Held, that there was nothing in these circumstances justifying the ignoring of the principle that a defendant who has pleaded a general justification must furnish the plaintiff with the particulars of the facts before obtaining discovery from the plaintiff.

Nelson v. Bradstreet, [1917] 2 W.W.R. 1191.

JUSTIFICATION—FAIR COMMENT—PRIVILEGE —REPLY TO NEWSPAPER ATTACK.

Wilson v. Deane, 3 A.L.R. 186.

DEFENCE TO ACTION — JUSTIFICATION — FRESH PUBLICATION OF LIBEL.

Méthot v. Taschereau, 39 Que. S.C. 289.

(§ III C—108)—DEFENCES — ABSENCE OF MALICE.

The absence of malice in making the publication, though it may not be a bar to an action for libel, may reduce the quantum of damages; and the defendant is entitled to plead in mitigation of damages that he acted in good faith and with honesty of purpose.

Robert v. Herald Co., 10 D.L.R. 20.

Pleading justification is not, by itself, evidence of malice in a libel action but it will tend to aggravate the damages if the

defendant either abandons the plea at the trial or fails to prove it.

Chiniquy v. Bégin, 7 D.L.R. 65, 41 Que. S.C. 261.

ABSENCE OF MALICE.

Where the occasion is privileged, in an action for libel, the presumption is in favour of the absence of malice.

Winnipeg Steel Granary & Culvert Co. v. Canada Ingot Iron Culvert Co., 7 D.L.R. 707, 22 Man. L.R. 576, 22 W.L.R. 387.

(§ III C—109)—DAMAGES — GOOD FAITH —PROBABLE CAUSE—C.C. ART. 1053.

The defendant had 2 buffalo robes stolen. Having seen a rig go out of his yard he followed it and on the way picked up his 2 robes which had been thrown on the street. Having reached the rig he found an individual who told him that his name was Merrill the defendant. He sent him a lawyer's letter, claiming $15 damages on account of his buffalo robes: in these circumstances the defendant had acted in good faith and with probable cause and could not be sued.

Merrill v. Gayné, 25 Rev. Leg. 405.

(§ III C—110)—FAIR COMMENT — ESSENTIALS OF PLEA—TRUTH.

Where fair comment is pleaded in a libel action, the defendant must prove the truth of the facts upon which the comment was based, and that it was honestly and fairly made upon a matter of public interest.

Augustine Automatic Rotary Eng. Co. v. "Saturday Night," 34 D.L.R. 439, 38 O.L.R. 609.

FAIR COMMENT.

Everyone has a right to comment on matters of public interest provided he does so fairly and honestly and such comment, however severe, is not actionable.

Winnipeg Steel Granary & Culvert Co. v. Canada Ingot Iron Culvert Co., 7 D.L.R. 707, 22 Man. L.R. 576, 22 W.L.R. 387, 3 W.W.R. 356.

Even a personal attack may, under certain circumstances, form part of a fair comment upon giving "facts" truly stated, if it be a reasonable inference from them.

Brown v. Orde, 6 D.L.R. 297, 4 O.W.N. 18, 36, 22 O.W.R. 1002.

FAIR COMMENT—PUBLIC OFFICE.

The conduct of the holder of a public office held not to be a matter of public interest in a political contest in another part of the country a number of years after such person had ceased to hold such office, and when he was not a candidate or official in the contest in question, and particulars of such matters of alleged public interest were struck out of the statement of defence in an action for libel.

Wade v. News Advertiser, 24 B.C.R. 260, [1917] 2 W.W.R. 1134.

FAIR COMMENT—ACTION BY COMPANY.

In an action of libel a defence invoking the public interest, good faith and the right of fair comment, cannot relieve the author of the comment from liability unless he proves in addition the truth of the assertions contained in the libellous writing. A joint stock company may bring action for defamation if it suffers in respect of its property. Accusations which by their very nature would cause injury and real damage may be the subject of reparation without proof of special damage.

Chicoutimi Pulp Co. v. Price, 51 Que. S.C. 360.

(§ III C—111) — TRUTH — NEWSPAPER CHARGING EXPULSION FROM RACETRACK FOR ASSAULT.

The plea of truth in justification for a libellous statement published in a newspaper that the plaintiff had been fined and suspended from association racetracks for assaulting the starter at a race-meeting, the innuendo being that the plaintiff had been guilty of an unlawful assault and indictable offence and of improper conduct as a horseman, is not sufficiently established where the evidence shews that the alleged assault was committed by another person, but the fine had been erroneously recorded against the plaintiff, or that on a previous occasion he was fined for irregularities on the track not in connection with the incident charged in the libel.

Govenlock v. London Free Press Co., 26 D.L.R. 681, 35 O.L.R. 79.

BELIEF IN TRUTH—MOTIVE.

Inasmuch as the rule of law is that the motive or intention of the writer is immaterial to the right of action, the fact that the writer wrote as a Roman Catholic addressing himself to Roman Catholic readers is not a ground of justification for the publication of an absolute statement that 2 persons were not legally married when the fact was merely that their marriage was not recognized as valid by the Roman Catholic Church.

Chiniquy v. Légin, 7 D.L.R. 65, 41 Que. S.C. 261.

JUSTIFICATION — FAIR COMMENT — BELIEF IN TRUTH — MISDIRECTION.

In an action to recover damages for libel, a direction by the Trial Judge to the jury that the defence of justification would be established if the defamatory statements had been made in honest belief of their truth, although in fact untrue, and that, if the publications were an honest comment on the facts, that, in itself, would be sufficient to establish the defence of fair comment, is erroneous and misleading.

Price v. Chicoutimi Pulp Co., 23 D.L.R. 116, 51 Can. S.C.R. 179, affirming 22 Que. K.B. 393.

JUSTIFICATION—TRUTH.

In an action claiming damages for defamation evidence of the truth of the facts cannot be received as justification, but the court can take it into consideration from the point of view of the intention to cause

injury, which is an element of the defamation, and for the mitigation of the damages.

Bois v. Deschêne, 48 Que. S.C. 178.

(§ III C—112)—Allegations as to provocation.

On an application to the referee in chambers to strike out paragraphs of a statement of defence, an affidavit to prove the truth of a reply should not be admitted. Paragraphs of a statement of defence in a libel action, setting up a previous article published by the plaintiff and that the article complained of was invited and provoked by such previous article, were sustained; it being for the jury to say whether the retort was in self defence, and the plaintiff was ordered to attend and submit to be examined as to the first article.

Dojackek v. West Canada Pub. Co., 34 W.L.R. 645.

Attacks by political newspapers—Provocation.

In an action claiming damages for libel in a political newspaper, it is permissible to plead, as an extenuation of the fault, provocation by the plaintiff in another paper of articles alleged to be injurious and harmful attacking collectively the French-Canadian deputation to the Dominion Parliament, and especially the political friends of the newspaper put on its defence. The court can take the circumstances into account in order to determine the extent of the liability of the defendant. In any case such provocation should be direct and personal. The defence cannot allege that the articles that it invokes as provocation are untrue, defamatory and libellous; the last ground is an exception to the right of another, and can in any case only furnish matter for an incidental demand.

Fournier v. Soleil Pub. Co., 47 Que. S.C. 45.

(§ III C—113)—Justification — Basis for plea of truth, when insufficient as to specific facts.

In an action for libel, a justification must be specially pleaded and with sufficient particularity to enable the plaintiff to know precisely what is the charge he will have to meet, and, although where the words complained of are precise and convey a specific charge in full detail, it is sufficient to plead that they are true in substance and in fact and no particulars are necessary, yet an allegation in plaintiff's statement of claim, that the defendant newspaper published an article charging, that an effort was made "to stampede the members of the city council into appointing a member of the police force," and that the first move to secure a certain appointment to the police force was made by the plaintiff "of the notorious cafeteria and later the pioneer of the still more notorious South Coulee," does not allege such specific facts in full detail as would entitle the defendant to plead truth in justification without stating particulars shewing the specific facts which he means to prove in order to establish the truth of the alleged libel. [Zierenberg v. Labouchere, [1893] 2 Q.B. 183; Walker v. Hodgson, [1909] 1 K.B. 239, followed.]

Reid v. Albertan Publishing Co., 10 D.L.R. 495, 5 A.L.R. 486, 23 W.L.R. 330, 3 W.W.R. 919.

Truth.

Where an alleged libellous statement is true, if it be a privileged communication, there can be no recovery no matter what amount of malice may exist.

Winnipeg Steel Granary & Culvert Co. v. Canada Ingot Iron Culvert Co., 7 D.L.R. 707, 22 Man. L.R. 576, 22 W.L.R. 387, 3 W.W.R. 356.

(§ III C—114)—Explanation of alleged libellous matter by same or other articles.

A defendant in an action of libel is entitled to plead and prove in mitigation of damages that the remainder of the articles not set out in the plaintiff's statement of claim modify the words sued upon or that other passages in the same publication qualify them.

Robert v. Herald Co., 10 D.L.R. 20.

Libel — Inscription in law — Commissioners' report — Public opinion.

A journalist sued for libel has the right to rely on public documents to discuss an appointment to some position. He may allege the state of public opinion concerning the plaintiff, such a fact being useful to some extent in fixing the amount of damages.

Belanger v. Beck's Weekly, 16 Que. P.R. 346.

(§ III C—115) — Contemptuous damages —Verdict for 5 cents—Costs.

Emerson v. Ford-McConnell, 16 B.C.R. 193, 17 W.L.R. 672.

Libel — Newspaper — Denial of special damage — Innuendo — Apology — Tender.

Parks v. Journal Co., 16 W.L.R. 705.

IV. Criminal libel.

Seditious libel, see Sedition.

(§ IV—120)—Criminal libel — Refusing private prosecutor leave to prefer indictment or formal charge after committal of accused for trial — Crown's refusal to permit prosecution.

After a committal for trial for criminal libel, the court will refuse leave to the private prosecutor to prefer a charge, if the Crown not only refuses to prosecute but opposes the application of the private prosecutor to proceed with the charge, as in case leave were granted the Att'y-Gen'l could immediately enter a stay of proceedings under Cr. Code, s. 962, which would, in effect, nullify any order granting leave.

R. v. Edwards, 31 Can. Cr. Cas. 330.

Libel in attributing intention.

A false statement made in writing that

another person intended to commit suicide is not a libel involving a criminal charge.

Stone v. World Newspaper Co., 30 Can. Cr. Cas. 292, 44 O.L.R. 33.

(§ IV—121) — PRIVATE PROSECUTOR — CROWN.

The person who laid the information for defamatory libel, which was followed by a commitment for trial and indictment of the accused, is none the less a "private prosecutor" liable for costs of the defendant under Cr. Code, s. 1045, on judgment going in the latter's favour, although the Crown counsel took up the proceedings after the preliminary enquiry and conducted them as Crown business. [R. v. Patterson, 36 U.C. R. 129, followed.]

R. v. Fournier; Martin v. Fournier, 28 D.L.R. 379, 25 Can. Cr. Cas. 430, 25 Que. K.B. 526.

LICENSE.

I. FROM PRIVATE PERSONS.
A. In general.
B. Revocation.
II. FROM PUBLIC, OF RIGHT TO DO BUSINESS.
A. In general.
B. Power as to, generally.
C. On what business.
D. Uniformity and equality; discrimination.
E. Reasonableness; amount.
F. Enforcement of license tax.

See Municipal Corporations; Companies; Intoxicating Liquors; Automobiles.

Annotation.

Municipal license to carry on a business; powers of cancellation: 9 D.L.R. 411.

I. From private persons.

A. IN GENERAL.

See Timber; Easements.

License or invitation to use fire escape, see Landlord and Tenant, III C—65.

(§ I A—1) — LIABILITY FOR FAILURE TO KEEP MARKET PLACE SANITARY — OCCUPANCY OF STALL WITH KNOWLEDGE OF CONDITION.

A huckster occupying a stall in a public market under a weekly license, assumes the risk of injury to health by reason of the unsanitary condition of the stall by continuing in occupation thereof for many weeks after becoming aware of its condition. [Lax v. Darlington, 5 Ex. D. 28, distinguished.]

Wood v. Hamilton, 12 D.L.R. 451, 28 O.L.R. 214, reversing 8 D.L.R. 824, 28 O.L.R. 214, 23 O.W.R. 627.

IN GENERAL.

An agreement on the part of the owner of land to grant the use of his land for one or the other of 2 specified days for picnic purposes, including the right to take wood and water to be used on the grounds, is not an agreement for an interest in land within the meaning of the Statute of Frauds, but is a mere license to go upon the land.

Gray v. Hurley, 45 N.S.R. 353.

NEGLIGENCE — LICENSEE — DAMAGES — WATER PIPES — LAYING — RENEWING — REPAIRING.

In obtaining permission from the Board to lay a water main under the railway yard of the respondent, the applicant, who is a mere licensee, should assume responsibility for all damages that may occur, arising from any negligence on the part of its employees or those of the respondent, connected with the laying, renewing, or repairing of its water pipes, through the respondent's property.

Winnipeg v. C.P.R. Co. (Greater Winnipeg Water District Case), 23 Can. Ry. Cas. 75.

B. REVOCATION.

(§ I B—5)—LICENSE OF PASTURAGE—PERSONAL RIGHT—REVOCATION.

The permission given by an owner to pasture animals on his land is a personal right, which expires with the right of ownership, and does not bind a purchaser of the land.

Credit Metropolitan v. Clark, 46 Que. S.C. 392.

II. From public; of right to do business.

A. IN GENERAL.

See Municipal Corporations; Intoxicating Liquors; Automobiles.

As to fisheries, see Constitutional Law, I G—140; Fisheries, I B—5.

(§ II A—10) — MUNICIPAL LICENSE — LICENSE ON A TRADE OR BUSINESS—REFUSAL OF CHIEF OF POLICE TO RECOMMEND LICENSE.

A municipality, one of whose by-laws imposes on those who wish to ply a certain business the obligation of obtaining a license, which it will give on the recommendation of the chief of police, cannot be compelled by way of mandamus to give this permit when the chief of police has refused to recommend it. This functionary, moreover, cannot be forced to give the recommendation which he has refused. He does not have to justify his refusal, and, the applicant must prove that the chief of police acted arbitrarily and without sufficient cause.

Waller v. Montreal, 45 Que. S.C. 15.

(§ II A—14)—CONFIRMATION OF CERTIFICATE—OPPOSITION—REVOCATION.

The municipal elector who signs an opposition to the grant of a license certificate cannot withdraw his signature, and art. 930 of R.S.Q. 1909, as amended by (1 Geo. V., c. 10), permitting a municipal elector to personally appear before the authorities charged with the duty of confirming the certificate and to withdraw his signature does not apply to an opposition signed by the absolute majority of the municipal electors. Resolutions of a municipal council

permitting the signers of an opposition to the confirmation of a certificate for license to withdraw their signatures so that it will no longer contain the entire majority, and confirming the certificate, notwithstanding his opposition, are illegal and ultra vires, and will be quashed on application of the municipal elector.

Chaput v. St. Denis, 47 Que. S.C. 146.

B. Power as to, generally.

(§ II B—20)—Article 932 of the License Law of Quebec, R.S.Q. 1909, requires a municipal council to give the reasons upon which it refused to confirm the certificates of license of the existing holder, when it confirms that of a new license holder and this law being one of public order, a resolution by the municipal council which is passed under breach of its provisions is void.

Bourassa v. Salaberry, 18 Rev. de Jur. 474.

Licensing — Conditions precedent — Municipal Act, R.S.B.C. 1911, c. 170, subss. 318, 349, 352—Crown Office R. 40—Certiorari.

Compliance with the requirements of the Municipal Act, as to the signature to a petition for a license, and as to the statement of distances of residences of signatories from the premises is a condition precedent to the jurisdiction of a Board of License Commissioners to hear the petition. Rule 40 of the Crown Office Rules only applies to an omission or mistake in a judgment or order.

Re New Westminster Board of License Commissioners, 6 W.W.R. 681.

Cancellation—Procedure.

When cancelling a license under the authority of a by-law which contains no provisions as to procedure, a licensing board is not bound to observe the principles governing procedure in court. [Re Crabbe and Swan River, 9 D.L.R. 405, followed.] Subs. 121, s. 95, c. 40, 1913 (B.C.), is confined to proceedings before courts of justice for infractions of inter alia by-laws.

Re Vancouver Licensing Board; Re Mills, [1917] 3 W.W.R. 449.

Sale—Government indemnity.

The sale of a tavern or restaurant license is a legal sale of an incorporeal right and is perfected by the acceptance of the transfer of the license by the Government. The unpaid vendor of such license has a right to be collected by privilege for the amount of the price of sale remaining due upon the above-mentioned indemnity paid to the insolvent by the government.

Gervais v. Bilodeau, 52 Que. S.C. 66.

C. On what business.

To practice law, see Municipal Corporations, II C—105.

To operate gaming machines, see Gaming, I—6.

As to sale of liquor, see Intoxicating Liquors.

(§ II C—25)—Theatres — Powers of municipality—Amount.

The corporate powers of a municipality, under s. 64 (24) of the Towns Incorporation Act (C.S.N.B., c. 166), to license and regulate all theatres, is subject to the limitation of s. 3 of c. 168, that the license fee on "public places of amusement" shall not exceed $50; a by-law imposing on moving picture shows an annual license fee or $300 is ultra vires and void.

The King v. Dimock, 30 D.L.R. 217, 26 Can. Cr. Cas. 311, 44 N.B.R. 124.

Shooting gallery — Moral character—Mandamus.

Section 233 of the Edmonton (Alta.) charter is wide enough to authorize the requirement of good moral character as a condition precedent to the issuing of a license for a shooting gallery, which may be made to depend upon a report certified by the chief of police; and the court will not, by mandamus, interfere with the action of the license authorities refusing a license because of an unfavourable report. [R. v. Sparks, 10 D.L.R. 616, 18 B.C.R. 116; Hall v. Moose Jaw, 3 S.L.R. 22, distinguished.]

Elves v. McCallum and Edmonton, 28 D.L.R. 631, 9 A.L.R. 530, 34 W.L.R. 669, 10 W.W.R. 696.

(§ II C—27)—Theatres and moving pictures—Powers as to regulation.

By s. 3 of the Theatres Act (Alta. 1911-12, c. 29), the Lieut.-Gov.-in-council may make regulations governing the erection, operation, supervision and safety of all classes of theatres and entertainment halls, and by s. 4 may make regulations for licensing, controlling and governing the use and operation of cinematographs, moving picture machines or similar apparatus, and for regulating or prohibiting the exchange, leasing, sale or exhibition of films, and by s. 13 may make such regulations as may be deemed necessary, advisable or convenient for the purpose of carrying into effect the provisions of the Act:—Held, that the above provisions do not authorize the Lieut.-Gov.-in-council to impose a license fee on theatres.

Lethbridge v. Wilson, 8 A.L.R. 178, 8 W.W.R. 424.

Exhibition—Trade privileges — Concessions.

Hopkins v. Canadian National Exhibition Assn. 16 D.L.R. 866, 6 O.W.N. 71.

(§ II C—33)—Sales by sample—Commercial travelers.

Where the enabling statute authorizes a by-law to be passed by a city for licensing commercial travelers for nonresident traders selling directly to consumers, a by-law which is not restricted to nonresidents is

ultra vires because it is broader than the statute authorizes, and a summary conviction thereunder will be quashed although the trader whom the accused represented was a nonresident.

R. v. Pierce, 34 D.L.R. 630, 27 Can. Cr. Cas. 442, [1917] 1 W.W.R. 1312.

COMMERCIAL TRAVELER—TAKING ORDERS.

A wholesale merchant who sends a commercial traveler to take orders in a neighbouring municipality for the sale of goods, and who delivers such goods there on the following day to the purchasers by the same clerk, does not carry on a commercial business in such municipality and is not obliged to take out a license there.

Gillard v. Dupuis, 50 Que. S.C. 257.

PEDDLERS — INSTALLATION OF LIGHTNING RODS.

A lightning rod vendor who canvasses for orders for the supply and installation of lightning rods on buildings is not a "peddler" within the Hawker's and Pedler's Act (Sask.), at least where it does not appear from the evidence that the value of the skill and labour in the work of installation was trifling as compared with the value of the rods alone as goods and merchandise.

R. v. Staudall, 31 Can. Cr. Cas. 144, 12 S.L.R. 282.

TRADER—TAKING ORDERS.

A merchant, who sends his clerks to take orders from the residents of a neighbouring municipality and delivers the goods sold through the same or other clerks, with his own vehicles, a day or two afterwards, is a "trader" within such municipality, and bound to take a license for that purpose, according to the by-laws of said municipality.

Saint-David-de-l'Auberivière v. Guy, 51 Que. S.C. 272.

(§ II C—44)—VEHICLES FOR HIRE—CHARACTER CERTIFICATE REQUIREMENTS FOR LICENSE.

Statutory authority to a municipality to license and regulate the driving of cabs, hacks, motor cars and other vehicles plying for hire, does not authorize the municipality to limit licenses to such persons as are certified by the chief of police to be of good moral character.

R. v. Sparks, 10 D.L.R. 616, 18 B.C.R. 116, 21 Can. Cr. Cas. 184, 23 W.L.R. 613, 3 W.W.R. 1126.

(§ II C—46)—PLANTERS AND FARMERS—MARKETS.

Leases of private market stalls are not invalid as based on an illegal consideration by reason of the fact that the municipal authorities have refused to grant the licenses for the stalls, and such leases will not be cancelled because the tenants allege they have been deprived of the enjoyment of the premises leased as a result of the city's refusal to grant them such license.

Wallenberg v. Merson, 1 D.L.R. 212, 21 Que. K.B. 310.

Once an applicant for a butcher's license establishes that the locality where he proposes to open a private stall is at the required distance from any public market, that it is a proper place for such private stall, and that he is ready to pay the necessary license, the municipal authorities are bound, in the absence of any by-law limiting the number of such private stalls, to issue this license and have no discretion in the matter; and they will be compelled to fulfil this duty by mandamus.

Rosenfelt v. Biron, 8 D.L.R. 481, 43 Que. S.C. 127.

E. REASONABLENESS; AMOUNT.

(§ II E—70)—MUNICIPAL CORPORATIONS—TRANSIENT TRADERS' BY-LAW—EXCESSIVE LICENSE FEE—MUNICIPAL ACT, R. S.O. 1914, c. 192, s. 420, para. 7 (3)—MOTION TO QUASH CONVICTION—IRREGULARITIES—COSTS.

Re Borror's Conviction, 8 O.W.N. 601.

(§ II E—73)—LICENSE FEE ON COMMERCIAL TRAVELERS—DISCRIMINATION BETWEEN RESIDENTS AND NONRESIDENTS—PROHIBITIVE AMOUNT ($300)—ULTRA VIRES—CITY ACT, SASK. STATUTES 1915, c. 16, s. 204 (62).

Re Certiorari, 9 W.W.R. 1184.

F. ENFORCEMENT OF LICENSE TAX.

(§ II F—80)—MUNICIPAL CORPORATION—TRANSIENT TRADERS' BY-LAW—MUNICIPAL ACT, R.S.O. 1914, c. 192, s. 430 (7)—COMPANY OCCUPYING WAREHOUSE AND SELLING GOODS WITHOUT BEING ON ASSESSMENT ROLL OR HAVING LICENSE—CONVICTION OF SERVANT OR AGENT—EVIDENCE — QUASHING CONVICTION — COSTS.

Re Lang, 6 O.W.N. 629.

PERMIT TO CUT HAY—CONDITION—SALE OF LAND—RIGHTS OF LICENSEE.

Oliver v. Slater, 16 W.L.R. 107.

LIEN NOTES.

See Bills and Notes; Sale.

LIENS.

I. IN GENERAL.
II. PRIORITIES.
III. LOSS; WAIVER; DISCHARGE.

Of mechanic or materialman, see Mechanics' Liens.

Vendor's lien, see Vendor and Purchaser; Sale.

Judgment-lien, see Judgment; Execution; Land Titles.

Maritime lien, see Admiralty; Seamen; Towage.

Of solicitors, see Solicitors, II C—30.

For taxes, see Taxes, IV—175.

Reservation of lien in promissory note, see Bills and Notes, I A—2.

Annotation.

Lien for labour; for materials; of contractors; of subcontractors: 9 D.L.R. 105.

I. In general.

(§ I—1)—On land—Breach of contract for support—Part performance.

On the failure of the defendant to carry out an agreement to support the plaintiff's son for life, in consideration of the purchase and conveyance by the plaintiff to the defendant of certain real estate, a lien on the land in the nature of that of a vendor will be given the plaintiff for the value of the property, less whatever sum the defendant may be entitled to for the support and maintenance of the son until the breach of the agreement. [Cunningham v. Moore, 1 N.B. Eq. 116; Paine v. Chapman, 6 Grant 338, followed; Zdan v. Hruden, 4 D.L.R. 255, 22 Man. L.R. 387, distinguished.]

Spencer v. Spencer, 11 D.L.R. 801, 23 Man. L.R. 461, 24 W.L.R. 420, 4 W.W.R. 785.

On land—Right to—Loss—Conveyance before asserting right to lien.

The failure of a creditor to assert a contract right to obtain a lien on land before its sale by the debtor will defeat the former's right to such lien, where the contract was not in itself a valid lien and merely gave a right to sue for the enforcement of an agreement to give the lien.

Imperial Elevator & Lumber Co. v. Olive, 15 D.L.R. 103, 6 S.L.R. 142, 26 W.L.R. 193, 5 W.W.R. 628.

Liability of lienor in possession for loss of property by theft.

The liability of a thresher holding grain under a statutory lien for his services in threshing it, is that of a bailee, and he is answerable for grain stolen while in his custody only where he is guilty of negligence. [Finnicane v. Small, 1 Esp. 315, followed.]

Hill v. Stait, 14 D.L.R. 158, 23 Man. L.R. 832, 25 W.L.R. 475, 5 W.W.R. 225.

Charge for storage — Chattel held for other debt.

A person who has a lien upon a chattel for a debt cannot, if he keeps the chattel to enforce payment on the lien, add to the amount for which the lien exists, a charge for keeping the chattel until the debt is paid; there is no implied promise to pay for a storage when the bailee has retained the goods for his own benefit. [Somes v. British Empire Shipping, 8 H.L.C. 338, applied.]

Canada Steel & Wire Co. v. Ferguson, 21 D.L.R. 771, 25 Man. L.R. 320, 8 W.W.R. 416, reversing 19 D.L.R. 581.

For taxes paid on another's land.

One paying taxes on another's land under the mistaken belief that the land belonged to him, acquiesced in by the true owner, is entitled to a lien upon the land for the amount paid.

Riddell v. McRae, 34 D.L.R. 102, 11 A.L.R. 414, [1917] 2 W.W.R. 546.

For improvements upon land under mistake of title.

[Note:—This judgment contains a valuable discussion on the right to a lien on land for improvements made by a person who mistakenly believed that he was the owner.]

Tuckwell v. Guay, 34 D.L.R. 106, [1917] 1 W.W.R. 1229. [Affirmed in 37 D.L.R. 805, 27 Man. L.R. 529.]

Title to land—Lost deed — Failure to prove—Reference in will to deed —Recovery of possession of land— Lien for improvements made in mistake of title—Conveyancing and law of Property Act, s. 37—Damages for removal of chattels—Findings of Trial Judge—Appeal—Costs.

Tanner v. Sutor, 16 O.W.N. 319.

Advances made and services rendered in respect of real property—Evidence —Conflict—Findings of Trial Judge —Lien for advances, costs, and commissions — Judgment for payment and in default realization by sale —Reference for ascertainment of amount due—Costs.

Heyd v. Gross, 16 O.W.N. 334.

Lien on lands for improvements—Lease of farm by father to son—Alleged promise to devise farm—Request— Representations — Estoppel — Action against executors of father— Failure to prove definite contract —Claim for value of work done under lease.

Muirhead v. Muirhead, 12 O.W.N. 103, affirming 11 O.W.N. 221.

Improvements—Infant put in possession of land by grandfather—Representations inducing belief that land given to infant—Lien for improvements — Recovery of possession — Costs.

McCartney v. McCartney, 12 O.W.N. 199.

Of drayman.

A drayman, who removed furniture from one building to another, has a right to be paid the price agreed upon for his services as soon as the furniture has arrived at the latter building and is ready to be taken into the house. On refusal of payment he can hold the furniture for his privileged claim.

Walker v. Corbeau, 50 Que. S.C. 276.

Accountant—Books of corporation.

An accountant has a lien for his services upon the books of account upon which he works, provided he is rightfully in possession of them while doing the work, but he cannot acquire such lien upon any books of a company which it is required, either by its Act of incorporation or articles of association, to keep at all times in its office,

though he may have been permitted to take them to his own office.

Re Residential Building Co., 26 Man. L.R. 638.

IN GENERAL.

R. had purchased a quantity of furniture from the plaintiffs under a hire purchase agreement, which was duly registered, but, before completing her payments, she stored the furniture with defendant, a warehouseman, but without the knowledge of plaintiffs, who some months afterwards, on discovering the fact, demanded delivery up of the furniture under the terms of their agreement. Defendant refused to deliver until his warehouse charges were paid. Held, that defendant was not entitled to retain the goods until his charges were paid.

D. A. Smith v. Campbell, 16 B.C.R. 505, 17 W.L.R. 493.

USAGE — POSSESSORY LIEN OF FURNITURE MOVERS.

A furniture mover is entitled to a possessory lien on proof of usage of such claim in the district.

Welch v. Scott, [1919] 3 W.W.R. 425.

(§ 1—2a)—THRESHER'S LIEN—SEIZURE—FORCIBLE ENTRY.

The position of a lienholder under the Thresher's Lien Act (Sask.), s. 1, is that of a purchaser for value, and he has the right of forcible entry for the purpose of taking a sufficient quantity of grain in satisfaction for his lien.

Bell v. Cross, 36 D.L.R. 459, 10 S.L.R. 286, [1917] 3 W.W.R. 242.

The owner of a threshing outfit cannot claim a lien on grain threshed under the Threshers' Lien Act, for compensation for threshing it at a certain rate per bushel, where there was no definite agreement thereto, but the rate was to be determined by the yield per acre.

Delbridge v. Pickersgill, 3 D.L.R. 786, 21 W.L.R. 285, 2 W.W.R. 393.

MANITOBA THRESHERS' LIEN ACT—RIGHT TO BREAK OPEN BUILDING—SUFFICIENCY OF AGREEMENT.

The Manitoba Threshers' Lien Act, R.S. M. 1902, c. 167, being remedial in its nature, will be liberally construed. Under the Threshers' Lien Act, R.S.M. 1902, c. 167, which creates an active and not a passive lien, a locked granary may be broken open in order to take possession of grain for the purpose of acquiring a lien thereon. A stipulation that grain will be threshed at the same rate as is charged by another person is a sufficient agreement that it shall be done "at or for a fixed price or rate of remuneration" so as to satisfy such requirement of the Threshers' Lien Act, R.S.M. 1902, c. 167.

Hill v. Stait, 14 D.L.R. 158, 23 Man. L.R. 832, 25 W.L.R. 475, 5 W.W.R. 225.

SEED GRAIN ACT.

The proceedings authorized by an Act Respecting Seed Grain, c. 21, 1908, must have been taken in order to make the sum claimed by the Crown for seed grain a tax upon the land.

Johansson v. Cronquist, 38 D.L.R. 508, 12 A.L.R. 225, [1917] 3 W.W.R. 1029.

THRESHER—SEIZING GRAIN—SALE.

A thresher taking grain to satisfy his lien under the provisions of the Thresher's Lien Act (R.S.S. 1909, c. 152, s. 1, amended by Acts 1913, c. 67, s. 24), becomes a "purchaser for value" of the grain so taken, and as such, has a right to sell the grain to satisfy his claim.

Rudy v. Sonmore, 29 D.L.R. 40, 9 S.L.R. 267, 34 W.L.R. 1122, 10 W.W.R. 1279.

Plaintiff agreed to thresh defendant's crop at a specified rate per bushel. After he had threshed the greater portion of the crop his men refused to work and he was unable to complete the contract, and by reason of this breach the defendant was unable to get the balance threshed. Plaintiff sued for the amount of his account, interest, the expenses of endeavouring to exercise his lien, and a declaration that he was entitled to a lien on the grain. The defendant objected that the contract was an entire one, and that the plaintiff had never completed it, and counterclaimed for general damages but not for special damages: —Held, that the contract was not an indivisible one and payment was not conditional upon completion, and the plaintiff was therefore entitled to recover. 2. But the defendant was entitled to complete performance and upon breach to damages. 3. But the defendant, not having pleaded special damage, could not now be allowed to shew special damage, and the amount agreed upon when settlement was discussed fixed the basis upon which damages should be assessed. 4. That the notice of intention to charge interest was sufficient compliance with the provisions of subs. 2 of s. 37 of the Judicature Act, and the plaintiff was entitled to recover interest at legal rate. 5. Any right to a lien which the plaintiff had under the Act respecting threshers' liens, and that Act being in derogation of the common law must be strictly complied with before the plaintiff could avail himself of its provisions. 6. That the right of lien to be effective must be exercised within sixty days and by the actual taking of the grain, and a notice of intention to exercise not accompanied by an actual taking is not effective for that purpose, and the plaintiff had therefore no right of lien.

Elsom v. Ellis, 4 S.L.R. 294.

CROP PAYMENT ACT—FORCIBLE ENTRY.

The Crop Payment Act, 1915, does not take away a thresher's lien, even in respect to the share of the crop which under an agreement between the grower thereof and the vendor to him of the land belongs to the vendor. A thresher has a right to break into a granary in order to obtain the grain which is the security of the price of his

threshing bill. [Bell v. Cross, 36 D.L.R. 459, 10 S.L.R. 286, followed.]

Annable Co. v. Youngloye, [1917] 3 W.W. R. 453.

THRESHERS' LIEN ACT—SECTION 5 (2)—NATURE OF LIEN—HOW EXERCISABLE.

Defendant was held liable for trespass and conversion for taking grain from plaintiff's granary to satisfy alleged balance of claim for threshing. Defendant held not entitled to lien by reason of noncompliance with the provisions of the Threshers' Lien Act. Section 5 (2) of said Act considered. Said Act does not allow the breaking open of a building to get out of grain "in bulk" a quantity to satisfy the lien.

Hopkins v. Shubert, [1919] 1 W.W.R. 748.

RIGHT OF THRESHERS TO BREAK INTO GRANARY—EXCESSIVE SALE—DAMAGES—LIABILITY OF PURCHASERS.

The defendant threshers had a right to break into plaintiff's granary to seize under their threshers' lien if the amount taken was not excessive. Where, after seizure, the threshers were paid their account except for the hauling, but nevertheless proceeded to sell all the grain seized, they were held liable in damages, as were also their purchasers, for the excessive sale.

Hill v. Howie, [1919] 2 W.W.R. 392.

SEED GRAIN LIEN—INTEREST OF DEFENDANT IN LAND NOT APPEARING IN RECORDS.

Otis v. Weidmark, 19 W.L.R. 723.

THRESHER'S LIEN — RIGHT TO SEIZE GRAIN —REASONABLY SUFFICIENT TO SATISFY CLAIM—CANNOT APPLY SURPLUS ON OLD ACCOUNT—CONVERSION.

Strongman v. Dow, 46 D.L.R. 691, 12 S.L.R. 140, [1919] 1 W.W.R. 963.

THRESHERS' LIENS—POSITION OF THRESHER AS PURCHASER FOR VALUE.

In an action under the Threshers' Lien Act, the thresher has, prior to actual seizure, a lien upon all grain threshed by him, as security for the payment of his claim, and the moment he takes possession he becomes the actual owner to all intents and purposes, and when he sells the grain so taken by him, he does so, not as a lien holder, but as owner. This would not in any way prevent the debtor from recovering damages in case the seizure were of an excessive amount, as s. 2 of the Act limits the quantity which may be taken by the lien holder to a sufficient quantity computed at the market value to cover the debt. If the seizure were, however, of a quantity which, under all the circumstances, could be considered only reasonably sufficient to pay the claim of the lien holder, the latter would not be liable to damages for illegal seizure merely because he realized upon the sale more than enough to pay his claim, but he might in such a case be liable to account for the balance as a purchaser who had not paid the full purchase price of goods bought by him. No precise line can be drawn between excessive, and therefore illegal, seizures, and reasonable, and therefore legal, seizures, because each such case must be governed in this respect by its own circumstances.

Bunk v. Markwat, 6 W.W.R. 1084.

(§ 1—3)—FOR KEEPING AUTOMOBILE—GARAGE—LIVERY STABLE—HORSE OWNED BY THIRD PARTY.

Section 3, subs., 5 of the Innkeepers Act, 1 Geo. V. (Ont.) c. 49 (R.S.O. 1914, c. 173), conferring a right of lien upon livery stable keepers, does not apply to keepers of automobile garages, the context in the Act shewing that the Legislature intended the statute to apply only to livery stables where horses are ordinarily kept. As distinguished from the common law lien of an innkeeper on property of a third party in the possession of a debtor, the statutory lien of a livery stable keeper under the Act will not be construed as covering the property of a third person.

Automobile & Supply Co. v. Hands, 13 D.L.R. 222, 28 O.L.R. 585.

OF STABLE KEEPER.

The Stable Keepers' Act, R.S.M. (1913), c. 183, does not entitle the keeper to a lien on an animal put in the stable without the knowledge and consent of the owner. [Buxton v. Baughan, 6 Car. & P. 674, followed.]

Yeo v. Farragher, 39 D.L.R. 324, 28 Man. L.R. 424, [1918] 1 W.W.R. 624.

WOODCUTTER'S LIEN — SUBCONTRACTOR — NOTICE—PERSONAL LIABILITY.

A woodcutter who worked for a subcontractor and who, not having been paid his wages, gave the owner of the wood the notice required by art. 1994c, C.C. (Que.), acquires a privilege on the wood of the latter, but does not thereby obtain any personal recourse against him.

Laurentides Paper Co. v. Rompré, 27 Que. K.B. 194.

SEIZURE OF WOOD AFLOAT — RIGHTS OF OTHERS.

The privilege, created by art. 1994, c. C.C. (Que.), in favour of wood cutters, can only be exercised under the conditions determined by law. The fact that the wood seized under the exercise of this privilege was, during the process of the suit, carried away by the breaking up of the ice, and mixed with other wood belonging to a third person who had paid for it, gives ground for personal recourse against the latter.

Rheault v. Brown Corp., 53 Que. S.C. 296.

WOOD ADRIFT—SALVAGE—RIGHT OF RETENTION—PLEADING.

One who saves lumber floating astray on a river has a right of lien on such lumber for his costs of salvage. A creditor who has a right of retention, and who is sued by the owner revendicating the object thus retained, must not ask by his plea the dismissal of the action, but must conclude that he should not be dispossessed without having been reimbursed his costs.

Gagne v. Daigle, 54 Que. S.C. 239.

For labor.

Under a contract by which the plaintiff was to manufacture laths, etc., out of defendant's lumber at a certain price per 1,000 feet, it was provided that the plaintiff was to deliver the laths, etc., as fast as defendant could take them "and settlements to be made the tenth day of each month for the preceding month's saw bill:"—Held, defendant was entitled to delivery of the laths before payment therefor; that this agreement was inconsistent with a right of lien for the price of sawing and the plaintiff was therefore not entitled to a lien. The fact that the defendant gave a note in part payment, which was dishonoured, and the fact that the defendant went into liquidation under the Winding-up Act, R.S.C. 1906, c. 144, while some of the laths were in the possession of the plaintiff did not entitle the plaintiff to a lien upon such laths.

Bathurst Lumber Co. v. Nepisiquit Lumber Co., 41 N.B.R. 41, 11 E.L.R. 552.

(§ I—3a)—Miner's lien—Consolidated actions—Joint of several judgment.

Gabriell v. Jackson Mines, 15 B.C.R. 373.

Labour liens — Enforcement of liens against company in liquidation.

Good v. Nepisiquit Lumber Co., 10 E.L.R. 252.

(§ I—4)—Equitable liens.

A general lien asserted by one party upon the property of another, for the balance owing by the latter upon the accounts between them, depends upon possession of the property by the party asserting the lien.

Northern Sulphite Mills v. Craig, 4 D.L.R. 82, 3 O.W.N. 1388, 22 O.W.R. 563.

Equitable liens—Definiteness.

A lien is not created by a covenant to charge property not defined by the covenant and where there has been no acquisition of property with intent to perform the covenant. [Mornington v. Keane, 2 DeG. & J. 290, 44 E.R. 1001, followed.]

Trusts and Guarantee Co. v. Whitla Co., 16 D.L.R. 185, 6 W.W.R. 42, 27 W.L.R. 589, 7 A.L.R. 330.

Automobile repairs.

A workman who makes repairs to an automobile has thereon a right of retention, and his claim for repairs constitutes a privileged debt which takes rank by preference on the proceeds of the sale of the vehicle. He may issue a conservatory attachment to give effect to his privilege.

Morin v. Garbi, 50 Que. S.C. 273.

II. Priorities.

(§ II—5)—Seaman's lien for wages—Priorities—Statutory lien for building.

A lien for a seaman's wages has priority over a statutory lien for building, equipping or repairing a ship under s. 4 of the Admiralty Court Act, 1861, or for necessaries.

The Aurora, 7 W.W.R. 5.

(§ II—7)—Employee's lien on assets of employer in priority to bank's statutory security.

The statutory charge in favour of employees to the extent of three months' wages owing to them by the wholesaler or other person giving a statutory security to a bank under s. 88 of the Bank Act (Can.), 1913, may be enforced by direct action by the employeees against the bank, if the latter has taken possession of or disposed of the property covered by the security.

Edborg v. Royal Bank, 16 D.L.R. 385, 19 B.C.R. 514, 6 W.W.R. 180, 27 W.L.R. 680.

(§ II—9)—Threshers—Right of sale, upon retention, how exercised—Conversion.

Under the Threshers' Lien Ordinance (Alta.) giving a lien "for the purpose of securing payment" for threshing grain, the lienor's right is only one of retention, and he is guilty of conversion if he sells the subject-matter of the lien without resorting to his legal remedy. The proper procedure of the enforcemnt of a lien conferred by the Ordinance is to sue in a court of equity for a foreclosure of the lien and have a sale made by an order of the court. The Ordinance does not confer upon the lienor the right to seize such grain by breaking open the granary of the owner, where the grain is stored, and sell it without resorting to legal process. [Brown v. Glenn, 16 Q.B. 254; and Mulliner v. Florence, 3 Q.B.D. 484, applied.]

Prinneveau v. Morden, 11 D.L.R. 272, 24 W.L.R. 268, 4 W.W.R. 637, 6 A.L.R. 52.

III. Loss; waiver; discharge.

(§ III—10)—Discharge.

The discharge of a mortgage debt by a chirographic creditor of the mortgagor in consideration of the undertaking by the mortgagee to facilitate the purchase by the creditor, at the lowest possible price, of immovables of the debtor levied on under execution, does not create an obligation which entitles him who has paid to recover the sum from the mortgagee on the ground that the latter received it a second time, by another title, under a judgment rendered subsequent to their agreement.

Gagnon v. Bédard, 21 Que. K.B. 172, affirming 39 Que. S.C. 368.

(§ III—13)—Distribution of funds—Collocation — Mutual insurance company——Bill of deposit—Laborer—Privilege—Estate by destination—Machinery — Legal sale — C.C. arts. 379, 1489, 1490, 2000, 2009, 2033—C.C.P., arts. 668, 814, 815, 816—S. ref. [1909] arts. 7023, 7124.

There is a legal mortgage in favour of mutual insurance companies against fire, for the recovery of subscriptions in the bill of deposit; and this mortgage takes rank counting from the date of the bill of deposit, without affecting the former mortgages. A laborer, who asks to be entitled to a claim based on a hiring of service,

ought to indicate the nature of the services rendered, the value, added by his work to the estate of the debtor, and the registry of his lien. Machinery having been sold in execution with the estate, and the purchaser having paid the price, the tenant can not reclaim unless there had been collusion.

Copping v. La Banque d'Ottawa & Rivest, 25 Rev. Leg. 206.

LIFE INSURANCE.

See Insurance.

LIFE TENANTS.

Creation of life tenancy, see Wills; Deeds.

Annotation.

Estates for life: 31 D.L.R. 390.

LIABILITY FOR EXPENSES, ETC.

While the life tenant is entitled to the use of the land during his term and to the receipt of all the income and profits, he is in such fiduciary relationship to the remainderman that he is not allowed to injure or deal with the estate to the latter's detriment.

Atkinson v. Farrell, 8 D.L.R. 582, 27 O.L.R. 204.

REPAIRS—POWER TO MORTGAGE TO KEEP UP THE PROPERTY.

Re Darch, 16 D.L.R. 875, 6 O.W.N. 107, 26 O.W.R. 100.

LIMITATION OF ACTIONS.

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- A. In general; statutes.
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As to breach of condition of acceptance under will, see Wills.

Annotations.

Limitations as to actions for redemptions of mortgage: 36 D.L.R. 15.

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I. Limitation in general.

A. IN GENERAL; STATUTES.

Prescriptive and possessory rights, see Adverse Possession; Easements.

(§ I A—1)—N.W.T. ORDINANCE—STATUTE OF JAMES—SUPERSEDED, HOW FAR.

The N.W.T. Ordinance, Con. Ord. 1898 c. 31, is a substitution for the corresponding English enactment, 21 Jac. I. c. 16, and, so far as the latter deals with the same class of actions, it is not part of the law of Alberta. [Rutledge v. U.S. Savings & Loan Co., 37 Can. S.C.R. 546, followed.]

Quaker Oats Co. v. Denis, 19 D.L.R. 327, 8 A.L.R. 31, 7 W.W.R. 1008.

STATUTES—RAILWAYS—"FOR DAMAGE OR INJURY SUSTAINED BY REASON OF A RAILWAY"—ONE YEAR.

The provisions of the Ontario Railway Act, 1906, 6 Edw. VII. c. 30, s. 223, whereby actions for damage or injury sustained by reason of a railway under that Act, must be brought within 1 year, are in effect incorporated with the special Act 36 Vict. (Ont.), c. 99 (under which the London Street R. Co. was incorporated), and the limitation of 1 year substituted for that of 6 months under the Railway Act, 1859, c. 66, s. 83, which by the special Act were declared to be incorporated therewith.

Kilgour v. London Street R. Co., 19 D.L.R. 827, 30 O.L.R. 603.

ADMIRALTY PROCEEDINGS — NEGLIGENCE OF HARBOUR COMMISSIONERS — PUBLIC AUTHORITIES ACT.

Under s. 2 (2) of the Colonial Court of Admiralty Act, 1890, 53 & 54 Vict. c. 27, as well as Exchequer r. 288, action against the Harbour Commissioners of Montreal for negligence or default in the performance of a public duty are within the six months' prescription imposed by the Public Authorities Protection Act, 1893, 56 & 57 Vict. (Imp.) c. 61.

Sydney, Cape Breton & Montreal Steamship Co. v. Harbour Commissioners of Montreal, 11 D.L.R. 814, 15 Can. Ex. 1.

B. EQUITABLE REMEDY; LACHES.

See Estoppel, III G—85.

(§ I B—7)—EFFECT OF FOREIGN JUDGMENT UPON ORIGINAL CLAIM.

An extraterritorial personal judgment is

not effective to prevent the operation of the Statute of Limitations in Alberta as regards the original claim upon which the judgment was founded, where the defendant had acquired no domicile in the province in which the judgment was obtained, and had not appeared in the action there brought, nor attorned to the jurisdiction of the court.

Belcourt v. Noel, 9 D.L.R. 788, 23 W.L.R. 368, 3 W.W.R. 926.

(§ I B—10)—Title to land by possession —Evidence—Finding of local Master —Appeal.

Re Hamilton, 16 O.W.N. 119.

As to land.

The right of the Harbour Board of Montreal to sue for the rescission of a contract alienating land contingent to harbour is limited to a period of 10 years.

Harbour Commissioners of Montreal v. Foundry & Machine Co., 21 Que. K.B. 241.

Real property — Limitations Act—Adverse possession for period of years — Title by prescription — Right of occupant.

Bradshaw v. Patterson, 4 S.L.R. 208.

Title to land—Title not extinguished—Construction of Real Property Limitation Act.

McMillan v. Att'y-Gen'l for Ontario, 19 O.W.R. 799, 2 O.W.N. 1444.

C. Bar of prior or other claim, or of portion of claim or defence.

(§ I C—23)—Accounts—Part payment —Some items barred — Some items not barred—Burden of proof.

Ross v. Flanagan, 19 O.W.R. 499.

(§ I C—20)—A counterclaim for a simple contract debt cannot be successfully pleaded as such, where it could be met by the Statute of Limitations.

Fee v. Tisdale, 8 D.L.R. 524, 4 O.W.N. 373, 23 O.W.R. 489.

D. By and against whom available.

(§ I D—25)—Tenant at will without rent—Statute of Limitations (Ont.)

Where a person becomes tenant at will of another's lands without paying rent therefor, the Statute of Limitations, 10 Edw. VII. (Ont.) c. 34, s. 6, begins to run in his favour as against the owner at the end of one year after being let into possession.

Noble v. Noble, 9 D.L.R. 735, 27 O.L.R. 342.

(§ I D—26) — Corporations — Electric company.

The statutory obligation of an electric railway company to supply lighting to customers within a certain distance of the company's lines makes its negligence in allowing a dangerous current to set fire to the customer's premises one in relation to the works or operations of the defendant, and the customer's action therefor must be brought within the period of limitation which is provided for that class of action by its special Act (Con. Ry. Companies Act, 1896, B.C., c. 55, s. 44). [Lyles v. Southend, [1905] 2 K.B. 1, applied.]

Union Ass'ce Co. v. B.C. Electric R. Co., 21 D.L.R. 62, 21 B.C.R. 71, 30 W.L.R. 717, 8 W.W.R. 327.

(§ I D—27)—Against whom available—Municipality — Public Authorities Protection Act.

The period of limitation provided by the Public Authorities Protection Act, 1 Geo. V. (Ont.) c. 22, R.S.O. 1914, c. 89, for actions against public officials does not extend to and include actions against a municipality.

Glynn v. Niagara Falls, 15 D.L.R. 426, 29 O.L.R. 517.

Municipality.

A cause of action against a municipality in British Columbia for damages accruing in July, 1897, in respect of alleged deviations from certain dyking and drainage works constructed by it under the authority of municipal by-laws was subject to the provisions for limitation of actions contained in the B.C. Municipal Act, 1892, and of the Municipal Clauses Act, R.S.B.C. 1897. Such an action would be barred in so far as the claim was based upon the contention that the works were not justified by the by-laws relied upon as authorizing the same, after the expiry of the periods of limitation specified in ss. 243, 244 B.C. Municipal Clauses Act, 1897.

Wilson v. Delta, 8 D.L.R. 881, [1913] A. C. 181, 22 W.L.R. 931.

Municipalities—Retroactiveness of statute.

Section 358 of c. 16 Sask. 1915, barring claims for damages against municipalities resulting from land being injuriously affected unless made in writing with particulars of the claim within one year after the injury, affects more than mere matters of procedure and takes away a right existent under the law as it stood before the passage of the statute, and is therefore not retrospective. [R. v. Dharma, [1905] 2 K. B. 335, The Ydun, [1899] P. 236, distinguished; Hickson v. Darlow, 52 L.J. Ch. 453; Wright v. Hale, 30 L.J. Ex. 40, applied.]

Prince Albert v. Vachon, 27 D.L.R. 216, 34 W.L.R. 107, 10 W.W.R. 359, affirming 33 W.L.R. 470, 9 S.L.R. 80.

(§ I D—29)—Attaching creditor.

Under Nova Scotia Practice Order 46, r. 6, which provides that a subsequent attacher may dispute the validity and effect of a previous writ of attachment on the ground that the sum claimed was not justly due, or was not payable when the action was commenced, the subsequent attacher may take the ground that the debt was barred by the Statute of Limitations as an answer to the claim of the previous attacher.

Gormley v. DeBlois, 8 D.L.R. 109, 46 N. S.R. 280.

E. To what claims applicable.

(§ I E—30)—Railway Act—Breach of contract to locate station.

An action for the breach of an agreement to locate a railway station on the plaintiff's land in consideration of a right-of-way over it, is not within the limitation of one year prescribed by s. 306 of the Railway Act, 1906, for actions for damages or injury sustained by reason of the construction or operation of a railway. [Beard v. Credit Valley R. Co., 9 O.R. 616, followed.]

Gauthier v. C.N.R. Co., 14 D.L.R. 490, 7 A.L.R. 229, 25 W.L.R. 955, 5 W.W.R. 537.

Fraud—Breach of trust—Pilots' fund.

The Statute of Limitations does not run against a claim founded on fraud or fraudulent breach of trust, as for funds wrongly obtained or withheld by pilotage authorities with respect to a fund for the benefit of pilots.

Smith v. Halifax Pilot Commissioners, 35 D.L.R. 765, 51 N.S.R. 241.

Railway Act (Can.)—Construction and operation—Occupation.

An action for damages suffered by the landowner which could not be included in the award on expropriation of the land under the Railway Act, 1906, e.g., for a wrongful occupation by the railway prior to taking expropriation proceedings, is not within the limitation of 1 year prescribed by s. 306 of the Act, as such injury arises merely out of the occupation by the railway company and not out of the "construction or operation" of the railway.

Gauthier v. C.N.R. Co.; Dagenais v. C. N.R. Co., 17 D.L.R. 193, 7 A.L.R. 229, 19 Can. Ry. Cas. 144, 28 W.L.R. 240, 6 W.W.R. 949, varying 14 D.L.R. 490, 25 W.L.R. 955, 5 W.W.R. 537.

To what claims applicable—Recovery of personalty.

There is no statute of limitations applicable to an action for the recovery of personal property in Ontario, and therefore no statutory bar to such an action, though laches and delay for even a shorter time than the statutory period applicable to real property may be a bar to it.

McGregor v. Curry, 20 D.L.R. 706, 31 O. L.R. 261.

Money lent—Action for—Onus—Failure to discharge—Statute of Limitations.

Soady v. Soady, 6 O.W.N. 240.

Commercial debt.

The debt created by a loan of money, from a father to his son, to assist him in business, is not commercial. It is prescribed by 30 not by 5 years.

Quevillon v. Quevillon, 52 Que. S.C. 273.

Timber—Possession—Curator.

The action of a lumberman against a person in possession of the timber, to produce the value thereof to enable him to exercise his lien, is not an action for damages, but an action in revendication, to which arts. 2261, 2268, C.C. (Que.), relating to the prescription of 2 years, to that of movables, do not apply. The recourse against the judicial curator in such case does not exclude that against the person in possession of the timber, subject to the lien.

Marinier v. Riordon Paper Mills Co., 51 Que. S.C. 532.

II. When statute runs.

A. In general.

(§ II A—35)—Accounts—Charges on one side only.

That the last item of an account for goods sold is within 6 years will not draw after it those of longer standing, where the account is not mutual, but all charges are on one side only. [Cotes v. Harris, Buller's N.P. 149; Beck v. Pierce, 23 Q.B.D. 316, applied.]

Beck v. Anderson, 14 D.L.R. 798, 6 S.L. R. 283, 26 W.L.R. 144, 5 W.W.R. 659, 702.

Attorneys' fees—Settlement of case.

Where there has been a substitution of attorneys by consent in a pending cause, the prescription of 5 years against costs then due to the attorneys does not, where the case is subsequently settled, commence to run from the date of the substitution, but only from the date of settlement, even where the settlement has not been confirmed by a judgment. Fees for the study of a case, its preparation and other special services are not taxable; they cannot be allowed except upon proof of the value of such services. In such case prescription does not commence to run from the date of the final judgment, in the same manner as against taxable costs, but from the date when the services were rendered.

Millette v. Mayer, 50 Que. S.C. 312, affirming 45 Que. S.C. 430.

Peremption of action—Inscription of case on roll by prothonotary—Que. C.P. 280.

The peremption of action begins to run only from the date of its being put on the roll.

Pelletier v. Charbonneau, 16 Que. P.R. 194.

B. Contracts; mortgages.

Redemption of mortgage, dower, see Adverse Possession, I E—30.

(§ II B—40)—Lien note.

The Statute of Limitations does not begin to run on a lien note until the day following the due date stated therein, as an action could not be brought until the expiry of the due date. [Kennedy v. Thomas, [1894] 2 Q.B. 759, followed; Sinclair v. Rolson, 16 U.C.Q.B. 211, not followed.]

Willoughby v. Wainwright, 12 D.L.R. 741, 23 Man. L.R. 289, 24 W.L.R. 504, 4 W.W.R. 874.

HIRING CONTRACT—COMPLETION OF WORK—MIXED ACT — MERCHANT—COMMERCIAL ACT — SUMMONS — DAMAGES — PRESUMPTION C.C. ART. 2260.

In the case of a hiring contract for the construction of a house, if the contractor abandons the work and the owner, after having summoned the contractor to go back to work within 24 hours has given over the completion of the building to another, the prescription against an action for damages by the owner does not commence to run till the day following the last day of the time given to the contractor to go back to work. Thus in this case, the time having expired on the 21st August 1912, the prescription did not commence to run till the following day, the 22nd and the action for damages having been commenced by the owner on the 21st August, 1917, was brought in time. Moreover, the 5 years prescription does not apply to the action for damages. A contract can be commercial for one party and civil for the other. When it is a question of deciding whether a prescription is commercial or civil it is the quality of the creditor that must be considered. Because one party is commercial it does not follow that all his acts are so. Thus a contract of a merchant concerning immovables, like this one, is not an act of commerce.

Bachand v. Duchesne, 56 Que. S.C. 132.

(§ II B—41)—NEGOTIABLE NOTE—LOAN.

A promissory note payable to order given for a loan at interest and not in acknowledgment of a prior debt, is subject to the prescription of 5 years.

Hebert v. Demers, 47 Que. S.C. 252.

PROMISSORY NOTES—ACTION AGAINST MAKER—COMPUTATION OF DAYS IN STATUTORY PERIOD—RATE OF INTEREST POST DIEM—INTEREST FROM COMMENCEMENT OF ACTION TO JUDGMENT IN ADDITION TO SIX YEARS' ARREARS.

Canadian Heating & Ventilating Co. v. Cutts, 8 O.W.N. 565.

PROMISSORY NOTE PAYABLE ON DEMAND—TIME OF COMMENCEMENT OF STATUTORY PERIOD — DEPARTURE OF MAKER FROM PROVINCE AFTER COMMENCEMENT.

Findlay v. Battram, 9 O.W.N. 308.

(§ II B—42)—MORTGAGE.

The covenant to repay mortgage moneys implied by the Land Titles Act, even though imported into an instrument not under seal, is a specialty debt, and the applicable period of the Statute of Limitations is 20 years, by virtue of 1 Geo. V. c. 28, s. 102, Ontario, being an amendment to the Ontario Land Titles Act, providing that any charge or transfer not under seal, shall operate the same as if they were under seal, being the substance of s. 107 of the former Act. R.S.O., 1897, c. 138. The obligation to pay the mortgage moneys, imposed by a covenant implied by statute, is a specialty, and is not barred by lapse of time less than 20 years from the date of default.

Beatty v. Bailey, 3 D.L.R. 831, 26 O.L.R. 145.

DEFAULT IN PAYMENT OF INTEREST.

An action to recover money due on a mortgage in statutory form, providing that in default of the payment of the interest the principal shall become payable, is barred, under 10 Edw. VII. c. 34, s. 49 (k), unless action is brought within 10 years from default in the payment of interest, notwithstanding 10 years has not elapsed since the principal would have become payable apart from the acceleration clause. [McFadden v. Brandon, 8 O.L.R. 610, followed.]

Cameron v. Smith, 12 D.L.R. 64, 4 O.W.N. 1459, 24 O.W.R. 767.

VACANT LANDS—CONSTRUCTIVE POSSESSION — WHEN STATUTE BEGINS AGAINST MORTGAGEE.

Where a right of entry or to sue for possession has accrued to a mortgagee by the mortgagor's default in payment, and the mortgaged lands are left unfenced and without actual occupation by anyone, the Statute of Limitations does not run against the mortgagee so as to extinguish his title to the lands; the mortgagee may still foreclose although the remedy by action for the debt is barred, and the mortgagor similarly is not barred of his right to redeem. [Bucknam v. Stewart, 11 Man. L.R. 625; Delaney v. C.P.R., 21 O.R. 11, applied.]

Creamer v. Gooderham, 17 D.L.R. 235, 27 W.L.R. 646, 6 W.W.R. 250, 7 S.L.R. 173, affirming 9 D.L.R. 372, 23 W.L.R. 304, 3 W.W.R. 949.

REDEMPTION OF MORTGAGE—POSSESSION.

A mortgagee not having possession cannot set up the Statute of Limitation in bar of the right to redeem.

Martin v. Evans, 37 D.L.R. 376, 39 O.L.R. 479.

HYPOTHEC—SHERIFF'S DEED.

A purchaser who has received from the sheriff a deed subject to the charge of the right of enjoyment stipulated by the owner of the immovable sold in favour of his wife, cannot invoke the 10 years' prescription against hypothecs which have not been renewed, inasmuch as in doing so he would be seeking to have prescription against his own title.

Hope v. Leroux, 25 Que. K.B. 130.

D. TRUSTS; BAILMENT.

(§ II D—50)—TRUST—FRAUD—RELEASE.

Where it is not alleged or proved that the defendant was guilty of fraud or that he had retained or converted to his own use any of the trust property, he is entitled to the benefit of the Limitations Act, R.S.O. 1914, c. 75, s. 47. Where the effect of a transaction and release was to convert the plaintiff's interest in remainder into an interest in possession (s. 47 (2) (b)) the statute began to run against him from the

date of the transaction, and his right to recover was, at the time of the commencement of this action, barred.

Lees v. Morgan, 39 D.L.R. 259, 40 O.L.R. 233 at 235, reversing 11 O.W.N. 222.

TRUST.

The Statute of Limitations will not bar a wife's claim against her husband to account for her money handed over to him by her on an express trust that he should invest it on her behalf.

Ellis v. Ellis, 15 D.L.R. 100, 5 O.W.N. 561, 25 O.W.R. 539.

TRUSTS — ARREARS OF ANNUITY — WHEN STATUTE RUNS.

Where a trust is created by will for the payment of an annuity, the right to payment of arrears is not limited to the arrears for 6 years past.

Re Mackenzie, 11 D.L.R. 818, 4 O.W.N. 1392, 24 O.W.R. 678.

FRAUDULENT REPRESENTATION OF AUTHORITY —EXPRESS TRUST.

Where money is handed over to the defendant by the plaintiff to pay off the mortgage of the latter to a third person upon defendant's false and fraudulent representation that he, the defendant, is the mortgagee's agent, and the money is not paid over to the mortgagee, the defendant becomes an express trustee of the money for the plaintiff from whom he received it, and the Statute of Limitations applicable to ordinary claims of debt does not apply.

Freeman v. De Blois, 9 D.L.R. 552, 11 E. L.R. 573.

(§ II D—51)—POSSESSION UNDER VOID DEED.

One who is in possession of land under a conveyance, which is void by reason of the insanity of the grantor, is a trustee for the lunatic and his representatives, and the Statute of Limitations does not run in his favour as against them.

Hoover v. Nunn, 3 D.L.R. 503, 3 O.W.N. 1223, 22 O.W.R. 28.

E. FRAUD.

(§ II E—55)—Where the contesting party only becomes aware of the existence of a deed in fraud of his rights when it is produced in court, he has 1 year from that moment, and not 1 year from the making of the deed, within which to contest under C.C. (Que.) 1040.

Banque Nationale v. Godbout, 8 D.L.R. 668, 19 Rev. Leg. 401.

WHEN STATUTE RUNS—FRAUD.

The Statute of Limitations is not a bar to equitable relief in case of fraud founded on fraudulent misrepresentations made to induce the purchase of shares in a company, as against the persons guilty of the fraud, if the person defrauded is not guilty of laches in seeking relief; and so long as the latter remains in ignorance of a concealed fraud without any fault of his own, his remedy is not barred. [Bulli Coal Co. v. Osborne, [1899] A.C. 351; Betjemann v. Betjemann, [1895] 2 Ch. 474, applied.]

Twyford v. Bishopric, 20 D.L.R. 871, 7 A.L.R. 442, 7 W.W.R. 102, varying 14 D.L. R. 320, 25 W.L.R. 832.

FRAUD AND MISREPRESENTATION—RECOVERY OF MONEYS OBTAINED BY—RESCISSION—AMENDMENT.

Johnston v. Haynes, 8 O.W.N. 551.

F. TORTS; NEGLIGENCE; INJURIES TO PERSON OR PROPERTY; CRIMES.

(§ II F—60)—TORTS—NEGLIGENCE.

The limitation period for commencing an action for damages for personal injury against the owners of a motor vehicle by collision with the motor vehicle is 6 years from the time when the cause of action arose, under 10 Edw. VII. (Ont.) c. 34, s. 49 (g) as an action "upon the case."

Maitland v. Mackenzie, 6 D.L.R. 336, 4 O.W.N. 109, 23 O.W.R. 80.

NEGLIGENCE OF CIVILIAN RIFLE ASSOCIATION.

The members of a civilian rifle association in an action for injuries, alleged to have been received by reason of their negligence, while acting in pursuance of the Militia Act, are entitled to the benefit of the provision of that Act, requiring an action to be commenced within 6 months from the time the act complained of was committed.

Webster v. Leard, 7 D.L.R. 429, 11 E.L.R. 203.

PROSECUTIONS UNDER ADULTERATION ACT.

The time for laying an information for an offence punishable on summary conviction under the Adulteration Act, R.S.C. 1906, c. 133, is 2 years under s. 50 of that Act and s. 135 of the Inland Revenue Act, which it makes applicable; s. 1142 of the Cr. Code does not apply.

R. v. Regina Trading Co., 35 D.L.R. 403, 28 Can. Cr. Cas. 85, 10 S.L.R. 242, [1917] 2 W.W.R. 363.

ACTION AGAINST CROWN—INTERRUPTION OF PRESCRIPTION.

By s. 33 of the Exchequer Court Act (R.S.C. 1906, c. 140) the provincial laws relating to prescription and limitation of actions apply to an action for personal injuries against the Crown in right of the Dominion. Mere "negotiations" do not operate as an interruption of the prescription.

Fradette v. The King, 40 D.L.R. 699, 17 Can. Ex. 167.

RAILWAY FIRES—OPERATION OF RAILWAY.

The burning of worn-out ties by a railway company on its right-of-way in performance of the duty imposed by s. 297 of the Railway Act, 1906, to keep the right-of-way free from unnecessary combustible matter, any damage or injury resulting therefrom is caused by reason of the "operation of the railway" within the meaning of that phrase in s. 306, the right of action for which accrues within one year.

Greer v. C.P.R. Co., 23 D.L.R. 337, 51

Can. S.C.R. 338, 19 Can. Ry. Cas. 58, affirming 19 D.L.R. 140, 32 O.L.R. 104.

RAILWAY CLAIMS—NEGLIGENT WAREHOUSING—DAMAGE FROM "CONSTRUCTION AND OPERATION."

An action for breach of a railway company's contract of warehousing entered into by it after the arrival of the consignment at destination is not within the limitation of s. 306 of the Railway Act, 1906, which deals with actions for damages caused by reason of the "construction or operation" of the railway.

Great West Supply Co. v. G.T.P.R. Co., 23 D.L.R. 780, 8 A.L.R. 478, 19 Can. Ry. Cas. 347, 31 W.L.R. 259, 8 W.W.R. 720.

ACTIONS AGAINST RAILWAYS—INUNDATION CAUSED BY DEFECTIVE DITCHES.

An action for damages brought against a railway company for having neglected to keep its ditches in repair, and having thereby caused damages to the plaintiff by inundating his land, being founded upon a quasi-délit, is prescribed by two years.

Sénécal v. G.T.R. Co., 48 Que. S.C. 496.

PROSECUTIONS UNDER ADULTERATION ACT (CAN.).

The time limit for laying an information for an offence punishable on summary conviction under the Adulteration Act (Can.), is 2 years (R.S.C. 1906, c. 135, s. 50); and s. 1142 of the Cr. Code does not apply.

R. v. John Irwin Co., 31 Can. Cr. Cas. 54, [1919] 2 W.W.R. 226.

G. SUITS RELATING TO REAL PROPERTY.

(§ II G—65)—SUITS RELATING TO REALTY—LACHES.

Mere laches, short of 20 years from the accrual of the right to recover any land, will not bar the plaintiff's claim under s. 16 of the Statute of Limitations, R.S.B.C. 1911, c. 145.

Cook v. Cook, 17 D.L.R. 661, 19 B.C.R. 311, 27 W.L.R. 930.

LIMITATION OF ACTIONS—DISPUTE AS TO BOUNDARY-LINE BETWEEN TWO HALVES OF LOT—POSSESSION AND FENCING IN ACCORDANCE WITH AGREEMENT—ACTION TO RECOVER POSSESSION OF SMALL STRIP OF LAND—EVIDENCE.

Booth v. Sjolin, 16 O.W.N. 378.

THE REAL PROPERTY LIMITATION ACT, 1874—THE LAND TITLES ACT, S. 44—ACTUAL POSSESSION OF LAND—ACTION BY REGISTERED OWNER AGAINST ACTUAL OCCUPIER—DEFENCE ON STATUTORY LIMITATIONS — PLEADINGS — EFFECT OF ACTUAL POSSESSION AGAINST REGISTERED OWNER.

Harris v. Keith, 3 A.L.R. 222.

INTEREST IN LAND—MORTGAGE—ESTOPPEL — ADVERSE POSSESSION — EVIDENCE — FAMILY ARRANGEMENT — VISITS TO PROPERTY—FINDINGS OF MASTER—APPEAL.

Re Shields, 14 O.W.N. 205.

REAL PROPERTY LIMITATION ACT, 1874 (IMP.) — ADVERSE POSSESSION FOR TWELVE YEARS—POSSESSION OF PLAINTIFF'S HUSBAND—DEVISEE UNDER WILL OF HUSBAND—TITLE BY PRESCRIPTION.

Bradshaw v. Patterson, 4 S.L.R. 208, 18 W.L.R. 402.

REAL PROPERTY—LIMITATION OF ACTIONS—REGISTERED OWNER IN POSSESSION—PRIOR POSSESSION IN ANOTHER FOR OVER 12 YEARS—EFFECT ON RIGHTS OF PARTIES—THE REAL PROPERTY LIMITATIONS ACTS (IMP.)—THE LAND TITLES ACT, SS. 44, 104.

The right and title which by s. 34 of the Real Property Limitation Act, 1833 (Imp.), continued in force by the Real Property Act, 1874 (Imp.), which, under s. 2 of c. 31 of the Con. Ord. 1898, is in force in Alberta, is extinguished by possession of the land in another over the statutory period, is the right and title to bring a suit for the recovery of possession, and not the registered owner's right and title to the land. Such interpretation is necessary in order to give full effect to both said section and s. 44 of the Land Titles Act which makes the certificate of title "conclusive evidence . . . that the person named therein is entitled to the land . . ." Hence, where the registered owner is in possession the fact that another has had possession for over 12 years gives the latter no right to a declaration of ownership; nor has the latter any right of action for recovery of possession by reason of s. 104 of the Land Titles Act.

Sinclair v. McLellan, [1919] 2 W.W.R. 782.

ADVERSE POSSESSION—POSSESSOR TO HOLD IN FEE SIMPLE—RECTIFIED DESCRIPTION IN DEED—DEED TO GRANTEES AS TENANTS IN COMMON.

Foisy v. Lord, 3 O.W.N. 373, 20 O.W.R. 699, affirming 19 O.W.R. 390, 2 O.W.N. 1217.

(§ II G—66)—INJURY TO PROPERTY—NUISANCE—TRESPASS.

Where an injury or damage caused by the construction or operation of a railway is continuous, the limitation of 1 year for bringing an action therefor, as prescribed by s. 306 of the Railway Act, 1906, does not apply.

Carr v. C.P.R. Co., 5 D.L.R. 208. [Affirmed, 15 D.L.R. 295, 48 Can. S.C.R. 514, 13 E.L.R. 559.]

WHEN STATUTE BEGINS TO RUN—INJURY TO LANDS BY DIVERTING SURFACE WATER.

The flooding of an adjoining owner's land by a railway company by interference with the natural flow of surface water may result in such continuing damage as to extend the time for bringing an action for damage sustained by reason of the construction or operation of the railway.

Niles v. G.T.R. Co., 9 D.L.R. 379, 4 O.W.N. 820, 15 Can. Ry. Cas. 73.

FLOODING OF LANDS—DEFECTIVE CULVERT—CONTINUATION OF DAMAGE.

The negligent construction of a culvert obstructing the flow of a natural watercourse and causing the flooding of lands is a continuation of damage, and the limitations under s. 267 of the Railway Act (B.C.) 1911, c. 44, will not begin to run until after one year after the doing or committing of such damage ceases. [McGillivray v. G.T.P.R. Co., 25 U.C.Q.B. 69, followed.]

McCrimmon v. B.C. Electric R. Co., 24 D.L.R. 368, 22 B.C.R. 76, 32 W.L.R. 81, 8 W.W.R. 1289, affirming 20 D.L.R. 834, 19 Can. Ry. Cas. 329, 7 W.W.R. 137.

RAILWAY COMPANY—NEGOTIATION.

Where a railway company negotiates with a person whose crops have been injured by trespass of cattle caused by defective fencing, the period of limitation of action against the railway company runs from the termination of such negotiations.

Philip v. Canadian North-Western R. Co., 6 W.W.R. 1220.

(§ II G—67)—RIPARIAN RIGHTS.

The statutory period of prescription for the use of a stream of deposit sawdust and mill refuse in, begins to run from the date of the first substantial injury causing damage to the millowner, lower down the stream.

Hunter v. Richards, 5 D.L.R. 116, 26 O.L.R. 458, 22 O.W.R. 408.

H. MUNICIPAL INDEBTEDNESS OR LIABILITIES.

(§ II H—70)—STREET RAILWAY — NEGLIGENT CONSTRUCTION AND OPERATION.

The limitations of time for bringing actions against a municipality for its negligent construction or operation of a street railway, are governed by the Ontario Railway Act, R.S.O. 1914, c. 185, s. 265; and the Municipal Act, R.S.O. 1914, c. 92, the Public Utilities Act, R.S.O. 1914, c. 204, and the Public Authorities Protection Act, R.S.O. 1914, c. 89, have no application.

Knussisto v. Port Arthur, 31 D.L.R. 670, 37 O.L.R. 146, 20 Can. Ry. Cas. 335.

NEGLIGENCE ACTIONS.

Section 2 of the Municipal Act, R.S.O. 1914, c. 192, which bars any action for negligence against a municipality if not brought within 3 months from the time when the damages were sustained, will also apply to a case where the municipality is added as a party defendant after the expiration of the statutory period, although the action was instituted within the time.

Burrows v. G.T.R. Co., 23 D.L.R. 173, 18 Can. Ry. Cas. 183, 34 O.L.R. 142.

DAMAGE CAUSED BY THE PILING OF SNOW.

In the case of damages claimed from the city of Montreal as having succeeded to the rights and obligations of the Toll Road Trustees of Montreal, damages caused by the piling of snow in an orchard alongside a snow fence erected by the city, the prescription which applies is not that of 6 months provided for by the charter of the city, but that of 12 months contained in the Railway Act of Quebec, R.S.Q. 1909, art. 6642. This prescription begins to run, not from the construction of the snow fence, but from the time at which the injury was suffered, and could be definitely ascertained. The privilege of notice of action and of prescription should be strictly interpreted.

Del Sole v. Montreal, 24 Que. K.B. 550.

RIOT—SUPPRESSION—PERSONAL DAMAGES—PRESCRIPTION—CHARTER OF THE CITY OF QUEBEC, ART. 310, 561.

An action to recover personal damages caused by the suppression of a riot in the City of of Quebec is subject to the prescription of six months laid down by art. 561 of the charter of Quebec. Only the damages to property caused by a tumultuous gathering of people disturbing the peace are exempted from this prescription art. 310 of the same charter.

Berubé v. The City of Quebec, 56 Que. S.C. 106.

PRESCRIPTIONS—MONTREAL CHARTER.

Article 2267, C.C. (Que.), which denies an action and states that the debt is absolutely extinguished in cases of prescription under arts. 2250, 2260, 2261, 2262, C.C. (Que.), cover equally special prescription and particularly those found in arts. 536a and 537 of the charter of the city of Montreal.

McAvoy v. Montreal, 24 Rev. Leg. 314.

I. TAXES, ASSESSMENTS AND TAX SALES.

(§ II I—75)—IMPROVEMENT ASSESSMENTS BY MUNICIPAL CORPORATIONS—YEAR TO YEAR LEVIES.

An action against a municipality by reason of the imposition of an assessment alleged to be irregular comes within the purview of ss. 512, 513 of the Municipal Act, R.S.B.C. 1911, c. 170, requiring certain actions against a city to be commenced within a limited time, and the period of time begins to run from the time of the making of such assessment, notwithstanding that the assessment was to be levied from year to year.

Arbuthnot v. Victoria, 9 D.L.R. 564, 18 B.C.R. 35, 23 W.L.R. 563, 4 W.W.R. 145.

J. DECEDENT'S ESTATE; EXECUTORS AND ADMINISTRATORS.

(§ II J—80)—DECEDENT'S ESTATE—REMAINDERMEN.

The Statute of Limitations does not begin to run against a remainderman until he becomes entitled to possession.

Hall v. Wildman; Re Nicholls, 14 D.L.R. 244, 29 O.L.R. 206.

EXECUTORS AND ADMINISTRATORS.

Executors may retain from the distributive share of the estate to which a beneficiary is entitled an amount in which such beneficiary was indebted to the testator although, at the time of the testator's

death, the indebtedness was barred by the Statute of Limitations. [Re Akerman, [1891] 3 Ch. 212, followed.]

Re DeBlois Trusts, 8 D.L.R. 68, 11 E.L.R. 578.

ACTION TO ENFORCE CHARGE ON LAND—WILL — LEGACY — EXECUTORS — DEVISE — TRUST—DEVOLUTION OF ESTATES ACT.

McKinley v. Graham, 2 D.L.R. 916, 3 O.W.N. 645, 21 O.W.R. 222.

DISSOLUTION OF PARTNERSHIP BY DEATH—ACCOUNTING.

A partnership, formed for the purchase of book debts, stocks and immovables for the purpose of speculation, is commercial; but the administration and liquidation of such partnership by the legatees or heirs of one of the partners are not commercial acts, and the action for an account by the surviving partner against them is not prescribed by 5 years from the death of the other partner.

Ostigny v. Savignac, 47 Que. S.C. 376.

(§ II J—86)—INTEREST ON FOREIGN JUDGMENT—DEBT AND COSTS.

Royal Trust Co. v. Baie Des Chaleurs R. Co., 13 Can. Ex. 9.

M. COVERTURE, INFANCY, LUNACY, OR OTHER DISABILITY.

Possession of a lunatic's land by the Inspector of Asylums acting as such, is possession by the lunatic, and will interrupt the operation of the Statute of Limitations against the lunatic.

Hoover v. Nunn, 3 D.L.R. 503, 3 O.W.N. 1223, 22 O.W.R. 28.

REDEMPTION OF MORTGAGE—DISABILITIES.

The disability sections of the Limitations Act (R.S.O. 1914, c. 75), do not apply to an action to redeem a mortgage.

Smith v. Darling, 36 D.L.R. 1, 55 Can. S.C.R. 82, affirming 32 D.L.R. 307, 36 O.L.R. 587, reversing 9 O.W.N. 385.

III. When action is barred.

B. CONTRACTS; CONTRIBUTION.

(§ III B—110)—SALE OF GOODS.

Article 2260 (5) C.C. (Que.) can only be invoked in the case of prescription of the action to recover on a claim resulting from the sale of movable effects.

Themens v. McLaughlin Carriage Co., 49 Que. S.C. 393.

COMPANY—WINDING UP—CONTRIBUTORY — STATUTE OF LIMITATIONS—CONTRACT UNDER SEAL—PERIOD OF LIMITATION.

Re Canadian Cordage & Mfg. Co., Ferguson's Case, 7 O.W.N. 130.

(§ III B—112)—MORTGAGE.

Although the remedy is barred by the Statute of Limitations, a debt consisting of the principal and interest due upon a mortgage, remains, and may be retained by the administrator as against any claim made by the debtor against the estate.

Noecker v. Noecker, 41 D.L.R. 138, 41 O.L.R. 296.

MORTGAGE—SALE OF LAND SUBJECT TO—EQUITABLE OBLIGATION OF VENDEE TO PAY—CONVEYANCE NOT EXECUTED BY VENDEE—AGREEMENT UNDER SEAL—RECITAL—SPECIALTY DEBT—ABSENCE OF COVENANT—ASSIGNMENT OF SUPPOSED COVENANT—ACTION BY ASSIGNEE TO RECOVER MORTGAGE-MONEY—NECESSITY FOR NOTICE OF ASSIGNMENT—RULE 85 — PLEADING—STATEMENT OF CLAIM DISCLOSING NO CAUSE OF ACTION—REFUSAL TO AMEND—STATUTE OF LIMITATIONS—SUMMARY DISMISSAL OF ACTION.

Furness v. Todd, 5 O.W.N. 753, 25 O.W.R. 708.

C. CORPORATIONS; OFFICERS AND STOCKHOLDERS.

(§ III C—115)—MUNICIPALITY—"ACTION"—PROCEEDINGS FOR COMPENSATION—EXPROPRIATION.

An application to a judge to appoint an arbitrator is merely a step in the statutory proceedings to determine compensation and not an "action" within the meaning of s. 513 of the Municipal Act (R.S.B.C. 1911, c. 170), barring actions against the municipality if not commenced within a year from their accrual.

Hanna v. Victoria, 27 D.L.R. 213, 22 B.C. R. 555, 34 W.L.R. 307, affirming 24 D.L.R. 889, 9 W.W.R. 761.

E. FRAUD.

See also Fraud and Deceit.

(§ III E—125)—WHEN ACTION IS BARRED.

In case of a concealed fraud so far as the plaintiff seeks relief against a person not committing the fraud but who had received the benefit of the money without himself being at fault, the plaintiff must shew that he has been diligent and vigilant; and if by reasonable diligence he could have discovered the fraud more than 6 years before action brought, the court will refuse the relief of following the money against the innocent party on the ground that it would be inequitable to permit the plaintiff to set up such claim after the long delay.

Twyford v. Bishopric, 20 D.L.R. 871, 7 A.L.R. 442, 7 W.W.R. 102, varying 14 D.L.R. 320, 25 W.L.R. 832.

F. TORTS; NEGLIGENCE; INJURIES TO PERSON OR PROPERTY; RECURRENT.

(§ III F—130)—TORTS—RECURRENT INJURIES—FAILURE TO REBUILD BRIDGE.

On the failure of a town to restore a bridge that had been swept away, a new cause of action arises daily in favour of those injured by such default for which damages may be recovered for 3 months, less one day, prior to the time of bringing action, since the period of limitation prescribed by s. 606, Con. Municipal Act (Ont.) 1903, c. 19, does not apply to such a case.

Strang v. Arran, 12 D.L.R. 42, 28 O.L.R. 106.

ACTION FOR FLOODING LAND—RAILWAY ACT.

In an action for damages for flooding land, the plaintiff's right of recovery was limited to damages sustained within one year before the action was begun because of s. 198 of c. 8 of the Railway Act (Alta.), 1907.

McCord v. Alberta & Great Waterways R. Co., 49 D.L.R. 696, [1918] 3 W.W.R. 622, reversing 41 D.L.R. 722, 13 A.L.R. 476, [1918] 2 W.W.R. 708.

CONTRACTOR IN CONSTRUCTING RAILWAY—SPARKS FROM LOCOMOTIVE.

The limitation prescribed by s. 306 of the Railway Act, 1906, for bringing action against railway companies for damages, extends, by virtue of s. 15 of 3 Edw. VII., c. 71, to the National Transcontinental Railway Commission, since that body is required by law to let the work of construction by contract, such limitation includes actions against a person constructing a portion of the National Transcontinental Railway under contract with such commission for a fire negligently started by a locomotive owned by the former. Fire started on the land of a person by sparks from a locomotive owned by persons building a railway under a contract with the National Transcontinental Railway Commissioners, is an injury sustained "by reason of the construction" of the railway for which action must be brought within one year, the period of prescription fixed by s. 306 of the Railway Act, 1906.

West v. Corbett, 12 D.L.R. 182, 47 Can. S.C.R. 596, 15 Can. Ry. Cas. 202, 12 E.L.R. 475.

NOTICE OF ACTION.

Where a provincial statute enacts that in cases of claims for bodily injuries the claimant must give notice to the corporation of the accident within 60 days therefrom, failing which such corporation is to be relieved of all liability, and further provides that suit cannot be instituted before the expiry of 15 days from the service of such notice, but that no action shall lie unless instituted within 6 months "after the day the accident happened, or right of action accrued," then the prescriptive period of 6 months begins to run from the day of the accident and not from the expiry of the 15 days following the service of the notice, where the plaintiff's pleading shews only a single right of action and a single claim for damages resulting therefrom.

Allard v. Beauharnois, 9 D.L.R. 162.

INJURY FROM OPERATION OR CONSTRUCTION OF RAILWAY.

The statutory limitation as to time for bringing an action for damages for injuries sustained by reason of "the construction or operation of the railway" (Railway Act, 1906, s. 306), extends to a case of injury sustained by a labourer, who was employed in a gang loading old rails on flat cars by means of a crane and steel chain which broke, such work being performed in the actual "construction or operation of the railway."

Danyleski v. C.P.R. Co., 32 D.L.R. 95, 20 Can. Ry. Cas. 410, 27 Man. L.R. 364, [1917] 1 W.W.R. 993, reversing [1917] 1 W.W.R. 649.

The time limit imposed by s. 306, of the Railway Act, 1906, respecting actions for injuries caused by reason of the "construction or operation of the railway" does not apply to action arising for injuries to passengers out of negligence in their carriage.

Traill v. Niagara, St. Catharines & Toronto R. Co., 33 D.L.R. 47, 38 O.L.R. 1.

DIFFERING PERIODS OF LIMITATION UNDER PROVINCIAL RAILWAY ACT—LONGER PERIOD UNDER LORD CAMPBELL'S ACT (B. C.)—ACTION AGAINST RAILWAY FOR CAUSING DEATH.

A suit brought under the Families Compensation Act, R.S.B.C. 1911, c. 82, against a railway company, is not barred when begun more than 6 but within 12 months after the accident, the limitation being controlled by that Act and not by B.C. Con. R. Co.'s. Act, 1896, c. 55, s. 60.

B.C. Electric Ry. Co. v. Gentile, 18 D.L.R. 264, [1914] A.C. 1034, 28 W.L.R. 795, 6 W.W.R. 1342, 111 L.T. 682, 18 Can. Ry. Cas. 217, affirming 15 D.L.R. 384, 18 B.C.R. 307.

TORTS—NEGLIGENCE—"OPERATION OF THE RAILWAY"—INTERPRETATION OF—BURNING WORN-OUT TIES ON RIGHT-OF-WAY—DAMAGE RESULTING.

The injury done to adjoining property by the railway company setting out fire on its right-of-way for the purpose of destroying worn-out ties, and by its omission to prevent the spread of the fire, is an injury caused by the "operation of the railway" within the time limitation for bringing action therefor imposed by the Railway Act. [McCallum v. G.T.R., 31 U.C.R. 527, followed; Ryckman v. Hamilton G. & B.R. Co., 10 O.L.R. 419; Northern Ry. Co. v. Robinson, [1911] A.C. 739; Grant v. C.P.R., 36 N.B.R. 528, distinguished.]

Greer v. C.P.R. Co., 19 D.L.R. 140, 32 O.L.R. 104, 19 Can. Ry. Cas. 52, affirming 19 D.L.R. 135, 31 O.L.R. 419.

FAMILIES COMPENSATION ACT—RAILWAY ACT—WHICH ACT CONTROLS AS TO LIMITATION.

In an action by the dependents under Families Compensation Act, R.S.B.C. 1911, c. 82, against a railway company, the limitation is controlled by that Act and not by B.C. Con. R. Cos. Act 1896, c. 55, s. 60.

B.C. Electric R. Co. v. Turner and Trawford, 18 D.L.R. 430, 49 Can. S.C.R. 470, 6 W.W.R. 288, 18 Can. Ry. Cas. 193, affirming 9 D.L.R. 817, 18 B.C.R. 132, 15 Can. Ry. Cas. 39, 23 W.L.R. 175, 4 W.W.R. 150.

TORTS—NEGLIGENCE — LORD CAMPBELL'S ACT—CITY CHARTER — WHICH ACT CONTROLS.

The time limited by Con. Ord. c. 48 (Alta.) (Lord Campbell's Act), for bring-

ing actions thereunder for damages for negligence causing death is not limited or controlled as to such actions against the city of Calgary arising from the operation of a street railway by the municipality, by a general clause of the Calgary charter (s. 125), fixing a shorter period within which any "action for damages by reason of the negligence or default of the city" shall be brought.

Small v. Calgary, 18 D.L.R. 473, 7 A.L.R. 430, 6 W.W.R. 1192.

OBSTRUCTION OF WATER BY RAILWAY.

An action for damages sustained by reason of the illegal obstruction of access to navigable waters by a railway company must be brought within 1 year from the completion of the obstruction. [McArthur v. Northern & Pacific Junction R. Co., 17 A.R. (Ont.) 86; Lumsden v. Temiskaming, 15 O.L.R. 469, followed.]

Westholme Lumber Co. v. G.T.P.R. Co., 23 B.C.R. 32, 21 Can. Ry. Cas. 165, [1917] 1 W.W.R. 170.

TORTS—NEGLIGENCE.

If the land proprietor is under any direct liability to the injured party for neglect to keep adjacent sidewalks on the public street in repair, or free from snow or ice, by virtue of a municipal by-law (R.S.Q. 1909, art. 5641, subss. 3, 20), the neglect of such duty would, at most, be only a quasi-délit of omission on the part of the municipality, and the land proprietor jointly and severally, and the latter may set up the same defences as would be available to the municipal corporation, including the prescriptive limitation by which action against the municipality must be taken within a period of 6 months after the accident (R.S.Q. 1909, art. 5684, C.C. (Que.) arts. 1106, 1112, 2231).

Batsford v. Laurentian Paper Co., 5 D.L.R. 306, 41 Que. S.C. 367, 18 Rev. de Jur. 70.

QUASI-DELIT — LACK OF IDENTITY — PRESCRIPTION.

The lack of means by which to prove the commission of a quasi-délit (in this case want of knowledge of the identity of the responsible party) does not make it absolutely impossible for the party injured to sue (art. 2232 C.C. (Que.)) and his right of action is none the less subject to the prescription of 2 years (art. 2261).

Charpentier v. Craig, 22 Que. K.B. 385.

NEGLIGENCE OF NOTARY.

The contractual negligence of a notary, like that of an agent, is prescribed by 30 years, as the Civil Code and the Notaries Code are silent upon the point. (Art. 2242, C.C. Que.)

Chaput v. Crepeau, 52 Que. S.C. 443.

RAILWAY ACT, R.S.C. 1906, c. 37—LIMITATION OF TIME—INJURY RECEIVED WHILE WORKING AT ICEHOUSE FOR RAILWAY COMPANY.

Sutherland v. C.N.R. Co., 21 Man. L.R. 27, 18 W.L.R. 211.

(§ III F—131)—Under the Alberta Workmen's Compensation Act, providing that a claim for compensation thereunder must be made within 6 months from the occurrence of the accident causing the injury and permitting the injured person notwithstanding his failure in an action for negligence to ask for compensation provided the action is brought within the time limited by the Act for taking proceedings, no compensation can be fixed by the court in an action begun more than 6 months after the accident. [Cribb v. Kynoch (No. 2), [1908] 2 K.B. 551, followed.]

Smolik v. Walters, 1 D.L.R. 891, 4 A.L.R. 179, 20 W.L.R. 57, 1 W.W.R. 615.

WORKMEN'S COMPENSATION — ACTION FOR NEGLIGENCE.

Where in an action for negligence it is found that the damages therein are to be fixed as a compensation under s. 3 (4) of the Workmen's Compensation Act (Alta.) 1908, c. 12, the court will not allow any compensation under the Act where the original action is not commenced within the statutory period of 6 months. [Smolik v. Walters, 1 D.L.R. 891, followed.]

Berge v. Mackenzie, 24 D.L.R. 575, 8 W.W.R. 1191, 31 W.L.R. 936.

INJURY FROM CONSTRUCTION OR OPERATION OF RAILWAY.

Injuries sustained while unloading rails from a box car to a flat car for easier distribution in replacing the old track, are sustained "by reason of the construction or operation" of the railway, within the meaning of the Railway Act, 1906, and an action for damages must be commenced within 1 year as provided by s. 306. [Greer v. C.P.R. Co., 23 D.L.R. 337, 51 Can. S.C.R. 338, followed.]

C.N.R. v. Pszenicznzy, 32 D.L.R. 133, 54 Can. S.C.R. 36, 20 Can. Ry. Cas. 417, reversing 25 D.L.R. 128, 25 Man. L.R. 655, 32 W.L.R. 460, 9 W.W.R. 205.

WORKMEN'S COMPENSATION ACT—PETITION PRELIMINARY TO ACTION—LIMITATION.

The petition provided for by art. 7347, R.S.Q. 1909 (Workmen's Compensation Act), does not bar prescription if notice of action is not served within a year from the date of the accident.

Ruffineau v. Quebec & St. Maurice Industrial Co., 45 Que. S.C. 400.

RAILWAY OPERATION.

When the action was for injury sustained by reason of the construction or operation of a railway, the statutory provisions limiting the time for bringing an action applied; the action not having been brought within a year, the plaintiffs were barred: s. 306 of the Railway Act, 1906, and s. 265 (1) of the Ontario Railway Act, R.S.O. 1914, c. 185. [C.N.R. Co. v. Robinson, [1911] A.C. 739, distinguished.]

G.T.R. v. Sarnia Street R., 37 O.L.R. 477.

WORKMEN'S COMPENSATION.

The limitation of one year, in respect of actions to recover compensation for injuries

sustained "by reason of the construction or operation" of railways, provided by s. 306 of the Railway Act, 1906, relates only to injuries sustained in the actual construction or operation of a railway; it does not apply to cases where injuries have been sustained by employees engaged in works undertaken by a railway company for procuring or preparing materials which may be necessary for the construction of their railway. [C.N.R. Co. v. Robinson, [1911] A.C. 739, applied.]

C.N.R. Co. v. Anderson, 45 Can. S.C.R. 355, 20 W.L.R. 416, varying 21 Man. L.R. 121.

Injuries suffered through the refusal of a railway company to furnish reasonable and proper facilities for receiving, forwarding and delivering freight, as required by the Railway Act to and from shipper's warehouse, by means of a private spur-track connecting with the railway, do not fall within the classes of injuries described as resulting from the construction or operation of the railway, in s. 242 of the Railway Act, 1903, and, consequently, an action to recover damages therefor is not barred by the limitation prescribed by that section for the commencement of actions and suits for indemnity.

C.N.R. Co. v. Robinson, [1911] A.C. 739, 21 W.L.R. 624, affirming 43 Can. S.C.R. 387, which affirmed 19 Man. L.R. 300.

G. Suits relating to real property.

(§ III G—135)—Recovery of lands—Alberta.

An action for the recovery of land in Alberta as against a person holding adversely must be brought within twelve years by virtue of the Imperial Statutes of Limitations, 37 & 38 Vict. c. 57, the Alta. Ordinances (1911), c. 31, s. 2, and the Alta. Act, 4 & 5 Edw. VII. (Can.) c. 3.

Wallace v. Potter, 10 D.L.R. 594, 6 A.L.R. 83, 24 W.L.R. 262, 4 W.W.R. 738.

Devise of lands to town corporation for public park—Acceptance on conditions of will—Breach—Forfeiture—Claim for declaration—Continuous breach beginning more than 10 years before action — Limitations Act, R.S.O. 1914, c. 75, ss. 5, 6 (9).

As to the alternative claim, that there was one breach, continuing over many years, of the condition, and the time for commencing the action founded upon that breach expired at the end of 10 years after the breach had begun.

Matheson v. Mitchell, 44 O.L.R. 619. [Affirmed, 17 O.W.N. 267.]

Excepting that which is due to the Crown and the interest on the judgments, the arrears of rent even in tenants for life, arrears of interest, those of tenants and leaseholders, and in general all arrears of natural benefits are prescribed in 5 years.

Labreeque v. Boulette, 24 Rev. Leg. 447. [See also 25 Rev. de Jur. 75.]

Annulment of deed—Mistake.

A negatory action, founded upon the nullity of a deed on account of mistake, is prescribed in 10 years.

Riopelle v. Papineau, 54 Que. S.C. 451.

Ownership of land between two houses — Acts of ownership — Adverse possession—Requisites of.

Nixon v. Walsh, 19 O.W.R. 422.

Absolute conveyance of vacant land to secure money lent—Conveyance cut down to mortgage—Action by mortgagor for redemption — Statute of Limitations.

Cowderoy v. Kirby, 18 W.L.R. 314.

Prescription—Acts sufficient to acquire title by—Street laid down on plan—Evidence—No intention to exclude owner of fee.

Wright v. Olmstead, 3 O.W.N. 434, 20 O.W.R. 701.

H. Taxes.

(§ III H—140)—Taxes—Action against municipality to set aside sale.

An action to question the validity of a tax sale of land to a municipality must be begun within 6 months after the sale, or at least after notice of application for registration of the tax sale title, or it is barred under ss. 512, 513 of the Municipal Act, R.S.B.C. 1911, c. 170, providing that actions for any unlawful act of a municipality purporting to have been done under statutory authority, shall be commenced within 6 months after the cause of action arose.

Temple v. North Vancouver, 13 D.L.R. 492, 18 B.C.R. 546, 25 W.L.R. 215, 350, 4 W.W.R. 1369. [Affirmed, 6 W.W.R. 70.]

I. Judgment.

(§ III I—145)—When action barred—Judgments—Sale on execution after judgment barred—Levy during lifetime of judgment.

The word "proceeding" in s. 22 of c. 167, of R.S.N.S. 1900, limiting the time within which actions or other proceedings may be brought for the recovery of money secured by judgments, relates only to the acts or steps necessary to put the judgment in force, such as an application to obtain execution, and not to the sale necessary to complete the proceedings incidental to a levy made within the limitation period.

Rateau v. Ball, 15 D.L.R. 574, 47 N.S.R. 488.

Execution upon judgment.

Execution upon a judgment is barred if application for leave to issue execution is not commenced within the period prescribed in the Limitations Act, R.S.O. 1914, c. 75, s. 49 (1). [Poucher v. Wilkins, 21 D.L.R. 444, distinguished.]

Doel v. Kerr, 25 D.L.R. 577, 34 O.L.R. 251.

J. Miscellaneous.

(§ III J—150)—Parol gift—Evidence—Adverse possession—Statute of limitations.

Worsnop v. Wood, 19 W.L.R. 533.

(§ III J—151)—Prosecutions under Temperance Act.

The requirement of the Nova Scotia Temperance Act, 1910, c. 2, s. 36, that a prosecution shall be commenced "within 3 months after the alleged offence" would authorize an information on March 1st for an offence committed on the previous 1st day of December.

R. v. Nolan, 35 D.L.R. 334, 28 Can. Cr. Cas. 100.

Summary conviction — Continuing offence.

A charge under s. 409, Cr. Code for knowingly availing oneself of the results of personation at an examination from and after the date of such examination, is a charge of a continuing offence, and would not be barred by s. 1142, although the examination was held more than 6 months before a charge was laid under Pt. XV. of the Code. The limitation of 6 months enacted by the Cr. Code for the prosecution of summary conviction offences (s. 1142) applies only where the prosecution is under the procedure of Pt. XV, relating to summary convictions; it has no application to a proceeding by way of indictment although there was an alternative method of prosecution by summary conviction under the law creating the offence.

R. v. Lartie, 25 Can. Cr. Cas. 300.

IV. Interruption of statute; removal of bar.

A. In general.

Nullum Tempus Act, interruption, acknowledgment, see Adverse Possession, II—60.

(§ IV A—155)—Interruption of statute—Removal of bar—"Judicial demand"—Part payment by curator in Quebec—Effect in Alberta.

Even if the collocation on the dividend sheet by the curator appointed under Quebec law in proceedings following a demand by another creditor for the debtor's abandonment of property to his creditors or the subsequent payment of the dividend operates to interrupt the period of limitation in Quebec, where the debt was incurred, an action in Alberta on the debt after the debtor's removal to that province will be barred in 6 years after the cause of action arose it based on a simple contract; the payment by the curator is not to be regarded under Alberta law as a payment by or on behalf of the debtor and does not stay the effect of the Ordinance. [Birkett v. Bisonette, 15 O.L.R. 93, followed.]

Quaker Oats Co. v. Denis, 19 D.L.R. 327, 8 A.L.R. 31, 7 W.W.R. 1008. [Affirmed 24 D.L.R. 226, 9 A.L.R. 62, 31 W.L.R. 379, 8 W.W.R. 877.

Death—Personal representative.

The want of a personal representative to be sued will not interrupt the running of the Statute of Limitations for a debt due by the deceased.

McKinnon v. Shanks, 28 D.L.R. 77, 26 Man. L.R. 427, 34 W.L.R. 761, 10 W.W.R. 895.

Renunciation — Negotiations — Municipalities — Municipal officers and employees — C.C. arts. 2184, 2185, 2186, 2267—S. ref., [1909] art. 5865.

A renunciation of prescription of a claim for damages against a municipality arises when the Municipal Council appoints a commission charged to examine this claim, with instructions not to pay anything before the amount of the damages is assessed between the interested parties and paid by them. An action founded on art. 5865 s. ref. [1909] which established a prescription of 6 months in favour of every municipality, its officers and employees, for damages resulting from offences, quasi-offences, or illegalities, does not fall within the provisions of art. 2267, C.C.

Prud'homme v. Town of Saint-Jérome, 55 Que. S.C. 374.

B. By suit.

(§ IV B—160)—Filing petition.

Service and filing of a petition to sue under the Workmen's Compensation Act operates, by virtue of art. 2224 C.C. (Que.), as an interruption of prescription.

Page v. Joliette, 29 D.L.R. 240, 49 Que. S.C. 437.

Limitation—Court of Revision—Delay—Proper procedure—C.C.P., art. 279.

The production of depositions in the office of the Court of Revision after an entry has already been made there, is a proper proceeding which suspends the period of limitation.

Rioux v. Canadian Country Club, 56 Que. S.C. 107.

Commencement of action—Incidental demand.

When a plaintiff asks a certain sum as damages and, later, ascertaining that damages have increased or become permanent in such a manner as could not have been foreseen, files an incidental demand claiming that the damages should be increased, such increased damages, so claimed, are not prescribed by the lapse of 1 year—prescription having been suspended by the main action.

Montreal v. Tramways Co. v. McNeil, 25 Que. K.B. 90.

Petition of right.

The lodging of a petition of right with the Secretary of State, in compliance with the provisions of s. 4 of the Petitions of Right Act (R.S. 1906, c. 142) will interrupt prescription within the meaning of art. 2224 C.C.P.

Saindon v. The King, 15 Can. Ex. 305.

(§ IV B—163)—Workmen's Compensation Act — Reviver — Renewal of writ.

An action at common law and under the Workmen's Compensation Act (R.S.O. 1914, c. 146), the cause of action under the Act being barred at the expiration of 6 months from the occurrence of the accident unless kept alive by the renewal of the writ of summons, cannot, after the writ is expired and no valid service having been effected, be revived by a renewal of the writ, though the common law cause of action has not become barred. [Doyle v. Kaufman, 3 Q.B.D. 7, 340; Hewett v. Barr, [1891] 1 Q.B. 98, followed.]

Travato v. Dominion Canners, 26 D.L.R. 507, 35 O.L.R. 295.

C. By payment of promise.

(§ IV C—165)—Interruption of statute —Part payment.

That a payment or part payment should have the effect of taking a transaction out of the Statute of Limitations, it is not necessary that the payment should be actually made in money. Any arrangement between the parties intended to have the effect of discharging pro tanto the party indebted, will have the same effect as the payment of money. [Maber v. Maber, L.R. 2 Ex. 153, followed.]

Robson v. Malloch, 6 W.W.R. 1049.

Prescription—Interruption of—Promissory note—Partial payment.

In a commercial matter, partial payments constitute a tacit acknowledgment which will operate to interrupt prescription and may be proved by oral testimony.

Henderson v. Armstrong, 13 Que. P.R. 140.

(§ IV C—166)—Payment of dividend by assignee or curator.

The payment of a dividend by a curator or assignee for creditors does not imply a new promise by the debtor so as to raise a new obligation to pay a debt barred by limitations. [Birkett v. Bisonette, 15 O.L.R. 93, applied.]

Quaker Oats Co. v. Denis, 24 D.L.R. 226, 9 A.L.R. 62, 31 W.L.R. 579, 8 W.W.R. 877, affirming 19 D.L.R. 327, 8 A.L.R. 31, 7 W.W.R. 1008.

Mortgage — Payments by assignee of equity of redemption.

Payments of interest to a mortgagee by an assignee of an equity of redemption who, pursuant to agreement with the mortgagor or by virtue of s. 89 of the Real Property Act, R.S.M. 1902, c. 148, assumes the payment of the encumbrance, will prevent the running of the Statute of Limitations in favour of the mortgagor. [Forsyth v. Bristowe, 22 L. J. Ex. 255; Bradshaw v. Widdington, [1902] 2 Ch. 430; and Alston v. Mineard, 51 Sol. J. 132, followed.]

Ross v. Schmitz, 14 D.L.R. 648, 6 S.L.R. 131, 25 W.L.R. 828, 5 W.W.R. 399.

Payment.

The Statute of Limitations is not a bar to an action for the balance due on a grocer's account incurred by the wife of the defendant where it appeared that, during the life time of the grocer it was the practice of the defendant's wife to buy groceries and make monthly payments therefor, generally precisely the amount of the month's purchases, but sometimes a little more or a little less, so that at the death of the grocer there was a balance left unpaid, a statement of which was sent by the executrix of his estate to the wife of the defendant who promised to pay the bill, and payments were made by her from time to time until her death and then were continued by her daughter until the defendant put a stop to it, and, therefore, the executrix is not debarred from recovering the balance remaining unpaid from the defendant.

Scott v. Allen, 5 D.L.R. 767, 26 O.L.R. 571, 22 O.W.R. 597.

In an action on a promissory note where the limitation period under the statute would be held to have run but for a part payment made within the period of the fact that the Alberta Statute of Limitations is silent as to a part payment interrupting the statute and that the English statute, 9 Geo. IV. c. 14, s. 1, provides as regards the original English statute from which the Alta. statute was taken that nothing contained therein shall alter, take away or lessen the effect of any payment or any principal or interest, may properly be invoked in support of the long series of judicial interpretations fixing the law in relation thereto. In an action on a simple contract, where a 6 year Statute of Limitations is pleaded, a part payment made even after the expiration of the 6 years is sufficient in general to revive the cause of action, and therefore raise the implication of a promise to pay the balance and of an acknowledgment of the existence of a larger debt.

Sawyer-Massey Co. v. Weder, 6 D.L.R. 305, 5 A.L.R. 362, 22 W.L.R. 150, 2 W.W.R. 965.

Workmen's Compensation Act—Different indemnities.

The indemnities provided by the Workmen's Compensation Act (Que.), whether for temporary incapacity or for permanent partial incapacity, are subject to one and the same action, and are governed by the same prescription, and payments by an employer to an injured workman operate as an acknowledgment of debt under the Act, thereby interrupting the prescription, regardless as to which of the indemnities the payments were intended to apply.

Quebec & Lake St. John R. Co. v. Forgues, 26 D.L.R. 34, 24 Que. K.B. 538.

Mortgage — Payments of interest by heirs of mortgagor.

The plaintiff sued upon a mortgage made in 1888, payable 5 years after its date, with

interest. The mortgagor died in 1904, leaving a widow and three children, the defendants, who continued to live upon the mortgaged land. From time to time, payments on account of interest on the mortgage were made by one of the children, the last being in June, 1915. The widow defended the suit, alleging that she was not party or privy to the making of the payments on account of interest, and that she had now acquired a possessory title to the land:—Held, that the case was governed by s. 24 of the Limitations Act, R.S.O. 1914, c. 75, and s. 13 had no application. The payment of interest by one of those claiming under the mortgagor was a sufficient payment to keep the mortgage alive as against all persons claiming under him. [Roddam v. Morley, 37 Ch. D. 651, followed.]

McKay v. Hutchings, 41 O.L.R. 46.

NOTE—PAYMENT OF DIVIDEND BY ASSIGNEE FOR CREDITORS.

The payment of a dividend by the curator in a judicial abandonment of property, upon a debt having for consideration notes payable to order, interrupts the five year prescription, as payment made by the curator is as though made by the insolvent himself. In such case prescription begins to run, not from the date when the dividend was payable, but from that of the payments.

Laporte-Martin v. Bouthiller, 53 Que. S.C. 471.

(§ IV C—167)—PROMISE OR ACKNOWLEDGMENT.

A letter written by a client to his solicitor requesting him to look after his affairs once more and enquiring as to the amount of his (the client's) past indebtedness, constitutes an interruption of prescription as regards such indebtedness, but does not constitute a renunciation to prescription acquired.

Bernard v. Pelissier, 8 D.L.R. 545.

INTERRUPTION OF STATUTE—PROMISE OR ACKNOWLEDGMENT.

Where an alleged debtor on a liquidated money claim, in answer to the creditor's notice of intended action, writes a letter to him acknowledging the debt, without superadding any mere conditional promise to pay, such letter is sufficient to take the case out of the Statute of Limitations; the acknowledgment is not qualified even if accompanied by a request for time, by a statement that the debtor will not be able to pay until a future time.

Waddell v. Caldwell, 17 D.L.R. 411, 48 N.S.R. 109, 14 E.L.R. 332 at 334, affirming 15 D.L.R. 678, 14 E.L.R. 332.

INTERRUPTION OF STATUTE — REMOVAL OF BAR — PROMISE OR ACKNOWLEDGMENT, CONDITIONAL OR OTHERWISE—WHEN INEFFECTIVE.

McNeill v. McEachren, 20 D.L.R. 971.

ACKNOWLEDGMENT OF DEBT — CONDITIONAL PROMISE TO PAY.

A promise to pay conditional from the promisor's ability to do so does not operate as an absolute acknowledgment of a debt barred by limitations.

Quaker Oats Co. v. Denis, 24 D.L.R. 226, 9 A.L.R. 62, 31 W.L.R. 579, 8 W.W.R. 877, affirming 19 D.L.R. 327, 8 A.L.R. 31, 7 W.W.R. 1008.

PROMISE OR ACKNOWLEDGMENT—"MY DEBT."

Agreeing to waive the Statute of Limitations is not a sufficient acknowledgment unless coupled with a promise; and though the expression "my debt" might by itself be construed as implying a promise of immediate payment, it is not so if negatived by the debtor's statement of his inability to pay. [Rackham v. Marriott, 2 H. & N. 196. Smith v. Thorne, 18 Q.B. 134, followed.]

Lyman's v. Gagner, 23 D.L.R. 567, 31 W.L.R. 700.

ACKNOWLEDGMENT OF DEBT.

When a debtor executes a contract in writing with his creditor by which he undertakes to do some work for $70, and that at the foot of the document places the following clause: "I agree to pay $5 on old bill from above amount," he acknowledges that he owes the old debt, the prescription of which is therefore interrupted.

O'Shea v. Hague, 47 Que. S.C. 394.

MORTGAGE—PAYMENT OF INTEREST BY SON AND DAUGHTER OF MORTGAGOR—SUFFICIENCY TO KEEP MORTGAGE ALIVE AS AGAINST ALL PERSONS CLAIMING UNDER MORTGAGOR—LIMITATIONS ACT, R.S.O. 1914, c. 75, s. 24.

McKay v. Hutchings, 41 O.L.R. 46.

INTERRUPTION—WRITING.

The prescription of 5 years prescribed for negotiable notes works a forfeiture of the right of action. If the amount of the note exceeds $50, the interruption of the prescription can only be proved by a writing from the maker.

Dion v. Cimon, 51 Que. S.C. 57.

ACKNOWLEDGMENT OF DEBT — SCHEDULE—ASSIGNMENT FOR CREDITORS.

The enumeration of a debt in a schedule to a creditor's trust deed is an insufficient acknowledgment to take the debt out of the operation of the Statute of Limitations and part payment of the debt by the trustee is equally important.

Cockshutt Plow Co. v. Young, 10 S.L.R. 68, [1917] 1 W.W.R. 1441.

PROMISSORY NOTE — ACKNOWLEDGMENT IN WRITING.

To an action begun Nov. 5, 1912, to recover the amount of a promissory note made by the defendant and his brother, dated Nov. 1, 1903, payable one year after date, the defendant pleaded the Limitations Act; and it was held, that a letter written by the defendant to the plaintiff, dated Nov. 8, 1906, in which the defendant said: "I thought that note matter was settled long ago. I will write my brother John for details and on receipt of his re-

ply you will hear from me again"—assuming that the letter referred to the note—was not a written acknowledgment of the debt from which a promise to pay might be inferred.

Wood v. Tromanhauser, 32 O.L.R. 370, reversing Junior Judge, County of York.

UNCONDITIONAL ACKNOWLEDGMENT OF DEBT — LAW IMPLYING PROMISE TO PAY — PREVENTING CLAIM BEING BARRED.

The law implies a promise to pay where the acknowledgment of the debt is unconditional; so as to prevent the claim being barred by the Statute of Limitations.

Bank of Vancouver v. Kennedy, [1919] 3 W.W.R. 51.

SUFFICIENCY OF ACKNOWLEDGMENT OF DEBT.

A letter of the defendant in which there was an offer to confess judgment for a debt constitutes a sufficient acknowledgment to deprive him of the benefit of the Statute of Limitations.

Western Foundry & Metal Co. v. H.T. Stevens Co., [1919] 3 W.W.R. 1021.

A CERTAIN ACKNOWLEDGMENT IN LETTER HELD SUFFICIENT TO PREVENT THE OPERATION OF THE STATUTE OF LIMITATIONS.

Sparling v. Western Trust Co., [1919] 1 W.W.R. 770.

LIMITATION OF LIABILITY.

See Carriers; Shipping.

LIQUIDATED DAMAGES.

See Damages, III; Contracts.

LIQUIDATION.

See Companies, VI.; Banks, V.; Partnership, VI.; Assignment for Creditors.

LIQUIDATOR.

See Companies.

LIQUOR LAWS.

See Intoxicating Liquors.

LIS PENDENS.

I. IN GENERAL.

II. PURCHASERS PENDING SUIT.

See Land Titles.

I. In general.

(§ I—1)—IN GENERAL — DEFECTIVE ENDORSEMENT—STATEMENT OF CLAIM — REFUSAL TO SIGN "OPTION" OF PURCHASE OF LAND—VACATING REGISTRY OF CERTIFICATE.

Jenkins v. McWhinney, 5 D.L.R. 883, 4 O.W.N. 90, 23 O.W.R. 29.

INSCRIPTION IN LAW.

If, on the very face of a declaration, it appears that the plaintiff has already brought an action upon the same grounds, but it is not alleged that such action was followed by a final judgment, it is an exception of lis pendens and not an inscription in law which is open to the defendant.

Chaput v. Legault, 20 Que. P.R. 286.

ESSENTIALS — IDENTITY OF ACTIONS — JOINDER.

In order that there may be lis pendens of two actions, it is necessary that there be identity of parties, identity of cause of action, and identity of the object of the action. If one of these is wanting there cannot be lis pendens. In the latter case, to prevent a possible conflict between the two judgments, the procedure to follow is that of joinder of the actions.

Rayeraft v. Little, 49 Que. S.C. 505, 17 Que. P.R. 436.

EXCEPTION OF LIS PENDENS—ANSWER IN WRITING—PROOF—INSCRIPTION ON THE ROLL—C.P., 164, 173, 293 ET SEQ.

If an exception of lis pendens has been answered in writing and proof is to be adduced, the case should not be inscribed on the ordinary roll for proof and hearing. On a motion to reject such inscription, the case will be sent to the Practice Court to be disposed of.

Gingras v. Hoileau, 16 Que. P.R. 341.

(§ I—2)—EFFECT OF LACHES—WRONGFUL ISSUANCE.

The delivery of an amended statement of claim will not validate a certificate of lis pendens wrongfully issued by a clerk of the court, pursuant to s. 35 of the Alberta Mechanics' Lien Act when the original statement of claim filed with him as a condition to the issuing of the certificate was defective in not setting out the statutory allegations and claims for relief. The filing of an amended statement of claim in an action wherein the original statement of claim did not authorize the registration of a lis pendens certificate will not validate such certificate. [25 Cyc. 1473, approved.]

Horne v. Jenkyn, 6 D.L.R. 54, 5 A.L.R. 359, 2 W.W.R. 929.

CERTIFICATE OF — REGISTRATION — MOTION TO VACATE—WHAT MUST BE SHEWN—ABUSE OF PROCESS OF COURT—DELAY IN PROSECUTION OF ACTION—MOTION TO DISMISS.

National Match Co. v. Thomas, 13 O.W.N. 413.

(§ I—3)—EFFECT OF NOTICE GENERALLY.

The registration of a certificate of lis pendens by the plaintiff is the means provided to protect his interests and give notice to other parties that he claims an interest in the property involved and is seeking to enforce his rights by action, and such registration operates as a notice to all who are or may become interested in the property.

Robinson v. Holmes, 17 D.L.R. 372, 5 W.W.R. 1143.

(§ I—4)—REMOVAL OF—BONA FIDE PURCHASER—TRUST.

Under ss. 79 and 99 of the Real Prop-

erty Act (R.S.M. 1913, c. 171) a bona fide purchaser has the right to deal with the registered owner without any inquiry as to how and under what circumstances the owner procured title; if at the time of the agreement the purchaser has no knowledge that the vendor held the land merely as trustee for another person, he is not bound by a lis pendens filed by a judgment creditor of the real owner in an effort to subject the land to satisfaction of the judgment, and the purchaser is entitled to hold the land free from such claim, and to have the registration of the lis pendens removed, as forming a cloud upon his title. [Cooper v. Anderson, 5 D.L.R. 218, followed.]

Bain v. Pitfield, 28 D.L.R. 206, 26 Man. L.R. 89, 33 W.L.R. 681, 9 W.W.R. 1163.

VACATION OF — CONVEYANCE BY HUSBAND TO WIFE UPON SEPARATION—RECOHABITATION — ACTION FOR DECLARATION OF RIGHTS.

Bowers v. Bowers, 25 D.L.R. 838, 34 O.L.R. 463.

MOTION TO VACATE REGISTRY — ACTION FOR ALIMONY — CLAIM TO FOLLOW INTO LAND OF HUSBAND MONEY ADVANCED BY WIFE.

Bulmer v. Bulmer, 11 O.W.N. 73.

APPLICATION BY REGISTERED OWNER, NOT A PARTY, TO REMOVE.

Ridette v. Pelletier, 3 S.L.R. 467, 16 W. L.R. 42.

II. Purchasers pending suit.

(§ II—9)—CAVEAT IN LAND TITLES.

The filing of a caveat, under the Manitoba Real Property Act, R.S.M. 1902, c. 148, has no greater effect, so far as the rights or interests of the caveator are concerned, than a certificate of lis pendens.

Pearson v. O'Brien; O'Brien v. Pearson, 4 D.L.R. 413, 22 Man. L.R. 175, 20 W.L.R. 510, 1 W.W.R. 1026. [Affirmed, 11 D.L.R. 175, 4 W.W.R. 342.]

(§ II—10)—REGISTRATION — MOTION TO VACATE — PLEADING NOT JUSTIFYING ANY LIEN OR CHARGE ON LAND.

Forrester v. Lafontaine, 16 D.L.R. 881, 6 W.W.R. 677.

Where a writ of summons has been issued and a lis pendens filed, but no valid service of the writ is made on the defendant, the latter must enter an appearance gratis before launching a motion to dismiss the action and for the discharge of the lis pendens.

Peat v. Sexton, 8 D.L.R. 761, 22 W.L.R. 736, 3 W.W.R. 514.

Where the plaintiff, to whom a certificate of title was issued and land transferred as security for a debt from the grantor, gave his grantor a power of attorney, and afterwards alleged that the latter, as the result of a conspiracy, transferred the land, in trust for himself, to another, and that a certificate of title was issued to the transferee, who, in turn, transferred the land in fee simple to a trust company, without consideration, in trust for the grantor and others, one not a party to the alleged conspiracy, who acquired from the trust company an interest in the land under an agreement for its purchase, obtained under ss. 71, 91 of the Real Property Act (Man.), a good title as against the plaintiff, since he secured it from its registered owner, and a lis pendens filed by the plaintiff will be vacated on motion of such contract purchaser in an action brought by the plaintiff to set aside all of such transfers.

Cooper v. Anderson, 5 D.L.R. 218, 20 W.L.R. 347, 21 W.L.R. 902, 1 W.W.R. 848, 1092.

SETTING ASIDE.

A certificate of lis pendens will not be vacated before trial, unless the applicant can shew that under no possible circumstances can the facts as set out in the endorsement on the writ or the plaintiff's pleading give him any right in respect of the land in question.

Salter v. McCaffrey, 9 D.L.R. 259, 4 O. W.N. 478, 23 O.W.R. 611.

MOTION TO VACATE — SPEEDY TRIAL OF ACTION — TERMS.

Kennedy v. Kennedy, 10 D.L.R. 853, 4 O.W.N. 1336, 1370, 24 O.W.R. 626, 726.

DISCHARGE OF — LAND TITLES ACT.

In an action for the specific performance of an agreement for the sale of land, the plaintiff issued and registered in the Land Titles Office a certificate of lis pendens. The defendant moved before a local master to have the lis pendens discharged on the ground that there was no authority to issue the same except in actions respecting mechanics' liens. The local master having refused the application, the defendant appealed to a Judge in Chambers. On appeal:—Held, that although the certificate of lis pendens was issued out of the court, yet the registering of it in the Land Titles Office was the act of the registrar and not of an official of the court. That the application not being made under any of the provisions of the Land Titles Act, and the action itself not having been disposed of, a Judge in Chambers has no power on such a motion as the present to direct the registrar to vacate the registration of the certificate of lis pendens.

Dufour v. Dehid, 8 S.L.R. 19.

EXCEPTION—LIS PENDENS.

The exception of lis pendens must identify the persons, cause and object of the two actions.

Pacaud v. Pacaud, 12 Que. P.R. 319.

LITIGIOUS RIGHTS.

WHAT CONSTITUTE — ASSETS OF INSOLVENT COMPANY — RIGHT OF WAY.

A sale of the assets of a company being wound-up, even if such assets include claims of which the amount is undetermined, does not constitute a sale of litigious rights. In

order that a right may be considered litigious, the contestation to which it is subject must bear on the very existence of that right, and not on its value.

Ste. Thècle v. Matte, 27 Que. K.B. 185.

LITTORAL RIGHTS.

See Waters.

LIVERY STABLE.

SALE TO REALIZE LIEN FOR CHARGES — INCAPACITY OF LIENOR TO BECOME PURCHASER.

The party exercising the statutory right to sell a horse under an innkeeper's or livery stable keeper's lien for stabling charges under the authority of the Innkeepers Act. 1 Geo. V. (Ont.) c. 49, cannot himself become the purchaser at the sale. The statutory requirement of two weeks' notice by newspaper advertisement is not complied with by advertisement in the successive weekly issues of the newspaper, where the last publication took place only the day prior to the sale.

Martin v. Howard, 10 D.L.R. 760, 24 O.W.R. 617, 4 O.W.N. 1266.

HIRE OF HORSE — DUTY OF KEEPER TO WARN — NATURE OF ANIMAL.

The keeper of a livery stable who hires a horse to another is bound to give notice to the bailee of any dangerous quality in the animal hired of which he has or should have knowledge, and failure to give such notice, while it may not be accurately designated contributory negligence, may, in an action against the bailee for an injury resulting from neglect to exercise proper caution, go directly to the question of the bailee's negligence and liability.

Gray v. Steeves, 42 N.B.R. 676.

LOCAL IMPROVEMENTS.

See Municipal Corporations; Highways; Taxes.

LOCAL OPTION.

See Intoxicating Liquors.

LODGES.

See Benevolent Societies; Insurance.

LOGS AND LOGGING.

Lien for services, see Liens.

See Timber; Contracts, VI A—410; Waters, II—155.

For injuries to lumbermen, see also Master and Servant; Negligence.

(§ I—1) — JURISDICTION AS TO RATES — REASONABLENESS — POWER OF COURTS TO REVIEW.

Questions relating to the establishment of rates and their reasonableness under art. 7300, R.S.Q. 1909, for the privilege of logging or the value of improvements made by a company to facilitate the driving of logs, are left to the entire discretion of the Lieut.-Gov.-in-Council, whose decisions are final, and from which the law provides no appeal to the courts.

Shives Lumber Co. v. Chaleur Bay Mills, 25 D.L.R. 262, 24 Que. K.B. 408.

(§ I—2)—MOVING A BOOM—LOSS THROUGH CARELESSNESS AND INCOMPETENCE.

Wattsburg Lumber Co. v. Cooke Lumber Co., 16 B.C.R. 154.

(§ I—3)—BOOMS — OBSTRUCTING NAVIGATION — RIGHTS AND LIABILITIES OF PARTY REMOVING OBSTRUCTION — PUBLIC HIGHWAY — NUISANCE.

Johnston v. Despard, 7 D.L.R. 837, 19 W.L.R. 802, 1 W.W.R. 722.

(§ I—4) — COMPENSATION FOR DRIVING — SETTING ASIDE ARBITRATOR — TIMBER SLIDE COMPANY'S ACT.

Re Little Sturgeon River Slides Co. and Mackie Estate, 6 D.L.R. 895, 4 O.W.N. 262.

COMPENSATION FOR DRIVING — LEVYING TOLLS — RIGHTS OF BOOM COMPANY — ABSENCE OF IMPLIED CONTRACT.

Where a lumber company in the course of its logging operations banked its logs on the ice during the winter season, and in the spring the logs were floated down to a river and then driven down the river to the mills where they were to be sawn, the character of the river being such that it would be impracticable to float or drive the logs in cribs or boomed together, the fact that the lumber company, in common with other operators, floating and driving their logs in single pieces allowed them to become intermixed and in this intermixed condition to pass into certain works erected in the river, which did not in any way improve its floatable character, by a boom company incorporated under the laws of a foreign country, does not constitute an implied request to separate the logs; and the lumber company, deriving no benefit from the interference with the logs by the boom company, and having forbidden the boom company from so interfering, a contract will not be implied to pay the tolls fixed by the boom company, although under its powers as amended, the boom company had authority to construct the works and to collect tolls and charges for such services.

Rainy Lake River Boom Corp. v. Rainy River Lumber Co., 6 D.L.R. 401, 27 O.L.R. 131, 22 O.W.R. 952.

(§ I—5)—EXERCISE OF STATUTORY RIGHTS — UNREASONABLE OBSTRUCTION OF STREAM — CONSTITUTIONAL LAW — SAW LOGS DRIVING ACT.

A lumber company that unreasonably obstructs navigation on a river by the driving of its logs, cannot justify its conduct by provincial legislation conferring on it the right to float logs, and to use the waters of the stream for such purpose; since the Parliament of Canada alone has jurisdiction over navigation. The Ontario Saw Logs Driving Act, R.S.O. 1897, c. 143, does not authorize the obstruction of navigation

by the floating of logs in a stream, which is expressly forbidden, not from necessity but ex abundanti cautelâ, by s. 3 of the Act. [See R.N.A. Act, s. 91.]

Ireson v. Holt Timber Co., 18 D.L.R. 604, 30 O.L.R. 209, affirming 11 D.L.R. 44, 4 O.W.N. 1106.

(§ 1—6)—CONTRACT FOR SALE OF LUMBER—IMPLIED CONDITION — IMPOSSIBILITY — DELAY CAUSE.

McKean v. Dalhousie Lumber Co., 40 N.B.R. 218, 8 E.L.R. 390.

(§ 1—7)—CONTRACT FOR CUTTING AND HAULING—NONDESIGNATION OF SCALE—RIGHTS OF PARTIES.

In an action for a balance claimed due on a contract for cutting and hauling logs, containing a clause that they are "to be paid for according to the count and scale of ——, which shall be final and conclusive between the parties," without naming the scale to be used, the plaintiff will not be bound by the scale appointed by the defendant, but evidence of scales appointed by both will be received to determine the quality of logs to be paid for.

Blue v. Miller, 24 D.L.R. 852, 43 N.B.R. 307.

CONTRACT FOR CUTTING TIMBER—INNOCENT MISREPRESENTATION AS TO QUANTUM—RECTIFICATION OF CONTRACT—PAYMENT FOR VALUE OF WORK DONE—EVIDENCE—FINDINGS OF TRIAL JUDGE.

Grant Campbell & Co. v. Devon Lumber Co., 6 O.W.N. 673.

(§ 1—8)—COMPENSATION FOR SORTING.

Where, as the result of common action, logs of different log owners become intermixed in their course down a floatable stream, the cost and expense of separating and securing them shall be paid by each individual log owner, and if one log owner requests a boom company to separate his logs from the intermixed logs, no implied contract with another log owner can be presumed on the part of the boom company to entitle it to recover for services rendered in connection with this separation of the logs especially where such last-mentioned log owner had forbidden the boom company from interfering or meddling with his logs.

Rainy Lake River Boom Corp. v. Rainy River Lumber Co., 6 D.L.R. 401, 27 O.L.R. 131, 22 O.W.R. 952.

CULLING AND MEASURING.

A party alleging error of calculation by a culler or measurer does not need to ask for the cancellation of the contract; on the contrary, his prayer for a reformation is a demand for the complete execution of the contract. He must, however, give conclusive proof of error in such measurments, and measurements taken ex parte when the logs were in the water in the early spring and when many of them were hidden from view, cannot be accepted as against the measurements of the culler chosen by the parties under the contract. Under a contract for the cutting of logs in timber limits where it is stipulated that the culling and measuring will be done by a culler appointed by the party who undertakes the cutting, the calculations of such culler will be accepted by the court and such clause given effect to although mere errors of calculation may be reformed.

Church v. Racicot, 2 D.L.R. 528, 21 Que. K.B. 471.

SORTING—EXPENSE OF—APPORTIONMENT—DAMAGES.

Tremblay v. Pigeon River Lumber Co., 2 D.L.R. 882, 3 O.W.N. 894, 21 O.W.R. 698.

QUANTITY TO BE ASCERTAINED BY OFFICIAL SCALER—LOSS OF SHINGLE BOLTS IN TRANSIT AFTER DELIVERY.

Where logs and shingle bolts are to be paid for as taken out and loaded, according to the quantities found by an official scaler, the buyers who took delivery of shingle bolts and placed them on a scow which drifted away before the contemplated scaling and was lost, will be liable notwithstanding the impossibility of scaling according to the contract if it did not result from any fault of the seller; the quantity will be determined in such case by the best available evidence apart from the official scaling which was stipulated for in the contract.

Rich v. North American Lumber Co., 17 D.L.R. 25, 18 B.C.R. 543.

(§ I—9)—WOODMEN'S LIEN — WHO ENTITLED.

The lien provided by art. 1994 (c), C.C. (Que.), to secure the charges of any person engaged in cutting or manufacturing lumber, applies not only to those who are directly engaged in the work themselves, but also to those who have the work done by others.

Houseman v. LePage, 25 D.L.R. 332, 24 Que. K.B. 413.

WAGES—WOODMAN'S LIEN.

The contractor for logging operations is entitled as well as the wage earner to a lien on the logs or lumber in respect of the work he has had performed in cutting the timber and hauling the logs to the mill for the agreed contract price by virtue of the Woodman's Lien Act (Alta.), 1913, 2nd sess., c. 28. [Baxter v. Kennedy, 35 N.B.R. 179, distinguished.]

Desautels v. McClellan, 23 D.L.R. 625, 7 W.W.R. 1221, 30 W.L.R. 485.

WOODMEN'S LIEN—ENFORCEMENT—SEVERAL CLAIMS—JURISDICTIONAL AMOUNT.

McNulty v. Clark, 25 D.L.R. 832, 34 O.L.R. 434.

CLAIM FOR TOWAGE — PRIORITIES BETWEEN WOODMEN'S LIENS AND MARITIME LIENS.

Towage is freight, and as such, the maritime lien takes precedence over the Woodman's Lien Act (B.C.). The clause in that Act relating to timber slide companies was meant to protect towage.

Prembo v. Pacific Slope Lumber Co., 7 W.W.R. 1195.

WOODMEN'S LIEN — DEMAND — SPECIFIC AMOUNT.

Under s. 9 of the Woodmen's Lien Act, C.S.N.B. 1903, c. 148, the affidavit required must shew that the amount claimed is justly due and owing, and that payment thereof has been demanded and refused, but this does not mean that the claim should be dismissed unless the amount claimed and demanded is the exact amount subsequently found to be owing. It is the duty of the judge under s. 17 of the Act to determine what if anything is due and if anything is found to be due and owing to order that the amount be paid to the lien holder.

Olsen v. Goodwin: Branson v. Goodwin, 28 D.L.R. 177, 43 N.B.R. 449.

WOODMAN'S LIEN AGAINST PURCHASER — DATE OF CONTRACT.

Sections 37, 38 of the Woodmen's Lien for Wages Act, R.S.B.C. 1911, c. 243, under which a workman is entitled to a right of action for his wages against the person for whom logs are supplied under a contract, if the latter fails to require, before making any payment, the production of the employer's payroll, apply only to contracts which contemplate the employment of labour after the date of the contract, and not to a purchaser of logs manufactured and ready to be taken possession of by the purchaser at the date of the contract; to entitle a workman to recover under these sections for work done subsequently to the date of the contract he must be able to prove that the subsequent work was performed in respect of the particular logs under the contract.

Mills v. Smith Shannon Lumber Co., 28 D.L.R. 40, 22 B.C.R. 579, 34 W.L.R. 358.

(§ I—10)—MINERS' LIEN FOR CUTTING AND SAWING—SALE OF LUMBER BY OWNER WITHOUT KNOWLEDGE—MINERS' LIEN ORDINANCE, Y.T.

Bradshaw v. Saucerman, 9 D.L.R. 439, 18 B.C.R. 41, 23 W.L.R. 33, 3 W.W.R. 761, affirming 4 D.L.R. 477, 21 W.L.R. 65.

(§ I—11)—EXPORT RESTRICTIONS UNLESS MANUFACTURED — PRODUCT OF CROWN LANDS (B.C.)—SHINGLE BLOCKS.

The prohibition of export from British Columbia of timber cut on Crown lands therein unless manufactured within the province into boards, deal, joists, lath, shingles "or other sawn lumber" (Forest Act, B.C., s. 100), applies to prevent the export of the product of the timber after sawing the log into short lengths of from 16 to 20 inches, and cutting these short lengths longitudinally so as to leave each block only a small arc of the circumference of the log, where the blocks are left unfinished for any practical permanent use and are commercially suitable only for further manufacture into shingles.

Excelsior Lumber Co. v. Ross, 16 D.L.R. 593, 19 B.C.R. 289, 27 W.L.R. 467, 6 W.W.R. 367, affirming 13 D.L.R. 740, 5 W.W.R. 54.

(§ I—12)—SALE AND TRANSFER OF RIGHT TO CUT TIMBER—PRIORITY AS BETWEEN UNPAID VENDOR AND BANK HOLDING SECURITY FROM PURCHASER ON LOGS CUT.

Mutchenbacker v. Dominion Bank, 21 Man. L.R. 320, 18 W.L.R. 19.

LORD CAMPBELL'S ACT.

See Death; Damages, III—187.

LORD'S DAY.

See Sunday.

LOST GRANT.

See Easements; Adverse Possession; Waters.

LOTTERY.

I. IN GENERAL.

II. WHAT CONSTITUTES.

Annotation.

Lottery offences under the Criminal Code: 25 D.L.R. 401.

See also Gaming.

I. In general.

COUPON WITH STORE PURCHASES — GIFT WITH WINNING NUMBER.

The giving of an automobile by a department store under an advertised scheme whereby all purchasers of $1 worth of goods or more obtained a free coupon belonging to a series from which one particular number had been selected as the winning number to be disclosed after the close of the competition, is an offence under the lottery clauses of the Cr. Code; and the advertisement and management of such scheme are punishable under paras. (a) and (c) respectively of subs. 1 of s. 236, Cr. Code.

R. v. Hudson's Bay Co., 25 D.L.R. 396, 25 Can. Cr. Cas. 1, 9 A.L.R. 227, 32 W.L.R. 900, 9 W.W.R. 522.

BUSINESS BY MODE OF CHANCE.

Upon a charge of carrying on a business by modes of chance contrary to the lottery clauses of the Cr. Code (s. 236), evidence of persons who had canvassed for business on her behalf with which the lottery features were proposed, is not admissible evidence against the accused where not connected by evidence that the accused did in fact hold the lottery drawings suggested by the canvassers.

The King v. Lumgair, 19 Can. Cr. Cas. 123, 3 O.W.N. 309.

The sale of immovables with the intention, agreed upon between vendor and purchaser, of organizing a lottery and disposing of it by public drawings, is radically null, being simulated between the parties as accessory to the main design of committing an act prohibited by law. It cannot, therefore, be relied on in opposition to a subsequent legal sale to a third party.

Bédard v. Phoenix Land Improvement Co., 42 Que. S.C. 1.

II. What constitutes.

(§ II—5)—Sale of lots.

A deed of sale intended as a blind for the purpose of running a lottery in subdivision lots, is illegal and void and cannot be opposed to a subsequent bona fide purchaser of these lots from the original owner, although it has been registered.

Bedard v. Phœnix Land & Improvement Co., 8 D.L.R. 686, 43 Que. S.C. 50.

Free option certificates.

It is not a lottery offence under para. (a) of subs. 1 of s. 236, Cr. Code, to publish a scheme for the drawing, without payment or obligation to pay, of certificates giving a privilege of purchase of a class of article at a fixed price alleged to be lower than the value, where no sales of such article are made except to those who draw certificates and they are under no obligation to purchase.

R. v. Robinson, 41 D.L.R. 46, 29 Can. Cr. Cas. 153, 10 S.L.R. 448, [1918] 1 W.W. R. 258.

LUNATICS.

See Incompetent persons.

MAGISTRATE.

See Justice of the Peace; Summary Conviction; Certiorari; Criminal Law.

Jurisdiction — Appointment — Dominion Commissioner of Police.

Although sitting within his territorial jurisdiction a magistrate cannot try an offence which is alleged to have been committed beyond his territorial jurisdiction, except where there is a statutory extension of his power in that respect; s. 577 the Cr. Code has not been made applicable to offences under Alberta statutes. A commissioner of police appointed by the Governor-in-Council under R.S.C. 1906, c. 92, has no jurisdiction to make a conviction under a provincial law; his jurisdiction is restricted to the matters set forth in the Dominion Act and coming within the legislative jurisdiction of the Parliament of Canada.

R. v. Coyne, 28 Can. Cr. Cas. 428, [1917] 3 W.W.R. 267. [Affirmed, 41 D.L.R. 225, 29 Can. Crim. Cas. 216, [1917] 3 W.W.R. 622.]

Exception—Competence of courts — Penal actions — Circuit Court and Magistrates Court — C.C. art. 16, 1682c, 1682d—C.C.P. arts. 170, 1285—S. Ref. [1909] art. 29—31 Vict. [1867], c. 7, art. 10—49-50, Vict. [1886], c. 95, art. 29—8 Ed. VII. [1908], c. 12.

Penal actions, the hearing of which is not left to any specially named tribunal, are of the competence of the Magistrate's Court. The Circuit Court has not jurisdiction to hear an action for recovery of the penalties laid down by arts. 1682c and 1682d, C.C. An action of this nature should be sent back to the Magistrate's Court.

Trudel v. C.N.R., 55 Que. S.C. 231.

MAIL.

As to sending indecent matter, see Post Office.

MAINTENANCE.

See Parent and Child; Infants; Husband and Wife.

MALICIOUS PROSECUTION.

I. In general.
II. Want of probable cause; malice.
A. In criminal prosecution.
B. Of civil action.
III. Termination of prosecution.

See also False Imprisonment; Arrest.

As to questions for jury in action for, see Trial.

Annotations.

Malicious prosecution; principles of reasonable and probable cause in English and French law compared: 1 D.L.R. 56.

Malicious prosecution; questions of law and fact; preliminary questions as to probable cause: 14 D.L.R. 817.

I. In general.

Malice—Sufficiency of motive to render prosecutor liable in damages.

Hurst v. Elliott, [1919] 2 W.W.R. 849.

Reasonable and probable cause—Advice of counsel.

The fact that the informant who was afterwards sued for malicious prosecution had first consulted counsel and laid all the facts before him and had been advised by such counsel to lay the information is not in all cases a bar to the action being maintained, but is to be considered in determining the questions of malice and want of reasonable and probable cause. Where counsel's advice to the prosecutor upon the true facts fully laid before him to lay an information for a criminal offence is acted upon by the prosecutor and this is followed by a committal for trial and the finding of a true bill upon such facts, the prosecutor, against whom no express malice is shewn, is justified in his prosecution although a conviction is not secured; and a verdict for damages for false arrest and malicious prosecution will not under such circumstances be supported.

Richard v. Goulet, 19 D.L.R. 371, 23 Can. Cr. Cas. 327, 45 Que. S.C. 374.

(§ I—2)—Advice of counsel.

Advice of counsel before charging a person with an offence, while evidence in the defendant's favour in an action for malicious prosecution, does not constitute a complete answer to a claim of want of probable cause, especially where it appears that the defendants tried to rely on their solicitor without forming an opinion of their own as to the guilt or innocence of the plaintiff.

Harris v. Hickey, 2 D.L.R. 356, 17 B. C.R. 21, 19 W.L.R. 948.

REASONABLE AND PROBABLE CAUSE—ADVICE OF COUNSEL—APPROVAL OF CROWN ATTORNEY—MALICE—FINDINGS OF JURY—DISMISSAL OF ACTION—COSTS.

McMullen v. Wetlaufer, 32 O.L.R. 178.

CHARGE OF THEFT OF BOAT FROM ASSIGNEE FOR BENEFIT OF CREDITORS OF BUILDERS—ACTING ON SOLICITOR'S ADVICE—MALICE.

A person who institutes a criminal proceeding, honestly believing in his case, is entitled to act on the advice of his counsel, but the duty is placed upon him to put before counsel everything including all circumstances in mitigation of the accused's action.

Momsen v. Rudolph, 18 B.C.R. 631, 3 W.W.R. 10.

ADVICE OF COUNSEL NO JUSTIFICATION—MITIGATION.

An informant is not discharged from liability for damages caused by an arrest without probable cause by the mere fact that he acted on the advice of counsel, and it can only be taken into consideration by the judge in estimating the amount of the damages.

Calogery v. Spencer, 47 Que. S.C. 12.

CHARGE OF KEEPING BAWDY HOUSE—JUSTIFICATION—ADVICE OF COUNSEL.

In an action for malicious prosecution for charging the plaintiff with keeping a bawdy house, the fact that the defendant, owing to the mistaken idea he entertained as to what in law constituted a bawdy house, honestly believed, and under all the circumstances was reasonably justified in believing, the charge to be true, is no defence, nor is the fact that the defendant acted bona fide and under the advice of the clerk of the peace and of counsel of itself enough to afford a good defence.

Croker v. Storey, 43 N.B.R. 69.

REASONABLE AND PROBABLE CAUSE—HONEST BELIEF OF DEFENDANT IN GUILT OF PLAINTIFF — REASONABLE GROUNDS — ADVICE OF COUNTY CROWN ATTORNEY—MALICE—INDIRECT MOTIVE—COUNTERCLAIM.

Sexsmith v. McMath, 9 O.W.N. 228.

DAMAGES—ADVICE OF COUNSEL AS A DEFENCE—WANT OF REASONABLE AND PROBABLE CAUSE.

Dundas v. Wilson, 19 O.W.R. 17.

MALICE—MAGISTRATE'S ADVICE.

Burns v. Rombough, 2 O.W.N. 767, 18 O.W.R. 689.

NO REASONABLE AND PROBABLE CAUSE FOR LAYING CHARGE—ABSENCE OF MALICE.

Where plaintiff wrongfully shut in defendant's horses to prevent them going in his yard, for which defendant, a foreigner, on advice of a magistrate laid a criminal charge, an action by plaintiff for malicious prosecution was dismissed without costs on the ground that although there was no reasonable and probable cause for the prosecution, the plaintiff had failed to show malice.

Kretsul v. Papella, [1919] 2 W.W.R. 847.

CONSULTING WITH POLICE.

In an action for damages for malicious prosecution it is not a good defence that the only part taken in the prosecution by the defendant was the laying of the information, and the fact that the defendant acted on the advice of a constable or police sergeant, or the combined advice of both, is not conclusive evidence or reasonable or probable cause.

Schaal v. Reeves, [1918] 2 W.W.R. 442.

ADVICE OF COUNSEL—INQUIRIES—MALICE—CIVIL RIGHT.

Where, in an action for malicious prosecution, the defendant sets up the defence that he consulted a solicitor before instituting the criminal proceedings, the soundness of the solicitor's advice is, generally speaking, not weighed, and such defence is a complete answer to the allegation that the defendant had acted without reasonable or probable cause unless the question remains whether through the neglect of the defendant, and subsequently of his solicitor, to make proper inquiries, such defence is not destroyed. The instituting of criminal proceedings for the purpose of establishing a civil right amounts to the malice which must be proven in an action for malicious prosecution.

Ibbotson v. Berkley, 26 B.C.R. 156, [1918] 3 W.W.R. 1018.

ADVICE OF COUNSEL—CHARGE OF FALSE PRETENCES—MALICE.

The fact that a defendant to an action for malicious prosecution acted upon the advice of counsel in instituting the prosecution is not necessarily a complete answer to the allegation of lack of reasonable and probable cause. [Harris v. Hickey, 17 B.C.R. 21, 2 D.L.R. 356, followed.] A person seeking to shelter himself behind his counsel must take proper care to inform himself of all the facts. In an action for malicious prosecution, proof that the defendant endeavored to use the criminal courts as a means for collecting a debt establishes such malice as the law requires the plaintiff to prove.

Olds v. Paris, 25 B.C.R. 453, [1918] 2 W.W.R. 682.

(§ I—3)—OF CIVIL ACTION.

The principles of the French law as laid down in art. 1053 C.C. (Que.), and not the principles of the English law govern in such a case. [Copeland v. Leclerc M.L.R., 21 B.R. 365, disapproved.]

C.P.R. Co. v. Waller, 1 D.L.R. 47, 19 Can. Cr. Cas. 190.

ATTACHMENT—SAISIE-ARRET BEFORE JUDGMENT.

A transaction, without reserve, does not only extinguish the actual damages claimed, but also future ones for the same reason. So, where the plaintiff desists from an at-

tachment before judgment with the consent of the defendant and without any reserve, this latter cannot afterward claim damages from the plaintiff for malicious prosecution. Where the plaintiff, in an attachment before judgment, falsely alleges the insolvency of the defendant, and persists in this allegation, even after he had desisted from his seizure, he may be, in a cross demand, condemned in damages.

Burtner Coal Co. v. Gano Moore Co., 24 Rev. Leg. 435.

(§ I—4)—WHETHER CHARGE WAS FOR CRIMINAL OFFENCE—DEFECTS IN INFORMATION.

A charge of setting fire to a "separator" is equivalent to a charge of attempting to destroy an agricultural machine under s. 371 (read with s. 510) Cr. Code, and where such facts have been set out in the information, but the words "contrary to s. 511" were added, whereas the offence was not in fact under s. 511 as erroneously supposed, but under s. 371, the information may none the less be relied upon as a charge of a criminal offence in an action subsequently brought for malicious prosecution.

Mortimer v. Fisher, 11 D.L.R. 77, 6 S.L.R. 200, 23 W.L.R. 905.

II. Want of probable cause; malice.

A. In criminal prosecution.

(II A—10) WANT OF PROBABLE CAUSE—IN CRIMINAL PROSECUTION—SUFFICIENCY.

Upon the question of want of reasonable and probable cause in an action for malicious prosecution, where the alleged offence was based on the plaintiff's want of ownership in certain property, a finding that such ownership was established is not in itself sufficient proof of want of reasonable and probable cause, but it should also be shewn by the plaintiff that the defendant, in taking the proceeding against the plaintiff, did not act under an honest and reasonable belief as to facts and circumstances which, if true, would warrant any reasonable and prudent man in taking the proceeding. [Archibald v. McLaren, 21 Can. S.C.R. 588; Brown v. Hawkes, [1891] 2 Q.B. 718, distinguished.]

Dugnay v. Myles, 15 D.L.R. 388, 42 N. B.R. 265.

CRIMINAL PROSECUTION — ESSENTIALS OF CAUSE OF ACTION.

In an action for malicious prosecution, the plaintiff's cause of action is established on proof of these essentials: (a) that he was prosecuted by the defendant on a criminal charge; (b) that the prosecution was determined in his favour; (c) that the defendant instituted or carried on the proceedings maliciously; (d) that there was an absence of reasonable and probable cause for such proceedings; (e) damages express or implied.

Mortimer v. Fisher, 11 D.L.R. 77, 6 S.L. R. 200, 23 W.L.R. 905, 4 W.W.R. 454.

ARREST—PROBABLE CAUSE.

A cashier of a company who procures the arrest of an employee of the company in the honest belief, because of his failure to return to work, that he was the one to whom a missing sum of money was overpaid, acts under reasonable and probable cause, and the employer is not liable for malicious prosecution or false arrest.

Landry v. Bathurst Lumber Co., 35 D. L.R. 701, 44 N.B.R. 374.

BELIEF IN GUILT — FORGERY — ELECTIONS—MALICE SHEWN BY ARREST OF RIVAL CANDIDATE.

Mere belief in a person's guilt, without ascertaining any reasonable grounds for its probabilities, does not justify a prosecution for the arrest of the accused person. A letter purporting to be written by the Attorney-General voicing the sentiment of a political party in indorsement of the candidature of the addressee at an election, the writing of which is denied by the alleged author, does not establish reasonable and probable cause for the belief that such letter had been forged by the addressee, in defence of an action for malicious prosecution for the forgery by a rival candidate.

Where the principal object of a prosecution for forgery is to secure the imprisonment of the accused so as to prevent his participation at an election in which he is a rival candidate, malice will be inferred. [Wright v. Greenwood, 1 W.R. 393, applied.]

Rudyk v. Shandro, 24 D.L.R. 330, 9 A. L.R. 87, 8 W.W.R. 880, affirming 18 D.L.R. 641, 7 W.W.R. 415.

REASONABLE AND PROBABLE CAUSE—FINDING OF TRIAL JUDGE—MALICE—VERDICT OF JURY—DAMAGES—COSTS.

Gratton v. Lavoie, 9 O.W.N. 213.

CRIMINAL PROSECUTION — INDIRECT MOTIVE —RECOVERY OF PROPERTY—MALICE.

That the defendant laid a charge of theft against a person to whom he had entrusted a horse for sale, merely for the purpose of recovering possession of the horse which the agent refused to deliver up, may be an indirect motive from which malice may be inferred against him in an action for malicious prosecution, where he knew that the agent claimed possession solely for the purpose of selling it on defendant's account under an agreement between them not limited as to time whereby such agent was to receive for his services and expenses any sum he should receive in excess of a minimum net price to be turned over to the defendant. In the absence of direct evidence of malice on the part of the defendant, in an action against him for malicious prosecution, malice may be inferred from the absence of reasonable and probable cause in taking the criminal proceedings complained of, or from the fact that in

taking them the defendant was actuated by indirect or improper motives.

Collins v. Gould, 9 D.L.R. 665, 6 A.L.R. 132, 23 W.L.R. 288, 3 W.W.R. 811.

MALICE—IN CRIMINAL PROSECUTION—SUFFICIENCY.

Upon the question of the existence of malice in an action for malicious prosecution, the jury properly determines whether the defendant did or did not act honestly and without ill-will or any other motive or desire than to do what he bona fide and reasonably believed to be right in the interests of justice, as one of the factors in finding malice or no malice. [Hicks v. Faulkner, 8 Q.B.D. 167, applied.]

Duguay v. Myles, 15 D.L.R. 388, 42 N.B.R. 265, 14 E.L.R. 410.

ARREST FOR CATTLE STEALING—REFUSAL TO LISTEN TO EXPLANATION AS TO POSSESSION.

Want of reasonable and probable cause for laying information against a person for stealing cattle he had bought from the defendant, which were not to be delivered until paid for, is not to be inferred merely because, at the time of the plaintiff's arrest, the defendant had refused to listen to explanations made by the latter or to examine a receipt held by him showing payment for the cattle to one not authorized to receive it, where the other circumstances leading up to the prosecution were such as to demand immediate action by the owner of the cattle to prevent their impending shipment.

Darling v. Flater, 12 D.L.R. 294, 6 A.L.R. 276, 24 W.L.R. 666, 4 W.W.R. 1002.

REASONABLE AND PROBABLE CAUSE.

Reasonable and probable cause for the plaintiff's arrest is shown by the fact that he took the defendant to the former's house and locked him in, releasing him only after by reason of threats and intimidation the defendant agreed to pay the plaintiff a large sum of money, and gave him $300 in cash.

Dickinson v. Harvey, 12 D.L.R. 129, 18 B.C.R. 461, 24 W.L.R. 777.

PROBABLE CAUSE—INQUIRY.

Honest belief in the case after reasonable inquiry as to the true facts and circumstances is sufficient reasonable and probable cause for instituting a criminal prosecution.

Lyone v. Long, 36 D.L.R. 76, 10 S.L.R. 343, [1917] 3 W.W.R. 139.

ARREST—WARRANT.

Where the Trial Judge, sitting without a jury, has found on undisputed evidence that an offence for which the plaintiff might have been arrested without a warrant has been committed, and that the defendants honestly believed that such an offence had been committed, and that it had been committed by the plaintiff he is justified in drawing the inference that there were reasonable and probable grounds for the arrest and granting the protection of s. 30 Cr. Code.

Anderson v. Johnson, 43 D.L.R. 183, 11 S.L.R. 478, 30 Can. Cr. Cas. 268, [1918] 3 W.W.R. 620, affirming 38 D.L.R. 563, 29 Can. Cr. Cas. 24, 10 S.L.R. 352, [1917] 3 W.W.R. 353.

ARREST OF TENANT BY LANDLORD—REMOVAL OF GOODS.

When a tenant fraudulently removes his goods subject to the privilege of his landlord, without giving him notice and unknown to him, the latter, after having exhausted his civil remedy and taken the opinion of a magistrate, has probable cause for having him arrested under the Criminal Code, and is not liable in damages if the tenant is subsequently set at liberty.

Rousseau v. Dubois, 54 Que. S.C. 1.

(§ II A—11)—RECEIVING STOLEN GOODS—PURCHASE AT GROSS UNDERVALUE FROM NONTRADER.

The fact that a junk dealer had purchased in bulk a quantity of goods which could not properly be classed as junk at a gross undervalue from a nontrader in such goods is sufficient to put such purchaser upon inquiry as to their ownership, and may be set up in proof of reasonable and probable cause in defence of an action for malicious prosecution.

Klein v. Katz, 24 D.L.R. 794, 24 Can. Cr. Cas. 153, 21 Rev. Leg. 275.

(§ II A—12)—ADMISSION OF NONBELIEF.

A belief upon which the private prosecutor has acted is essential to the existence of reasonable and probable cause as it affects an action against him for malicious prosecution; so, where the prosecutor, when examined at the trial in the latter action, denied ever having had a belief that the plaintiff was guilty and also denied having laid any charge against the plaintiff, but is proved to have laid the charge, his denial of belief in the plaintiff's guilt is conclusive proof of want of reasonable and probable cause in favour of the plaintiff who had been acquitted on the criminal trial and who also denied his guilt on the civil trial, although it may further appear that there were grounds of suspicion which would have sustained a defence of reasonable and probable cause had the defendant admitted that he had believed them. [Haddrick v. Heslop, 12 Q.B. 267, and Shrosbery v. Osmaston, 37 L.T. 793, applied.]

Geers v. Nestman, 1 D.L.R. 312, 5 S.L.R. 85, 20 W.L.R. 212, 1 W.W.R. 861.

Reasonable and probable cause, as well as want of malice, in preferring a charge of theft and of aiding and abetting another to obtain money from a municipal corporation by false pretences, is shewn where it appears that the plaintiff, a girl of 16, who was able to read and write, presented money orders drawn by her father, a sectional foreman employed by the city, in which she was fictitiously named, at the city hall, all of which were in unsealed en-

velopes, for the payment to her of wages of city labourers her father had fraudulently carried on his pay rolls, and that the plaintiff delivered to her father the money she obtained thereon, as, under such circumstances, the inference was warranted that she was aiding her father to defraud the city.

Provost v. Montreal, 3 D.L.R. 128.

Want of probable cause on the part of the defendants is sufficiently shewn in an action for malicious prosecution where the circumstances disclose that, in preferring a charge of theft against the plaintiff, they acted rashly, and the question whether they really believed that the plaintiff intended to steal from them was open to doubt, as honesty and reality of belief in his guilt was essential to the defendant's protection.

Harris v. Hickey, 2 D.L.R. 356, 17 B.C.R. 21, 19 W.L.R. 948, 1 W.W.R. 679.

PROBABLE CAUSE — MALICE — CHARGE OF THEFT.

Neither malice nor want of reasonable and probable cause are necessary inferences against the informant in a criminal charge for theft of timber, because of such informant having first instituted civil proceedings against the trespasser with the sole purpose of recovering the price and before being advised by his solicitor that the facts justified a prosecution for theft, if the informant later instituted criminal proceedings in pursuance of his solicitor's advice and the charge was dismissed. [Burgoyne v. Moffatt, 10 N.B.R. 13, distinguished.]

Priest v. McGuire, 27 D.L.R. 290, 25 Can. Cr. Cas. 139, 43 N.B.R. 469.

Probable cause exists for laying information for theft against one who forcibly took a crop from a purchaser which was planted by the former after the extinguishment of his rights in the land by a sale by the sheriff under an execution, where the taking was by force and accompanied by trespass to lands, although under a pretended claim of right.

Hirtle v. Knox, 13 D.L.R. 21, 47 N.S.R. 219, 49 C.L.J. 620.

ARREST—CONSTABLE ACTING IN GOOD FAITH.

An action for damages for malicious arrest and prosecution will not lie against a city where the constable making the arrest acted in good faith, and with probable cause, although the case when called was dismissed for lack of evidence.

Del Solo v. Montreal, 43 D.L.R. 96, 54 Que. S.C. 159.

ESSENTIALS OF DEFENCE.

There are four essentials to the defence of reasonable and probable cause in an action for malicious prosecution, namely: (1) an honest belief in the guilt of the accused; (2) this belief being based on an honest conviction of the existence of the circumstances which led the accuser to that conclusion; (3) this belief based on reasonable grounds, i.e., such as would lead any fairly cautious man in the defendant's situation so to believe; and (4) the circumstances so believed and relied on such as amount to reasonable ground for belief in the guilt of the accused. [Hicks v. Faulkner, 46 L.T.R. 127, applied.] The advice of counsel, after disclosure of all facts, is cogent evidence of the existence of reasonable and probable cause; but, if the complainant does not believe in the guilt of the accused, there is no reasonable and probable cause for him. [Connors v. Reid, 25 O.L.R. 44, followed.]

McMullen v. Wetlaufer, 21 D.L.R. 750, 33 O.L.R. 177, affirming 22 O.L.R. 178.

FALSE ARREST—MISTAKE—PROBABLE CAUSE.

A false arrest procured under mistake, as a result of acting rashly on information as to the alleged offence, is without reasonable and probable cause and actionable, notwithstanding that upon discovery of the error the charge was immediately withdrawn; liability in such instance, in Quebec, is governed by the Quebec civil law (C. C. Que., art. 1053), and not by English law.

Fabyan v. Tremblay, 37 D.L.R. 444, 26 Que. K.B. 416.

PROBABLE CAUSE — EMBEZZLEMENT — CASH REGISTER.

An employee in charge of a cash register who fails to register a sum, in order to reimburse himself for an equal amount he claimed to be due him, cannot maintain an action for malicious prosecution against his employer for procuring his arrest for theft, on which charge he was acquitted, since the latter, in the circumstances, has acted in good faith, and with reasonable and probable cause.

Lachaud v. Giguère, 33 D.L.R. 615, 49 Que. S.C. 541.

In an action claiming damages for malicious prosecution it appeared that, on the preliminary hearing before the magistrate, defendant made the admission: "I do not think the plaintiff meant to steal the car in the ordinary meaning of stealing the car. I thought at the time he had taken the car for a claim he had himself." Held, that the finding of absence of reasonable and probable cause was justified and that plaintiff was entitled to recover.

Foley v. Harrison, 49 N.S.R. 135.

MALICIOUS ARREST — CAPIAS — PROBABLE CAUSE—INSOLVENCY — QUE. C.P. 893, 894, 853, 498, 475, QUE. C.C. 1570.

A malicious arrest, to give a right to damages, must have the following characteristics:—(a) It must have been made without probable cause. (b) It must be followed by an acquittal. A capias is issued with probable cause against a trader, when the latter:—(c) neglects to pay his debts at maturity; (d) allows himself to be sued; (e) makes on Sunday big bargain sales of which he keeps the proceeds in his pockets instead of depositing them as usual with his banker. Probable cause is one which gives rise, in the mind of a prudent man, to a reasonable suspicion, and is a

question of strict law, to be determined only by the judge. That question of law arises from a series of facts established and admitted by the jury. Malice, in an illegal arrest, is inferred from lack of probable cause.

Perron v. Drouin, 16 Que. P.R. 121.

MALICE.

A commitment for trial of an indictable offence, after a preliminary investigation, raises a presumption that there was a probable cause for the charge, and, in the absence of evidence to rebut it, relieves the party who made it from liability for malicious prosecution.

Wilds v. Bank of Toronto, 43 Que. S.C. 330.

PROBABLE CAUSE — EVIDENCE — ONUS — HONEST BELIEF — PRACTICE — QUESTIONS FOR JURY.

Renton v. Gallagher, 47 Can. S.C.R. 393, 23 W.L.R. 575.

ARREST — JURISDICTION OF MAGISTRATE — IMPROPER MOTIVE — BONA FIDE CLAIM OF RIGHT — DAMAGES — TRUST — PURCHASE OF LAND — NOTICE — EVIDENCE.

Herrington v. Cochran, 7 O.W.N. 225.

REASONABLE AND PROBABLE CAUSE.

Ouelette v. Sinasac, 10 O.W.N. 182.

FINDING OF JURY—DAMAGES.

Truesdell v. Holden, 5 O.W.N. 58.

EVIDENCE—ASSAULT—DAMAGES.

Bigham v. Boyd, 4 O.W.N. 1193, 24 O.W.R. 499.

CRIMINAL LAW — FALSE ACCUSATION — MALICIOUS INTENTION — PROBABLE CAUSE — INFORMATION LAID AFTER ADVICE AND INQUIRY.

Lake of the Woods Milling Co. v. Ralston, 20 Que. K.B. 536.

B. OF CIVIL ACTION.

(§ II B—16)—RESPECTIVE FUNCTIONS OF JUDGE AND JURY — JUDICATURE ACT, R.S.O. 1914, c. 56, s. 62 — REASONABLE AND PROBABLE CAUSE — FINDINGS OF JUDGE AND JURY — DAMAGES — NO MISDIRECTION — NO MISCARRIAGE OF JUSTICE SHEWN.

The question of reasonable and probable cause in an action for malicious prosecution is to be determined by the judge, R.S.O. 1914, c. 56, s. 62. The function of the jury is to determine the following only: 1. Whether the defendant prosecuted the criminal charge against the plaintiff as alleged before a tribunal into whose proceedings the civil courts are competent to inquire. 2. Whether the proceedings complained of terminated in the plaintiff's favour. 3. Whether the defendant instituted or carried on the proceedings maliciously. 4. The damages sustained by the plaintiff.

Jewhurst v. United Cigar Stores, 49 D.L.R. 649, 46 O.L.R. 180.

WANT OF PROBABLE CAUSE.

Reasonable and probable cause for the arrest of the plaintiff, a watchmaker, on a charge of having converted to his own use a watch left with him for repairs, is not shewn, in an action for malicious prosecution, where the only thing tending to shew any improper dealing with the watch was his statement to the defendant that he was leaving town and would leave all repair work with another person, and that he omitted to leave with him the watch in question.

Wood v. Newby, 5 D.L.R. 486, 4 A.L.R. 333, 21 W.L.R. 438, 2 W.W.R. 409.

In an action for malicious prosecution, a formal finding by the judge of absence of reasonable and probable cause may be unnecessary, if such a finding can be necessarily inferred from what took place at the trial.

Connors v. Reid, 3 D.L.R. 636, 3 O.W.N. 1137.

PROBABLE CAUSE — SEARCH WARRANT — INSTRUCTIONS OF POLICE — WHAT CONSTITUTES — EVIDENCE.

Longmuir v. Forrest, 7 S.L.R. 162, 28 W.L.R. 821.

REASONABLE AND PROBABLE CAUSE.

Ford v. Canadian Express Co., 24 O.L.R. 462, affirming 21 O.L.R. 585.

REASONABLE AND PROBABLE CAUSE — HONEST BELIEF — MALICE — INDIRECT MOTIVE.

Prentiss v. Anderson Logging Co., 16 B.C.R. 289.

REASONABLE AND PROBABLE CAUSE — DIVISIONAL COURT PROCEEDING AS ARBITRATOR BY CONSENT.

Laporte v. Wentenkel, 2 O.W.N. 896, 19 O.W.R. 112.

CIVIL PROCESS — ORDER FOR ARREST—SUPPRESSION OF FACTS — ABSENCE OF REASONABLE AND PROBABLE CAUSE.

Fitchet v. Walton, 23 O.L.R. 260, affirming 22 O.L.R. 40.

REASONABLE AND PROBABLE CAUSE.

Davis v. Wright, 21 Man. L.R. 716, 19 W.L.R. 762.

(§ II B—17)—MALICE.

Malice, in an action for malicious prosecution, may be found from the facts that the defendant, without reasonable or probable cause, procured the arrest of the plaintiff on the ground that the latter, a watchmaker, who had removed from the town, had in his possession a valuable watch belonging to the defendant, and the latter did not take a summons for the plaintiff, as suggested by the magistrate, as he stated that he feared that if a summons was issued it would give the plaintiff an opportunity to escape, since, from such circumstances, it appeared that the defendant's desire was to recover the watch and not to punish the plaintiff. Malice may be implied in an action for malicious prosecution, where there was not reasonable and

probable cause for the arrest of the plaintiff.

Wood v. Newby, 5 D.L.R. 486, 4 A.L.R. 333, 21 W.L.R. 438, 2 W.W.R. 409.

MALICE IN FACT MUST BE PROVED — NOT LEGAL MALICE.

The malice which a plaintiff in an action for malicious prosecution has to prove is not malice in its legal sense, but malice in fact, malus animus, indicating that the defendant was actuated either by spite or ill-will against the plaintiff.

Scott v. Harris, 44 D.L.R. 737, 30 Can. Cr. Cas. 363, 14 A.L.R. 143, [1918] 3 W. W.R. 1028.

The entire absence of reasonable and probable cause constitutes malice in law which entitles the plaintiff to recover damages.

C.P.R. Co. v. Waller, 1 D.L.R. 47, 19 Can. Cr. Cas. 190.

OF CIVIL PROCEEDINGS — ATTACHMENT OF GOODS—MALICE.

Harris v. Bickerton, 24 O.L.R. 41, 19 O. W.R. 383.

MALICE.

Currie v. Caloff, 19 W.L.R. 767.

III. Termination of Prosecution.

(§ III—20)—MINUTE OF DISMISSAL — REQUIREMENT AS CONDITION PRECEDENT, HOW LIMITED.

As a basis for an action against the defendant for malicious prosecution, it suffices if the plaintiff proves his dismissal in the prosecution complained of, nor is proof of a minute in writing of such dismissal a condition precedent to recovery in the action for malicious prosecution.

Rudyk v. Shandro, 18 D.L.R. 641, 7 W. W.R. 415.

PROOF WITHOUT PRODUCTION OF RECORD.

In the absence of proof that the withdrawal of the prosecution was brought about by a compromise or arrangement to which the accused was a party proof of such withdrawal is a termination of the prosecution in favour of the accused. [Mortimer v. Fisher, 11 D.L.R. 77, applied.]

Tamblyn v. Westcott, 20 D.L.R. 131, 7 W.W.R. 1037, 23 Can. Cr. Cas. 391.

QUASHING ON TECHNICAL GROUNDS.

There must be a final termination of the prosecution in favour of the accused before he can maintain an action against the informant for malicious prosecution; such termination means a final judgment discharging the accused as innocent and not merely by the quashing of the indictment on account of a technicality or irregularity apart from the merits.

Richard v. Goulet, 19 D.L.R. 371, 23 Can. Cr. Cas. 327, 45 Que. S.C. 374.

An action for damages for malicious charge of a criminal act and for false arrest cannot be maintained until the prosecution for such charge is at an end; such prosecution can not be considered as terminated by the fact that the complaint, after a preliminary hearing, has been declared by a magistrate not well founded, if it appears that the complainant, the defendant in the action for damages, has given the recognizance required by s. 688 Cr. Code to the effect that he will prosecute his accusation before the Court of King's Bench.

Ducharme v. Bazinet, 18 Rev. de Jur. 255.

SUFFICIENCY OF ALLEGATIONS — WITHDRAWAL BY CROWN.

In an action for malicious prosecution the malicious proceedings complained of were sufficiently terminated in the plaintiff's favour if the magistrate dismissed the charge upon the proceedings being abandoned, unless the abandonment was brought about by some compromise or arrangement with the accused; the principle being that the termination must be such as to furnish prima facie evidence that the action was without foundation. A prosecution is terminated if the grand jury ignores the bill of indictment; and as in Saskatchewan grand jury functions are performed by the Att'y-Gen'l and his agents the withdrawal of the prosecution by any of those officers of the Crown is of the like effect.

Mortimer v. Fisher, 11 D.L.R. 77, 6 S. L.R. 200, 23 W.L.R. 905, 4 W.W.R. 454.

TERMINATION OF PROCEEDINGS IN PLAINTIFF'S FAVOUR — COMPROMISE.

A favourable termination of a criminal prosecution for obtaining chattels with intent to defraud, so as to permit the recovery of damages for malicious prosecution, is not shewn where the prosecution was dismissed only upon terms of the prisoner giving security to pay for the property. It may be shewn in defence of an action for malicious prosecution that the termination of a criminal proceeding in the plaintiff's favour was in fact the result of compromise or agreement, notwithstanding the records shew that the dismissal was based on the prosecutor's statement that he did not have any evidence to offer. [Baxter v. Gordon Ironsides & Fares Co., 13 O.L.R. 598, applied.]

Cockburn v. Kettle, 12 D.L.R. 512, 28 O. L.R. 407.

The termination of criminal proceedings before a magistrate is sufficiently shewn in an action for malicious prosecution where the records of such officer shewed that the charge against the plaintiff was dismissed with costs, and the testimony of the magistrate was to the same effect.

Wood v. Newby, 5 D.L.R. 486, 4 A.L.R. 333, 21 W.L.R. 438, 2 W.W.R. 409.

MANDAMUS.

I. WHEN MAY ISSUE.
- A. In general.
- B. To Court or Judge.
- C. To provincial or federal officers.
- D. To county, town or municipal officers.
- E. To corporations.

F. Concerning elections; to determine title to office.
G. To school officers.
H. To excise officers.

II. Procedure: hearing; determination.
A. In general; prerequisites.
B. Parties.
C. Pleading; writ and return.
D. Hearing and determination; defences.

Annotation.

Mandamus: 49 D.L.R. 478.

I. When may issue.

A. In general.

(§ I A—1)—Right to remedy.

In order to entitle himself to a mandamus an applicant must first shew that he has a legal specific right to ask for the interference of the court.

Clegg v. Macdonald, 39 D.L.R. 130.

(§ I A—3)—Making or enforcing contracts.

A mandatory order to restore a wall may be granted under the prayer for general relief although not specifically asked for where a proper case is made on the pleadings and evidence.

Holman v. Knox, 3 D.L.R. 207, 25 O.L.R. 588, 21 O.W.R. 325.

To allot church pews.

Every freeholder may have recourse to mandamus to compel a vestry board to allot the pews according to law.

Houde v. St. Croix, 49 Que. S.C. 106.

Procedure — Intervention — Interest of intervenant — Mandamus — Discretion of public body or officer — Rescission of contract — Prosecution of suit by municipal corporation.

Gourdeau v. Quebec, 40 Que. S.C. 388.

Private contract — Religious community — 992 C.C.P.

A mandamus cannot be had to obtain the execution of a private contract. A nun, who has been relieved of her vows at her own request, and who has left the community, cannot afterwards, by way of mandamus, compel the community to take her back. Her remedy, if any, being a simple action for damages.

Labbe v. Soeurs, etc., de Notre Dame de Montreal, 15 Que. P.R. 316.

(§ I A—4)—Existence of other remedies.

To entitle an applicant to a mandamus he must have a legal right to the performance of some duty of a public and not merely of a private character, and there must be no other effective, lawful method of enforcing the right.

Frankel v. Winnipeg, 8 D.L.R. 219, 23 Man. L.R. 296, 22 W.L.R. 597, 3 W.W.R. 405.

Existence of other remedy.

The court should exercise its discretion by refusing a writ of mandamus where there is an alternative remedy which is equally convenient, beneficial and effective.

Charleson v. Byrne, 22 D.L.R. 240, 21 B.C.R. 281, 31 W.L.R. 309, 8 W.W.R. 930.

To compel license — Other remedy.

A writ of mandamus will not be granted where there is an alternative remedy which is equally convenient, beneficial or effective, nor will a mandamus lie when the issue of the writ would be ineffectual. [Re Charleson Assessment, 21 B.C.R. 281, 22 D.L.R. 240, followed.]

Re McKay and Vancouver, 24 B.C.R. 298.

B. To court or judge.

(§ I B—5)—Illegal fine.

Mandamus does not lie to compel a magistrate, acting within his judicial capacity, to reverse his decision as regards a penalty he imposed not in accordance with statute. [R. v. Wong Tun, 28 D.L.R. 698, 26 Can. Cr. Cas. 8; R. v. Case, 7 Can. Cr. Cas. 204, followed.]

The King v. Fields, 30 D.L.R. 728, 27 Can. Cr. Cas. 51, [1917] 1 W.W.R. 149.

To enforce judgment — Coercive imprisonment.

A mandamus will not lie to compel the Circuit Court, or one of its judges, to order the execution of an order of coercive imprisonment. Coercive imprisonment can be executed only 15 days after the service of the judgment ordering it.

Shapiro v. Roy, 19 Que. P.R. 55.

(§ I B—7)—Warrant for arrest — Witnesses — Safe conduct.

Mandamus will not lie to compel a magistrate to issue a warrant for the arrest, on a criminal charge of conspiracy, of persons resident out of Canada who are temporarily therein solely for the purpose of giving evidence before a committee of a provincial legislature in respect of the very matter which is sought to be made the subject of the criminal charge, while such non-residents are under the protection of a safe-conduct granted to them by the legislature.

Marsil v. Lanctot, 28 D.L.R. 380, 25 Can. Cr. Cas. 223, 20 Rev. Leg. 237.

Preliminary enquiry — Cross-examination — Application for mandamus requiring question to be allowed.

The King v. Martin, 3 S.L.R. 495, 18 Can. Cr. Cas. 107, 16 W.L.R. 166.

Criminal law — Mistakes — Sworn complaint — Order for arrest — Refusal of magistrate — Judge of K.B. — Jurisdiction — Grand jury —Cr. Code, art. 873.

When a district magistrate refuses to issue an order for arrest on a sworn complaint for a wrong, a judge of the Court

of King's Bench is without jurisdiction to order the issuing of this order or to give order that the accusation be brought before the grand jury.

Lacoste v. Lussier & Cusson, 25 Rev. Leg. 23.

REFUSAL TO ISSUE SUMMONS — DISCRETION OF MAGISTRATE.

Re Broom, 18 Can. Cr. Cas. 254, 3 O.W.N. 51.

(§ I B—8)—TO COMPEL REINSTATEMENT OF CASE — REFUSAL TO HEAR CRIMINAL APPEAL.

Mandamus lies to require an inferior court to enter continuances and to hear an appeal from a summary conviction which it had improperly refused to hear on the merits upon an erroneous ruling against the sufficiency of the notice of appeal.

R. v. Trottier, 14 D.L.R. 355, 22 Can. Cr. Cas. 102, 6 A.L.R. 451, 25 W.L.R. 663, 5 W.W.R. 263.

TO REHEAR APPEAL — SUMMARY CONVICTION.

Where a summary conviction is appealed against under Cr. Code, ss. 749, 750, and the appeal was allowed without any evidence being taken, on the sole ground that the information was insufficient, such decision, even if erroneous under s. 753, because the objection had not been raised in the Magistrate's Court from which the appeal was taken, is not a decision upon a mere preliminary point, but one upon the merits; and mandamus will not lie, even with the consent of the County Judge, who had so decided, to compel him to reopen the appeal. [Long Point Co. v. Anderson, 18 A.R. (Ont.) 401; R. v. Middlesex Justices, 2 Q.B.D. 516, applied.]

R. v. County Judge of Frontenac; Re McLeod and Amiro, 8 D.L.R. 726, 25 Can. Cr. Cas. 230, 27 O.L.R. 232.

(§ I B—9)—TO AID APPEAL.

Mandamus will not lie to a District Court Judge because of his allowance of an appeal taken under Cr. Code, s. 750, on the failure of the prosecutor or of the Att'y-Gen'l to appear in opposition thereto, the writ not being intended to direct in what manner the trial below shall be conducted, but merely that the inferior court shall exercise its jurisdiction in the event of its erroneously declining so to do.

R. v. Wong Tun, 28 D.L.R. 698, 26 Can. Cr. Cas. 8, 9 A.L.R. 525, 33 W.L.R. 903, 10 W.W.R. 15.

C. TO PROVINCIAL OR FEDERAL OFFICERS.

(§ I C—10)—POST OFFICE AUTHORITIES.

The Superior Court has no jurisdiction to enjoin by mandamus the post office authorities or any other public department from doing anything or to order any Crown officer to do something.

Linde Canadian Refrigerator Co. v. Taillon, 13 Que. P.R. 182.

(§ I C—15)—TO TAXING OFFICER.

Where, under an order by a court for a prosecutor to pay the accused person his costs of the criminal proceedings which was made under s. 689 Cr. Code, and therefore by the provision of such section included the costs of the accused's appearance on the preliminary inquiry, though made in general terms and not specially referring to such costs, the taxing officer acting upon the theory that the judge in his order did not intend to award such costs, declined to tax them, the Ontario High Court has jurisdiction to issue a mandatory order to the officer directing him to tax and to allow to an accused person such costs.

Re Constantineau and Jones, 5 D.L.R. 483, 26 O.L.R. 160, 21 O.W.R. 880.

D. TO COUNTY, TOWN OR MUNICIPAL OFFICERS.

To compel municipal authorities to grant license upon tender of fee, see Fisheries, I B—5.

To compel municipal councils to fill vacancies on school board, see Schools, III A—55; liability for costs of proceedings, see Costs, I—11.

To compel the opening of highway, see Municipal Corporations, I B—10.

(§ I D—25)—COMPELLING APPOINTMENT OF HOSPITAL BOARD.

An application to compel a municipal corporation by mandamus to appoint a minority representation in a board of trustees in the management of a hospital, in pursuance of a provincial statute divesting the municipality from the control of the management, the property and funds whereof vested in the municipality under the terms of a charitable bequest, and where the appointments sought by the mandamus would otherwise prove futile, was dismissed by an equally divided court.

The King v. Roach; Re Payzant Memorial Hospital, 25 D.L.R. 177, 49 N.S.R. 310.

ACTION FOR MANDATORY ORDER TO COMPEL CORPORATION TO PERFORM CONDITION — OBLIGATION TO SUPERINTEND PERFORMANCE NOT ASSUMED BY COURT.

A testator, who died in 1883, devised lands to a town corporation, the defendants, and their successors forever, to be used and kept as a place of recreation and amusement for the inhabitants of the town forever, and to be called "M. Park," with a proviso that if the corporation should neglect or refuse "to keep the same and the fences surrounding it in proper order and repair and as a public park should be kept I hereby in that event cancel the said gift and direct that the said lands shall revert to and form part of my estate." The town council accepted the gift, on the conditions of the will. In this action, brought in 1918, by the executor of the testator, to compel the defendants to perform the condition, or for a declaration that the title to the land had reverted to the estate, it was found that there had been a continuous breach of the condition, beginning more

than 10 years before action:—Held, that a judgment in the nature of a mandatory order could not be pronounced, for that would involve the assumption by the court of the obligation of superintending for all time to come the performance of continuous duties, in the performance of which the exercise of a certain amount of discretion must necessarily be allowed to the defendants—an obligation which the court does not assume. [Bickford v. Chatham, 16 Can. S.C.R. 235, followed.]

Matheson v. Mitchell, 44 O.L.R. 619. [Affirmed, 17 O.W.N. 267.]

Where the term of office of a board of commissioners of sewers, appointed under c. 159, C.S.N.B. 1903, had expired between the date of argument of a motion for a mandamus against the board, to compel them to make an assessment upon certain marsh lands, and the date of judgment upon such motion, it was held that the writ might go against their successors in office.

Ex parte Dixon, 10 E.L.R. 383.

(§ I D—28)—To compel mayor's signature—Contract.

The mayor of a city cannot be compelled by mandamus to sign, in the name of the council, a contract whose exact wording has not been submitted for the approval of the council.

National Cartage & Supply Co. v. Belleau, 54 Que. S.C. 15.

(§ I D—29)—To board of health.

Although a board of health appointed under the Ontario Public Health Act, R. S.O. 1897, c. 248, is not constituted a corporation, neither the board as a whole nor its members individually are to be held liable for the recovery of medical claims as for a private debt, but the remedy is to be sought against the board as a public body by the prerogative writ of mandamus requiring the board to issue an order upon the municipality for payment.

Rich v. Melanethon Board of Health, 2 D.L.R. 866, 26 O.L.R. 48, 21 O.W.R. 516.

(§ I D—30)—Court of revision — Judicial body — When mandamus will lie.

The Court of Revision (B.C.) is a judicial body and the Court of Appeal (B.C.) cannot review its proceedings in the sense of inquiring into the correctness of the courts' conclusions. If a mandamus will lie at all to the Court of Revision it will only lie when it is made to appear that the court has refused to hear and determine the complaint. [The Queen v. Dayman, 7 El. & Bl. 673, followed.]

Fletcher v. Wade, 45 D.L.R. 91, [1919] 2 W.W.R. 1.

(§ I D—31)—To compel city to supply water.

The duty of a municipal corporation to supply water from its water supply is enforceable by mandamus; the remedy will be refused when the party seeking it refuses to pay the assessments therefor.

Minister of Justice v. Levis, 45 D.L.R. 180, [1919] A.C. 595, affirming 51 Que. S.C. 267, sub nom. Doherty v. Levis.

Illegal dismissal of tax officer.

A municipality may be compelled by mandamus to restore one to the office of assistant assessor who has been dismissed without personal notice of the council meeting called to consider his dismissal.

The King v. Halifax; Re Stevens, 25 D.L.R. 113, 49 N.S.R. 289.

A mandamus to a municipal council should be directed to the corporate body and not to the individuals composing it, although it is proper to notify the individuals. [See also Re Bolton and Wentworth, 23 O.L.R. 390.] Where after a written demand had been made on it for funds for the maintenance of a continuation school by the chairman and secretary-treasurer of the school board, followed by a personal demand for the money by the chairman and other members of the school board but the council did nothing to fulfil its statutory obligation to furnish the money, this inaction is a sufficient refusal to indicate that it did not intend to do what was required, and a mandamus will lie to compel the council to supply the money. Mandamus will not lie against a municipal corporation at the instance of a school board where there has not been a sufficient demand for the providing of funds by the school board under the High Schools Act, 9 Edw. VII. (Ont.), c. 91, s. 38, but the application for the mandamus may be dismissed without prejudice to another application to be made after formal demand.

Re West Nissouri Continuation School, 3 D.L.R. 195, 25 O.L.R. 550 at 554, 21 O.W.R. 533, affirming 1 D.L.R. 252, 25 O.L.R. 550.

To town officers.

The right of mandamus to compel a municipal corporation to do a certain act is not accorded to taxpayers as such; and in order to establish ground for the claim accruing from the misfeasance of the corporation, it is not sufficient to shew that the plaintiff is a stockholder in a company affected by the misfeasance complained of, such not being equivalent to a private claim by the plaintiff himself.

Gourdeau v. Quebec, 13 Que. P.R. 388.

Resolution—Enforcement.

A municipal corporation cannot be compelled by mandamus to execute and cause to be put in force a resolution of its council accepting a tender for certain public works.

Laperriere v. Pierreville, 18 Que. P.R. 315.

(§ I D—37) — Assessment of taxes — Compelling review of.

A mandamus should not be granted to review the confirmation of a property assessment by the municipal Court of Revision unless the court is satisfied that the

decision of the lower court was not made bona fide or was not based upon matters which it could legally take into consideration.

Charleson v. Byrne, 22 D.L.R. 240, 21 B.C.R. 281, 31 W.L.R. 309, 8 W.W.R. 930.

To compel tax levy.

Under s. 263 of Public Schools Act, R.S. M. 1902, c. 143, for the purpose of realizing on the execution placed in his hands, the sheriff caused the treasurer of a municipality to be served in 1906 with a precept to levy the necessary rate upon the lands situated in the defendant school district. Subsequently the treasurer resigned and B. was appointed treasurer. B. made out the general tax roll without including the levy. He said he had no knowledge of the proceedings against the municipality but admitted knowing of the judgment. He had been a member of the municipal council during 1906. On application for a mandamus to compel B. to levy the rate:—Held 1. That, as a member of the council, he should have had knowledge of the proceedings taken, and the plaintiffs were entitled to the order asked for, as the duties of the treasurer upon whom the precept had been served devolved upon his successor in the office. 2. That the inability of the treasurer to obey the mandamus for lack of some preliminary steps required by law to be attended to by other officers of the municipality, over whom he had no control, was not a sufficient answer to the application. [London & Canadian v. Morris (1893) 9 M.R. 377, followed.] On appeal:—Held, that the omission of the words "by rate" in the direction to the sheriff to levy indorsed on the execution was fatal to the proceeding and that the application for a mandamus should be dismissed.

Canada Permanent Mortgage Corp. v. School District of East Selkirk, No. 99, 21 Man. L.R. 750.

(§ I D—38)—Board of audit — Sheriff's fees for returns — County liable — Province.

Re Mack and Board of Audit of Stormont, Dundas & Glengarry, 19 O.W.R. 740, 2 O.W.N. 1413.

E. To corporations.

(§ I E—40)—To enforce transfer of shares.

Recording a transfer of shares is not such a public duty as will be compelled by prerogative writ of mandamus; mandamus may be obtained in an action upon sufficient grounds.

Hutchings v. Can. Nat. Fire Ins. Co., 33 D.L.R. 746, 27 Man. L.R. 444, [1917] 2 W. W.R. 41. [See 33 D.L.R. 750, 752, 27 Man. L.R. 496, [1917] 2 W.W.R. 45, 513.]

To Bar Association — Ordering admission to Bar.

A petition for a "mandamus" ordering the Bar of the Province of Quebec to admit the petitioner among its members should be directed (1) to the Board of Examiners of the sections; (2) to the section itself; (3) to the general corporation.

Langstaff v. Bar of Quebec, 47 Que. S.C. 131.

Turnpike roads — To keep ditches in good order — C.P. 992 — Rights of riparian owners.

A mandamus will lie against a turnpike road company to have its roads and ditches drained in such a condition as to obviate unnecessary damage to the riparian owners, notwithstanding the discretionary powers given to the trustees.

St. Felix du Cap Rouge v. Chemin à Barrières de la Rive Nord, 15 Que. P.R. 295.

(§ I E—41)—Transfer of shares.

Mandamus is the proper remedy to require the board of directors to register a transfer of shares of stock on the books of the company issuing them.

Re Polson Iron Works, 4 D.L.R. 193, 3 O.W.N. 1269, 22 O.W.R. 84.

To compel delivery of shares.

Mason v. Goldfields, 6 D.L.R. 909, 4 O.W.N. 300.

F. Concerning elections; to determine title to office.

(§ I F—50) — Election — Protest against return of candidate—Statement of grounds — Investigation by council.

By 22 Vict. c. 8, s. 24 (1859) any candidate or elector dissatisfied with the decision of the presiding officer in any election for mayor, etc., in the city of Fredericton, may, within 10 days after the election, make application in writing through the city clerk to the council, setting forth the cause of complaint and demanding an investigation thereof; and by s. 11 of the amending Act, 26 Vict., c. 33 (1863) it is provided that no such petition shall be inquired into by the city council, unless within two hours after the declaration, a protest against the return be delivered to the presiding officer stating the grounds of the protest; and confines the inquiry to the grounds stated in the protest:—Held, on an application for a mandamus, that the city council was not justified in refusing to grant an investigation on a protest filed demanding a recount of the ballots cast, and assigning as a cause of complaint that certain ballots were accepted which were illegal in that they were not in accordance with the law relating to elections on the grounds that the council had no jurisdiction to hold a recount, and that there was no specific statement of grounds in the protest. The council cannot inquire into grounds stated in a petition praying for an investigation which have not been stated in the protest delivered under s. 11 of 26 Vict., c. 33.

Ex parte Farrell, 42 N.B.R. 478.

(§ I F—54)—Election — Performance of duty by returning officer.

Mandamus will not lie, under s. 235 of

the Alberta Election Act, 9 Edw. VII. c. 3, to compel a returning officer to open envelopes containing disputed ballots allowed by a court of enquiry, and add them to election returns, where he has properly added the votes cast, with the exception of the disputed ballots, as required by law; since his neglect to add the disputed ballots was not a wilful delay, neglect, or refusal to perform the duties imposed upon him by law; and adequate relief could be obtained on a recount before a District Court Judge. On a returning officer wilfully neglecting to add disputed votes allowed by a court of enquiry under the Alberta Elections Act, 9 Edw. VII. c. 3, though under a bona fide misapprehension of his duty, mandamus lies under s. 235 to compel him to do so; an appeal to a District Court judge or a recount by him not affording such other remedy as precludes relief by mandamus.

Re Clearwater Election, 11 D.L.R. 353, 24 W.L.R. 306, 4 W.W.R. 630. [Affirmed in part, reversed in part, 12 D.L.R. 598, 6 A.L.R. 343, 24 W.L.R. 683, 4 W.W.R. 1025.

(§ I F—54a) — CONCERNING ELECTIONS — RETURN THAT ELECTION VOID.

On an application by one of the candidates for a mandamus to a returning officer who had made formal return that the election was void, asking that the returning officer should be directed to return that the applicant was the duly elected candidate, the court, on finding no material on which to so order, will simply dismiss the application, and will not use the application as the means of issuing a mandamus to the returning officer to make return as to which of the candidates was elected as shewn by the only poll books which had been properly kept, where no such general direction had been applied for and the result of such a count would be adverse to the applicant.

Re Cumberland Election, 15 D.L.R. 48, 7 S.L.R. 8, 26 W.L.R. 176, 5 W.W.R. 688.

G. To SCHOOL OFFICERS.

(§ I G—65)—An order for mandamus will be granted at the suit of ratepayers of a township directing the continuation school board to take proceedings to establish the school, where it appears that it has already been determined by the proper court that the continuation school district had been validly established; that a mandatory order had been granted at the instance of the school board directing the payment by the township corporation to the board of a certain sum for maintenance purposes; that a motion for a mandamus to compel the payment of a sum by the council for the purpose of erecting a school building failed solely because of the insufficiency of the demand made by the school board; and that all resolutions offered thereafter in the school board looking to the establishment of the school, were blocked by one-half of the members thereof voting against them because they were determined not to permit the continuation school to be established.

Re West Nissouri Continuation School, 4 D.L.R. 847, 3 O.W.N. 1623, 22 O.W.R. 842. [Affirmed, 4 O.W.N. 497, 23 O.W.R. 601.]

A mandamus will lie to compel the trustees of a school district to allow the children of a parent whose permanent and principal place of residence is within the school district, to attend the school without the payment of a fee.

Inkster v. Manitonka School District, 6 D.L.R. 57, 22 Man. L.R. 487, 22 W.L.R. 57, 2 W.W.R. 1105.

PETITION FOR THE BUILDING OF A SCHOOL HOUSE — C.P. 992.

A mandamus is the proper proceeding to enforce a petition for the re-establishment of a school house, where there was a sufficient number of children to attend.

Bureau v. St. Edouard de Stoneham, 15 Que. P.R. 293.

H. To EXCISE OFFICERS.

As to granting liquor license, see also Intoxicating Liquors, II B—40.

(§ I H—70)—LIQUOR LICENSE.

Prudhomme v. License Commissioners for Prince Rupert, 16 B.C.R. 487, 19 W.L.R. 289.

(§ I H—71)—LICENSES — DISCRETIONARY DUTIES.

By mandamus the court can compel a functionary to perform his duties; but it cannot direct license officers, in discharge of their legal power, to come to a particular decision as to granting or refusing licenses. The licensing power granted to such representative bodies should not be narrowly scrutinized by the courts; very wide scope should be allowed them in their endeavours toward the welfare of the community.

Elves v. McCallum, 28 D.L.R. 631, 9 A.L.R. 530, 34 W.L.R. 669, 10 W.W.R. 696.

TO BOARD OF LICENSE COMMISSIONERS — TO COMPEL GRANT OF LICENSE.

Re Club Laurier, 10 D.L.R. 823, 23 Man. L.R. 24, 23 W.L.R. 380.

A collector of provincial revenue for a district is a public official; he may be compelled by mandamus to fulfil any duty which the law imposes upon him.

Ethier v. Boulet, 50 Que. S.C. 40.

LICENSE COMMISSIONERS — ART. 992 C.P.Q.

Lusher v. Choquet, 12 Que. P.R. 410.

II. Procedure; hearing; determination.

A. IN GENERAL; PREREQUISITES.

(§ II A—75)—Where an inferior court decides a matter within its jurisdiction on a preliminary point without going into the merits, there is no real decision on the case, and mandamus will lie to compel a reconsideration, but it must be clear that the point upon which the decision rested was in reality preliminary and not one upon the merits. On an appeal to a Division Court under s. 749 (a) Cr. Code, from

a conviction by a police magistrate, a decision by the Appellate Court allowing the appeal on the sole ground that the information on which the conviction was based was insufficient though this point was not raised before the magistrate, while it may be erroneous under s. 753, is nevertheless a decision on the merits and not on a matter preliminary, and hence mandamus will not lie to compel the Division Court to reopen the appeal.

Re McLeod v. Amiro, 8 D.L.R. 726, 27 O.L.R. 232.

(§ II A—76)—To municipality — Conditions precedent — Building permit — Terms.

Re Coleman and McCallum, 12 D.L.R. 140, 24 O.W.R. 754, reversing 11 D.L.R. 138, 24 O.W.R. 470.

Condition precedent.

A motion for a mandamus should be made on behalf of the Sovereign ex rel. the prosecutor.

Frankel v. Winnipeg et al., 8 D.L.R. 219, 23 Man. L.R. 296, 22 W.L.R. 597.

Mandamus to compel hearing of appeal —Affidavit—By whom made.

One M. laid an information before two justices of the peace against one E. alleging an improper dismissal from E.'s employment, contrary to R.S.S. (1909), c. 149, s. 3, subs. 2. The justices having made an order against E. he appealed to the judge of the District Court. When the appeal was called, objection was taken by counsel for M. that the money paid to the justices as security pursuant to Cr. Code, s. 750 (c), had not been paid into court by the justices, and thereupon the judge dismissed the appeal with costs. The present application was made on behalf of E. for a writ of mandamus directed to the said judge to set aside the order of dismissal and directing him to hear the appeal. The application was supported by an affidavit of E.'s solicitor, but there was no affidavit of E. himself:—Held (1) that the word "prosecutor" in Crown Practice r. 25 means the applicant for a writ of mandamus; (2) that an affidavit in support of a writ of mandamus must be made by the applicant himself, and must shew that he has a real interest in the subject-matter; (3) that the filing of such affidavit is a condition precedent to the granting of the writ, and that this omission was more than a mere irregularity, and that leave should not on this application be granted to file an affidavit of the applicant.

Re Myhra & Elliott, 8 S.L.R. 21, 7 W.W.R. 1340.

C. Pleading; writ and return.

(§ II C—88)—The writ.

The high prerogative writ of mandamus originally confined to the King's Bench alone may now be issued out of any of the divisions of the High Court of Justice in Ontario. [Toronto Public Library Board v. Toronto, 19 P.R. (Ont.) 329, approved.]

Rich v. Melancthon Board of Health, 2 D.L.R. 866, 26 O.L.R. 48, 21 O.W.R. 516.

Disobedience of mandatory order — Erection of house of refuge — Attachment of county councillors.

Re Bolton and Wentworth, 23 O.L.R. 390, 18 O.W.R. 795.

MANSLAUGHTER.

See Homicide.

MARINE INSURANCE.

See Insurance.

Marine Risk, see Landlord and Tenant, II B.

MARITIME LIENS.

See Seamen; Shipping; Admiralty; Towage.

MARKETS.

Market values, see Damages; Expropriation.

As affecting carriers' rates, see Carriers; Railway Board.

Annotation.

Private markets; municipal control: 1 D.L.R. 219.

Public market.

A public market is a place to which any one having goods to sell, which may be properly sold upon such market place, may go, provided he pays the fees imposed by the municipality for such privilege. A building containing under one roof different shops or stalls, all of which are rented to different persons carrying on the trade of butchers, is not a public market. [Wallenberg v. Merson, 1 D.L.R. 212, followed.]

Rosenfelt v. Biron, 8 D.L.R. 481, 43 Que. S.C. 127.

License for space in — Licensee not tenant.

Wood v. Hamilton, 12 D.L.R. 451, 28 O.L.R. 214, reversing 8 D.L.R. 825, 28 O.L.R. 214, 23 O.W.R. 627.

A public market is one to which any person whosoever may bring and offer for sale marketable articles subject only to municipal and police regulations. An aggregation of private stalls does not constitute a public market so long as the individual tenants only may carry on their trade therein.

Wallenberg v. Merson, 1 D.L.R. 212, 21 Que. K.B. 310.

MARKING OF GOODS.

As to regulation of gold and silver marking, see Constitutional Law, II B—364.

Gold and silver.

It is an offence under the Gold and Silver Marking Act, 1908 (Can.), to have in possession with intent to sell the same, rings marked as of 9 karat gold unless nine

twenty-fourths of the weight of the ring, including that of the cement inclosed in the inner part of the ring, is of gold; and the nine twenty-fourths proportion does not apply to the gold and alloy only in the article but to all that part of the article which has the appearance of and is likely to be the subject of fraudulent sales on the representation that it is throughout of the quality indicated by the mark.

The King v. Austin, 19 Can. Cr. Cas. 70, 25 O.L.R. 69.

MARKS.

Crime of unlawfully applying mark or stamp appropriated for use of Crown, see Crown, I—10.

MARRIAGE.

I. In general.
II. Mode or form; validity generally.
III. Capacity of parties; who may marry.
IV. Annulment generally; termination.

Separation and alimony, see Divorce and Separation.

Custody and support of children, see Infants; Parent and Child; Divorce and Separation.

Marriage contracts and settlements, see Husband and Wife.

Validity of foreign divorce, remarriage, see Conflict of Laws, I C—65.

Annotations.

Foreign common law marriage; validity: 3 D.L.R. 247.

Enemy alienage as affecting status of married women: 23 D.L.R. 375, 380.

Void and voidable marriages, jurisdiction to annul: 30 D.L.R. 14.

Validity of foreign divorce; domicile: 33 D.L.R. 146, 156.

I. In general.

(§ I—2)—Legislative power over.

Section 92 of the B.N.A. Act, which enacts that the legislature of each province may exclusively make laws relating to matters within an enumerated class, among them being "property and civil rights," "solemnization of marriage," and "generally matters of a local or private nature in the province," operates by way of an exception to the powers conferred by subs. 16 of s. 91 of the Act as regards "marriage," and the provincial legislatures therefore have jurisdiction to enact conditions as to solemnization which may affect the validity of the marriage contract.

Re Marriage Law of Canada, 7 D.L.R. 629, 11 E.L.R. 255, [1912] A.C. 880.

The law of the Province of Quebec governing marriage does not render null and void, unless contracted before a Roman Catholic priest, a marriage that would be otherwise legally binding, which takes place in such province between persons, who are both Roman Catholics, or, between persons one of whom only is a Roman Catholic.

Re Marriage Laws, 6 D.L.R. 588, 46 Can. S.C.R. 132.

The provisions of the Manitoba Marriage Act, 5 & 6 Edw. VII. c. 41, validating (under the limitations of s. 30) all marriages after two years between persons not under legal disqualification notwithstanding irregularities, "so far as respects the civil rights in Manitoba of the parties or their issue, and in respect of all matters within the jurisdiction of the Legislature of Manitoba," apply to persons whether married within the province or in foreign countries.

Zdrahal v. Shatney, 7 D.L.R. 554, 22 Man. L.R. 521, 22 W.L.R. 336, 3 W.W.R. 239.

II. Mode or form; validity generally.

(§ II—5)—Form of — Celebration de facto—Validity.

Except in cases of bigamy and actions for criminal conversation there is a strong presumption in favour of the validity of a marriage proved to have been celebrated de facto.

Hedge v. Morrow, 20 D.L.R. 561, 32 O.L.R. 218.

(§ II—6)—Validity of form.

A marriage of two Roman Catholics performed by a Protestant minister of the Methodist Church, under the authority of a license, sealed with the great seal of the Province of Quebec and signed by the Lieutenant-Governor of that Province authorizing the omission of a previous publication of the banns, as permitted by arts. 59, 59a, C.C. (Que.), was declared to be valid and binding in law in proceedings by opposition in a civil action in the Province of Quebec brought by the man to declare its invalidity in conformity with an ecclesiastical decree made by the Roman Catholic Archbishop of Montreal declaring the marriage null and void upon the ground that the Methodist minister was incompetent to perform the marriage in view of a decree known as the Ne Temere Decree proclaimed by the congregation of the council of the Roman Catholic Church that only those marriages of Roman Catholics could be valid which had been contracted before the curé of the place, where in such civil action the court maintained her claim made upon an opposition on her own behalf and upon a tierce-opposition in her capacity of tutrix to her minor child to vacate the default judgment entered therein upon the husband's claim on the ground of fraud and undue influence. [Laramée v. Evans (upon demurrer), 24 L.C.J. 235 (on the merits), 25 L.C.J. 261, not followed.]

Hébert v. Cloutre, 6 D.L.R. 411, 41 Que. S.C. 249, 10 E.L.R. 335. [Reversed on other grounds 15 D.L.R. 498, 16 Que. P.R. 29.]

(§ II—9)—Foreign marriage.

An agreement to marry, followed by cohabitation which constitutes a valid marriage in a foreign country where it was made by two residents of Ontario not forbidden by the law of that province to enter into such contract will be recognized as a valid marriage in Ontario.

Forbes v. Forbes, 3 D.L.R. 243, 3 O.W.N. 557, 20 O.W.R. 924.

On a prosecution for bigamy the admission of his first marriage made by the accused after his arrest, and the testimony of witnesses to that marriage which took place in a foreign country affirming that the same took place in the ecclesiastical form usual there, and was followed by cohabitation of the parties, will, if believed, be sufficient proof of the first marriage to support a conviction without expert evidence of the foreign marriage law.

The King v. Naoum, 19 Can. Cr. Cas. 102, 24 O.L.R. 306.

Marriage in foreign country—Intention to live in Quebec—Presumption.

A plan made by an intended husband and wife, living in a foreign country, to come and live in the Province of Quebec after their marriage which plan also was carried out, cannot, by itself, be construed to establish a presumption of their intention to be governed, as to their matrimonial conventions, by the laws of Quebec.

Lachance v. Leboeuf, 46 Que. S.C. 421.

(§ II—11)—Presumption of marriage.

Where a man and woman have cohabited for such a length of time and in such circumstances as to have acquired the reputation of being man and wife, a lawful marriage between them will be presumed, although there may be no positive evidence of any marriage having taken place; and the presumption can be rebutted only by strong and weighty evidence to the contrary.

Johnston v. Hazen, 43 N.B.R. 154.

III. Capacity of parties; who may marry.

(§ III—20)—Deceased brother's wife—Death—Action.

Marriage between a man and his deceased brother's wife is not permitted and although the different churches and religious communities have retained the right they were enjoying at the time of the coming into force of C.C. (Que.), of granting dispensation from impediments to marriage, under art. 127, C.C. (Que.), they cannot grant such dispensation in the cases prohibited by art. 125. However, a marriage, which is null according to the terms of art. 125, may have civil effects if contracted in good faith by all the parties thereto. A widow who marries her deceased husband's brother has a right of action for the death, by accident, of her second husband.

Denault v. Mansfield and Pontefract, 54 Que. S.C. 499.

(§ III—21)—Infants.

A judge has no authority to homologate the advice of a family council, naming a tutor ad hoc with authorization to grant his consent to the marriage of a minor because her father being dead, her mother refuses her consent to said marriage.

Ex parte Beland, 15 Que. P.R. 19.

Infants.

An angry exclamation by a mother to her son, on hearing of his marriage, "You had better go and live with your wife!" is no evidence of her consent to the marriage.

Hagen v. Stewart, 44 Que. S.C. 121.

(§ III—27)—Consanguinity or affinity—Capacity to marry.

Kinship, under canon law, between the third and the fourth degree in collateral line, between Catholics, creates an invalidating impediment to their marriage, and the absence of a valid dispensation renders such marriage null in law, and, in the circumstances, the court will give civil effect to the decree of the bishop of the diocese annulling such marriage.

Manegre v. Laferriere, 18 Rev. de Jur. 405.

The C.C. Quebec, independently of and in addition to the absolute invalidating impediments decreed in arts. 124, 125, 126 of the Code, recognizes equally, in art. 127, all other acknowledged impediments, at the time of the promulgation of the marriage, in accordance with the different religious beliefs, whether due to consanguinity or affinity, subject to the right of dispensation under such causes as formerly recognized in the different churches and religious societies; and kinship between the third and the fourth degree in collateral line constitutes, under canon law, between Catholics, an invalidating impediment to such marriage, and, in the absence of a dispensation from a competent ecclesiastical authority, such marriage is null in law; and it is the duty of the courts to ratify the impediments recognized at the time of the promulgation of the C.C. by the different religious bodies whether owing to consanguinity or affinity or due to other causes; in the circumstances, when a marriage, between Catholics, has been annulled by the bishop of the diocese, the court in sustaining an action to annul such marriage can only ratify and give civil effect to the decree issued under Episcopal authority.

Laberge v. Lauzon, 18 Rev. de Jur. 407.

IV. Annulment generally; termination.

(§ IV—45)—Jurisdiction—Marriage Act, R.S.O. 1914, c. 148—Right of Attorney-General to intervene.

Because of the right to intervene given to the Att'y-Gen'l of Ontario by the Marriage Act, R.S.O. 1914, c. 148, in actions to annul certain irregular marriages, the Att'y-Gen'l has a status to make a preliminary application to dismiss or stay the ac-

tion on the ground that the case disclosed by the plaintiff's pleading is not within the statutory provision for annulment and that the court would therefore have no jurisdiction to entertain it.

Reid v. Aull, 19 D.L.R. 309, 32 O.L.R. 68.

CONSANGUINITY—QUEBEC LAW.

Article 152 C.C. (Que.) is not exhaustive of the causes making null a marriage and, in addition to those enumerated in arts. 124-6 referred to in art. 152, art. 127, provides for others resulting from consanguinity, affinity and other causes which remain subject to the rules followed, up to the promulgation of the Code, in the various churches and religious bodies. Therefore, Roman Catholic consorts who, at the time of their marriage, were related in the fourth degree of the collateral line, are entitled to maintain an action to annul the marriage on establishing that the Roman Catholic Church makes such relationship an absolute bar to marriage. The possession of status of a married person and production of the marriage certificate is not a ground for dismissal of an action brought by one of the consorts to annul the marriage, but only for dismissal of a motion to declare the certificate a nullity.

Tremblay v. Despatie, 43 Que. S.C. 59, affirming 40 Que. S.C. 429.

(§ IV—50)—ANNULMENT DECREE—ABANDONMENT—QUEBEC MARRIAGE LAWS.

It is not against public policy to permit a husband who has obtained a default judgment declaring his marriage annulled, to formally abandon the decree on its being attacked in opposition proceedings alleging fraud, undue influence, and threats by the husband and others which had induced the wife not to defend the action.

Hébert v. Clouâtre, 15 D.L.R. 498, 45 Que. S.C. 239, 16 Que. P.R. 29, reversing, on other grounds, 6 D.L.R. 411, 41 Que. S.C. 241.

ANNULMENT OF—FINAL DECREE—FORM.

Walker v. Walker, [1918] 2 W.W.R. 233.

ACTION FOR DECLARATION OF NULLITY—1 GEO. V. C. 32—CONSTITUTIONALITY—MARRIAGE OF CHILDREN—EVIDENCE.

Malot v. Malot, 4 O.W.N. 1405, 1577, 24 O.W.R. 714, 884.

(§ IV—55)—PROHIBITED DEGREES OF CONSANGUINITY—EFFECT OF DEATH.

The validity of a marriage voidable on the ground that the parties were within the prohibited degrees of consanguinity, such as uncle and niece, can only be questioned during the lifetime of both parties, and cannot be attacked by the next of kin of the deceased spouse. [Re Murray Canal; Lawson v. Powers, 6 O.R. 685; Kidd v. Harris, 3 O.L.R. 60, followed.]

Gray v. Nat. Trust Co., 23 D.L.R. 608, 31 W.L.R. 684, 8 W.W.R. 1061.

ACTION FOR DECLARATION OF NULLITY OF MARRIAGE—JURISDICTION—PARTIES RELATED WITHIN PROHIBITED DEGREES.

May v. May, 22 O.L.R. 559, 18 O.W.R. 515.

REMITTING CASE TO COURT APPEALED FROM—MARRIAGE — IMPEDIMENTS — RELIGIOUS PERSUASION—COLLATERAL RELATIONSHIP AMONG ROMAN CATHOLICS—ART. 152, C.C. (QUE.).

Tremblay v. Despatie, 40 Que. S.C. 429.

(§ IV—56)—PHYSICAL INCAPACITY.

The High Court of Justice for Ontario has no jurisdiction to entertain an action to have a marriage declared invalid by reason of the alleged physical incapacity to consummate the same on the part of one of the parties thereto.

Leakim v. Leakim, 2 D.L.R. 278, 21 O.W.R. 855, 3 O.W.N. 994. [Affirmed, 6 D.L.R. 875, 4 O.W.N. 214, 23 O.W.R. 227.]

HUSBAND AND WIFE—ACTION BY HUSBAND FOR DECLARATION OF NULLITY OF MARRIAGE OR FORM OF MARRIAGE—PHYSICAL DEFECTS PREVENTING CONSUMMATION—SUPREME COURT OF ONTARIO—JURISDICTION—SEPARATION AGREEMENT—PROVISION FOR PAYMENT OF ALLOWANCE TO WIFE.

Barlow v. Barlow, 15 O.W.N. 399.

(§ IV—57)—ANNULMENT — AGE — FALSE AFFIDAVITS—PARENTAL CONSENT.

Neither absence of the consent by parents required by statute, nor a false affidavit by the husband made to procure the license to marry, nor false statements by the parties to the celebrating clergyman made to induce him to perform the ceremony, invalidate a marriage. The policy of the law is not to invalidate marriages because of irregularities leading to them.

Harris v. Meyers, 30 D.L.R. 26, 50 N.S.R. 112.

The consent to the marriage of a person under 18 required by s. 15 of the Marriage Act (R.S.O. 1914, c. 148) is not a condition precedent to the validity of the marriage. Ont. Stats. 1919, c. 36, makes written consent an absolute necessity.

Peppiatt v. Peppiatt, 30 D.L.R. 1, 36 O.L.R. 427, affirming 34 O.L.R. 121.

INFANCY—LACK OF PARENT'S CONSENT.

Under the law of Alberta an action does not lie either by the girl's parent or by herself to annul her marriage at the age of 16 under a marriage license obtained by the husband on a false and fraudulent affidavit as to her age and a ceremony performed without the parent's consent, and this although the marriage had never been consummated.

Burns v. Hills, 22 D.L.R. 74.

WANT OF PATERNAL CONSENT—JURISDICTION OF COURT TO ANNUL.

The Supreme Court of Alberta has no jurisdiction to declare a marriage null and void by reason of the want of the consent thereto of the father of one of the parties.

Notwithstanding the words, "The father, if living, of any person under 21 years of age . . . shall have authority to give consent to such marriage," a marriage between an infant and an adult without the consent of the father of the former is valid, the quoted words being merely directory. Consent under s. 11 of the Marriage Ordinance is a condition precedent to the grant of a marriage license, but not to the marriage and failure to obtain such consent does not render the marriage void.

R. v. M., 7 W.W.R. 1197, 8 W.W.R. 110.

ANNULMENT OF MARRIAGE—INFANCY.

A father who takes an action to have the marriage of his minor son annulled, on the ground that it was contracted without his consent, has the right to continue his action even if his son becomes of age pending the suit.

Guttman v. Goodman, 26 Que. K.B. 270.

INFANCY.

The marriage of the minor son of a widow, without her consent, is annulable, at her instance, by action brought within 6 months of her becoming aware of it. Conception by the wife within 6 months of the marriage affords no ground of defence to such an action, art. 153 C.C. (Que.) having reference to art. 115, but not to arts. 119, 120.

Hagen v. Stewart, 44 Que. S.C. 121.

INFANT UNDER 18—ACTION FOR DECLARATION OF INVALIDITY—MARRIAGE ACT, R.S.O. 1914, C. 148, S. 36—EFFECT OF SUBS. 2—SEXUAL INTERCOURSE AFTER CEREMONY—FINDING OF FACT OF TRIAL JUDGE.

McIntyre v. Gental, 13 O.W.N. 309.

(§ IV—58)—DEGREE OF INSANITY AS GROUND OF ANNULMENT—GENERAL PARESIS.

The degree of insanity as ground for annulment of a marriage need not necessarily be that of interdiction or established by medical authority; a person affected with general paresis at the time of the marriage, the circumstances pointing to the abnormal exercise of his ordinary mental faculties and his general inability to realize the nature and consequences of his acts, is not legally capable of giving a valid consent necessary for the formation of a valid marriage.

Michalson v. Glassford, 29 D.L.R. 87, 22 Rev. de Jur. 485.

DECLARATION OF NULLITY OF MARRIAGE—INSANITY—JURISDICTION OF HIGH COURT.

A. v. B., 23 O.L.R. 261.

(§ IV—59)—ANNULMENT — PRIOR MARRIAGE.

A prior valid marriage, which has not been legally dissolved, existing at the time a marriage is contracted, renders the second marriage void and it will be annulled by the court.

Shackleton v. Edmondson, 30 D.L.R. 577.

OTHER EXISTING MARRIAGE.

A marriage will not be held invalid upon an agreement between the parties filed in the action that the pretended marriage between them should be adjudged and declared a nullity on the grounds set forth in the plaintiff's statement of claim, that she was induced to go through a marriage ceremony with the defendant on the false representations that he had obtained a divorce from a woman to whom he had been formerly married.

Dilts v. Warden, 5 D.L.R. 186, 3 O.W.N. 1319, 22 O.W.R. 228.

MARRIED WOMEN.

See Husband and Wife.

Married Women's Relief Act, see Statutes, II D—125.

Annotations.

Enemy alienage as affecting status of married women: 23 D.L.R. 375, 380.

Separate estate; property rights as to wife's money in her husband's control: 13 D.L.R. 824.

MARSHALLING ASSETS AND SECURITIES.

See also Mortgage.

(§ I—5)—INSURANCE FUNDS—MORTGAGEES—ASSIGNEE.

Where a first mortgagee has a claim against two mortgage funds upon the mortgaged premises, which funds belong respectively to different persons, and a second mortgagee has a claim against one only of the funds, the court, at the suit of the second mortgagee, will not apply the equitable principle of marshalling assets to the prejudice of the dominant creditor, the debtors or their assigns, so as to compel the first mortgagee to satisfy his claim out of one of the funds only, but the claim of the first mortgagee will be charged rateably against both funds. [Re Mower's Trusts, L.R. 8 Eq. 110, distinguished; Ex parte Kendall, 17 Ves. 514; Gwilliam v. McCormack, 4 S.W.R. 521, followed.]

Dominion Lumber & Fuel Co. v. Gelfand, 28 D.L.R. 262, 26 Man. L.R. 350, varying 34 W.L.R. 10.

MORTGAGEES—EXECUTION CREDITORS.

Where in case of loss the insurance upon certain property is, by the terms of the policy, payable in the first place to a first mortgagee, and, secondly, to a second mortgagee, and executions have been registered before the second mortgage was made, the first mortgagee has a right by statute (Mortgagee's Act, R.S.O. 1914, ch. 112, sec. 6, subs. 3) to apply all the insurance money to the satisfaction of his mortgage, and cannot be compelled to take part of his claim from the proceeds of the sale of the remaining mortgaged property, so as to

leave a portion of the insurance money to the second mortgagee.

Midland Loan & Savings Co. v. Genitti, 30 D.L.R. 52, 36 O.L.R. 163.

MASTER.

See Courts.

Annotation.

Constitutional law, appointment of Judges; Masters; powers of province as to appointment: 24 D.L.R. 22.

MASTER AND SERVANT.

I. Rights and relations generally.
- A. In general; authority to employ servant or physician.
- B. When relation exists.
- C. Compensation; wages.
- D. Hours of labour.
- E. Termination of relation; discharge; enticing.

II. Liability of Master to servant.
- A. Nature and extent; master's duty.
- B. Servant's assumption of risks.
- C. Contributory negligence of servant.
- D. Disobedience of rules.
- E. Fellow-servants and their negligence.

III. Liability of Master to strangers for acts of servant or independent contractor.
- A. For acts of servant or agent.
- B. For acts of independent contractor.

IV. Liability of servants.

V. Workmen's compensation; cases.

Employer's liability insurance, see Insurance, VIII.

Maritime employment, see Seamen.

Liability of Crown, see Crown.

Annotations.

Assumption of risks; superintendence: 11 D.L.R. 106.

Employer's liability for breach of statutory duty; assumption of risk: 5 D.L.R. 328.

Justifiable dismissal; right of wages (a) earned and overdue; (b) earned, but not payable: 8 D.L.R. 382.

Workmen's compensation; Quebec law; 9 Edw. VII. (Que.), ch. 66; R.S.Q. 1909, secs. 7321-7347: 7 D.L.R. 5.

Fraud of agent or employee; estoppel by conduct: 21 D.L.R. 13.

Rights of alien enemies to recover for injuries arising out of employment: 23 D.L.R. 375, 381.

Master's liability under penal laws for servant's acts or defaults: 31 D.L.R. 233.

I. Rights and relations generally.

Employment by company, ultra vires, see Companies, IV D—65.

A. In general; authority to employ servant or physician.

(§ I A—1)—Contract with nonresident—Money advanced for transportation—Right of recovery—Master and Servant Act, R.S.B.C. 1911, c. 153, s. 19.

P. entered into an agreement with D. in London, England, whereby D. was to go to British Columbia and enter into possession of and work P.'s farm for at least a year at a salary of $700 a year. P. was to advance £100 for D.'s transportation expenses, which was to be repaid from D.'s salary as it came due. P. advanced the £100 and D. went to British Columbia, where he lived upon and worked P.'s farm for 2½ months, when he left. In an action by P. for the return of the money advanced for transportation, it was held by the Trial Judge that the agreement being void under s. 19 of the Master and Servant Act, the action should be dismissed:—Held, on appeal, that there should be a new trial. [Ashmore v. Bank of B.N.A., 18 B.C.R. 257, followed.]

Pretty v. Dodd, 18 B.C.R. 640.

Transferring employees without their consent.

An employer cannot transfer to another the personal services of his workmen or apprentices without their consent. Consequently the transferee cannot demand from them the continuation of the services that they had undertaken to render to the transferor nor exercise against them the remedy in damages for a breach of the contract that they had entered into with the transferor. Nor can he compel his employees to fulfil their obligations towards him when he has not himself fulfilled his own, especially when he has failed to pay their wages regularly.

Julien v. Auger, 52 Que. S.C. 472.

Authority of general manager of company to engage medical attendance for injured workman.

Ledwell v. Charlottetown Light & Power Co., 13 E.L.R. 225.

(§ I A—4a)—Rights of, in patents obtained by servant while employed by Master.

The question of the respective rights of Master and servant in patents obtained by the servant must be decided in each particular case upon the facts of that case.

Imperial Supply Co. v. G.T.R. Co., 7 D. L.R. 504, 14 Can. Ex. 88, 11 E.L.R. 340.

(§ I A—4b)—Employment of infant.

A contract for hire of services between a boy 12 years of age and an industrial company is absolutely void and can have no legal existence as it contravenes a law of public order. If the boy meets with an accident in the course of his work his father may recover damages at common law but

not under the Workmen's Compensation Act.

Boutin v. Corona Rubber Co., 13 Que. P.R. 282.

B. When relation exists.

(§ I B—5)—Masters and Servants Act, R.S.S. 1909, c. 149—Hiring of man and team—Act applying to contracts of personal service only.

R. ex rel. Coulter v. King, [1919] 2 W.W.R. 164.

(§ I B—7)—For purpose of fixing master's liability to servant.

An employee is shewn to have been injured during and in consequence of his employment with the railway where it appeared that he, with others, was hired by the conductor to dig out a freight train stalled in snow, and was told at the time of the hiring that he would be carried to the place and back and after the train was dug out the men, at the invitation of the conductor, went into the caboose to warm themselves and to wait to go back and, while they were there waiting, another train collided with the caboose and caused the injuries complained of. [Holmes v. Great Northern R. Co., [1900] 2 Q.B. 409, approved.]

Gordon v. C.N.R. Co., 2 D.L.R. 183, 5 S.L.R. 169, 20 W.L.R. 705, 2 W.W.R. 114.

Actress—Weekly salary—Time at disposal of company—Not a servant—Ontario Companies Act (R.S.O. 1914, c. 178).

A motion picture actress engaged by a theatrical company, at a weekly salary, to play the parts as cast, and whose time is at all times to be at the company's disposal, is not a servant of the company within the meaning of the Ontario Companies Act (R.S.O. 1914, c. 178), and cannot recover unpaid wages under s. 98 of the Act. [Welch v. Ellis, 22 A.R. (Ont.) 255, followed.]

Ryan v. Wills, 44 D.L.R. 634, 43 O.L.R. 624.

That a gang of labourers working on the construction of an irrigation ditch early in the winter season should lay off work during an extremely cold day by reason of their not yet having prepared themselves with suitable clothing for severe weather does not ipso facto constitute an abandonment of the employment nor terminate their status as employees.

Wakuryk v. McArthur, 6 D.L.R. 66, 21 W.L.R. 160.

A chief engineer of a vessel, even though in receipt of regular wages during the off season, and prior to the date fixed for his actively commencing work, under the terms of his hiring and while not engaged in work, for his employer, is in the same position in respect to injuries sustained by him by reason of the defective condition of his employer's premises upon which he went voluntarily for his own purposes as a stranger would be, and an action based upon the relationship of master and servant and of the Workmen's Compensation Act utterly fails.

King v. Northern Navigation Co., 6 D.L.R. 69, 27 O.L.R. 79, 22 O.W.R. 697.

One who contracts to take coal from a mine, and over whom the mine owner has no control, is not a workman within the meaning of the Alberta Workmen's Compensation Act, 1908.

Re Reid and Leitch Collieries, 5 D.L.R. 50, 4 A.L.R. 338, 21 W.L.R. 689, 2 W.W.R. 385.

When relation exists—Workman's compensation — Accident to painter — Payment by the hour—Right of action—R.S.Q. 1909, art. 734.

Though there may be serious doubts as to whether or not a painter who has sustained a fall in working on a house for so much per hour is entitled to sue under the Act respecting accidents to workmen, his application for leave to sue will not be dismissed in limine.

Gagnon v. Demers, 15 Que. P.R. 100.

(§ I B—7)—Proceedings by servant—Contract for one month certain—Continuance in employment — Effect.

Halter v. Goody, 4 S.L.R. 161, 17 W.L.R. 261.

Employment of sales-agent—Substituted contract made by general manager—Informal acceptance by company—Validity.

Denman v. Clover Bar Coal Co., 17 W.L.R. 702.

(§ I B—8)—Under supervision of engineers—Fixed scale.

A man who agrees to do work on a fixed scale of prices at so much per yard, etc., or furnishes materials and work at so much per foot under the supervision of engineers, surveyors, etc., is not a builder nor even a subcontractor within the meaning of art. 1688 C.C. (Que.); he is merely a workman.

Stilwell-Bierce v. Lyall, 3 D.L.R. 369.

C. Compensation; wages.

Price of work not agreed, reasonable price, see Contracts, II D—190.

(§ I C—10)—Wages.

Where the statute (R.S.C., c. 113) fixed the salary of a harbour master, whom the Crown could dismiss at any time, "at the rate of" $600 per annum, and provided that he should, on December 31 of each year, pay to the Crown all harbour fees collected during the year, less his compensation, and that if the amount of fees should be less than $600, the lesser amount would constitute his salary, he can, upon his discharge after serving the first month of a year, retain as remuneration $50 only, the proportionate share of his annual salary he had actually earned, and not $229 in fees collected during the previous month, as his compensation will be determined by the con-

tract of employment, and not by the manner and time of accounting for the fees received by him.

The King v. McLeod, 4 D.L.R. 491, 17 B.C.R. 189, 21 W.L.R. 517, 804, 2 W.W.R. 578.

COMPENSATION — SUPERINTENDENT — COMMISSION ON SAVINGS IN COST—CHEAPENING WORK.

One employed to superintend the construction of a waterworks system for a municipality who, in addition to a fixed allowance, was to receive a commission on any saving effected by him from the estimated cost, may be refused any commission where he permitted material deviations from the original plans to such an extent that, while the initial cost was cheapened, the municipality would have to spend a sum in excess of the difference to place the system upon an efficient basis conformable to the original plans. The expenses of preliminary advertising, searching of titles, preparing and registering right-of-way plans, and of making a final examination of the work on completion are presumably not included in the item of "contingencies 10 per cent" included in the estimate of the cost of a public work supplied by the engineer of a municipality and which formed the basis of an agreement for the latter's remuneration.

McArthur v. Cardston, 13 D.L.R. 575, 24 W.L.R. 850.

CONTRACT OF EMPLOYMENT—AUTHORITY OF FOREMAN.

A railway company is not liable to an employee as for breach of an agreement by its foreman to allow such employee, as pay for his services and in addition to per diem wages, to cut hay growing on the company's premises, where the wages proper agreed upon were at the maximum rate which the foreman, who employed him, was authorized to allow, and where there was no shewing that the foreman was authorized to bind the company by the agreement respecting the hay, though it was his duty to see that the hay was removed.

Cleveland v. G.T.R. Co., 11 D.L.R. 118, 15 Can. Ry. Cas. 165, 4 O.W.N. 1281, 24 O.W.R. 586.

WRONGFUL DISCHARGE — MEASURE OF DAMAGES—MITIGATION.

In an action for breach of contract by the master, profits derived by the servant out of the employer's business which he could not have earned if the contract had been performed should be deducted from the damages.

Cockburn v. Trusts & Guarantee Co., 37 D.L.R. 701, 55 Can. S.C.R. 264, affirming 33 D.L.R. 159, 38 O.L.R. 396, reversing 32 D.L.R. 451, 37 O.L.R. 488.

CONTRACT FOR FIRST YEAR'S SERVICES—NO DEFINITE CONTRACT FOR SECOND—TERMINATION BY EMPLOYEE ON MONTH'S NOTICE — WAGES — RIGHTS OF PARTIES — CONSTRUCTION OF CONTRACT.

Haber v. Buttery, 46 D.L.R. 681.

WAGES ON WRONGFUL DISCHARGE.

A servant who has been wrongfully dismissed may recover against the master on a quantum meruit for the services rendered, although the contract of hiring did not comply with the Statute of Frauds inasmuch as it was not to be performed within a year of the making thereof. [Rose v. Winters, 4 Terr. L.R. 353, followed.]

Smith v. Mills, 10 D.L.R. 589, 6 S.L.R. 181, 23 W.L.R. 553, 3 W.W.R. 1066, affirming 8 D.L.R. 1041, 3 W.W.R. 172.

SERVICES WITHOUT SPECIFIC CONTRACT — QUANTUM MERUIT.

Where the court finds that there was no concluded agreement of hiring for the specific length of time contended for by the employer, as the employee had never understood that the hiring was for such term, nor assented thereto and the agreement was not in writing, the employee will be entitled to recover upon a quantum meruit for the services he had rendered.

Ness v. Babcock, 9 D.L.R. 636, 6 S.L.R. 218, 23 W.L.R. 547, 3 W.W.R. 1144.

EMPLOYEE SHARING "NET PROFITS"—MONTHLY ACCOUNTING—SCOPE OF—MONTHLY "NET LOSS," HOW BORNE—MEANING OF GOODWILL.

Under a contract of employment whereby the employee was to have one-half of the "net profits of the business after deducting all rents, advertisements and other expenses" with an accounting each month, the cost of getting the goods in and of repairs and alterations of the store premises, may, in the absence of any intention shewn to the contrary, be charged against the month in which they were incurred, although their main advantage was to follow in later months; and, semble, under such an agreement each month's business must stand by itself and only net profits for the month divided, the employer alone standing the losses in months in which no profit was made. The "fraud" which in the terms of the Master and Servant Act, 10 Edw. VII. c. 73, s. 3, must be shewn in order to impeach a statement or return made by an employer of the net profits a share in which he had contracted to give his employee by way of remuneration for his services, must involve dishonesty; mere mistake is not enough. [Ex parte Watson, 21 Q.B.D. 301, applied.] A right of an employee to a stated share in the "net profits" of the business under the terms of his contract of employment does not entitle him to share in what his employer received on selling out for the goodwill of the business. [Sims v. Harris, 1 O.L.R. 445, applied.]

Washburn v. Wright, 19 D.L.R. 412, 31 O.L.R. 138.

ARCHITECT — PREPARATION OF PLANS AND SPECIFICATIONS — REMUNERATION — EVIDENCE—AGENCY—RATIFICATION.

Armes v. Mancil, 5 D.L.R. 885, 4 O.W.N. 93, 23 O.W.R. 50.

ILLNESS OF SERVANT—RIGHT TO WAGES.

A head waiter in a hotel is as a servant entitled to his wages or salary during absence through temporary illness, provided that the contract of service remains in existence during that time, and that he is ready and willing to carry out his duties save for the incapacity produced by the illness; but the illness of the servant may so go to the root of the consideration as to justify the master in rescinding the contract.

Montague v. G.T.P.R. Co., 23 D.L.R. 355, 25 Man. L.R. 372, 8 W.W.R. 528.

REMUNERATION BASED ON "NET PROFITS."

Where a contract of hiring depends entirely on the "net profits" realized from sales which the employee has been directly or indirectly instrumental in making, the court will not be astute to deprive the employee of such profits where it seems reasonably clear that they have been earned, and in determining the "net profits" a just proportion of the overhead charges of the business should be allocated to that quantum of business done in which the employee is to participate.

Whyte v. McTaggart, 22 D.L.R. 8, 31 W.L.R. 654.

PER DIEM CHARGE—AGREEMENT.

Where at the time of the hiring the person hired told the employer what the per diem charge would be for the service, that should be the basis of compensation as constituting an agreement to pay that amount and not merely a quantum meruit, where the service was accepted and no variation of such compensation was discussed.

Bain v. Cochana, 23 D.L.R. 619.

ACCOUNTING AS CONDITION PRECEDENT TO RECOVERY.

A manager, who on receipt of a notice of dismissal delivers to his employer his books and everything which has been entrusted to him, is not obliged to render an account, when not demanded by the employer, before suing for his salary.

Gallagher v. Confer, 48 Que. S.C. 303.

WAGES—WHAT CONSTITUTES—DIVISION OF PROFITS—TRUCK ACT.

Gaffo v. MacDonald, 24 D.L.R. 890, 32 W.L.R. 966.

CONTRACT OF EMPLOYMENT — INFANT EMPLOYEE—WAGES—INCREASE IN—COUNTERCLAIM AND SET-OFF — FINDINGS OF FACTS.

Hogate v. Hogate, 24 D.L.R. 900, 31 W.L.R. 843.

CONTRACT OF HIRING — SALARY — BONUS — DISMISSAL — REASONABLE NOTICE — DAMAGES IN LIEU OF.

Evans v. Fisher Motor Co., 8 O.W.N. 19.

WAGES—PERIOD OF TEMPORARY INCAPACITY BY REASON OF ILLNESS.

A servant is entitled to his wages or salary during absence through temporary illness, provided that the contract of service remains in existence during that time, and that he is ready and willing to carry out his duties save for the incapacity produced by the illness. Review of authorities. [Cuckson v. Stones (1858), 28 L.J.Q.B. 25, followed.]

Colman v. Naish, 28 W.L.R. 487.

MISCONDUCT—RIGHT TO SALARY.

Misconduct on the part of an employee does not disentitle him to previously earned salary.

Canada Bonded Attorney v. Leonard-Parmiter, 42 D.L.R. 342, 42 O.L.R. 141, varying 12 O.W.N. 388.

CHANGE OF SALARY—EFFECT—DISMISSAL.

Where, during the employment, the salary of the employee is changed from a fixed salary of $125 per month with a commission of 10 per cent to a sole commission of 20 per cent the contract of hire itself is not affected and remains in force. The employer is bound to pay to his employee the agreed salary, whether he is satisfied or not with his services, as long as he does not choose to put an end to the contract.

Ritchie v. Spence, 24 Rev. Leg. 297.

HIRE OF SERVICE—CLERK—PROOF OF HIRING—PREFERENTIAL CLAIM—QUE C.C. 1233, 1994, 2006—R.S.C. 1906 c. 144, s. 70.

A yearly engagement of a clerk by a merchant can be proved by parol evidence. This engagement can also be shewn by the execution of the contract between the parties. Clerks have a preferential claim upon goods which are found in their employer's shop, for a period not exceeding 3 months.

Abeles v. Turgeon, 23 Que. K.B. 533.

TRAVELING SALESMAN—COMMISSIONS.

A manufacturer employing a traveler to be paid by commission for the sale of certain products, who afterwards, by agreement with the traveler, changes his business and the commission payable but retains the services of the latter, thereby tacitly agrees that the contract made between them shall continue on the same conditions except as to the modifications agreed upon. A provision in the contract that the traveling agent will be the only representative for a certain town does not give him the exclusive right of sale. If the agent cannot cover this territory within a reasonable time, the employer may, without violating his contract, employ another agent to cover the ground which the first was unable to cover within the time.

Picher v. Marceau, 51 Que. S.C. 305.

Where a traveling salesman is employed on the basis of a commission payable on sales that are ratified, the goods delivered and the price paid, and the employer reserves the right to cancel sales made to customers whose former debts were not paid at maturity, the salesman cannot demand any commission on such sales, nor upon sales lost by the insolvency of the purchaser, even after the extended time agreed to by the employer, unless he prove that it was by the gross negligence on the employer's

part that the latter was not paid by these customers.

Drolet v. Tousignant, 52 Que. S.C. 320.

CLAIM FOR ARREARS OF WAGES—PROMISE TO INCREASE WAGES—EVIDENCE—FAILURE TO ESTABLISH CLAIM.

Ball v. Winters, 11 O.W.N. 360, affirming 11 O.W.N. 92.

CLAIM BY ENGINEER AGAINST MINING COMPANY FOR ARREARS OF SALARY — EVIDENCE—DISPUTED QUESTIONS OF FACT—CREDIBILITY OF WITNESSES—ACCOUNT—COUNTERCLAIM—PATENTS FOR INVENTIONS—PARTNERSHIP IN—DECLARATION—HALF INTEREST—REFERENCE—COSTS.

Spearman v. Renfrew Molybdenum Mines, 15 O.W.N. 343. [Affirmed, 17 O.W.N. 466.]

UNDER RAILWAY CONTRACT.

Debts owing to workmen employed on the works of construction of a railway become the personal debts of the company owning the railway, where the company has made payments to the contractors after having received notice of the claims of the workmen: and no distinction can be made between those workmen who were employed by the principal contractor and those who were employed by subcontractors.

Rheaume v. St. Charles & Huron R. Co., 50 Que. S.C. 112.

Where the plaintiff contracted to work for the entire season and left without cause before the end of the season, yet, as the wages were reserved monthly, he was entitled to recover for the time he worked. While the contract might be susceptible of a construction that the wages were not to be paid until the end of the season, yet the form of the defendant's defence in alleging that "the defendant agreed to employ the plaintiff" for the season "at $35 per month" precluded the defendant from now contending that the contract was otherwise than as so alleged.

Grant v. Bradley, 4 S.L.R. 505.

SPECIAL SERVICES — NURSING — PRESCRIPTION.

A sister employed as housekeeper by her bachelor brother, at a yearly salary, who has served him as nurse during his illness, thereby renders special services, and is entitled to extra compensation. The prescription of a year in art. 2262 C.C. (Que.) does not apply to such claim.

Fortin v. Fortin, 49 Que. S.C. 267.

ACTION FOR WAGES — SET-OFF — NOTICE OF DISMISSAL.

B. obtained judgment for $100 wages, but failed on a claim for $100 as a month's wages in lieu of notice. Held, that the employer of B. was entitled to set off a sum of $749 (a sum which had come to his hands and he had failed to account for, whether that failure was attributable to negligence or dishonesty) as an answer to B.'s judgment.

Bahme v. Great Northern R. Co., [1917] 1 W.W.R. 1255.

WAGES—SMALL DEBT ACTION—WAGES PAYABLE MONTHLY.

Grant v. Bradley, 18 W.L.R. 668.

WAGES, MEANING OF WORD—ACT RESPECTING ASSIGNMENTS OF WAGES.

Coupez v. Lear, 20 Man. L.R. 238, 16 W.L.R. 401.

CONTRACT BETWEEN AGENT AND INSURANCE COMPANY — COMMISSION ON RENEWAL PREMIUMS—DEATH OF AGENT.

Skinner v. Crown Life Ins. Co., 2 O.W.N. 647, 18 O.W.R. 455. [See also 44 Can. S.C. R. 616.]

"CLERKS OR OTHER PERSONS"—COMMERCIAL TRAVELER — PREFERRED CLAIMS FOR WAGES AND EXPENSES—ASSIGNMENT OF CLAIM—STATUS OF ASSIGNEE.

Re Morlock & Cline, Sarvis and Canning's Claims, 23 O.L.R. 165, 18 O.W.R. 545.

(§ I C—11)—MEDIUM OF PAYMENT.

An engagement of an engineer at a salary of $3,000 a year payable monthly is a contract for the term of 1 year and the words "payable monthly" are a mere indication of the manner in which such remuneration is to be paid.

Silver v. Standard Gold Mines, 3 D.L.R. 103.

(§ I C—13)—WHERE SERVANT LEAVES BEFORE CONTRACT PERFORMED.

A contract for service contains an implied condition that if faithful service is not rendered the master may elect to determine the contract, and where that right is properly exercised by the master during the currency of the servant's salary, the servant has no remedy, that is to say, he cannot recover salary which is not due and payable at the time of his dismissal, but which is only to accrue due and become payable at some later date, and on condition that he had fulfilled his duty as a faithful servant down to that later date.

Murray v. Coast Steamship Co., 8 D.L.R. 378, 17 B.C.R. 469, 22 W.L.R. 572, 3 W.W.R. 153.

QUITTING SERVICE DURING TERM.

A servant who, without just ground, quits his employment before the expiration of his term of service cannot recover for his services.

Beller v. Klotz, 31 D.L.R. 647, 9 S.L.R. 419, [1917] 1 W.W.R. 585.

RIGHT TO WAGES UPON LEAVING EMPLOYMENT — JUST CAUSE — INFERIORITY OF FOOD.

Inferiority in the quality of food for which no reasonable opportunity to remedy the complaint is given by the servant to the master does not constitute a just cause for leaving the employment so as to entitle the servant to a recovery of wages for the unexpired term of employment.

Pratt v. Idsardi, 23 D.L.R. 257, 21 B.C.R. 497, 31 W.L.R. 541.

SEAMAN'S WAGES—FISHERMEN—DESERTION.

A fisherman who unjustifiably deserts his ship before the performance of his contract

cannot recover for his services upon the express agreement nor upon a quantum meruit.
Selig v. Arenburg, 35 D.L.R. 608, 51 N.S. R. 198.

WAGES—LEAVING EMPLOYMENT DURING TERM—FARM WORK.
Neville v. Macdonald, 36 D.L.R. 594, 10 S.L.R. 284, [1917] 3 W.W.R. 240.

WAGES—SERVANT LEAVING BEFORE CONTRACT PERFORMED.
Farrow v. Gardner, 12 D.L.R. 843, 24 W.L.R. 929.

SAILORS—SALVORS—WAGES.
If a ship is driven on the coast and becomes a wreck and the sailors escape to the land, and successfully act as salvors so as to save enough to pay their wages, they are entitled to them, though not to salvage.
Young v. The Ship "Minnie A.," 40 D.L.R. 408, 17 Can. Ex. 19.

WAGES—IMPLIED CONTRACT TO PAY.
Angel v. Bresnik, 17 W.L.R. 233.

WAGES—SUMMARY ORDER—BREACH OF CONTRACT BY SERVANT.
Re Anderson and Bissonnett, 19 W.L.R. 73.

D. HOURS OF LABOUR.

(§ I D—15)—It is the duty of an able-bodied seaman in service on a ship to obey the master of the ship, and he cannot refuse to work at cargo on Sundays simply to vindicate a principle against Sunday work.
Murray v. Coast Steamship Co., 8 D.L.R. 378, 17 B.C.R. 469, 22 W.L.R. 572, 3 W.W.R. 153.

SHIP—SEAMAN—SUNDAY LABOUR IN PORT—REFUSAL TO PERFORM—LORD'S DAY ACT, R.S.C. 1906, c. 153, s. 12.
Green v. C.P.R. Co., 18 W.L.R. 608.

E. TERMINATION OF RELATION; DISCHARGE; ENTICING.

Sufficiency of notice of dismissal, see Schools, II C—40.
Liability for procuring wrongful discharge, see Conspiracy, II B—15.
Measure of damages for wrongful discharge, see Damages, III A—85.

(§ I E—20)—TERM OF EMPLOYMENT—CONCURRENT AGREEMENTS.
Where a contract of employment provides for an annual salary for 3 years, with a clause that the term of employment is to run "concurrently with the term of a certain agreement," which was for 21 years, terminable at the end of 7 years, the term of hiring must be deemed to be governed by the latter clause.
Goldie v. Cross Fertilizer Co., 37 D.L.R. 16, reversing 28 D.L.R. 477, 49 N.S.R. 540.

HIRE OF SERVICES—COMMERCIAL TRAVELER—ANNUAL ENGAGEMENT—DISMISSAL OF SERVICE—C.C. ARTS. 1642, 1667.
In default of proof to the contrary, when the salary of a commercial traveler is fixed at so much a year, and it has been thus entered in the books of his employer, the engagement is for a year; the fact that the salary is payable in monthly payments does not change the duration of the engagement. The quietness of business, not due to the fault of the employee, is not a justifiable cause for his dismissal. In this case of an engagement for a year, the burden of proof of breach of the contract by the employee, or the mutual consent pleaded by the employer, is upon the latter. If an employer suspends the work of his employee for two months, with the promise to take him back to his position after the lapse of that time, the latter is free to look for work elsewhere, and this step can be considered as an abandonment of his engagement.
Walters v. Dumontier, 25 Rev. Leg. 1.

ANNUAL CONTRACT—EFFECT ON BY INCREASE IN SALARY.
A contract for the hire of services of a manager a salary of $2,700 a year payable in 12 monthly payments is a contract for one year. Nor is such contract annulled by the fact that the salary had been increased during the year.
Gallagher v. Confer, 48 Que. S.C. 302.

HIRING OF SALESMAN FOR DEFINED TERRITORY ON SALARY AND COMMISSION—BREACH OF AGREEMENT.
Grocock v. Allen, 5 O.W.N. 340, 25 O.W.R. 304.

(§ I E—21)—RIGHT TO DISCHARGE—DISREGARD OF INSTRUCTIONS.
An employer is justified in discharging, without notice, a traveling salesman employed by him where it appears that the salesman disregarded instructions to keep in communication with the employer, and failed to travel with his trunks, in spite of instructions from his employer that this was absolutely essential, notwithstanding that the contract of employment provided that it was terminable by either party by giving a month's notice.
Braden v. Reid, 9 D.L.R. 668.

REFUSAL TO WORK — DISCHARGE — VILE NAMES—CONDONATION.
Refusal on the part of a servant to perform the duties for which he was hired gives the master the right to dismiss him, but does not justify the master in insulting him by calling him vile names. The servant does not necessarily condone the offence because he does not leave the employ immediately, especially if the offence is again committed after a few days, after which the servant does leave the employ.
Berg v. Cowie, 40 D.L.R. 250.

NOTICE—MISCONDUCT.
The period of notice stipulated in a contract of employment or the proportionate remuneration in lieu thereof, in the event of a termination of the relationship upon a failure to carry out the duties in accordance with the contract, does not affect the master's right of dismissal without remunera-

tion for any misconduct or a wilful breach of duty.

Buxton v. Lowes, 23 D.L.R. 848, 31 W.L.R. 768.

ILL HEALTH OF SERVANT—REFUSAL TO WORK —DISMISSAL NOT JUSTIFIED.

A master is not justified in dismissing a servant for refusal to obey an order to do certain work if the state of the servant's health is such that he is not fit to do the work.

Michaud v. Stroobants, [1919] 3 W.W.R. 46.

(§ I E—22)—GROUND FOR DISCHARGE—DISOBEDIENCE OF UNREASONABLE ORDER.

In order to justify the dismissal of a servant by his master on the ground that the servant disobeyed the orders of the master, it must appear that there was, on the part of the servant, wilful disobedience to the lawful and reasonable order of the master, and this fact is not established merely because the servant refused to answer a general call of the master to his servants to assist in loading a waggon where it appears that the servant honestly believed that his services were not required at that moment because he thought there were sufficient men answering the call to accomplish the master's object.

Smith v. Mills, 10 D.L.R. 589, 6 S.L.R. 181, 23 W.L.R. 553, 3 W.W.R. 1066, affirming 8 D.L.R. 1041, 3 W.W.R. 172.

ABSENCE WITHOUT LEAVE — MISCONDUCT — DISMISSAL—JUSTIFICATION.

A servant who absents himself from work without leave for two weeks and three days is guilty of misconduct justifying dismissal unless he can satisfy the burden which is on him of proving that he had leave to go on this vacation.

Lucking v. Thomas, 50 D.L.R. 724, 12 S.L.R. 407, [1919] 3 W.W.R. 585.

GROUNDS FOR DISMISSAL.

No wrongful dismissal of an employee hired to travel for his employers and to assist their local agents in selling goods, is shewn where the reason for the dismissal was the employee's receipt of a bonus from the agents for his assistance to them.

Tebb v. Baird; Tebb v. Hobberlin; Hobberlin v. Tebb, 3 D.L.R. 161, 3 O.W.N. 952.

GROUNDS FOR DISCHARGE OF EMPLOYEE.

There is no absolute legal rule as to what is a justification for the dismissal of an employee before his term of employment has expired; each case must stand on its own merits; lack of executive ability resulting in great financial loss to a company is sufficient to justify the dismissal of their general works manager.

Bashford v. Provincial Steel Co., 10 D.L.R. 187, 4 O.W.N. 1019, 49 C.L.J. 336, 24 O.W.R. 334.

GROUNDS FOR DISCHARGE—DISSATISFACTION WITH RESULTS — MISCONDUCT — INCOMPETENCY.

Where, under a written contract of hiring the defendants employed the plaintiff as traveling salesman at a fixed salary and commission for one year certain, the hiring to be extended for another year if defendants were satisfied with the results, but there was not expressly reserved any right of dismissal for mere dissatisfaction within the first year: and where, under such agreement the plaintiff acted faithfully, pursuant to instructions, but because of want of results the defendants before the expiry of the first year became dissatisfied and upon that ground alone dismissed the plaintiff; such dismissal was wrongful in the absence of misconduct or incompetence on plaintiff's part.

Carveth v. R. Asbestos Packing Co., 9 D.L.R. 631, 4 O.W.N. 872, 24 O.W.R. 151.

GROUNDS—INSUBORDINATION.

A servant may be summarily dismissed if he is insulting and insubordinate to such a degree as to be incompatible with the continuance of the relation of master and servant.

Montague v. G.T.P.R. Co., 23 D.L.R. 355, 25 Man. L.R. 372, 8 W.W.R. 528.

GROUNDS—DISOBEDIENCE OF INSTRUCTIONS —DISPOSITION OF BANK FUNDS.

A disregard by a manager of his master's instructions as to the disposition of bank funds, over which the manager has a power of attorney, amounts to a misconduct which will justify his dismissal by the master.

Buxton v. Lowes, 23 D.L.R. 848, 31 W.L.R. 768.

MUNICIPAL EMPLOYEE—GROUND FOR DISMISSAL.

The refusal of a municipal employee to discontinue living in apparent open adultery when threatened with dismissal if he continued, is sufficient to justify such dismissal.

McPherson v. Toronto, 43 D.L.R. 604, 43 O.L.R. 326.

TERM—IMPLIED RENEWAL—MUNICIPAL EMPLOYEE.

The engagement by a municipal corporation, for the term of a year, of a civil engineer charged with the superintendence of public works, is a contract of hire of services susceptible of continuing by tacit renewal. In order that there may be a tacit renewal it is not sufficient that the employee continue his services after the term ended, but the services so continued must be with the tacit consent of the employer.

Lessard v. Levis, 54 Que. S.C. 139.

TERM OF EMPLOYMENT—DISMISSAL—SALARY—DAMAGES.

By-laws adopted by a joint stock company, which order that the annual meeting of shareholders shall take place the first of February for the election of directors, and that the manager shall be chosen from among the directors, at their first meeting, establish that the engagement of the manager is by the year. A dismissed employee has not the right to sue for his future sal-

ary; he can only claim what is due. He ought, under the circumstances, to bring his action in the form of an action for damages, which are usually the amount of the salary which he should have received, less what he has earned or might earn.

Malherbe v. Orkin, 54 Que. S.C. 274.

WRONGFUL DISMISSAL—REMEDY—WAGES—DAMAGES.

An employee dismissed before the termination of his engagement, without sufficient reason, has not only a right of action, but also a right to sue for wages due. It is for the employer to prove the wages or damages of the employee.

Marchand v. Jean, 54 Que. S.C. 279, 24 Rev. de Jur. 492.

DISMISSAL—DISOBEDIENCE TO ORDERS.

Youngash v. Saskatchewan Automobile & Gasoline Engine Co., 4 S.L.R. 63, 16 W.L.R. 268.

(§ I E—23)—LIABILITY FOR WRONGFUL DISCHARGE.

The defendant employed the plaintiff under a written agreement in the following terms: "As a draughtsman and generally in survey work for 3 months or until the drafting and survey work in connection with a certain contract to survey certain C.N.P. R. Co.'s rights of way held by the employer, at $165 per month, and thereafter to complete a term of 3 years from the date of this agreement in the said employment at the rate of $125 per month." Plaintiff worked under the $165 wage for 9½ months, when the defendant told him that the contract with the C.N.P. Ry. was completed and he (plaintiff) would in future work under the $125 wage. The facts were that, although the defendant had been paid in full for his work under the contract, the drafting had not been completed. On the following day the defendant asked the plaintiff to make certain changes in this drafting, which plaintiff refused to do under the $125 wage. He was dismissed:—Held, that there was a breach of contract and that the measure of damages be $165 per month from the date of plaintiff's discharge to the time of his new employment.

Pos v. Johnson, 14 D.L.R. 447, 18 B.C.R. 159.

WRONGFUL DISCHARGE — HINDERING PERFORMANCE OF DUTIES.

A company having engaged a general manager is liable in damages for breach of the contract of employment, if during the currency of the term, by resolution of the directors, it materially lessens his authority under the contract and makes it impossible for him to discharge his duties thereunder.

Montreal Public Service Co. v. Champagne, 33 D.L.R. 49.

WRONGFUL DISMISSAL—EMPLOYEE OF MUNICIPALITY—WAGES FIXED BY DAY—NOTICE—LIABILITY—RURAL MUNICIPALITIES ACT, S. 148.

A superintendent of road work in a municipality is regarded as a municipal officer, and may be dismissed at the pleasure of the municipal council. This superintendent being hired at so much per day, cannot claim notice; neither can reimbursement for any moneys paid out be claimed except such expenses as were authorized by the municipality.

Stonehenge v. Dickenson, 50 D.L.R. 383, [1920] 1 W.W.R. 235.

An engineer engaged to superintend or manage a mine is entitled to employ a secretary to look after the routine business, correspondence, etc., and generally to use his discretion as to the manner in which he shall discharge his duties, and unless a clear abuse of such discretion is shewn, his employer cannot dismiss him before the term of his engagement.

Silver v. Standard Gold Mines, 3 D.L.R. 103.

LIABILITY OF MASTER FOR WRONGFUL DISMISSAL—RES JUDICATA—FORMER PROCEEDINGS UNDER THE MASTERS AND SERVANTS ORDINANCE.

Chekaluk v. Webster, 7 D.L.R. 866, 21 W.L.R. 159.

WRONGFUL DISMISSAL — GROUNDS UNDISCLOSED.

In an action by an employee against an employer for damages for wrongful dismissal, the employer may justify the dismissal on grounds never disclosed to the servant, and even on grounds that the master did not know about at the time of the dismissal.

Archibald v. Hygienic Fresh Milk Co., 9 D.L.R. 763, 47 N.S.R. 150, 12 E.L.R. 189. [Affirmed, 11 D.L.R. 416, 47 N.S.R. 150, 13 E.L.R. 92.]

LIABILITY FOR WRONGFUL DISCHARGE—EFFECT OF RECOVERY FOR PORTION OF TIME UNEMPLOYED — ESTOPPEL — RES JUDICATA.

The recovery by a servant of wages for the month following his wrongful dismissal from a yearly hiring, estops the parties from asserting that he was not entitled to the amount recovered qua wages, and also negatives a contention that the wrongful discharge applied to that month; therefore the wrongful dismissal will not take effect until the following month, when the servant may recover damages therefor for the balance of the term of his employment.

Hayes v. Harshaw, 18 D.L.R. 619, 30 O.L.R. 157.

WRONGFUL DISMISSAL—ELECTION OF REMEDIES.

Gregory v. Williams, 30 D.L.R. 279, 44 N.B.R. 204.

The contract for hire of personal services may be continued by tacit renewal. The employee hired for 1 year, at a salary payable by the week with an agreement for 1 month's notice by either party to terminate the engagement, if dismissed without notice has a right of action against his

employer for the amount of his salary for four weeks.

Choquette v. Paquette Co., 42 Que. S.C. 204.

When a contract which can be validly proved by oral evidence is made in writing oral testimony of variations made to it by the parties is admissible. An employee engaged for a term and dismissed without cause before its expiration has a right of action against the hirer of his services to recover the stipulated salary as its instalments fall due.

Charbonneau v. Publishers' Press, 42 Que. S.C. 97.

GROUNDS FOR DISCHARGE—THEFT—INJURIOUS WORDS.

An employer, who in unusual circumstances finds something belonging to him in the possession of his employee, the latter attempting to excuse himself by alleging a mistake, evidently ill founded, has probable cause for believing that it had been stolen by the latter and is justified for giving as a reason, when dismissing him from service, that he was a dishonest man and had committed theft.

Desjardins v. Reinhardt Mfg. Co., 52 Que. S.C. 27.

CHIEF OF POLICE AND FIRE BRIGADE—YEARLY CONTRACT—DISMISSAL—JUSTIFICATION—DAMAGES.

Where a municipal council engaged an official under a yearly salary and dismissed him during the engagement, the council must justify the cancellation of the contract or be condemned in damages.

Leguerrier v. St. Pierre, 25 Rev. de Jur. 437.

ACTION FOR WRONGFUL DISMISSAL—FINDING OF FACT.

Jacobs v. Glassco, 9 O.W.N. 351.

ACTION FOR WRONGFUL DISMISSAL OF SERVANT — EVIDENCE — TERMINATION BY SERVANT OF CONTRACT OF HIRING.

Campbell v. Sutherlands, 13 O.W.N. 428.

WRONGFUL DISMISSAL—ACTION FOR—DEFENCES — MISCONDUCT — INSOLENCE—EVIDENCE — CONTRACT — VALIDITY—COMPANY — EXECUTION OF DOCUMENT UNDER SEAL—SIGNATURES OF PRESIDENT AND SECRETARY—PART PERFORMANCE—DAMAGES—COSTS.

Goldbold v. Puritan Laundry Co., 12 O. W.N. 343.

DISMISSAL—SALARY IN ARREARS ON A PROMISSORY NOTE—DAMAGES FOR WRONGFUL DISMISSAL—REFUSAL TO OBEY ORDERS—DISMISSAL JUSTIFIED.

Dietrich v. Goderich Wheel Rigs Co., 3 O.W.N. 401, 20 O.W.R. 676.

WRONGFUL DISMISSAL—ASSAULT—DAMAGES—WAGES.

Cowper-Smith v. Evans, 7 O.W.N. 179.

DISMISSAL OF SERVANT—ACTION FOR WRONGFUL DISMISSAL — JUSTIFICATION — ACQUIESCENCE.

Wilson v. Sanderson-Harold Co., 4 O.W.N. 1403, 24 O.W.R. 686.

WRONGFUL DISMISSAL—MEASURE OF DAMAGES — CORPORATION — SEAL — LIABILITY OF COMPANY UPON CONTRACT NOT UNDER ITS SEAL — PRESUMPTION OF YEARLY HIRING.

Armstrong v. Tyndall Quarry Co., 20 Man. L.R. 254, 16 W.L.R. 111.

WEEKLY SALARY AND PERCENTAGE ON PROFITS—RIGHT TO TERMINATE CONTRACT ON GIVING A MONTH'S NOTICE—SUMMARY DISMISSAL.

Christie v. Denenberg, 40 Que. S.C. 450.

(§ I E—25)—LENGTH OF NOTICE—TERMINATING EMPLOYMENT.

Where a railway conductor had been employed continuously for 12 years by the same railway company, and the practice of the company had been not to dismiss employees of that grade in their service without holding an official inquiry, it may be assumed, in the absence of any contract to the contrary, that he should have a reasonable notice of the termination of his engagement other than for cause, and damages for wrongful dismissal are properly computed on the basis of the conductor being entitled to 3 months' notice.

Halliday v. C.P.R., 7 D.L.R. 198, 4 O.W.N. 162, 15 Can. Ry. Cas. 275, 23 O.W.R. 168.

MUNICIPAL OFFICERS—NOTICE AND CAUSE.

Under s. 126 of the Villages Act, R.S.S. 1909, c. 86, all officers apointed by the council hold office during the pleasure of the council, the latter having the right to dismiss a person, appointed by resolution as constable and engineer at a monthly salary, without notice or cause. [Wilson v. York, 46 U.C.Q.B. 289; Vernon v. Smith's Falls, 21 O.R. 331; Hellems v. St. Catharines, 25 O.R. 583; Davis v. Montreal, 27 Can. S.C.R. 539, followed.]

Newby v. Brownlee, 27 D.L.R. 509, 9 S.L.R. 207, 34 W.L.R. 278, 10 W.W.R. 249.

MONTHLY EMPLOYMENT—NOTICE OF DISMISSAL.

The employment of an agent at a salary of $200 per month, without conditions and for an indeterminate period, is not one made on trial, but is an employment by the month, and can only be terminated by one month's notice of dismissal.

Garon v. Security Life Ins. Co., 50 Que. S.C. 294.

STATUTORY NOTICE OF DISMISSAL—RETROACTIVE OPERATION — REGULATION OF MUNICIPAL EMPLOYMENT.

A servant of the city of Edmonton, who is not employed under a by-law, is not, by virtue of a provision of the Edmonton Charter, entitled to any notice of dismissal or to any damages for the failure to give such notice, and it is immaterial whether or not the servant was employed before or

after the enactment of the said provision. [Lawler v. Edmonton, 29 W.L.R. 661, followed.]

Hackett v. Edmonton, 30 W.L.R. 551.

DISMISSAL OF SERVANT—CONTRACT OF HIRING—NOVATION—CHANGE IN EMPLOYER—INDEFINITE PERIOD — REASONABLE NOTICE—DAMAGES—COSTS.

Freeman v. Wright, 9 O.W.N. 171.

(§ I E—26)—DISMISSAL—WHAT CONSTITUTES—REVOCATION OF POWER OF ATTORNEY AS GROUND FOR QUITTING.

The revocation by a master of a power of attorney over bank funds given to his manager, and a disapproval of the latter's actions because of his disregard of the master's instructions, does not amount to a dismissal from service as to warrant the servant to quit the employment.

Buxton v. Lowes, 23 D.L.R. 848, 31 W.L.R. 768.

(§ I E—27)—LIABILITY FOR INDUCING DISMISSAL—MALICE.

To induce an employer to dismiss an employee, where the person so inducing the dismissal violates no legal right of the employee, and neither does any illegal act nor uses any illegal means in obtaining his object, does not give the employee any cause of action against the person inducing his dismissal, even though that person is actuated by malicious motives.

Western Commercial Co. v. Rioux, [1917] 1 W.W.R. 486.

II. Liability of master to servant.

A. NATURE AND EXTENT; MASTER'S DUTY.

Injury to switchman, defective system, switch stand too near rails, see Railways, II A—10.

Injury to employee on yard train, statutory signals and warning, see Railways, III —51.

Liability of Crown for negligence of its officers or servants, see Crown, II—20.

(§ II A—30)—DEFECTIVE SYSTEM AND EQUIPMENT OF FACTORY—COMMON LAW LIABILITY.

A common law action will lie for an injury occasioned an employee by defects generally in the system and equipment of a factory.

Gower v. Glen Woollen Mills, 12 D.L.R. 394, 28 O.L.R. 193, affirming 9 D.L.R. 244, 23 O.W.R. 553, 28 O.L.R. 193.

WORKMEN'S COMPENSATION ACT—CHARGE OR CONTROL OF MACHINERY—CHAIN OF NEGLIGENT ACTS.

A workman using a movable hoisting apparatus is in charge or control of it within the meaning of the Ontario Workmen's Compensation Act, R.S.O. 1897, c. 160, R. S.O. 1914, c. 146, where he had to propel it to the place where it was to be used and lower and raise it. Liability under the Ontario Workmen's Compensation Act may be based on a finding of the jury that an employer did not take proper precautions to safeguard his employees from the negligence of fellow-servants, by not furnishing a safe place for the plaintiff to work by reason of permitting an accumulation of material near a steel girder being used in the construction on which the plaintiff was working, which was not properly braced, and which was thrown on the plaintiff as the result of the negligent operation of a hoisting apparatus by another workman, the rules regarding the use of which were not strictly enforced by the employer. A chain of negligent acts resulting in an injury to an employee is sufficient to predicate a liability under the Ontario Workmen's Compensation Act. [Thompson v. Ontario Sewer Pipe Co., 40 Can. S.C.R. 396, distinguished.]

Dunlop v. Canada Foundry Co., 12 D.L.R. 791, 28 O.L.R. 140, affirming 2 D.L.R. 887, 4 O.W.N. 791.

WORKMEN'S COMPENSATION ACT (ALTA.), S. 3.

Braithaity v. Mackenzie, Mann & Co., 19 D.L.R. 869.

The original contractor for the construction of a building, sued by one of the workmen for personal injury resulting from an accident in the course of employment, who pleads that before the date of the accident in question he had assigned his interest in the contract to a third party, (without alleging that the plaintiff had been informed of such assignment, by formal notice or otherwise), and who merely produces a copy of such assignment at the close of the trial, will not be held responsible for the amount claimed as damages in the action, but will be held liable for costs of the action where it appears that the assignee of the contract in the meantime made a settlement with the plaintiff as to the amount of damages.

Leberre v. Beauchamp, 18 Rev. de Jur. 380.

LIABILITY OF MASTER—FAILURE OF FELLOW-SERVANT TO PERFORM STATUTORY DUTY OF MASTER—CONTRIBUTORY NEGLIGENCE.

Linazuk v. Canadian Northern Coal & Ore Dock Co., 5 O.W.N. 642.

(§ II A—35) — NEGLIGENCE — MASTER'S DUTY—COMMON LAW LIABILITY.

An employer who provides a safe place for his servants to work, and equips it with modern tools and appliances, employs a competent foreman, and promulgates rules for the safety of his employees, is not liable at common law for an injury to a servant due to the violation of such rules by a fellow-servant.

Dunlop v. Canada Foundry Co., 12 D.L.R. 791, 28 O.L.R. 140, affirming 2 D.L.R. 887, 4 O.W.N. 791.

"INEXCUSABLE FAULT."

An employer is guilty of "inexcusable fault" in causing an inexperienced workman to work at a round-saw unprotected by any guard, contrary to the factory law regulations, with the help of a mere lad also inexperienced, especially when the inexperience of these employees has been re-

ported to him by his foreman. Three elements go to make "inexcusable fault:" (a) the will to do or not to do, (b) knowledge of the danger which may result from the act or omission, (c) the absence of any justifying or explanatory cause.

Poirier v. LeGrand, 9 D.L.R. 269, 22 Que. K.B. 193, 19 Rev. Leg. 266.

NATURE AND EXTENT—MASTER'S DUTY.

The Workmen's Compensation Act (Que.) presupposes the existence of a legal contract for the hire of services between employer and workman.

Boutin v. Corona Rubber Co., 4 D.L.R. 640, 41 Que. S.C. 519.

HEALTH AND SANITATION — NEGLIGENCE — PROXIMATE CAUSE.

If the negligence of a master causes a decrease in the disease-resisting power of a servant, the master is only liable for damage caused to the servant by an ailment when the negligence is shewn to be the proximate cause thereof.

Reed v. Ellis, 32 D.L.R. 592, 38 O.L.R. 123.

INJURY TO SEAMAN—NEGLIGENCE—TUG AND TOW.

Steves v. Kinnie, 33 D.L.R. 776, 24 B.C.R. 130, [1917] 1 W.W.R. 1250.

WORKMEN HIRED IN QUEBEC TO BE EMPLOYED IN QUEBEC AND ONTARIO—ACCIDENT IN ONTARIO—LAW APPLICABLE.

Common law liability, in cases involving delict or quasi-delict, is governed by the lex loci regit actum. Hence workmen hired in Quebec to be employed in Quebec and Ontario, who are injured by the positive act or by the fault of their employers in the latter province, have no remedy except under the provisions of its laws. When the evidence shews that the foreign law does not admit of the remedy relied upon by the plaintiff, and upon which a verdict has been given in his favour by the jury, he must be nonsuited, non obstante veredicto, a new trial being ineffective.

G.T.R. Co. v. Marleau, 14 Can. Ry. Cas. 284, reversing in part 38 Que. S.C. 394, 12 Can. Ry. Cas. 149.

DIRECTION TO OTHER WORK DISREGARDED.

When a workman is appointed to a particular task his employer's order not to work at it during a specified time, but to proceed to another, is not an absolute order not to continue, and his noncompliance does not deprive him of his remedy, nor constitute an inexcusable fault which can be set up against him, in case of accident. Thus, when the workman at a sawing machine was told by his employer to leave it and work on a planing machine for an afternoon, and he continues the work he was at and is injured, he has a right of action.

Ledoux v. Lucas, 43 Que. S.C. 427.

ACCIDENTS WHILE AT WORK—FALL—NATURAL SICKNESS—APPLICABILITY OF THE LAW—S. REF. [1909], ART. 731.

The plaintiff, widow of a laborer who during his work, fell, suddenly collapsed and died almost immediately, has no recourse against his employer in virtue of the law of accidents while at work, if it is proved that the workman was already suffering from an enlargement of the heart, and that the cause of his death was a cerebral hemorrhage.

Vandrin v. Canada Box Board Co., 25 Rev. Leg. 242.

NEGLIGENCE—WORKMAN—CARE OF TOOLS.

The rule imposed on the workmen by the person erecting a building that they shall keep their tools in a place reserved for that purpose while the work is going on, does not constitute a contract of deposit which renders him liable for the loss of tools kept there.

Hebert v. Harbour Commissioners of Montreal, 42 Que. S.C. 439.

JOINT RESPONSIBILITY—MASTER AND SERVANT—JOINT EXPLOITATION OF RAILWAYS —WARRANTY—C.C., ART. 1054.

A master is responsible for the wrongful act of his servant, committed in the performance of the work for which he is employed. A man may be the servant of two masters; and if, in such case, he renders himself liable in damages, the power of control is the element which decides the responsibility. His fault may involve both masters in liability. The master, in whose general service a man is, is not responsible for the tortious act of such employee, if the control of the master has been, for the time being, superseded by the control of another master into whose temporary service he has passed by being lent (even gratuitously). In such a case, it is the last employer who is responsible. Though a defendant in waranty did not contest the demand in warranty, the court should adjudge upon it, if it appears that in law such warranty liability does not exist.

Central Vermont Ry. v. Bain, 28 Que. K. B. 45.

DEATH OF SERVANT—NEGLIGENCE—EVIDENCE —FINDINGS OF JURY—MOTION FOR NONSUIT.

Christie v. London Electric Co., 7 O.W.N. 703.

DEATH OF SERVANT—NEGLIGENCE—FINDINGS OF JURY — APPEAL—EVIDENCE—NONSUIT — BUILDING TRADES PROTECTION ACT, R.S.O. 1914, C. 228, S. 6.

Stumpf v. Pulleyblank, 8 O.W.N. 1.

INJURY TO SERVANT — NEGLIGENCE—FINDINGS OF JURY — DEFECTIVE SYSTEM — ABSENCE OF EVIDENCE TO SUPPORT — SUGGESTED GROUND OF ACTION—NEGLIGENT ORDER OF FOREMAN—WORKMEN'S COMPENSATION FOR INJURIES ACT, S. 3 (C), S. 14—REFUSAL OF NEW TRIAL—DISMISSAL OF ACTION.

Caldarelli v. O'Brien, 9 O.W.N. 162.

(§ II A—36)—Liability of employer when guilty of "inexcusable fault" —Participation by employer.

As a rule the "inexcusable fault" of the coemployee is as regards the employee an excusable fault, except where the employer has participated therein (e. g., by engaging an employee of immature years to do dangerous work), but the inexcusable fault of a foreman is the inexcusable fault of the employer.

Poirier v. LeGrand, 9 D.L.R. 269, 22 Que. K.B. 193, 19 Rev. Leg. 266.

(§ II A—38)—Unlawful employment of children.

From the fact that art. 3833 R.S.Q. 1909, forbids the proprietor of an industrial establishment classed as dangerous to employ workmen under 16 years of age, and the fact that this provision is one of public order, the result does not follow that when a minor of 15 is so employed the contract for hire of his services, deemed to be based on such engagement, is tainted with nullity of public order so as to deprive the minor of his remedy under The Workmen's Compensation Act for injury by an accident occasioned by and in the course of his employment. Therefore the employer will not be allowed to set up such nullity to a claim for indemnity by the tutrix of the minor workman, victim of an accident under the above conditions.

Mitchell v. Fenderson, 43 Que. S.C. 516.

(§ II A—40) — Freezing as "accident" within Workmen's Compensation Act.

The freezing of a servant's limb as the result of his exposure for ten hours to intense cold in the discharge of his duties, constitutes an "accident" within the meaning of the Quebec Workmen's Compensation Act, R.S.Q. 1909, arts. 7321 et seq. The fact that other workmen employed with the plaintiff on an intensely cold day in the discharge of their duties did not suffer from frost bites, will not relieve an employer from liability to the plaintiff for an injury caused by freezing on the assumption that the injury was not an accident but was due to the plaintiff's poor health, which rendered him more susceptible than other persons to the cold.

Canada Cement Co. v. Pazuk, 12 D.L.R. 303, 22 Que. K.B. 432.

(§ II A—42) — Negligence — Injury on public work—"Public Works Health Act"—Regulations by order in council—Failure to provide surgical aid.

G.T.P.R. Co. v. White, 43 Can. S.C.R. 627, reversing 2 A.L.R. 522.

Amount paid by employer conveying injured servant to medical assistance —Expenditure considered by jury.

Brooks v. Fakkema, 16 B.C.R. 351.

(§ II A—43)—Failure to give notice of injury — Conduct of employer — Waiver.

The failure of an employee to give notice of an injury as required by s. 9 of the Workmen's Compensation Act, R.S.O. 1897, c. 160, will not avail an employer who was not prejudiced by the want of notice, and who, with full knowledge of the injury, by his conduct and representations led the employee to neglect to give such notice. [Armstrong v. Canada Atlantic R. Co., 4 O.L.R. 560; O'Connor v. Hamilton, 10 O.L. R. 529, followed.]

Gower v. Glen Woollen Mills, 12 D.L.R. 394, 28 O.L.R. 193, affirming 9 D.L.R. 244, 28 O.L.R. 193, 23 O.W.R. 553.

Workmen's Compensation Act—Notice of injury—Failure to give—Excuse.

An employee's ignorance of the fact that he was entitled to compensation for injuries is not a mistake that will excuse his failure to give notice thereof in the manner required by s. 4 of c. 12, of the Alta. Workmen's Compensation Act, 1908. [Roles v. Pascall, [1911] 1 K.B. 982, followed.] The failure of an employee to give notice of an injury within the time prescribed by s. 4 is not fatal unless the omission is prejudicial to the employer.

Bruno v. International Coal & Coke Co., 12 D.L.R. 745, 6 A.L.R. 269, 24 W.L.R. 729, 4 W.W.R. 888.

Statute requiring notice of cause of injury.

Where a workman, a foreigner, under the impression that he was in the employ of a firm which was the owner of several timber berths in the vicinity in which he was working, and which also owned and operated a saw-mill and conducted extensive logging operations in the same district, gave the firm the requisite statutory notice pursuant to the Workmen's Compensation for Injuries Act, R.S.O. 1897, c. 160, ss. 9, 13, of the injuries received by him, within the time limited by the Act, his action was maintained against his actual employer, a limited liability company operating one of the berths owned by the firm, notwithstanding the want of strict statutory notice to the company, where it appeared that the foreman in charge of the latter's works, in which the plaintiff was injured, knew of the accident and all the circumstances surrounding it and the evidence shewed that the company was in no way prejudiced by such failure to give the formal notice, and where the company had not pleaded want of notice as a defence but had subsequently, pursuant to s. 14 of the Act, served notice of intention to set it up at the trial.

Quist v. Serpent River Logging Co., 7 D. L.R. 463, 4 O.W.N. 159.

Workmen's Compensation Act — Notice of injury — Death of servant — Right of "dependents" under notice given by servant.

A notice of injury given by a workman

is sufficient to entitle those dependent upon him after his death to the benefits of the Workmen's Compensation Act, R.S.B.C. 1911, c. 244, without any other or further notice.

Moffatt v. Crow's Nest Pass Coal Co., 12 D.L.R. 643, 18 B.C.R. 303, 25 W.L.R. 126, 4 W.W.R. 1249, affirming 12 D.L.R. 642, 4 W.W.R. 747.

NOTICE OF INQUIRY — WORKMEN'S COMPENSATION.

Michelli v. Crow's Nest Pass Coal Co., Ltd., 7 D.L.R. 904, 3 W.W.R. 63.

RAILWAY — INJURY TO EMPLOYEE — NOTICE — NEGLIGENCE — DAMAGES.

McDonald v. G.T.R. Co., 40 D.L.R. 749. [Affirmed in 44 D.L.R. 189, 23 Can. Ry. Cas. 361, 57 Can. S.C.R. 268.]

(§ II A—46)—METHODS OF WORK — DEFECTIVE SYSTEM — COMMON LAW LIABILITY.

Where the employee sustains injury which he could not have avoided by the exercise of reasonable care by reason of the defective system of work operated by the employer, the latter is liable both at common law and under the Workmen's Compensation Act (Ont.).

Sturgeon v. Canada Iron Corp., 12 D.L.R. 500, 4 O.W.N. 1386, 24 O.W.R. 684.

METHODS OF WORK — STARTING DANGEROUS MACHINERY — SIGNALS — DUTY TO ADOPT.

The failure of an employer to adopt a proper system of signals for setting dangerous machinery in motion will render him liable for the death of a servant by the starting of machinery, as the result of improper signalling, while he was in a place of danger. [Choate v. Ontario Rolling Mills Co., 27 A.R. (Ont.) 155; Ainslie Mining & R. Co. v. McDougall, 42 Can. S.C.R. 420, 426; Fralick v. G.T.R. Co., 43 Can. S.C.R. 494, 519, followed.]

Darke v. Canadian General Electric Co., 12 D.L.R. 705, 28 O.L.R. 240, affirming 4 D.L.R. 259, 21 O.W.R. 583.

RAILWAY EMPLOYEES — RULES AND REGULATIONS — METHOD OF ADOPTION.

A railway company is not required to have every rule for the guidance of its staff printed or reduced to writing; if its employees are aware of the existence and terms of any rule they are bound by it.

C.P.R. Co. v. Frechette, 22 D.L.R. 356, 24 Que. K.B. 459, [1915] A.C. 871, 18 Can. Ry. Cas. 251, reversing 23 Que. K.B. 203.

DUTY TO ADOPT PROPER RULES — COMMON LAW LIABILITY — "DEFECTIVE SYSTEM" — ITS TESTS.

In the erection of a concrete construction where the forms or skeleton walls have continually to be heightened as the work progresses and a gangway of boards and scantling is laid across the skeleton walls to permit the concrete to be wheeled to the forms and dumped, the work so performed is not part of a "system," but is something that of necessity must be left to the care of a foreman and workmen, and the master's common law liability is satisfied on supplying the necessary materials, resources, and competent workmen to do it. [Wilson v. Merry, L.R. 1 H.L. Sc. 326, applied; Waugh-Milburn Construction Co. v. Slater, 15 D.L.R. 484, 16 D.L.R. 225, 48 Can. S.C.R. 609, distinguished.]

Liset v. B.C. Lumber Co., 17 D.L.R. 449, 19 B.C.R. 480, 27 W.L.R. 859, 6 W.W.R. 817.

MASTER'S LIABILITY — PROPER PLACES TO WORK — PROPER SYSTEM — MATERIALS —COMMON-LAW LIABILITY—NOTICE.

The master's primary duty to the employee is to provide in the first instance fit and proper places for the workmen to work in, and a fit and proper system and suitable materials under and with which to work, but he is not bound to see that the place is safe from day to day or from hour to hour; so if changes have to be made incidental to the work and to the place the employee is called upon to work in, and if these are made under the direction of persons competent to carry forward the work and under a system and with resources which would enable them to carry it out with due regard to the safety of themselves and their fellow-servants, the master is not at common law liable for the failure of such persons to exercise due care, skill and diligence in its prosecution unless the negligent performance amounts to a breach of a statutory duty imposed on the master or unless he had after actual or implied notice of the mistakes of the persons so entrusted failed to correct the same. [Ainslee v. McDougal, 42 Can. S.C.R. 420, applied; Fakkema v. Brooks, 44 Can. S.C.R. 413, distinguished.]

Hall v. C.P.R. Co., 20 D.L.R. 666, 20 B.C.R. 293, 18 Can. Ry. Cas. 163, 29 W.L.R. 409, 7 W.W.R. 39.

DEFECTIVE SYSTEM — FINDING OF FACT BY TRIAL JUDGE — APPEAL.

Kostenko v. O'Brien, 16 D.L.R. 875, 6 O.W.N. 99.

INJURY TO SERVANT — DANGEROUS WORK — DEFECTIVE SYSTEM — LIABILITY AT COMMON LAW.

Christiansen v. Vancouver Power Co., 19 W.L.R. 619.

DEFECTIVE SYSTEM — FINDINGS OF JURY— LIABILITY UNDER COMMON LAW AND STATUTE.

Holdaway v. Perrin, 19 O.W.R. 949, 2 O.W.N. 1346.

(§ II A—47) — EFFECT OF VIOLATION OF RULES.

In order to entitle the plaintiff to recover from a railway company for negligently causing the death of a locomotive fireman as the result of a defective system of operating a snow-plough, which was being propelled by the locomotive at the time of the accident, by placing a signalman on the plough who had not passed

the necessary eye and ear test, and an examination as to train rules, it must appear that such negligence was the proximate cause of his death.

Jones v. C.P.R. Co., 5 D.L.R. 332, 3 O.W.N. 1404, 22 O.W.R. 439. [Reversed on another point 13 D.L.R. 900, 30 O.L.R. 331.]

(§ II A—48)—DYNAMITE — EXPLOSION — CAUSE OF ACCIDENT — EVIDENCE—PRESUMPTION.

If an accident happens to a workman occupied in filling a mine, by the premature explosion of dynamite, and the cause of the accident cannot be discovered, there is a presumption of fault against the employer, owner of the dynamite and tools employed by the workman. Such presumption can be combated if the employer discovers a cause for the accident not chargeable to his own fault, and which would have been able to cause the explosion. In such case it is incumbent on the workman to prove the real cause, and to connect it with an act of negligence of the employer.

Angelo v. Brennan, 53 Que. S.C. 262.

THAWING OUT DYNAMITE — EXPLOSIONS — FAILURE OF MASTER TO INSTRUCT EMPLOYEE TO FOLLOW DIRECTIONS.

Strati v. Toronto Construction Co., 19 O.W.R. 88, 2 O.W.N. 1067.

(§ II A—49)—COURSE OF EMPLOYMENT.

Where a delivery man in the employ of the defendants finding two fellow-employees in the office at a time when he wished to make extra deliveries of his employers' goods, requested one of them to accompany him for the purpose of assisting him, and upon neither being willing, obtained permission from one of the defendants to take one of the men, which he did, and on the next day, the delivery man, for the same purpose, took the other employee who was in the office the day before, though not by any special order of any one of the defendants, and after the deliveries were made, the horse they were using ran away and the employee so assisting the delivery man was injured, the injury will be held to have occurred in the "course of his employment."

Veitch v. Linkert, 3 D.L.R. 39, 3 O.W.N. 874.

COURSE OF EMPLOYMENT.

Where a railway employee is injured while removing personal belongings from the defendants' car with the permission of the defendant company, the accident is one arising out of and in the course of his employment for which he is entitled to compensation under the provisions of the Saskatchewan Workmen's Compensation Act, even though an action brought by him at common law for damages had been dismissed on the ground that at the time of the accident he was on business of his own and was a mere licensee, if the accident occurred during the time he was in defendants' employment.

Gonyea v. C.N.R. Co., 14 D.L.R. 685, 6 S.L.R. 324, 16 Can. Ry. Cas. 33, 26 W.L.R. 57, 5 W.W.R. 607, affirming 9 D.L.R. 812, 6 S.L.R. 55, 23 W.L.R. 721, 4 W.W.R. 76.

A workman is not entitled to the benefit of the Workmen's Compensation Act (B.C.) for injuries received while in a place in his master's factory where his duty did not call him, and where he went to procure something for his own convenience and not in his employer's interest.

Scalzo v. Columbia Macaroni Factory, 4 D.L.R. 866, 17 B.C.R. 201, 21 W.L.R. 223, 2 W.W.R. 259.

Evidence that a workman went to his work in his usual good health and afterwards came from his place of employment with a hernia and the nature of his work was such as was specially likely to be the cause of hernia, is sufficient to establish that the hernia arose "out of and in the course of" his employment within s. 4 of the Manitoba Workmen's Compensation Act, 1910.

Re Eddles and School District of Winnipeg, 2 D.L.R. 696, 22 Man. L.R. 240, 21 W.L.R. 214, 2 W.W.R. 265.

One is not disentitled to the compensation under the provisions of the Workmen's Compensation Act (Alta.), merely by reason of the fact that he contracted to do the work at which he was employed at a lump sum and not upon a time basis.

Cargeme v. Alberta Coal & Mining Co., 6 D.L.R. 231, 5 A.L.R. 173, 22 W.L.R. 68, 2 W.W.R. 1058.

COURSE OF EMPLOYMENT.

Where one who has left the employ of a railroad company is killed while on his way to the office of the company to get his pay on the day following such abandonment of his employment, no compensation for his death can be claimed under the Alberta Workmen's Compensation Act, 1908, since the accident in question did not arise out of or happen in the course of his employment within the meaning of s. 3. A claim for compensation for the death of an alleged employee cannot be made unless it appears that the accident in question not only arose out of the employment but also happened in the course thereof, as it is impossible to construe disjunctively the word "and" in the second line of s. 3 of the Act.

Lastuka v. G.T.P.R. Co., 11 D.L.R. 375, 6 A.L.R. 59, 24 W.L.R. 137, 4 W.W.R. 569.

Where a brakeman is killed while switching cars on the "flying shunt" process, the accident may be found to have arisen "out of and in the course of the employment," although, when such accident occurred, the brakeman was on the ground (contrary to the rules of his employment) instead of on the engine-tender step while doing such work. [Harding v. Brynddu Colliery Co., [1911] 2 K.B. 747, at 750, 753, applied.] An accident arises "out of" the workmen's employment where such accident is shewn to have been due to and resulted from a risk reasonably incident to the employment. In construing the term "out of and in the

course of the employment" in the Workmen's Compensation Act (Sask.) 1910–1911, c. 9, s. 4, the words "out of" point to the origin or cause of the accident, and the words "in the course of" apply to the time, place and circumstances. [Fitzgerald v. Clark, [1908] 2 K.B. 796, applied.]

Kennedy v. G.T.P.R. Co., 15 D.L.R. 172, 6 S.L.R. 286, 26 W.L.R. 120, 5 W.W.R. 733, 747.

COURSE OF EMPLOYMENT — "OUT OF AND IN THE COURSE OF" — SHOVELLING CLAY—REPLACING DERAILED CAR.

Where the plaintiff was employed by the defendant (a brick and supply company) for the ordinary work of a labourer, a personal injury sustained while assisting a fellow-workman, at the latter's request, to put back on the track one of the cars used for carrying the clay from the pit to the plant, which had become derailed, is properly held to have arisen "out of and in the course of" his employment, where the replacing the car was such work as the plaintiff and the others of his class in the defendant's employ might reasonably have been called upon to do.

Ferguson v. Brick & Supplies, 16 D.L.R. 67, 7 A.L.R. 337, 27 W.L.R. 70, 5 W.W.R. 1227.

"COURSE OF EMPLOYMENT" — WORKMEN'S COMPENSATION ACT, R.S.B.C. 1911, c. 244 — EMPLOYEE WORKING ON A PILE DRIVER — PRESUMPTION THAT HE FELL OVERBOARD.

Alexander v. Todd, 7 D.L.R. 877, 1 W.W.R. 720.

COURSE OF EMPLOYMENT — WORKMEN'S COMPENSATION ACT.

An establishment run for the purpose of profit, where machines are operated by other means than by man power, or animal power is subject to the Workmen's Compensation Act (Que.) and, consequently, an employee in a laundry operated by electricity and run by a public hotel, is entitled to the benefit of the Act. When, in an industrial establishment, a workman is, after ordinary working hours, repairing a machine, and the foreman, living on the premises and believing the repairs completed, tries to operate the machine and is hurt, such an accident happens by reason of and in the course of his employment.

Caron v. Windsor Hotel Co., 46 Que. S.C. 529.

(§ II A—50) — LIABILITY OF MASTER — DUTY TO WARN AND INSTRUCT.

In an action by a workman for personal injury, due to an accident resulting from the negligence of the defendant employer's foreman in giving an order to the workman without warning him against the danger which was the effective cause of the accident and which was known or should have been known to the foreman, the defendant is liable under the Employers' Liability Act, R.S.B.C. 1911, c. 74, although it may appear that the workman's ordinary calling, in which he had been hired, prima facie imported a right on defendant's behalf to assume that the workman knew his business and would not place himself in danger.

Johansen v. Anderson, 17 D.L.R. 514, 27 W.L.R. 884.

DUTY TO WARN OR INSTRUCT — EXPLOSION OF BLAST — FAILURE TO HEAR WARNING.

The fact that an employee was injured as the result of his failure to hear a warning of a fellow-servant that a blast was about to be exploded, will not impose any liability on an employer where the method of warning was that employed by others engaged in similar work.

Beck v. Guthrie, 14 D.L.R. 524, 18 B.C.R. 482, 26 W.L.R. 11, 5 W.W.R. 531.

NEGLIGENCE OF THIRD PARTY — JOINT LIABILITY—ELECTRICITY.

An electric company, as employer, and a municipal corporation operating a hydro-electric system, may both be held liable for the death of a lineman electrocuted while at work, where the negligence of each was a real cause of the accident.

Toronto v. Lambert, 33 D.L.R. 476, 54 Can. S.C.R. 200, affirming 29 D.L.R. 56, 36 O.L.R. 269.

INJURY AT WORK — DUTY TO WARN OR INSTRUCT.

The fact that the employee is set at dangerous work at night for the first time, places upon the employer the duty of taking special care that the employee should receive all requisite instruction and warning for his protection while working where there is no light.

Sturgeon v. Canada Iron Corp., 12 D.L.R. 500, 4 O.W.N. 1386, 24 O.W.R. 684.

DUTY TO WARN OR INSTRUCT.

Where instructions and warning are necessary to enable employees, in circumstances involving danger, to appreciate and protect themselves against the perils incident to the work in which they are engaged, it is the duty of the employer to take reasonable care to see that such instructions and warnings are given. The employer may delegate that duty to competent persons; but, where compensation is sought for injuries sustained by an employee owing to neglect to give such instruction and warning, the onus rests upon the employer to shew that the duty was delegated to a person qualified to discharge it, or that other adequate provision was made to ensure protection against unnecessary risk to the employees. The failure of the employer to take reasonable care in the appointment of a properly qualified superintendent, to whom the duty of selecting persons to be employed is intrusted, amounts to negligence involving liability for damages sustained in consequence of the acts of incompetent servants. [Young v. Hoffman Manufacturing Co., [1907] 2 K.B. 646, ap-

plied.] In this case, as the risk incident to the employment of an incompetent foreman was not one of those which are assumed by an employee, the plaintiff was entitled to recover damages at common law.

C.N.R. Co. v. Anderson, 45 Can. S.C.R. 355, 29 W.L.R. 416.

INSTRUCTIONS, WARNINGS AND ORDERS TO WORKMEN AGAINST DANGERS.

Canadian Rubber Co. v. Karavokiris, 44 Can. S.C.R. 303, reversing 36 Que. S.C. 425.

EMPLOYER AND EMPLOYEE—IMPROPER METHODS OF WORKING.

Drolet v. Denis, 20 Que. K.B. 378.

(§ II A—53)—ELEVATOR—COMMON FAULT.

A contractor, who uses an electric elevator to carry material from one storey to another in a building under construction, should install it in such a manner that it could be said that he had taken the necessary precautions to protect his workmen. It is his duty to install an indicator within the elevator shewing the operator to what storey the ascent is required, to enable him to stop it there and prevent a possible accident to one who wishes to use the elevator. On the other hand, the workman employed on the building is guilty of negligence if, when wishing to take the elevator, he leans over into the pit of the elevator without having given the signal to stop. In such case there is common fault.

Norcross Co. v. Gohier, 26 Que. K.B. 387. [Affirmed 41 D.L.R. 687, 56 Can. S.C.R. 415.]

(§ II A—54)—AS TO WARNING OF SPEED OF MACHINE.

Where a child or young person of comparative inexperience has been employed in working a machine operating at a fixed speed and is transferred to a similar machine operating at a different speed, it is the duty of the employer to warn such employee of the difference in the machines, and in default he will be liable for personal injuries sustained by the employee who, in ignorance of the difference in speed, applied to the operation of the second machine, the movements applicable to the first and was injured in consequence.

Pickard v. Deutcher-Canadier Co., 8 D.L.R. 888, 5 A.L.R. 395, 22 W.L.R. 817, 3 W.W.R. 579.

(§ II A—56)—DUTY TO WARN — WORKMEN AT TRAMWAY CROSSING — APPROACHING CARS — "DEFECTIVE SYSTEM."

The work of laying planks at a tramway crossing may properly be found to have been done under a "defective system" when the foreman, whose duty it was to watch and warn the men of approaching cars passing at high speed at about 15 minute intervals, was also required to do manual work along with the men in his charge, thus distracting his attention from the watching which was necessary for their protection.

Ellis v. B.C. Electric R. Co., 20 D.L.R. 82, 20 B.C.R. 43.

(§ II A—58) — INFANTS, NEGLIGENCE TOWARDS.

It is negligence for a master to direct a minor servant, who was not employed for such position, to work temporarily at a dangerous machine, without warning or instructing him as to the danger, sufficient to render the master liable for an injury sustained by the servant, where, in attempting to unclog such machine, his hand was caught by spikes in a cylinder thereof, which he had never seen. [Smith v. Royal Canadian Yacht Club, 3 O.W.N. 19, distinguished.]

Stokes v. Griffin Curled Hair Co., 4 D.L.R. 844, 3 O.W.N. 1414, 22 O.W.R. 474.

Where a minor under fourteen years of age is illegally employed in an industrial establishment contrary to the provisions of the Quebec Industrial Establishments Act, there is no legal contract for the hire of his services, and if the minor suffers personal injuries, his remedy lies in an action for damages at common law (s. 1053 Cr. Code) and not in an action under the Workmen's Compensation Act.

Boutin v. Corona Rubber Co., 4 D.L.R. 640, 41 Que. S.C. 519.

NEGLIGENCE — CONDITION OF PREMISES — DANGEROUS WORK — INFANT—ABSENCE OF WARNING — CONTRIBUTORY NEGLIGENCE—FINDINGS OF JURY.

Crockford v. G.T.R. Co., 1 D.L.R. 923, 3 O.W.N. 847.

(§ II A—60)—DUTY OF MASTER—SAFETY AS TO PLACE AND APPLIANCES—BROKEN CABLE—NEGLIGENCE.

The inference may be drawn from the happening of the accident by the breaking of a cable at defendant's works, in the absence of explanation by the defendant, that it arose from want of care on the part of defendant or his servants, but not necessarily want of care for which the master is responsible to his workman; the master's duty is to take reasonable care and to make reasonable effort to provide a safe place and safe machinery in which and with which the servant is to work, but not to guarantee that the place and machinery shall be absolutely safe. [Scott v. London and St. Katharine Docks Co., 3 H. & C. 596, applied; Haywood v. Hamilton Bridge Works Co., 7 O.W.N. 231, distinguished.]

Kolari v. Mond Nickel Co., 20 D.L.R. 412, 32 O.L.R. 470.

LIABILITY OF MASTER TO SERVANT—INJURY TO APPRENTICE—DEFECTIVE TOOL SUPPLIED BY FELLOW-SERVANT—CUSTOM.

The fact that it is customary for journeymen plumbers to furnish their own tools will not absolve an employer from liability for an injury sustained by a 16 year old apprentice as the result of using a defective tool provided by a journeyman plumber in

the service of the employer, with whom the apprentice was required to work; since it was the duty of the employer to see that suitable appliances and tools were furnished for the use of his apprentice. [Jones v. Burford, 1 T.L.R. 137, distinguished.]

Hooper v. Beairsto Plumbing Co., 15 D.L.R. 621, 23 Man. L.R. 712, 26 W.L.R. 304, 5 W.W.R. 772.

LIABILITY OF MASTER TO SERVANT—SAFETY AS TO PLACE—ACCIDENT DUE TO SNOWSLIDE.

An employer is not relieved from liability under the Workmen's Compensation Act, R.S.B.C. 1911, c. 244, for the death of a mining employee as the result of the building or shelter in which he was required to work being struck by a snowslide, by reason of the fact that the slide was occasioned by abnormal conditions, where the shelter was located at a place where slides should have been anticipated. [Warner v. Couchman, 81 L.J.K.B. 45, distinguished.]

Culshaw v. Crow's Nest Pass Coal Co., 15 D.L.R. 566, 19 B.C.R. 13, 26 W.L.R. 619, 5 W.W.R. 1092, affirming 14 D.L.R. 25, 19 B.C.R. 13, 4 W.W.R. 1337.

SAFETY AS TO PLACE—DEFECTIVE TRACKS USED IN CONSTRUCTION WORK.

A brick-making company operating tracks on its premises for its undertakings is liable for damages in a personal injury accident to a licensee upon the premises resulting from nonrepair of the tracks particularly where it had knowledge of the lack of repair, although such licensee was in the direct employment of a third party doing construction work on the premises in the course of which work the track in question had to be used, it appearing that such third party with whom the plaintiff was employed had not assumed any responsibility as to the maintenance of the track.

Smith v. Alberta Clay Products Co., 17 D.L.R. 214, 7 A.L.R. 358, 28 W.L.R. 740, 6 W.W.R. 788, affirming 14 D.L.R. 296, 5 W.W.R. 405.

SAFETY OF APPLIANCES—GENERAL USE, MATERIALITY OF.

Upon a question of safety of appliances for workmen and the employer's duty in respect thereof, the general use of such appliances, by employers in the class of work involved, is not the determining test. [Ship Building Works v. Nuttall, 119 Pa. 149, disapproved.]

Muirhead v. Intercolonial Coal Mining Co., 16 D.L.R. 450, 48 N.S.R. 72, 14 E.L.R. 195.

DEFECTIVE SYSTEM—NEGLIGENCE OF FELLOW-SERVANT.

Where injuries sustained by a workman in loading a vessel are primarily due to a defective system in vogue, the employers are liable in damages under Lord Campbell's Act (C.S.N.B., 1903, c. 79), even though the accident was the result of the negligence of a fellow employee. [Wilson v. Merry, L.R. 1 H.L. (Sc.) 326, distinguished; Ainslie Mining v. McDougall, 42 Can. S.C.R. 420; Brooks v. Fakkema, 44 Can. S.C.R. 412, followed.]

Boddington v. Donaldson Line, 31 D.L.R. 520, 44 N.S.R. 290.

BREACH OF STATUTORY DUTY — DEFECTIVE ELEVATOR DOORS.

An employer's failure to fulfil the statutory duty imposed upon him by s. 33 of the Factories Act, R.S.M. 1913, c. 70, to protect an elevator with "good and sufficient trap-doors," will render him liable for the death of an infant employee, occasioned by a fall into an elevator shaft, as the result of a defect in the doors which caused them to spring open when the employee struck them while playfully wrestling [David v. Britannic, [1909] 3 K.B. 146; Jones v. C.P.R. Co., 13 D.L.R. 900, 30 O.L.R. 331; Iles v. Abercarn Welsh Flannel Co., 2 T.L.R. 547, applied.]

Owen v. Saults, 28 D.L.R. 287, 26 Man. L.R. 362, 34 W.L.R. 647, 10 W.W.R. 763.

RISK OF EMPLOYMENT — NEGLIGENCE OF SERVANT—LIABILITY.

Where an employer does not provide a window-cleaner at his service, with any protective appliance; and where the window-cleaner does not ask for any, they are both guilty of a common fault and must bear equally the damages suffered therefor by the employee.

Johansen v. Windsor Hotel Co., 42 D.L.R. 756, 24 Rev. Leg. 440, 24 Rev. de Jur. 424.

SAFETY AS TO APPLIANCES—LIFE IN PERIL.

Where a workman's life is in peril and the superintendent of the works knows it, and has under his control a safety appliance which, if applied, will remove or materially lessen the danger, and there is no sufficient reason for not applying it, then if, in consequence of the nonapplication, the workman is killed, the death is caused by the negligence of the superintendent, for which the employing company is liable under the employer's Liability Act, R.S.N.S. 1900, c. 179. Uylaki v. Dawson, 6 O.W.R. 569, applied.]

Muirhead v. Intercolonial Coal Mining Co., 16 D.L.R. 450, 48 N.S.R. 72, 14 E.L.R. 195.

SCAFFOLD.

A finding of the jury under subs. 3, of s. 3, of the Employers' Liability Act, R.S.B.C. 1911, c. 74, will not be disturbed where the defendant employer, a contractor erecting fire escapes on the walls of buildings, through his foreman (who knew or ought to have known of the danger) required the plaintiff employee to do certain work on a scaffold platform used in erecting the fire escapes, without (a) warning the employee that according as he did the work so directed the platform would become unsafe, or (b) taking precautions to secure the platform.

McGraw v. Hall, 17 D.L.R. 185, 19 B.C.R. 441, 27 W.L.R. 871.

INJURY TO WORKMAN RAISING BUILDING—SAFETY OF METHOD AND APPLIANCE—INSPECTION—LATENT DEFECTS.

Gusky v. Rosedale Coal & Clay Products Co., 36 D.L.R. 391.

STRUCTURAL WORKERS—SAFETY AS TO APPLIANCES.

Structural steel contractors in the erection of a building are properly found guilty of negligence in not providing guys or cinch lines or both, for the safety of their workmen on the structure.

Parkhurst v. Grant Smith, 22 D.L.R. 94.

DEATH OF SERVANT OF SHIPPING COMPANY BY BREAKING OF CABLE IN MOVING SHIP—NEGLIGENCE OF FOREMEN OF SHIPPING COMPANY AND RAILWAY COMPANY—FINDINGS OF JURY—DEFECTIVE PLANT—LENDING OF APPLIANCES AND MEN BY RAILWAY COMPANY TO SHIPPING COMPANY—GRATUITOUS BAILMENT—LIABILITY OF BOTH COMPANIES—CONTRIBUTION INTER SE.

MacTague v. Inland Lines, 8 O.W.N. 183.

NEGLIGENCE—EMPLOYERS' LIABILITY — DEFECTIVE APPLIANCES — WARNING AND INSTRUCTION—INJURY TO WORKMEN.

Drolet v. Denis, 48 Can. S.C.R. 510.

NEGLIGENCE OF THIRD PARTY—INJURY OF EMPLOYEE—DEFECTIVE SYSTEM — COMMON LAW LIABILITY—WORKMEN'S COMPENSATION ACT—DAMAGES.

A company engaged in the construction of conveyors or galleries to an elevator that it was building under contract, is liable at common law for damages for an injury to an employee, the result of the failure of the company to adopt a proper and safe system of carrying on the work, even though the accident would not have happened but for the negligence of a third party, a stranger to the work that was being carried on, and not connected with or under the control or supervision of the company.

Fulton v. Fegles-Bellows Engineering Co., 46 N.B.R. 249.

DAMAGES—ACCIDENT — NEGLIGENCE OF EMPLOYER—$5,000 FOR HUSBAND'S DEATH.

Fratte v. Canadian Rolling Mills, 25 Rev. de Jur. 289.

INJURY TO SERVANT—NEGLIGENCE—DEFECTIVE CONDITION OF MACHINE — CAUSAL CONNECTION WITH INJURY—ABSENCE OF CONTRIBUTORY NEGLIGENCE — EVIDENCE—FINDINGS OF JURY—JUDGE'S CHARGE.

Toben v. Elmira Felt Co., 11 O.W.N. 375.

INJURY TO SERVANT—WORKMEN'S COMPENSATION FOR INJURIES ACT—DEFECT AS TO ARRANGEMENT OF WORKS.

Portlance v. Milne, 4 O.W.N. 589, 23 O.W.R. 716.

(II A—62)—It is the duty of the employer to provide proper appliances for the employees and to maintain them in a proper condition and so to carry on his operations as not to subject those employed by him to unnecessary risk. [Smith v. Baker, [1891] A.C. 325, applied.]

Fairweather v. Canadian Gen'l Electric Co., 10 D.L.R. 130, 28 O.L.R. 300, 24 O.W.R. 164.

EMPLOYER'S DUTY RESPECTING APPLIANCES.

If, through breach of an employer's duty to use reasonable care to provide proper appliances, to maintain them in proper condition, and so to carry on his operations as not to subject his employees to unnecessary risk, an employee suffers injury, the employer is prima facie liable.

Hooper v. Beairsto Plumbing Co., 11 D.L.R. 245, 24 W.L.R. 182, 4 W.W.R. 562. [Affirmed, 15 D.L.R. 621, 23 Man. L.R. 712, 26 W.L.R. 304, 5 W.W.R. 772.

NEGLIGENCE — INJURY TO WORKMAN BY BREAKING OF CHAIN IN MOVING STEEL PLATES — ABSENCE OF EVIDENCE OF DEFECT OR WEAKNESS—ACTION BY WORKMAN AGAINST MASTER—NONSUIT.

Haywood v. Hamilton Bridge Works Co., 7 O.W.N. 231.

(II A—63)—An employer of workmen in the construction of a building is charged with the duty of making a reasonable inspection of the joists placed in the building on which and about which it is necessary for his servants to work, to ascertain their soundness and suitability for such purpose, and where an employee, in the absence of other means of egress, is compelled to walk across a joist placed in the building 25 feet above the ground in order to leave the building when work has ceased, the master, in the absence of such inspection, is liable for personal injuries to the servant resulting from the breaking of the joist from a defect therein.

Lafvendal v. Northern Foundry Co., 2 D.L.R. 155, 22 Man. L.R. 207, 20 W.L.R. 714, 2 W.W.R. 40.

HIRING OF SERVICES—ACCIDENT — PRIVATE INTERNATIONAL LAW — LEX LOCI CONTRACTUS—LEX FORI—C.C. ART. 1053.

In the case of a workman suing, under the common law for damages by him suffered in consequence of an accident, the obligations and liability of his employer are to be determined by the law of the province of Ontario where the accident took place, notwithstanding the fact that the contract to hire the workman's services took place in the province of Quebec. The law of the province of Quebec would apply, if the action was formed under the Quebec Workmen's Compensation Act.

Fullum v. Foundation Co., 25 Rev. Leg. 470.

The fact that a certain appliance might have prevented the death of a servant will not render a master liable therefor where the jury found that its use would have been impracticable, and that its absence did not amount to a defect.

Mercantile Trust Co. v. Canada Steel Co., 3 D.L.R. 518, 3 O.W.N. 980, 21 O.W.R. 808.

SAFETY AS TO PLACE AND APPLIANCES — SCAFFOLDING.

Section 6 of the Building Trades Protection Act, 1 Geo. V. (Ont.) c. 71 (R.S.O. 1914, c. 228), imposes an absolute duty on persons engaged in the erection, alteration, repair, improvement or demolition of a building, not to use scaffolding or other mechanical or temporary contrivances which are unsafe, unsuitable, or improper, or which are not so constructed, protected, placed and operated as to afford reasonable safety from accident to persons employed or engaged upon the building. [Watkins v. Naval Colliery Co., [1912] A.C. 699, applied.]

Hunt v. Webb, 13 D.L.R. 235, 28 O.L.R. 580.

DEFECTIVE SCAFFOLDING—BREACH OF STATUTORY DUTY—BUILDING TRADES PROTECTION ACT—FINDINGS OF JURY—NEGLIGENCE OF FELLOW-SERVANT — DETERMINATION OF LIABILITY BY APPELLATE COURT.

Benson v. Maher, 26 D.L.R. 752, 9 O.W.N. 363.

DEFECTIVE FOUNDATION OF DREDGE—LIABILITY.

Robertson v. Canadian Klondyke Mining Co., 31 D.L.R. 576.

Where an accident has happened resulting in injury, though the happening of the accident in itself may not be evidence of negligence, yet when the plaintiff establishes that the defendant owed to him a duty to take care, and also establishes that the injuries complained of resulted from a condition of things apparently incompatible with the performance of that duty, the maxim res ipsa loquitur applies, and the onus is cast upon the defendant of accounting for the accident, and if he does not satisfactorily account therefor, the happening of the accident under such a condition of things is evidence from which negligence may be inferred.

Lindsay v. Davidson, 4 S.L.R. 415.

SCAFFOLD.

Where a labourer, employed in the erection of a building, was ordered to finish some rivets at an elevation of at least 50 feet from the ground and for which work no scaffolding directly under the riveting was provided, and was ordered to place a plank across 2 beams near the work to be done, and to use them for that purpose, and in so doing the plank slipped and he was thrown and injured, the master, by reason of his failure to provide safe scaffolding, is liable for his injuries.

Dominion Bridge Co. v. Jodoin, 46 Can. S.C.R. 624, affirming 39 Que. S.C. 103.

DANGEROUS CONDITION OF FACTORY FLOOR—FAILURE TO SHEW THAT INJURY CAUSED THEREBY—WEIGHT OF EVIDENCE—DOCUMENTARY EVIDENCE.

Plant v. Consumers Box & Lumber Co., 10 O.W.N. 243.

(§ II A—64)—DEFECTIVE LADDER.

A workman is not entitled to recover for injuries sustained through the fall of a ladder, caused by the rounding of the edges at its end, where he had failed to report the defects to the proper authorities, so that they might be remedied.

Green v. G.T.R. Co., 10 W.W.R. 430.

(§ II A—65)—EXCAVATION WORK—SAFETY —MANAGEMENT — NEGLIGENCE OF FELLOW SERVANT.

An employer who appoints a competent superintendent over certain work, gives him requisite authority for the performance thereof and supplies him with all necessary material, is not liable at common law for injuries to a workman through the negligence of the superintendent in the discharge of his duties.

Western Canada Power Co. v. Bergklint, 34 D.L.R. 467, 54 Can. S.C.R. 285, [1917] 1 W.W.R. 1262, reversing 24 D.L.R. 565, 22 B.C.R. 241, 32 W.L.R. 884, 9 W.W.R. 456. [See also 7 D.L.R. 720, 17 B.C.R. 443, 22 W.L.R. 535, 3 W.W.R. 145, 50 Can. S.C.R. 39.

SAFE PLACE — EXCAVATION — FAILURE TO BRACE SIDES.

The fact that an employer was aware that two other cave-ins had occurred within 24 hours one at a point opposite where an employee was required to work in a deep, narrow trench, the sides of which were not braced in any manner, discloses such a failure to observe reasonable precaution for the safety of his employees as to render the employer answerable for an injury to one of them as the result of a cave-in.

Toronto General Trusts Corp. v. Municipal Construction Co. (No. 2), 15 D.L.R. 66, 6 S.L.R. 317, 26 W.L.R. 130, 5 W.W.R. 659, 717, reversing 12 D.L.R. 815, 5 S.L.R. 126, 25 W.L.R. 50.

INJURY TO SERVANT—EXPLOSION—REASONABLE CARE—PROPER APPLIANCES—UNNECESSARY RISK.

The utmost duty of a municipal corporation as regards its employees operating its waterworks is to take reasonable care to provide proper appliances and to maintain them in a proper condition and so to carry on its operations as not to subject those employed by it to unnecessary risk. [Smith v. Baker, [1891] A.C. 325, applied; McArthur v. Dominion Cartridge Co. [1905] A.C. 72; Winnipeg Electric v. Schwartz, 16 D.L.R. 681, 49 Can. S.C.R. 80, distinguished.]

Collier v. Hamilton, 20 D.L.R. 629, 32 O.L.R. 214.

TRENCHES.

Where a contractor is digging a trench, and previous blasting has rendered the sides of the trench liable to cave in, so that workmen in the trench are exposed to danger unless the sides are shored up, of which the contractor ought to have known, he is guilty of negligence if he fails to shore up the

sides, and a workman is injured in consequence.

Magnussen v. L'Abbé, 4 D.L.R. 857, 3 O.W.N. 864, 21 O.W.R. 376.

INJURY TO AND DEATH OF PERSON BY FALLING OF CRUST IN GRAVEL-PIT—DANGEROUS PLACE—TRAP—KNOWLEDGE OF DANGER—DIRECTION OF PERSON IN CHARGE—CONTRIBUTORY NEGLIGENCE — ACTION UNDER FATAL ACCIDENTS ACT—DAMAGES — FUNERAL EXPENSES — REASONABLE EXPECTATION OF PECUNIARY BENEFIT—PARENTS OF DECEASED—BROTHERS AND SISTERS—WORKMEN'S COMPENSATION ACT.

Durant v. Minnesota & Ontario Power Co., 12 O.W.N. 394. [Affirmed in 41 O.L.R. 130.]

(§ II A—66)—INJURIES—DEATH—APPLIANCES — CONDITIONS — EMPLOYER — DUTY OF—RISK UNNECESSARY.

Junior v. International Hotel Co., 20 D.L.R. 960, 32 O.L.R. 399.

(§ II A—66a)—MASTER'S DUTY AS TO WALLS — WHAT RISKS ASSUMED — VOLENTI NON FIT INJURIA.

Scotney v. Smith, 14 D.L.R. 786, 6 S.L.R. 290, 26 W.L.R. 163, 5 W.W.R. 660, affirming 4 D.L.R. 134, 5 S.L.R. 131, 21 W.L.R. 287, 2 W.W.R. 383.

(§ II A—66b)—STRINGING ELECTRIC WIRES —PROTECTION—RUBBER GLOVES.

Permitting an inexperienced employee to work at stringing wires charged with electricity, without furnishing him with rubber gloves as a protection against the danger of such work, will render the electric company liable for the death of the employee, caused by electrocution, during the course of the work.

Couillard v. Beauharnois, 26 D.L.R. 159, 24 Que. K.B. 324.

ELECTRICAL USES AND APPLIANCES.

A judgment for the plaintiff for negligently causing the death of a servant, will be sustained where the evidence justified the jury in finding that the deceased, a painter, who was free from contributory negligence, was not properly warned of the danger from highly charged and imperfectly protected electrical wires located within a few inches of the place where he was required to work on a narrow scaffold, that no notice of the dangerous character of the wires was posted, and that the deceased was directed by his master to work at the place where he met his death, and if he had been warned to keep away therefrom, such warning was overriden by subsequent directions.

Lefebvre v. Trethewey Silver Cobalt Mine, 5 D.L.R. 195, 3 O.W.N. 1535, 22 O.W.R. 694.

INJURY TO EMPLOYEE FROM CONTACT WITH WIRE—PROPER PRECAUTIONS.

Where it appears that every reasonable precaution had been taken for the safety of employees and there being nothing from which it may be inferred that the accident was due to the negligence of some other person for which the master is liable, a power company is not responsible for injuries to an employee resulting from contact with an electric wire represented to be harmless but which had in some way become charged.

Toronto Power Co. v. Raynor, 25 D.L.R. 340, 51 Can. S.C.R. 490, reversing 22 D.L.R. 578, 32 O.L.R. 612.

INJURY TO SERVANT—ELECTRIC SHOCK — NEGLIGENCE—FINDINGS OF JURY—VOLUNTARY ASSUMPTION OF RISK—FAULT OF FELLOW SERVANT — WORKMEN'S COMPENSATION FOR INJURIES ACT.

Jasper v. Toronto Power Co., 9 O.W.N. 194.

LIABILITY—DAMAGES—ACCIDENT AT WORK —ELECTRICITY—DEFECTIVE TRANSFORMER—C.C., ARTS. 1053, 1056.

An electric company is liable for an accident sustained by its employee, electrocuted in the course of his employment by coming in contact with a transformer known by the company to be defective and near which it had set the employee to work without taking the trouble to turn off the current.

Brown Corp. v. Bouchard, 28 Que. K.B. 219.

(§ II A—67)—MASTER'S DUTY TO FURNISH SAFE APPLIANCES—CHAIN FASTENED TOGETHER WITH WIRE.

A master who furnishes a chain which is insecurely fastened together with wire, for the use of his servants in hoisting heavy weights, is liable for an injury sustained by an employee as the result of the breaking of the chain by reason of such defective fastening.

Proctor v. Parsons Building Co., 14 D.L.R. 40, 6 S.L.R. 123, 25 W.L.R. 463.

INJURY TO INEXPERIENCED EMPLOYEE—DEFECTIVE APPLIANCE—LIABILITY OF EMPLOYER.

An inexperienced boy 16 years old, employed in the cutting of a concrete floor to hold a chisel while another employee struck it with a sledge hammer, can recover from the employer for loss of an eye caused by a splinter of steel flying from the chisel; it appearing that the chisel and the use to which it was put rendered scattering of splinters likely, and constituted a special danger to the injured boy, who was directed to so hold the chisel that his head was on or near a level with the top of it.

Hooper v. Beairsto Plumbing Co., 15 D.L.R. 621, 23 Man. L.R. 712, 26 W.L.R. 304, 5 W.W.R. 772, affirming 11 D.L.R. 245, 24 W.L.R. 182, 4 W.W.R. 562.

SAFE PLACE—POLE SET IN HOLE MADE BY CONTRACTOR OTHER THAN DEFENDANT.

One who contracts to string wires on poles to be set by him in holes dug by another contractor, which were accepted as being sufficiently deep, is answerable for the death of a servant as the result of the fall of a pole on which he was working that was set in a hole not deep enough to hold it

securely, since there was a failure to furnish a safe place in which to work.

Slater v. Vancouver Power Co., 13 D.L.R. 143, 18 B.C.R. 429, 25 W.L.R. 66, 4 W.W.R. 1311.

MISCELLANEOUS PLACES AND APPLIANCES.

Although at common law and by statute the servant is entitled to certain safeguards for his safety and protection, such as a safe place to work, safe tools and appliances and care in selecting overseers, it is for the master to say just when the servant shall work, and if the master suspends or postpones the work, but continues to pay, the servant cannot complain nor can a damage claim be sustained upon the relation of master and servant in respect of personal injuries sustained by the latter when on the master's premises wholly at his own instance and for his own purposes during a period for which his work was suspended although the employee's wages were being paid in the interim.

King v. Northern Navigation Co., 6 D.L.R. 69, 27 O.L.R. 79, 22 O.W.R. 697.

INJURY TO SEAMAN—"DAMAGE DONE BY ANY SHIP"—ADMIRALTY COURT ACT, 1861, S. 7—INTERPRETATION—JURISDICTION—CONSENT OF PARTIES—ACQUIESCENCE.

The plaintiff, a seaman, brought an action in rem for damages against the barge "Neosho" for bodily injuries sustained by him in an accident alleged to have been occasioned by negligence for which the ship was liable. Held, that the damage done was not "by" the barge, but "on" the barge, and is not such damage as gives plaintiff a remedy in rem within the meaning of s. 7 of the Admiralty Court Act, 1861. The court was therefore without jurisdiction in the matter. In the absence of jurisdiction existing by law, the filing of an appearance and the giving of bail by defendant do not give jurisdiction to the court in a proceeding in rem. Jurisdiction is not a matter of procedure and cannot be derived from the consent of parties.

Mulvey v. The Barge "Neosho," 47 D.L.R. 437, 19 Can. Ex. 1.

ASSUMPTION OF RISK—HORSES.

A servant assumes the usual and ordinary risks of his work and a master is not liable for injuries to such servant caused by horses with which he was working taking fright, if the horses are ordinary work horses and there is no evidence that the master knew them to be vicious or given to running away.

Williams v. Keeler, 41 D.L.R. 69.

ENGINEERING WORK—GUY ROPE—NECESSITY OF KEEPING CLEAR FROM PASSING TRAINS—NEGLIGENCE—INJURIES—DAMAGES.

Where conditions are such that it is impossible to secure an anchorage for a guy rope used to afford the necessary resistance to the strain put upon tackling in raising bents in connection with the erection of a grain conveyor, such as would hold the rope clear from passing trains, it is the contractor's duty to see that the work is made safe for his employees either by following a different system of erecting the bents, or by providing some adequate means to safeguard the guy wire from contact with passing trains, or to warn or stop passing trains while it was so attached. Failure by the railway employees to take sufficient care to avoid contact by the train with the guy wire was something which the contractor was bound to anticipate and guard against and negligence on the part of the company's employees would not affect his liability. [Ainslie Mining & R. Co. v. McDougall, 42 Can. S.C.R. 420; Brooks v. Fakkema, 44 Can. S.C.R. 412; Wilson v. Merry, L.R. 1 Sc. & Div. 326, applied.]

Fairbrother v. Fegles Bellows Engineering Co., 48 D.L.R. 248.

LIABILITY FOR INJURY TO SERVANT—SAFE PLACE—INSUFFICIENT EXCAVATION FOR POLES FOR ELECTRIC WIRES.

One who contracts to string wires on poles for an electric power line to be set by him in holes dug by another contractor, and who with knowledge of the local conditions accepts such holes as being sufficiently deep and takes no precautionary measure for better supporting the poles in case the ordinary filling of light soil there available should be insufficient, is answerable for the death of a servant as the result of the fall of a pole on which the latter was working that was set in a hole not deep enough to hold it securely, since there was a failure to furnish a safe place in which to work. [Johnson v. Lindsay, [1891] A.C. 371, distinguished.]

Waugh-Milburn Construction Co. v. Slater, 16 D.L.R. 225, 48 Can. S.C.R. 609, 26 W.L.R. 895, 5 W.W.R. 1080, affirming 13 D.L.R. 143, 25 W.L.R. 66, 18 B.C.R. 429, 4 W.W.R. 1311, sub nom. Slater v. Vancouver Power Co.

SAFETY AS TO APPLIANCES—FINDINGS OF TRIAL JUDGE.

Rawlings v. Tomiko Mills, 3 D.L.R. 876, 3 O.W.N. 1335, 22 O.W.R. 249.

DECAYED POLE—INJURY TO LINEMAN.

The decayed condition of a pole, undiscovered because of the master's negligent inspection, will render the master liable for the death of a lineman caused by his jumping from the pole as it appeared to be about to fall.

Christie v. London Electric Co., 23 D.L.R. 476, 33 O.L.R. 395.

WORKMAN INJURED IN THE COURSE OF HIS EMPLOYMENT — NEGLIGENT SYSTEM — CONTRIBUTORY NEGLIGENCE — SELF-BALANCING LIFTS—TRAP.

Hatch v. Powell River Paper Co., 18 B.C.R. 1.

A butcher's shop in which animals are, by slaughter, transformed into meat for sale is a manufactory within the meaning the indemnity granted in the cases provided of the Workmen's Compensation Act (Que.) and workmen there employed are entitled to the indemnity granted in the cases provided

for. Under the provisions of art. 7337, R.S.Q. 1909, the accidental collaboration of a fellow-workman is not essential; it suffices that a single workman is employed who has the rights and remedies provided by the Act. The indemnity under the Act may be awarded for injuries caused by accident without the necessity to establish negligence.

Thorne v. Roy, 41 Que,. S.C. 305.

LIABILITY—ACCIDENT—MASTER AND CARTER — DRAWING ICE — PLATFORM PIECE WORK—C.C. ART. 1053.

One who employs a carter to draw ice from the place where it is cut on a river to a platform built by himself, is liable when the horses of the carter are drowned in the river by the accidental collapse of the platform, although the carter is being paid at the rate of ten cents per cake instead of by wages.

Langlois v. Dominion Park, 56 Que. S.C. 353.

(§ II A—68)—STEVEDORING COMPANY.

A stevedoring company is under a duty to its employees engaged in loading a ship by a winch and tackle, to provide against any fouled tackle going over the side of the ship, and to see that some person is on the deck for the purpose of signalling the winchmen to stop on the fouling of the wires supporting the sling board.

Snell v. Victoria & Vancouver Stevedoring Co., 8 D.L.R. 32, 1 W.W.R. 985.

(§ II A—70)—MACHINERY.

Apart from any statutory obligation, no negligence is shewn on the part of an employer by his failure to place a guard on a dangerous machine where its presence would not have avoided the accident for which suit was brought, though such guard was afterwards placed on the machine, and it appeared that guards had been used in other localities prior to the accident.

Smolik v. Walters, 1 D.L.R. 891, 4 A.L.R. 179, 20 W.L.R. 57, 1 W.W.R. 615.

In an action to recover against a master for injuries received while operating a coping machine, where it appears from the plaintiff's evidence that he was not aware of any defect in the machine and another witness testifies that knowledge of the defect had been brought home to the defendants, such defect being the "tripping" of the machine twice when the operator had worked the "tripper" only once, a verdict by the jury for the plaintiff will not be disturbed on appeal, although it depends solely on the balance of probabilities without definite evidence on either side as to the cause of the repeated operation.

McMullen v. Coughlan, 7 D.L.R. 718, 17 B.C.R. 491, 22 W.L.R. 543, 3 W.W.R. 158.

SAWING OPERATIONS — DEFECTIVE SYSTEM —CONCLUSIVENESS OF VERDICT.

Where a jury, after having viewed a mill and its operations, has found that injuries sustained by a sawyer in course of operations were occasioned by a defective system, and awarded damages therefor, their verdict should not be interfered with on appeal.

Lyons v. Nicola Valley Pine Lumber Co., 31 D.L.R. 133, 23 B.C.R. 141, [1917] 1 W.W.R. 237.

DANGEROUS MACHINERY — INCOMPETENT MANAGEMENT — WANT OF SUPERVISION.

It is negligence on the part of employers to omit providing a proper system by which the dangerous character of the employment might be lessened, and in putting an incompetent man in charge of a dangerous machine, and keeping him there for part of the day and the whole of the night, without supervision or instruction. [Choate v. Ontario Rolling Mill Co., 27 A.R. (Ont.) 155; Jones v. C.P.R. Co., 5 D.L.R. 332, 13 D.L.R. 900, applied.]

Hull v. Seneca Superior Silver Mines, 24 D.L.R. 254, 33 O.L.R. 557.

DEFECTIVE MACHINERY — INJURY TO EMPLOYEE — COMMON LAW LIABILITY.

A master knowingly using a defective piece of machinery which could have been rendered safe by means of a simple and easily understood automatic mechanical device (e.g., a circuit breaker or cut-out to stop the rotation of the drum of a hoisting apparatus operated by electricity before it could take up too much of the cable) renders himself liable in damages for injuries caused his workmen through its use.

Paskwan v. Toronto Power Co., 15 D.L.R. 752, 5 O.W.N. 823.

DEATH — IMPROPER METHOD OF REPLACING BELT ON PULLEY.

An employer is properly held liable under the Ontario Fatal Accidents Act, 1 Geo. V. c. 33, for the death of a servant, where the deceased was absolved from contributory negligence, and it appeared that the accident would not have happened had the defendant's millwright, engaged in repairing a defective belt, not failed in his duty to see that the deceased was not exposed to danger.

Falconer v. Jones, 11 D.L.R. 769, 4 O.W.N. 1373, 24 O.W.R. 672.

OPERATION OF MACHINERY — DELEGATION OF DUTY TO ESTABLISH SAFE SYSTEM OF OPERATION — PROHIBITING STOPPING OF MACHINERY WHILE CHANGING WORK.

An employer cannot, by delegating to an employee the duty of establishing a safe system, escape liability at common law for injuries sustained by a servant as the result of a defective system of operating dangerous machinery. For an employer to require a servant to work in close proximity to a rapidly revolving drill, which caught his arm and injured it while he was changing work in the machine, which he was forbidden to stop, amounts to a failure to provide a safe place for the servant to work and renders the employer liable at common law.

Weppler v. C.N.R. Co., 14 D.L.R. 729, 23

Man. L.R. 665, 25 W.L.R. 858, 5 W.W.R. 472.

(§ II A—71) — GUARDING MACHINERY — USING FOR IMPROPER PURPOSE, ONUS.

Where an employee is injured while using a machine of his own accord for a purpose for which it was not intended, and the machine is without defect and is sufficiently guarded for use for the purpose for which it is intended, and a regular practice of using the machine for the improper purpose to the knowledge of the employer has not been shewn, the employer is not liable in damages.

Wyers v. Winlow & Irving Co., 10 D.L.R. 587, 4 O.W.N. 1080, 24 O.W.R. 401.

FACTORIES ACT, SASK. — DANGEROUS MACHINERY — DUTY TO GUARD — FAILURE TO COMPLY WITH ACT — NEGLIGENCE — LIABILITY.

Section 19 of R.S.S. 1909, c. 17 (the Factories Act) provides in part that: "In every factory all dangerous mill gearing and machinery . . . shall be so far as practicable securely guarded." Failure to comply with this statutory duty renders the factory owner liable for injuries causing the death of an employee, if such death resulted from breach of the statutory duty and not from the employee's own negligence. General instructions not to go near machinery when in motion does not obviate the necessity of complying with the requirements of the statute, nor does the fact that they were given establish that a man found dead in the unprotected machinery was guilty of negligence when his duty took him upon a small platform upon which the machinery was situated.

Hilton v. Robin Hood Mills, 47 D.L.R. 282, 12 S.L.R. 245, [1919] 2 W.W.R. 134, affirming 11 S.L.R. 370, [1918] 3 W.W.R. 168.

HOISTING MACHINERY — SELECTION OF APPLIANCES—QUESTION OF FACT FOR JURY.

Although a master is not bound to adopt all the latest improvements and appliances, the question as to whether proper safety appliances had been installed by a master to prevent the overwinding of hoisting machinery is one of fact for the jury, notwithstanding the fact that the master entrusted the selection of such appliances to a competent man; and it is sufficient, for the finding of the jury, where the evidence points to several kinds of safety appliances, that the improper devices had been installed.

Toronto Power Co. v. Paskwan, 22 D.L.R. 340, [1915] A.C. 734, 113 L.T. 353, affirming 15 D.L.R. 752, 25 O.W.R. 779.

In an action for injuries received by reason of the alleged negligence of defendant in failing to provide a guard for a gear, where it is not disputed that the gear should have been securely guarded, that it had been originally guarded, but the guard had been broken but had not been replaced, and that the accident would not have happened if the gear had been guarded, and where there is no evidence of contributory negligence, a verdict by a jury in favour of the defendant will be reversed and a new trial granted.

Alexe v. Canadian Western Lumber Co., 8 D.L.R. 1, 22 W.L.R. 559, 3 W.W.R. 267.

Failure to guard, as required by the Nova Scotia Factories Act, 1901, c. 1, s. 20, a protruding set-screw in a revolving shaft in a saw-mill at a point in close proximity to which a servant was required to work, constitutes a defect, within the meaning of c. 179, s. 3 and subs. (a) of s. 5 of the Employers' Liability Act, R.S.N.S. 1900, in the arrangement of the work and machinery of which the master was aware, so as to render him liable for injuries sustained by the servant through his clothing catching on the set-screw. A saw-mill is a "factory" within the meaning of s. 20 of the Nova Scotia Factories Act, which requires that all dangerous parts of mill-gearing, machinery, etc., shall be, so far as practicable, securely guarded, as such Act declares that "mill-gearing" comprises "every shaft, whether upright, oblique, or horizontal."

Kizer v. Kent Lumber Co., 5 D.L.R. 317, 46 N.S.R. 83, 11 E.L.R. 41.

A violation of subs. 1 (a) of s. 20 of the Factories Act (Ont.), is sufficient to justify a verdict in favour of a servant, where it is shewn that he would not have been injured if a set-screw in a shaft, which was admittedly dangerous, had been securely guarded or sunk into the shaft.

McClement v. Kilgour Mfg. Co., 3 D.L.R. 462, 3 O.W.N. 999, 21 O.W.R. 856.

In an action by the conductor of a construction train for injuries from a wing of a gravel-spreading machine operated by air pressure, coming down him, caused by the engineer in charge of the machine unintentionally starting it by striking his knee against the handle of a valve used to set it in motion while attempting to get closer to the air gauge, which, owing to the darkness, he could not see from where he stood without a light, to ascertain if there was sufficient air in the reservoir of the machine to operate the same, a motion for nonsuit was rightly refused, it being for the Trial Judge to say whether any facts have been established in evidence from which negligence may be inferred, and for the jury to say whether or not from these facts negligence ought to be inferred. [Metropolitan R. Co. v. Jackson, 3 App. Cas. 197, followed.]

Tobin v. C.P.R. Co., 2 D.L.R. 173, 5 S. L.R. 381, 20 W.L.R. 676, 1 W.W.R. 1252.

FAILURE TO GUARD SHAFT.

Where the direct and proximate cause of an accident was the neglect of the employer to guard a shaft, an injured employee himself free from negligence, may recover under either the Factories Act, R.S.O. 1897,

c. 256, or the Workmen's Compensation Act, R.S.O. 1897, c. 160.

Gower v. Glen Woollen Mills, 12 D.L.R. 394, 28 O.L.R. 193, affirming 9 D.L.R. 244, 23 O.W.R. 553.

UNGUARDED SET SCREW IN SHAFT — BREACH OF STATUTORY DUTY.

The failure to guard a projecting set screw in a rapidly revolving shaft, as required by c. 1 of the Factories Act (N.S.) 1901, near which a servant was required to work, is negligence sufficient to render an employer liable for an injury to a servant caused by his clothing catching on the set screw.

Zwicker v. McKay, 11 D.L.R. 616, 47 N.S.R. 144, 13 E.L.R. 1.

GUARDING DANGEROUS MACHINERY — EXCEPTIONAL WORK — LIABILITY BY STATUTE BUT NOT AT COMMON LAW.

The employer's duty at common law to see that the employees are not required to work under a defective system does not extend to an unusual employment of a workman in assisting to move a pulley through a passageway not ordinarily used or intended for workmen to work in; and where an unprotected revolving shaft projected into the passageway, and the workman, while assisting in moving the pulley through it, was injured by coming in contact therewith, the efficient cause of the injury was the direction of the superintendent to the workman to work there, and the damages must accordingly be limited to the amount recoverable under the Workmen's Compensation Act, R.S.O. 1897, c. 160, R.S.O. 1914, c. 146.

Hicks v. Smith's Falls Electric Power Co., 14 D.L.R. 575, 5 O.W.N. 301, 25 O.W.R. 294, varying 10 D.L.R. 653, 24 O.W.R. 556.

SAFETY OF APPLIANCES — GUARDING DANGEROUS MACHINERY.

Where there is evidence of negligence on the part of the employer company as regards the guarding of machinery for the safety of employees as required by statute, yet no recovery of damages for the death of the employee from coming in contact with the machinery can take place without evidence to connect such negligence with the accident. [Wakelin v. London & S.W.R. Co., 12 App. Cas. 41, applied.]

McGowan v. Warner, 15 D.L.R. 134, 41 N.B.R. 524, 14 E.L.R. 47.

GUARDING DANGEROUS MACHINERY — WORKMEN'S COMPENSATION FOR INJURIES ACT — NEGLIGENCE — DEFECTIVE WAYS — UNGUARDED CIRCULAR SAW — CONFLICT OF EVIDENCE.

Maitland v. Mills, 4 O.W.N. 557, 23 O. W.R. 688.

LACK OF GUARD ON SHINGLE CUTTER.

Ross v. Westminster Mill Co., 33 W.L.R. 307.

(§ II A—75)—MINING OPERATIONS — EXPLOSION — DEFECTIVE SYSTEM — CONCLUSIVENESS OF VERDICT.

The verdict of a jury, based on a reasonable conclusion from the evidence, that injuries occasioned by an explosion in the course of mining operations had been caused by a defective system of storing powder, cannot be disturbed on appeal.

Lilja v. Granby, 31 D.L.R. 591, 23 B.C. R. 147, [1917] 1 W.W.R. 243.

WORKMEN'S COMPENSATION ACT — LIABILITY TO PERSON INJURED WHILE REMOVING COAL FROM MINE — "UNDERTAKER" AS DEFINED BY ACT — MEANING OF "WORKMAN" — CASUAL EMPLOYMENT.

Armstrong v. McIntyre, 7 D.L.R. 786, 2 W.W.R. 336.

MINING — EXPLOSION — STATUTORY DUTY OF MASTER.

A mining company owning and operating a mine is liable in damages to a miner employed by the contractor to whom the drilling operations had been let, for personal injury of such miner through an explosion on striking a missed hole which should have been blasted by the previous relay or shift, and of which no report was made to him when he went on duty, where the company's system was faulty in not making provision as required by the Mining Act (R.S.O. 1914, c. 32) or reporting from one relay of men to the next that a charged hole had not exploded and in not seeing that proper directions were given to have it exploded before continuing the drilling as required by the statutory mining rules, s. 164 of the Act; the duties in that respect are imposed upon the company and it is not absolved from responsibility by having contracted out to another the operation of the drilling machine.

Danis v. Hudson Bay Mines, 23 D.L.R. 455, 32 O.L.R. 335.

MINES — HOLE CHARGED WITH DYNAMITE —WARNINGS.

An unexploded hole charged with dynamite left in a mine by the night shift without any report or warning as required by r. 14 of s. 164 of the Mining Act, R.S.O. 1914, c. 32, whereby a worker of the following shift, while engaged in his ordinary work, struck a protruding ledge of rock, causing an explosion, will render the master liable for the injuries he sustained thereby.

Doyle v. Foley-O'Brien, 22 D.L.R. 872, 34 O.L.R. 42. [Affirmed by Can. Sup. Ct. December 29, 1915; see 9 O.W.N. 494.]

MINES — INFANT EMPLOYEE — SUPERVISION — VIOLATION OF WARNINGS.

The employment of a boy of 14 years of age to attend to the wire rope at the revolving drum of a hoisting gear of a mine is not such as to call for special supervision or special instruction where the drum was properly guarded and the work was properly boy's work if done by him where he was directed to do it outside of

the guards, particularly where he had been specially warned of the danger of attempting to work inside the guards and was injured by doing so in spite of the warning.

McSorley v. Dominion Coal Co., 22 D.L.R. 802, 48 N.S.R. 552.

WORK IN MINES — INEXPERIENCED EMPLOYEE — WANT OF GUIDE — STATUTORY REGULATIONS.

Permitting an inexperienced employee to work alone at night on a dimly lighted deck of a mine, which required the taking of cars loaded with ore from the cage of a hoist, without having an experienced man to guide him in the work, affords reasonable grounds for a jury's finding, where the employee is later found dead below the deck even where nobody saw him fall, that the death was caused by the negligence and breach of statutory duty of the master. Section 164, r. 45, of the Mining Act, R.S. O. 1914, c. 32, prescribes the code of signals for raising or lowering a cage in the shaft of a mine, and r. 98 provides that the owner of a mine shall enforce and observe such care and precaution for the avoidance of accident or injury to any person in or about the mine as the particular circumstances of the case require, and that the machinery, plant, appliances, and equipment, and the manner of carrying on operations, shall always, and according to the particular circumstances of the case, conform to the strictest considerations of safety. Failure of a mine-owner to maintain the mine in a condition suitable for carrying on the work with reasonable safety is followed by liability, even though the act which caused the injury may have been attributable to neglect of duty of a fellow-employee, and even though the owner employed competent officials for the superintendence of the mine, and required the statutory directions to be observed. [Grant v. Acadia Coal Co., 32 Can. S.C.R. 427; G.T.R. Co. v. Griffith, 45 Can. S.C.R. 380, applied.]

Hull v. Seneca Superior Silver Mines, 24 D.L.R. 254, 33 O.L.R. 557.

MINES AND MINING — INJURY TO MINER — NEGLIGENCE — MINING ACT OF ONTARIO, 1908, 8 EDW. VII. c. 21, s. 164, AS AMENDED BY 2 GEO. V. c. 8, s. 18 — PROTECTION OF MINERS — RULE 40 — DAILY EXAMINATION OF LEVELS AND RAISES — DANGEROUS CONDITION OF LEVEL — FAILURE OF MANAGER TO EXAMINE — ABSENCE OF CONTRIBUTORY NEGLIGENCE — FINDINGS OF JURY — FINDINGS OF APPELLATE COURT ON EVIDENCE — AVOIDANCE OF NEW TRIAL.

Bakanawski v. Mann Mines, 15 O.W.N. 374.

IN MINES — INJURY TO AND DEATH OF SERVANT IN MINE — ACTION BY WIDOW FOR DAMAGES — NEGLIGENCE — STATUTORY DUTY — ABSENCE OF GUARD.

Pressick v. Cordova Mines, 5 O.W.N. 263.

MINING COMPANY — PROTECTION OF EMPLOYEE — COMMON FAULT.

Demauche v. Asbestos & Asbestic Co., 40 Que. S.C. 270.

(§ II A—76)—PENTICES.

Where a trap door built over a mining shaft was negligently left open, by reason whereof a rock fell through it from another level of the mine and injured one of the miners, there is an omission on the part of the mining company of a statutory obligation under r. 17 of the Ontario Mining Act, 1908, to "provide a suitable pentice" for the protection of the workmen working on the lower level while work was going on on a higher level, and this notwithstanding that the trap door while kept closed would be effective as a pentice.

Siven v. Temiskaming Mining Co., 2 D.L.R. 164, 25 O.L.R. 524, 21 O.W.R. 454. [Affirmed, 8 D.L.R. 1030, 46 Can. S.C.R. 643, 23 O.W.R. 312.]

(§ II A—80)—UNCOUPLING CARS—"UNPACKED FROG" — FINDINGS OF JURY — NEW TRIAL.

In an action for damages for the death of the plaintiff's husband by reason of the negligence of the defendants, a railway company, his employers, while he was engaged in uncoupling cars, there was evidence, which the jury rejected, that the deceased had gone in voluntarily between the cars when the train was in motion; the jury found negligence causing the accident, namely, "frog not properly packed," and negatived contributory negligence, but did not indicate the connection between the negligence they found and the accident, as they were directed to do:—Held, that the jury should have indicated how or why the want of packing was the cause of the death —there was a want of proper evidence of direct causal negligence and an absence of intelligible expression by the jury of what they thought was a reasonable inference, there being at least three explanations which might be accepted; and a new trial was ordered. [McArthur v. Dominion Cartridge Co., [1905] A.C. 72, distinguished.]

Ryan v. C.P.R. Co., 32 D.L.R. 372, 37 O.L.R. 543.

NEGLIGENCE — DANGEROUS TRAIN YARD — DEATH—REMEDY.

Insufficient space between tracks in a train yard, where snow and ice had been permitted to accumulate, the yard being inadequately lighted, is negligence which will render a master liable for the death of a servant who has been run over by an engine while at work thereat; the damages therefore may be enforced by an action at common law, under Lord Campbell's Act, and need not be restricted under the Employer's Liability Act.

Armstrong v. C.N.R. Co., 35 D.L.R. 568, 28 Man. L.R. 147, [1917] 3 W.W.R. 219.

NEGLIGENCE — CONTRIBUTORY — JURY — FINDINGS — EXPERT EVIDENCE—GOOD RAILWAY PRACTICE — SWITCH STAND — LOCATION — TOO CLOSE TO RAIL.

A jury may find, without the assistance of expert evidence, that the location of a switch stand in a railway yard is too close to the rail, and is not reasonably sufficient to permit of the safe passage through it of a man riding on the side ladder of a car. The fact that the order of the Railway Commissioners does not govern the location of switch stands of a certain height, constructed according to good railway practice, does not justify a railway company placing such a stand so close to passing cars, that it is dangerous to switchmen. An employer is not entitled to expose his servants unnecessarily to obvious dangers, which they can escape only by constant vigilance or unfailing alertness.

Nelson v. C.P.R. Co., 39 D.L.R. 760, 24 Can. Ry. Cas. 308, 55 Can. S.C.R. 626, [1918] 2 W.W.R. 177.

INJURY TO SWITCHMAN — WANT OF PRINTED RULES — SPECIFIC FINDINGS.

The general finding of a jury that the injuries sustained by a switchman were caused by the negligence of the railway company is limited by a specific finding that the negligence consisted in not having definite printed rules and in not seeing that they are at all times strictly obeyed, and discloses no specific act of negligence on which an action at common law is maintainable.

Hile v. G.T.P.R. Co., 24 D.L.R. 9, 8 W. W.R. 403.

INJURIES TO RAILWAY WORKMAN RETURNING FROM WORK.

A railway company is not responsible for the injuries sustained by its workmen while returning from work under the direction of their foreman to the sleeping accommodations provided by the company, since such injuries are not those arising in the course of their employment.

Sharpe v. C.P.R. Co., 23 D.L.R. 487, 33 O. L.R. 402, 19 Can. Ry. Cas. 224, reversing 19 D.L.R. 889, 33 O.L.R. 402.

INJURY TO RAILWAY FIREMAN — CONFLICTING FINDINGS — NEW TRIAL.

In an action for damages for injuries sustained by a locomotive fireman employed by the defendants, by reason of the escape of steam from a valve in the locomotive engine, the jury found in answer to questions: (1) that the injuries of the plaintiff were caused by the negligence of the defendants; (2) that such negligence consisted in not seeing that the valve was properly closed; (3) in answer to the question, "Or were the plaintiff's injuries the result of his own negligence?" — "No;" (5) that the plaintiff by the exercise of reasonable care could have avoided the accident; (6) that he could have done so "by examining valve:"—Held, that there was evidence proper to be submitted to the jury on all branches of the case; and that the answers of the jury were conflicting, and there should be a new trial: r. 501 (1).

Ball v. Wabash R. Co., 35 O.L.R. 84.

(§ II A—83)—HEAD-LIGHTS.

Where the plaintiff, in an action under the Fatal Injuries Act (Ont.) for damages for the death of her husband who had been run over by a train while employed as a section-man upon the railway, pleaded lack of notice or warning of the approach of the train and the defendant railway company pleaded in answer that the accident was not caused by their neglect or omission, the fact that evidence was given and submitted to the jury at the trial of the failure to maintain a head-light in accordance with the company's rules, although that point was not more specifically raised by the pleadings, will not be a ground for granting the defendants a new trial, if they were not taken by surprise, but stood upon the evidence given and raised no objection until after verdict.

Graham v. G.T.R. Co., 1 D.L.R. 554, 25 O.L.R. 429, 13 Can. Ry. Cas. 232, 20 O.W. R. 965.

(§ II A—85)—RAILWAY TRACK — ACCUMULATION OF ICE.

It is the duty of the employer to provide safe premises for his servants to work; allowing ice and snow to accumulate along the side of a railway track so as to be a trap for a workman walking along the track in the performance of his duty is negligence, and if the cause of an accident the company is liable. The fact that the accident happened on a highway is no defence, the duty being founded not on ownership but on possession.

McEntee v. G.T.P.R., 40 D.L.R. 322, 11 S.L.R. 145, 23 Can. Ry. Cas. 269, [1918] 2 W.W.R. 253.

DEFECTIVE ROADBED — PROHIBITED SPEED — PROXIMATE CAUSE.

A sink-hole due to the inherent weakness of the subsoil of a roadbed, over which place trains were ordered by the railway company to be run at a slow speed, is not necessarily negligence per se and will not support the findings of a jury, that an accident causing the death of a locomotive engineer was caused by the defective roadbed and not having a watchman for same, where the real cause of the accident arose from the excessive and prohibited speed at which the deceased was running his train.

Lewis v. G.T.P.R. Co., 26 D.L.R. 687, 52 Can. S.C.R. 227, 20 Can. Ry. Cas. 318, 9 W.W.R. 1541, affirming 19 D.L.R. 606, 24 Man. L.R. 807, 29 W.L.R. 969, 7 W.W.R. 504.

DEATH OF SERVANT — ACTION BY ADMINISTRATOR UNDER FATAL ACCIDENTS ACT — NEGLIGENCE — RAILWAY — DECEASED WALKING ON TRACKS STRUCK BY TRAIN — FINDINGS OF JURY — NONSUIT—APPEAL.

Guardian Trust Co. v. Dominion Construction Co., 7 O.W.N. 611.

(§ II A—89)—SWING BRIDGE.

The exception to a rule of a railway company that its trains are entirely under the control of the conductors and that their orders must be obeyed except when they are in conflict with the rules and regulations or plainly involve any risk or hazard to life or property, in either of which cases all participating will be held alike accountable, is applicable where a locomotive driver ignored and passed a semaphore which was against his train proceeding and stopped at a water tank until he had filled his engine, when he signalled the conductor, who, by a rule of the company, had entire control of the train, that he was ready to go ahead, and the conductor signalled him to go ahead, and he, still ignoring the semaphore, ran on to a swing bridge which was then being opened to let a tug pass and the engine ran off into the water and the engineer was drowned, his death is due to his own negligence.

Smith v. G.T.R. Co., 8 D.L.R. 171, 14 Can. Ry. Cas. 300, 23 O.W.R. 805, reversing 2 D.L.R. 251, and restoring 3 O.W.N. 379, 4 O.W.N. 42.

(§ II A—94a)—POLE NEAR TRACK.

A railway company which has complied with an order of the Railway Board under subs. (g) of s. 30 of the Railway Act, 1906, requiring its water stand pipes to be placed 7 feet 6 inches from the centre of its tracks, is relieved from liability to a brakeman for injuries sustained while riding on a ladder on the side of a car, by coming in contact with a stand pipe located as required by such order. [G.T.R. v. McKay, 34 Can. S.C.R. 81, followed.]

Clark v. C.P.R. Co., 2 D.L.R. 331, 14 Can. Ry. Cas. 51, 17 B.C.R. 314, 20 W.L.R. 877, 1 W.W.R. 1213.

INJURY TO CONDUCTOR WHILE ADJUSTING TROLLEY — POLE NEAR TRACK.

In an action by a conductor of a municipal owned street railway for injuries sustained by colliding with a metal standard close to the track while adjusting the trolley pole, the fact of the close proximity of the standard otherwise properly constructed, or that because of the overcrowding of the vestibule he is compelled to leave it when adjusting the trolley pole, or the violation of rules of operation which are not pleaded, does not support a jury's finding of negligence against the defendant.

Schell v. Regina, 24 D.L.R. 755, 8 S.L.R. 275, 31 W.L.R. 834.

(§ II A—95)—RAILWAY — ACCIDENT TO WORKMAN IN REPAIRING CARS — FAILURE OF WORKMAN TO OBSERVE RULES — FAUTE COMMUNE.

Under certain rules prescribed by the Department of Railways and Canals, a blue flag was required to be placed at the end of a car, when workmen were engaged under or about it. Special instructions were also given that this rule should be strictly adhered to, and each car-repairer was supplied with two of such flags. L., on the day of the accident, had his flags in his toolbox, but neglected to use either of them. While L. was engaged, certain cars, came into contact with the car under which he was working, with the result that he was fatally injured. At the trial it was admitted that he had been negligent, but it was charged that there was faute commune, because the yard-master had ordered the cars to be moved by means of a flying-shunt. The evidence shewed that the yard-master would not have let the cars go on to the siding on which L. was working, had he seen a blue flag on that car:—Held, that the proximate cause of the accident was the negligence of L. in failing to put up a blue flag, and it was not a case in which the doctrine of faute commune should be applied.

Samson v. The King, 15 Can. Ex. 75.

DEFECTIVE SYSTEM — RAILWAYS — BRAKES — FELLOW SERVANT — LIABILITY — WORKMEN'S COMPENSATION.

The use of an auxiliary truck in substitution of a damaged car next to the engine, unconnected with the braking apparatus, thereby reducing the braking efficiency to one-half, is not of itself evidence of a defective system so as to charge the railway company with common law liability for the death of the engineer when the cab of the engine was struck by it in the process of shunting: the accident having been occasioned by the negligence of a fellow servant in thus placing the truck, the liability of the company was limited to recovery under the Workmen's Compensation Act (N.B.).

C.P.R. Co. v. Cheeseman, 45 D.L.R. 257, 57 Can. S.C.R. 439, 23 Can. Ry. Cas. 429, reversing 40 D.L.R. 437, 22 Can. Ry. Cas. 253, 45 N.B.R. 452.

(§ II A—96) — OPERATION OF RAILWAY CARS — NEGLIGENCE.

A railway company is liable for injury to an employee who was caught in a narrow space between a car which he was moving and a nearby building while he was climbing the nearest side-ladder to reach the brake to stop the car, though he could have safely used a ladder on the other side of the car, where, he, being ignorant of the closeness of the building to the track, naturally used the particular ladder, and where the danger must have been obvious to the foreman who directed him to move

the car, and the foreman negligently failed to warn him of the danger.

Winnipeg Electric R. Co. v. Shondra, 11 D.L.R. 392, 4 W.W.R. 328, affirming 21 Man. L.R. 622.

(§ II A—97)—Coupling cars — Negligence — Short levers — Foreign cars — Railway Act.

A railway company is liable for an injury sustained by a brakeman while coupling a car belonging to a foreign company, that had a short coupler lever which could not be operated without going between the end of the cars; since the hauling of a car so equipped was a violation of s. 264 (1) of the Railway Act, R.S.C. 1906, c. 37, requiring all freight cars to be provided with couplers that can be uncoupled without the necessity of men going between the ends of the cars.

Stone v. C.P.R. Co., 13 D.L.R. 93, 15 Can. Ry. Cas. 408, 47 Can. S.C.R. 634, reversing 4 D.L.R. 789, 14 Can. Ry. Cas. 61, 26 O.L.R. 121.

Government railway — Defective coupling — Negligence — Quebec law of common fault.

Lapointe v. The King, 14 D.L.R. 394, 14 Can. Ex. 219.

Safety appliances — Automatic couplers — Statutory compliance.

Section 264 of the Railway Act, 1906, imposing on railway companies the duty of equipping their cars with automatic couplers and with modern and efficient appliances, does not create an obligation to their employees to equip their cars with the very latest improved couplers immediately after they are put upon the market; and the equipment with couplers of 10 to 15 years' duration used extensively by other railways and approved by the Railway Board is a sufficient compliance with the Act.

C.P.R. v. Frechette, 22 D.L.R. 356, [1915] A.C. 871, 18 Can. Ry. Cas. 251, 24 Que. K.B. 459, reversing 23 Que. K.B. 203.

Safety appliances — Couplers — Frozen release — Injuries to employee uncoupling.

A train equipped with approved coupling devices as required by s. 264 (c) of the Railway Act, 1906, which had been inspected upon its arrival according to the usual practice and no apparent defects found, will not render a railway company liable for injuries to an employee sustained while uncoupling a car resulting from the formation of ice inside the coupler, preventing its operation, but which could not be visible from the exterior.

Phelan v. G.T.P.R., 23 D.L.R. 90, 51 Can. S.C.R. 113, 7 W.W.R. 1224, 18 Can. Ry. Cas. 233, affirming 12 D.L.R. 347, 23 Man. L.R. 435, 24 W.L.R. 785, 4 W.W.R. 1039.

Railway operation — Interswitching — Negligent coupling — Duty of train crew — Scope of employment — Employer's liability.

A train crew of the defendants while performing their duty in the transfer yard of another railway company were directed by the yardmaster to remove a special car of freight which was to be transferred to the defendants' railway from amongst a number of other cars in the yard. In order to do so it was necessary to shunt several cars placed in front of the car to be transferred and the train crew switched these cars to certain tracks on which there was then standing a train of the other railway company, headed by an engine under which the fireman, plaintiff, was then working. They undertook to couple the cars which they were switching to the standing train, as a matter of convenience, and, in doing so, struck the rear of the train with such force as to move the engine and cause injuries to the fireman who was working under it. Specific questions were not submitted to the jury, notwithstanding suggestions made by defendants' counsel after the judge had charged them, and they returned a general verdict in favour of the plaintiff:—Held, that in so proceeding to couple the cars they had switched on to the standing train the defendants' train crew were still acting within the scope of their employment in the defendants' business and, as they performed the work in a negligent manner, the defendants were liable in damages for the injuries caused to the plaintiff.

G.T.P. Ry. Co. v. Pickering, 50 Can. S.C.R. 393, 18 Can. Ry. Cas. 225, 28 W.L.R. 857, affirming 24 Man. L.R. 544.

(§ II A—100) — Railway employees — Locomotive engineer — Duties as to precaution — Collision — Liability for injuries.

A locomotive engineer or other railway employee having control of the tracks, after becoming aware of the presence of any person dangerously near the track, however imprudently, is bound to use ordinary care to avoid injury to him when he knows that the danger of collision is imminent; mere knowledge that the danger is possible is not enough there must be knowledge that a collision was likely to occur.

London v. G.T.R. Co.; Summers v. G.T.R. Co., 20 D.L.R. 846, 32 O.L.R. 642, 18 Can. Ry. Cas. 846.

Injury to and death of person employed in removing ice from tracks — Spur line in yard of industrial company — Negligence in moving cars on tracks — Liability of railway company.

Mercantile Trust Co. v. Steel Co. of Canada, 5 O.W.N. 307, 25 O.W.R. 272.

Collision — Injury to railway employee — Signals.

A railway company cannot relieve itself

of all responsibility for the consequences of a collision by proving that it gave all the warnings required by the Railway Act. It is liable at common law, wholly or partially according to circumstances, when the employee in charge of the engine could by taking ordinary precautions have prevented the accident.

Demers v. C.P.R. Co., 48 Que. S.C. 186.

RUNNING OF TRAINS.

Deceased was employed in the defendants' workshops, and traveled to and from his work on a pass. The condition on the back of the pass, exempting the company from liability for damages to person or property of holder of pass, was not signed by the workman. Deceased was a man skilled in his particular trade, and refused to work for the company unless given transportation. The jury found as a fact that deceased was traveling on a pass, but that there was not sufficient evidence to shew that he was made acquainted with the conditions thereon, and gave a verdict for $9,000, which, on motion for judgment, was sustained by the Trial Judge:—Held, that the finding as to want of knowledge of the condition on the pass should not be interfered with. That the finding was against the weight of evidence. Deceased, while traveling on his employers' car, was injured, and subsequently died from his injuries, in a collision between a car which broke away or became detached from the motor which was pulling it and ran back down grade, crashing into the car occupied by deceased. Defendants admitted that the accident occurred through the negligence of fellow-servants in the employment of defendant company, but there was no other evidence of negligence:—Held, on appeal, that it was for the plaintiff to shew that the accident was due to some specific act of negligence for which the defendants were responsible. Appeal allowed, and verdict set aside.

Farmer v. B.C. Electric R. Co., 16 B.C.R. 423.

RAILWAY—DEATH OF SERVANT—FIREMAN ON LOCOMOTIVE ENGINE—FALL FROM TRAIN ON BRIDGE—NEGLIGENCE—CAUSE OF DEATH—WIDTH OF BRIDGE—FIREMAN LEANING FROM TRAIN—EVIDENCE—FINDINGS OF JURY—NONSUIT.

Dunn v. Wabash R. Co., 7 O.W.N. 153.

(§ II A—101)—RAILWAY CASES — SHUNTING — NEGLIGENCE — PRECAUTIONARY DUTIES.

Mercantile Trust Co. v. Steel Co. of Canada, 16 D.L.R. 879, 6 O.W.N. 1, 25 O.W.R. 943.

RAILWAY CASES—SHUNTING CARS—ACTIONABLE NEGLIGENCE—PRECAUTIONARY DUTIES—"DEFECTIVE SYSTEM," WHEN NEGATIVED—WORKMEN'S COMPENSATION — COMMON LAW.

Kreuszynicki v. C.P.R. Co., 16 D.L.R. 879, 6 O.W.N. 1, 25 O.W.R. 939.

(§ II A—105) — LIABILITY OF RAILWAY COMPANY—ENGINEER RUNNING A SNOW-PLOUGH—PROCEEDING IN ABSENCE OF CROSSING OR STATION SIGNALS—WORKMEN'S COMPENSATION ACT (ONT.), R. S.O. 1897, c. 160.

Jones v. C.P.R. Co., 13 D.L.R. 900, 30 O.L.R. 331 at 337, 16 Can. Ry. Cas. 305, reversing 5 D.L.R. 332, 30 O.L.R. 331, 22 O.W.R. 439, 16 Can. Ry. Cas. 76.

(§ II A—109)—FAILURE TO OBSERVE STATUTORY REQUIREMENTS.

Section 276 of the Railway Act, 1906, is for the protection of employees of the railway company as well as of the public, and the widow and administratrix of a watchman employed by the company at a level crossing of the railway with a street railway, who is killed in an accident caused by a breach of that section by the running of a freight train backwards over the crossing without any person on the end car to give proper warning of its approach, resulting in a collision with a street car crossing the tracks, may recover damages against the company under s. 276. [McMullin v. N.S. Steel & Coal Co., 7 Can. Ry. Cas. 198, 39 Can. S.C.R. 593, and Lamond v. G.T.R. Co., 7 Can. Ry. Cas. 401, 16 O.L. R. 365, followed.]

Pettit v. C.N.R. Co., 7 D.L.R. 645, 22 W.L.R. 265, 23 Man. L.R. 213, 14 Can. Ry. Cas. 293, 3 W.W.R. 74. [Varied 11 D.L.R. 316, 15 Can. Ry. Cas. 272, 23 Man. L.R. 213, 24 W.L.R. 196, 4 W.W.R. 566.]

(§ II A—110)—ELEVATOR—DUTY TO INSPECT.

An employer is answerable for an injury to a servant by the falling of an elevator where there had been negligence of the employer in failing to have it inspected as frequently as the conditions incident to its use required, and such inspection would have disclosed the defect which caused the elevator to fall. [Ainslie Mining & R. Co. v. McDougall, 42 Can. S.C.R. 420, followed.]

Hitchin v. B. C. Sugar Refining Co., 12 D.L.R. 552, 18 B.C.R. 397, 24 W.L.R. 960, 2 W.W.R. 1326.

NEGLIGENCE—DEFECTIVE SYSTEM — TIMBER —INSPECTION.

Canadian Collieries v. Dixon, 39 D.L.R. 758, 55 Can. S.C.R. 620, affirming 36 D.L.R. 388, 24 B.C.R. 34, [1917] 2 W.W.R. 763.

(§ II A—114)—DUTY TO INSPECT—LATENT DEFECTS—ICE IN CAR COUPLER.

The duty of a railway company to inspect cars for defects was discharged, so as to absolve it from liability for an injury to a brakeman through the failure of an automatic car coupler of the best known type to work properly by reason of an accumulation of ice inside it, where the car on its arrival at a station was given the usual inspection, and no practicable system of inspection would have disclosed the presence of the ice.

Phalen v. G.T.P.R. Co., 12 D.L.R. 347,

23 Man. L.R. 435, 24 W.L.R. 785, 4 W.W. R. 1039.

(§ II A—115)—Selection and retention of employees—Master's liability.

Where a master does not personally superintend and direct the work of his servants, his duty is performed, at common law, if he selects proper and competent servants to do so, and furnishes the servants with adequate materials and resources for the work.

Klem v. Puget Sound Lumber Co., 11 D.L.R. 84, 24 W.L.R. 61, 4 W.W.R. 516.

Selection and retention of employees—City employing doctors for general vaccination—City's liabilities, how limited.

Where a city exercises due care and prudence in the selection of the physicians whom it employs to perform (without city supervision) the operations in the general vaccination of the resident children of the city, the alleged negligence or fault of one of such physicians in performing a vaccination is not competent or admissible as against the city in an action for personal injuries following the operation. [Hillyer v. St. Bartholomew's Hospital, [1909] 2 K.B. 820, and Wallis v. North Shore, 20 Que. K.B. 506, applied.]

Boilard v. Montreal, 18 D.L.R. 366, 21 Rev. Leg. 58.

(§ II A—120)—Servant "lent" by master to stranger to assist in work—Injury to servant by negligence of stranger—Liability of stranger as temporary master or directly for negligent breach of duty—Nonliability of real master.

Ballard v. Morris, 12 O.W.N. 48.

Responsibility — Blasting — Subcontractor—C.C. art. 1053.

A company engaged in blasting had 13 holes drilled into a shaft and charged them with dynamite. Only 12 went off. The next day the plaintiff and other laborers having been sent to work in the mine, the 13th hole was struck by a pick, there was an explosion, and plaintiff was injured. Held that the company was liable in damages. The fact that the plaintiff was working for a subcontractor of the company did not affect the liability of the company.

Buschuk v. Dane Mining Co., 25 Rev. Leg. 11.

(§ II A—122)—Safety — Servants of third person—Hired crew.

The hirer of a crane owes a duty to the crew furnished with it to so direct and supervise the operation as to provide for the safety of those engaged in it and to employ a system which will ensure the workmen against injury, no matter whose servants they are, and in the absence of the owner's knowledge of the character of the work to be performed with it and his undertaking to supply a machine capable of doing it, there being no contributory negligence or volens, the hirer and not the master of the crew is responsible for the death of a craneman occasioned by the overturning of the machine in course of operations.

Dubé v. Algoma, 27 D.L.R. 65, 35 O.L.R. 371. [Affirmed in part, 31 D.L.R. 178, 53 Can. S.C.R. 481.]

B. Servant's assumption of risks.

(§ II B—125)—Negligence of employer—Employee's duty to avoid consequences.

Notwithstanding negligence of an employer which imperils an employee, the latter is bound to use reasonable diligence to avoid the consequences thereof on becoming aware of the negligence.

Brown v. Coxsworth, 11 D.L.R. 369, 6 S.L.R. 80, 24 W.L.R. 361, 4 W.W.R. 776.

Injury to teamster—Defective truck—Knowledge of defect — Voluntary assumption of risk—Remedy under Workmen's Compensation Act — "Services temporarily let or hired."

Caplin v. Walker, 26 D.L.R. 774, 35 O.L. R. 291.

Continuance in employment with knowledge of danger.

Mere proof that the employee knew the danger and continued in the employment is not conclusive evidence to prove that he consented to assume the risk, and the trial tribunal is at liberty, notwithstanding, to find that the employee suing for personal injuries sustained by continuing in the dangerous work had not contracted or consented to run the risk.

Weppler v. C.N.R. Co., 14 D.L.R. 729, 23 Man. L.R. 665, 25 W.L.R. 858, 5 W.W.R. 472.

Injury to servant while repairing building—Defective condition.

Although the owner of a building is responsible for the damage caused by what has happened on account of want of repair or by defect in construction, this responsibility cannot be invoked by one who having undertaken to remedy these defects falls a victim to them during his work.

Lambert v. L'Oeuvre, etc., de St. Jean, 48 Que. S.C. 312.

Defective system—Volenti non fit injuria—Common fault.

A workman who, knowing the danger of using a machine deprived of protection, continues to use it and is injured, does not necessarily come within the rule volenti non fit injuria. If the employer, knowing of the defects in the machine, neglects to remedy them and permits the workman to use it in this state, there is fault and common liability.

Bégin v. Sharp Construction Co., 26 Que. K.B. 345.

(§ II B—130)—Negligence—Master and servant—Injury to employee caused by negligence of fellow employee intrusted with superintendence—Liability of employer of common

LAW—WORKMEN'S COMPENSATION FOR INJURIES ACT, R.S.M. 1902, c. 178, s. 3—RAILWAY ACT, R.S.C. 1906, c. 37, s. 306—LIMITATION OF TIME FOR ACTION.

Anderson v. C.N.R. Co., 13 Can. Ry. Cas. 321, 21 Man. L.R. 121.

DANGERS OBVIOUS AND INCIDENTAL TO WORK.

The use of dangerous machinery creates in itself no greater liability on the part of its owner to a servant operating it than the use of ordinary machinery. The probability of the circumstances which import danger—knowledge on the part of the Master and absence of knowledge on the part of the workman is much greater, however, where machinery is in its nature dangerous.

Williams v. Western Planing Mills, 3 A.L.R. 314.

(§ II B—132)—WORK OF BRAKEMAN.

By hiring as a brakeman on a railway an employee does not undertake to assume the risk of an accident caused by the neglect of the company to take all necessary and legal precautions for the protection of its employees, and the company is liable in damages for an accident caused by such neglect.

Wentzell v. New Brunswick, &c., R. Co., 43 N.B.R. 475.

(§ II B—133)—SERVANT' ASSUMPTION OF RISK—GANGWAY—SHIPPING CASES.

Where a longshoreman is engaged by shipowners to assist in unloading a ship, he must be taken to have assumed the risks of defects in the placing and securing by the ship's officers of the gangway over which he must board the ship to get to his work. [Saint John Gas Light Co. v. Hatfield, 23 Can. S.C.R. 164, distinguished.]

O'Regan v. C.P.R. Co., 9 D.L.R. 849, 41 N.B.R. 347, 11 E.L.R. 457.

(§ II B—135)—"DEFECTIVE SYSTEM"—BUILDING TRADES PROTECTION ACT—WORKMEN'S COMPENSATION—REASONABLE SAFETY, WHEN NEGATIVED.

Schofield v. Blome; Johnston v. Blome, 16 D.L.R. 875, 6 O.W.N. 149.

RAILWAY APPLIANCES—DEFECT—FINDING OF JURY—NEW TRIAL.

A railway company is not obliged to have the best appliances for the purpose of discharging freight if the appliances used are reasonably fit for the purpose. If the jury give no finding from which it can be inferred what the defect was which led to the accident, a new trial will be ordered.

Wamboldt v. Halifax & South Western R. Co., 40 D.L.R. 517, 52 N.S.R. 341.

INANIMATE CHATTEL—BORROWED UNLOADING CRANE—OWNER—CUSTODY OF THE CHATTEL—BORROWER—PRESUMPTION OF MISTAKE—CONTRARY EVIDENCE—C.C. 1053, 1054, 1776.

A derrick, belonging to the defendant being on government land in charge of the defendant Clayton, is an inanimate chattel and falls under art. 1054, C.C. The principle of liability imposed by art. 1054, C.C., is "in case of injury caused by the chattel which one has under his care sets up a presumption of fault." This presumption may be rebutted and destroyed by evidence given by the one who has charge of the chattel, that he committed no fault, and that he was not a party to the cause of the accident occasioning the injury.

Article 1054 does not apply to the defendant company because the crane which they had loaned to Clayton was not under their control and they were incapable of any fault, C.C. 1776.

Nantel v. Clayton & The Dominion Textile Co., 25 Rev. de Jur. 397.

INJURY TO SERVANT—NEGLIGENCE—DEFECTIVE SYSTEM—EVIDENCE—FINDINGS OF JURY—LIABILITY AT COMMON LAW.

Wasyliszyn v. Canada Cement Co., 7 O.W.N. 270.

DEFECTIVE SYSTEM—INJURY TO SERVANT—NEGLIGENCE—EXPLOSION IN HOTEL KITCHEN—DEFECT IN HOT WATER PLANT—LIABILITY AT COMMON LAW—WORKMEN'S COMPENSATION FOR INJURIES ACT, R.S.O. 1897, c. 160, s. 6 (a)—FINDINGS OF JURY—FINDING BY APPELLATE COURT ON EVIDENCE—JUDICATURE ACT, s. 27 (2).

Miller v. International Hotel Co., 7 O.W.N. 423.

INJURY TO SERVANT—VOLENTI NON FIT INJURIA.

A person entering on a work with full knowledge of possible danger from obvious defects, his duty being chiefly to remedy or report such defects, should not be allowed damages for injuries arising out of such defects unless there be some express agreement to that effect. Defence of volenti non fit injuria held applicable in an action by a roadmaster for injuries received from an accident while using a speeder on an official trip over defendant's railway, the alleged cause of the accident being the bad condition of the rails.

Mulcahy v. Edmonton, Dunvegan & B.C. R. Co., [1919] 3 W.W.R. 750.

BUILDING OPERATIONS—NEGLIGENCE—DEFECTIVE SYSTEM—BREAKING OF JOIST.

Lafendal v. Northern Foundry & Machine Co., 19 W.L.R. 350.

INJURIES DUE TO DEFECTIVE SYSTEM—LIABILITY AT COMMON LAW AND UNDER STATUTE.

Holdaway v. Perrin, 2 O.W.N. 1346, 19 O.W.R. 949.

INJURY TO SERVANT—NEGLIGENCE AT COMMON LAW—DEFECTIVE SYSTEM.

Boon v. Brown, 16 W.L.R. 120.

INJURY TO SERVANT THROUGH DEFECTIVE SYSTEM—DUTY OF EMPLOYER TO PROVIDE SAFE METHODS.

Carrigan v. Granby Consolidated Mining Co., 16 B.C.R. 157, 17 W.L.R. 459.

(§ II B—136)—Latent defects — Munition factory—Employee—Poisonous gases — Ventilation — Injury to health—Proximate cause—Proof.

In an action brought by a workman to recover damages for injury to his health caused, as he alleged, by neglect of his employers' duty to him as their servant while working in their munition factory to ventilate the building in which he worked so as to keep the air reasonably pure so as to render harmless, as far as reasonably practical, vapours generated in the course of the work. Held, that the fact the Workmen's Compensation Board had rejected the claim on the ground that it was not a case of "personal injury by accident" and so was not within the Act, did not stand in the way of the present action. Held, also, that there was no evidence on which reasonable men could find in plaintiff's favour, he having failed to prove absence of proper ventilation, the presence of poisonous vapours, or that the two combined were the proximate cause of his ill health.

Scotland v. Canadian Cartridge Co., 48 D.L.R. 655, 45 O.L.R. 586. [Reversed, 50 D.L.R. 666.]

(§ II B—139)—Dangerous scaffold.

It is not inexcusable fault for an employer to order his workmen to build a scaffold on which they are to work if the workmen are reasonably competent and know the danger to which they will be exposed and consent to build and use the scaffold without having it examined by a carpenter.

Wall v. Cape, 24 D.L.R. 559, 24 Que. K. B. 38.

Defective scaffold—Negligence of fellow-servants.

Lindsay v. Davidson, 17 W.L.R. 588. [Affirmed, 19 W.L.R. 433.]

Gross negligence—Lack of scaffolding—Notice of action—Workmen's Compensation Act.

Quinto v. Bishop, 2 O.W.N. 1152, 19 O. W.R. 313.

(§ II B—141)—Servant's assumption of risks—Elevators.

The risks of employment assumed by an operator of an elevator in a large office building cannot be construed to comprise risks caused by the employer's failure (a) to provide for the use of such operator an elevator in proper working order, and (b) to enclose the elevator shaft at the different floors of the building.

Jackson v. C.P.R. Co., 16 D.L.R. 138, 5 W.W.R. 1314, 27 W.L.R. 135.

(§ II B—143)—Assumption of risk—Common law liability—Machinery—Engine packing.

Where the machinery of a plant is in such a state of repair that no more than ordinary care and attention are required to keep it safe, the Master satisfies his common law liability if he places competent persons in charge and sees that adequate materials are kept on hand for use by them in keeping the machinery and plant in a safe condition; and he will not be liable at common law for injuries to an employee attributable to a fellow-servant's neglect to use the materials provided (e.g., engine packing), although there may be a restricted liability under an employers' liability law. [Canada Woollen Mills v. Traplin, 35 Can. S.C.R. 424, distinguished.]

Shearer v. Canadian Collieries, 16 D.L.R. 541, 19 B.C.R. 277, 27 W.L.R. 526, 6 W.W. R. 469.

Workmen's Compensation Act — What appliances within—Steam shovel.

A steam shovel resting on wheels on a temporary track is an "engine or machine" within the meaning of s. 3 (5), Workmen's Compensation Act, R.S.O. 1897, c. 160, so as to render its owner liable for injuries inflicted on a servant through its negligent operation by the engineer in charge. [Murphy v. Wilson, 52 L.J.Q.B. 524, distinguished.]

Dicarllo v. McLean, 12 D.L.R. 7, 4 O.W. N. 1444, 24 O.W.R. 749.

What machinery within Workmen's Compensation Act—Hoisting apparatus.

A hoist running on wheels along elevated rails from which depended a cylinder operated by compressed air for lifting and carrying heavy weights is a machine within the meaning of the Workmen's Compensation Act, R.S.O. 1897, c. 160; R.S.O. 1914, c. 146.

Dunlop v. Canada Foundry Co., 12 D.L. R. 791, 28 O.L.R. 140, affirming 2 D.L.R. 887, 4 O.W.N. 791.

Machinery generally.

If a servant, who has been injured in the course of his employment, has disobeyed any order of his master, or has put himself in the wrong place or otherwise acted as he should not, and if his act was one without which he would not have been injured, he cannot recover damages from his master, even though his act was due to mere inadvertence. [D'Aoust v. Bissett, 13 O.W.R. 1115; Mercantile Trust Co. v. Canada Steel Co., 3 O.W.N. 980, followed.]

Corea v. McClary Mfg. Co., 3 D.L.R. 323, 3 O.W.N. 1071, 21 O.W.R. 909.

Defective instrument — Negligence — Knowledge of defect—Appreciation of danger—Acceptance of risk.

To place in the hands of an employee an instrument for his use which owing to a defect in it is likely to cause him injury is negligence but if, at the moment he takes the instrument to use, he has knowledge of the defect and appreciates the danger and the risk and, notwithstanding this, he voluntarily decides to use it, there is no negligence towards him as he is to be regarded as volens. [Thomas v. Quartermaine, 18

Q.B.D. 685; Smith v. Baker, [1891] A.C. 357, applied.]

Tario v. West Canadian Collieries, 20 D.L.R. 761, 29 W.L.R. 167.

INJURY FROM FALL OF MACHINERY IN SMELTER—VOLUNTARY ASSUMPTION OF RISK—RES IPSA LOQUITUR—APPLICABILITY.

Meagher v. Granby Consolidated, 24 D.L.R. 892, 32 W.L.R. 334, 9 W.W.R. 37.

IMPROPER USE OF HOIST—NEGLIGENCE OF FOREMAN — OPERATION OF HOIST — BUILDING TRADES PROTECTION ACT, 1 GEO. V. c. 71, s. 6.

Schofield v. Blome; Johnston v. Blome, 5 O.W.N. 328, 25 O.W.R. 282.

DEFECTIVE SYSTEM—RECOVERY UNDER COMMON LAW.

Where personal injury is occasioned to a factory employee by reason of defects generally in the system and equipment of the factory, the employee is entitled to recover at common law, although an action under the employers' liability statutes has become barred by the lapse of the statutory limitation of time.

Gower v. Glen Woollen Mills, 9 D.L.R. 244, 28 O.L.R. 193, 23 O.W.R. 553. [Affirmed, 12 D.L.R. 394, 28 O.L.R. 193.]

INJURY TO SERVANT—DANGEROUS MACHINE—KNOWLEDGE OF DANGER.

Williams v. Western Planing Mills Co., 16 W.L.R. 13.

TOOLS OUT OF ORDER.

Kellett v. British Columbia Marine Railways Co., 16 B.C.R. 196, 18 W.L.R. 368.

DANGEROUS MACHINERY—SERVANT CAUGHT AND WHIRLED AROUND SHAFT—HEAD OF SET SCREW PROJECTED ABOUT ONE INCH—NEGLIGENCE—"VOLENTI NON FIT INJURIA."

McClement v. Kilgour Mfg. Co., 3 O.W.N. 446, 20 O.W.R. 770.

(§ II B—144)—USE OF DANGEROUS MACHINERY—FACTORY ACT.

When the employer neglected to guard a shaft, and such want of a guard was a direct and proximate cause of the accident the employee who is not himself negligent is entitled to recover under the Factories Act, R.S.O. 1897, c. 256, s. 19.

Gower v. Glen Woollen Mills, 9 D.L.R. 244, 28 O.L.R. 193, 23 O.W.R. 553. [Affirmed, 12 D.L.R. 394, 28 O.L.R. 193.]

UNGUARDED.

A machine which was no part of a factory or plant, but a product thereof manufactured for a customer, is not within the words or intention of s. 32, c. 8, of the Factories Act, 1911 (B.C.), which requires the secure guarding, so far as practicable, of all dangerous parts of mill-gearing, machinery, shafts, etc., so as to render a manufacturer liable where a servant sustained injuries while testing such newly constructed machine, by coming into contact with a portion thereof which was not guarded as such section required, since it was necessary that such portion should be exposed to view in order that all parts of the machine might be properly inspected.

Everett v. Schaake, 4 D.L.R. 147, 17 B.C.R. 271, 21 W.L.R. 525, 2 W.W.R. 572.

A master who requires his servant to perform a dangerous service cannot say that it was done voluntarily merely because the servant, in the exercise of his duty, performed the service, instead of refusing to do so at the risk of dismissal. A servant who does that which his duty requires him to do, though it may be dangerous, and does it in a reasonable manner, so as not to increase the risk, does not bring himself within the rule volenti non fit injuria.

McClemont v. Kilgour Mfg. Co., 8 D.L.R. 148, 27 O.L.R. 305, affirming 3 D.L.R. 462, 3 O.W.N. 999.

The maxim, volenti non fit injuria, is not applicable where a servant sustains injuries as a result of a violation of a statutory duty by a master. A servant who continues in an employment with knowledge of the close proximity of a protruding set-screw in a revolving shaft that was not guarded, as required by c. 1, s. 20, of the Nova Scotia Factories Act, 1901, does not thereby voluntarily assume the risk of injury therefrom, so as to deprive himself of a cause of action for personal injuries under the Employers' Liability Act (N.S.) 1900.

Kizer v. Kent Lumber Co., 5 D.L.R. 317, 46 N.S.R. 83, 11 E.L.R. 41.

DANGEROUS MACHINERY — NEGLIGENCE OF EMPLOYEE—NEGLIGENCE OF EMPLOYER—INJURY—DAMAGES.

A plaintiff cannot recover damages for injuries received where both the plaintiff and defendant are at fault, and the responsibility of the accident has been placed on both, the loss cannot be shared; it must be borne by the injured party.

Aimer v. Cushing Bros., 49 D.L.R. 492.

UNGUARDED MACHINERY—ASSUMPTION OF RISK.

On the defence of volens, in an action for damages by an employee on account of injuries sustained in the course of his employment, the question which has to be considered is whether the plaintiff agreed that, if injury should befall him, the risk was to be his and not his master's.

McPhee v. Esquimalt & Nanaimo Ry. Co., 16 D.L.R. 756, 49 Can. S.C.R. 43, 27 W.L.R. 444, 5 W.W.R. 926.

EMPLOYER'S LIABILITY—LEASE OF MACHINERY—SAW-MILL — PROTECTION — C.C. QUE. 1053.

One who operates a saw-mill with his own machinery is responsible for an accident happening to one of his workmen, even when he had rented his machinery to another person whom he paid for piece work. There is negligence and employer's liability

when a buzz plane in a saw-mill is not covered with a protector.

Hubert v. Bradford, 23 Que. K.B. 396, reversing 19 Que. K.B. 271.

The workman who, knowing of the danger of using a machine not properly protected, voluntarily continues to do so and is injured does not necessarily come within the principle of the maxim volenti non fit injuria. If his employer, also aware of the defective nature of the machine, has failed to provide a remedy, and has allowed the workman to use it in its unprotected condition, there is fault and common liability.

Viau v. Villeneuve, 21 Que. K.B. 263.

(§ II B—146)—MINING — VOLENS — MASTER'S BREACH OF STATUTORY DUTY.

The maxim volenti non fit injuria is not applicable in relief of a defendant guilty of a violation of a statutory duty such as is imposed by the Mining Act, R.S.O. 1914, c. 32. [McClemont v. Kilgour Mfg. Co., 8 D.L.R. 148, 27 O.L.R. 305, applied.]

Danis v. Hudson Bay Mines, 23 D.L.R. 455, 32 O.L.R. 335. [Affirmed by Can. Sup. Ct. February 1, 1916. See 9 O.W.N. 494.]

IN MINE.

The doctrine of volenti non fit injuria applies to bar a negligence action by an employee for personal injury in respect of the employer's failure to protect the place of work on a hillside from falling stones and debris, where the nature of the risk was known to the employee, who with his fellow-workmen had done the work they thought sufficient to guard the place against the stones and debris and where the plaintiff was an experienced man at such work. [Smith v. Baker, [1891] A.C. 325, distinguished.] The relation of master and servant implies an obligation on the part of the master to provide for the safety of his servant in the course of his employment to the best of the master's judgment; yet, in that sort of employment where the servant must have known as well as his master, or probably better, whether or not the place was safe, it is the servant's duty to exercise diligence and caution to avoid danger. [Priestley v. Fowler, 3 M. & W. 1, applied.]

Bergklint v. Western Canada Power Co., 7 D.L.R. 720, 17 B.C.R. 443, 22 W.L.R. 535, 3 W.W.R. 145.

DEATH OF SERVANT—WORKMAN EMPLOYED IN MINE—EXPLOSION — NEGLIGENCE — FAILURE TO INSPECT—FINDINGS OF JURY — EVIDENCE — MINES ACT, R.S.O. 1914, C. 32, S. 164, R. 10.

Musumicci v. North Dome Mining Co., 7 O.W.N. 48.

(§ II B—148)—INJURY TO SERVANT—RISK OF EMPLOYMENT—FREEZING.

Danger from freezing is not such a risk of a servant's employment as will absolve an employer from liability, where, on an intensely cold day the servant was required to work for 10 hours in the open air without shelter, or any provision being made by the employer to protect him against the severity of the cold, or allowing him sufficient rest to warm himself.

Canada Cement Co. v. Pazuk, 12 D.L.R. 303, 22 Que. K.B. 432.

(§ II B—150) — FELLOW-SERVANT — EVIDENCE—ONUS OF PROOF.

British Columbia Electric R. Co. v. Wilkinson, 45 Can. S.C.R. 263.

INJURY TO BRAKEMAN—STRUCK BY SWITCH-STAND—FINDING OF JURY.

Leitch v. Pere Marquette R. Co., 2 O.W.N. 617, 18 O.W.R. 433.

(§ II B—151)—SERVANT WHEELING CONCRETE OVER RUNWAY—DEFECT IN PLATFORM—INFERENCE.

McKeand v. C.P.R. Co., 2 O.W.N. 812, 18 O.W.R. 309.

(§ II B—153)—DAMAGES—DAMAGED CAR—DEFECTIVE LADDER—NOTICE—STATUTORY DUTY—RAILWAY ACT, R.S.C. 1906 C. 37, S. 264—BREACH OF RULES—PROXIMATE CAUSE OF INJURIES.

Smith v. G.T.R. Co., 20 D.L.R. 961, 32 O.L.R. 380.

INJURIES TO EMPLOYEE — MOVING CAR — NEGLIGENCE OF RAILWAY COMPANY FOREMAN ALLEGED.

Lennox v. G.T.R. Co. and C.P.R. Co., 19 O.W.R. 169.

(§ II B—156)—TRACK AND ROADBED.

Where in emergency work on a railroad, a member of the wrecking crew, while assisting in clearing the track after an accident from an unknown cause, is injured by the unexpected and unusual plunge of a twisted rail on its release by cutting the bolts on the fish-plate connecting the rail, no negligence is shewn against his employer and the doctrine res ipsa loquitur does not apply.

Rostrom v. C.N.R. Co., 3 D.L.R. 302, 22 Man. L.R. 250, 21 W.L.R. 225, 2 W.W.R. 260.

OPERATION OF RAILWAY—CONDITION OF YARD —"LAY-OUT" OF CONCOURSE—SWITCHING.

C.P.R. Co. v. Wood, 47 Can. S.C.R. 403, 23 W.L.R. 580.

(§ II B—158)—SPEED OF TRAIN.

A car cleaner employed by the defendants was injured by being struck by an engine while walking on the track. The jury found that the injured party was not guilty of negligence but that the negligence which caused the accident was improper light of yards during the time of alterations and the train being a little ahead of time running at an excessive speed. The jury did not answer the question as to failure to ring the bell. Held, that the accident was not due to actionable negligence on the defendant's part and the action must be dismissed. When a jury exonerates an injured party from the charge of contributory negligence upon the evidence which but for the

finding would appear to shew very convincingly that he was the author of his own injuries, the court should ascertain whether there is evidence upon which the jury might reasonably find negligence on the part of the defendants which actually caused the injury or whether the findings of the jury make a case of actionable negligence against the defendants. Charges of alleged negligence expressly put to the jury upon which the jury did not make a finding must be taken to have been negatived. There was no duty owed by the defendants to the plaintiff regarding the time of arrival of any of its trains. There is no rule of law limiting the rate of speed of railway trains in the interests of railway workmen. [Andreas v. C.P.R. Co., 37 Can. S.C.R. 1, 5 Can. Ry. Cas. 450, followed.]

Paquette v. G.T.R. Co., 13 Can. Ry. Cas. 68, 19 O.W.R. 305.

(§ II B—160)—Knowledge by servant of defect or danger.

Where a servant was killed by a brick falling through an opening in a platform under which his work did not take him the master is not answerable therefor where the servant had been warned as to and knew the danger of going under the opening, and had been expressly directed to keep away therefrom.

Mercantile Trust Co. v. Canada Steel Co., 5 D.L.R. 55, 3 O.W.N. 1467, 22 O.W.R. 568, affirming 3 D.L.R. 518, 3 O.W.N. 980.

Servant's assumption of risks—Knowledge of defect.

Neither the employee's knowledge of a defect in the condition of the works due to the employer's negligence, nor the continuance in the employment, is conclusive evidence of willingness on the part of the employee to incur the risk.

Fairweather v. Canadian General Electric Co., 10 D.L.R. 130, 28 O.L.R. 300, 24 O.W.R. 164.

Extent of knowledge.

Knowledge on the part of an employee of the risk he runs in his employment is not sufficient to bring him within the rule of volenti non fit injuria, but it is necessary also to prove that he knew the nature and extent of the risk.

Valci v. Small, 11 D.L.R. 433, 4 O.W.N. 1238, 24 O.W.R. 529.

Knowledge by servant of dangers—Duty to warn against dangers.

Though an employer must point out to an employee latent dangers, the latter must use ordinary care to ascertain dangers incident to his work.

Brown v. Coxworth, 11 D.L.R. 369, 6 S.L.R. 80, 24 W.L.R. 361, 4 W.W.R. 776.

Blasting.

The risk of injury from a premature explosion is assumed by an employee, who, without protest, works for six weeks loading holes for blasting, in proximity to other holes that, preparatory to loading, were being "sprung" or enlarged by exploding a small quantity of powder in them, with knowledge that the concussion therefrom was liable to discharge the powder in the hole he was charging.

Beck v. Guthrie, 14 D.L.R. 524, 18 B.C.R. 482, 26 W.L.R. 11, 5 W.W.R. 531.

Where a mine proprietor leaves a winze in the mine unprotected, contrary to a statute requiring protection, and supplies the employee with a defective wrench to use in his work on a drill, by reason of which negligence and defect the employee fell down the winze and was killed, the employer's liability is not taken away by a finding that the employee might have avoided the accident by exercising more care in using the defective wrench, if there is no evidence that the employee knew the wrench to be defective.

Pressick v. Cordova Mines, 14 D.L.R. 515, 5 O.W.N. 263, 25 O.W.R. 228, affirming 11 D.L.R. 452, 24 O.W.R. 631.

(§ II B—161)—In railway cases.

Where a statutory duty is cast upon a master in any particular work, the fact that a servant continues in that work with knowledge of its dangerous character and appreciation of the risk thereof, does not render the maxim volente non fit injuria applicable so as to absolve the master from liability, unless it is shewn that the servant undertook the employment not only with knowledge of the risk involved, but also of the master's statutory duty in respect thereto.

Clark v. C.P.R. Co., 2 D.L.R. 331, 20 W.L.R. 877, 17 B.C.R. 314, 14 Can. Ry. Cas. 51, 1 W.W.R. 1213.

Coupling cars—Knowledge of danger—Violation of rules.

On the principle of volens, a brakeman is not entitled to recover from a railway company for personal injuries he sustained while uncoupling cars where, with full knowledge of the risk and in violation of the company's rules, he goes between the cars while in motion for the purpose of uncoupling them.

C.P.R. v. Frechette, 22 D.L.R. 356, [1915] A.C. 871, 24 Que. K.B. 459, 18 Can. Ry. Cas. 251, reversing 23 Que. K.B. 203.

(§ II B—162)—Assumption of risk.

There is no assumption of risk unless the workmen knew of the danger; and the doctrine will not bar a bricklayer's action for damages for injuries sustained by the falling of the wall in the construction of which he was assisting where he followed the line, stretched to lay brick to, and which it was the duty of the corner-men to turn over as occasion required, so that the wall could be properly backed, where the plaintiff did not know that such duty of his fellow-workmen had been neglected to the extent of making the wall dangerous.

Scotney v. Smith, 14 D.L.R. 786, 6 S.L.R. 390, 26 W.L.R. 163, 5 W.W.R. 660, affirm-

ing 4 D.L.R. 134, 5 S.L.R. 131, 21 W.L.R. 287, 2 W.W.R. 383.

(§ II B—165)—Scope of employment—Engaging outside of duties.

An employee who was directed by his foreman to be present during the testing of a machine in another department of a factory, in order to attend to mechanical details during the test, was acting in the course of employment where he was killed while attempting to fasten the machine more securely to the floor.

Darke v. Canadian General Electric Co., 12 D.L.R. 705, 28 O.L.R. 240, affirming 4 D.L.R. 259, 28 O.L.R. 240, 21 O.W.R. 583.

Whether employee was within sphere of duties.

A foreman in charge of an electric power-house is acting within the sphere of his employment when he himself does or assists in doing necessary work which ordinarily would be done by others under his charge upon whom he had the right to call, unless it is shewn that his authority was limited by his employer to the requisitioning of help in such cases.

Fairweather v. Canadian General Electric Co., 10 D.L.R. 130, 28 O.L.R. 300, 24 O.W.R. 164.

(§ II B—170)—Compliance with commands.

Where the defendant's donkey engine was being moved by its pulling with its own steam upon a cable attached to a stationary object, thus being dragged along in the direction desired and was operated by the plaintiff, the engineer, who was standing on the two handles which worked the drums on one of which the cable was being rolled up as the engine moved along, though there was a runner along the side of the engine which would have been a safer place for him to stand if the engine should jerk, and the engine stuck fast and would not go ahead and the defendant's foreman in charge of the work shouted to the plaintiff to "slacken her up and give her head," meaning to loosen the cable and then go ahead at full steam so that when the cable pulled taut the engine would be jerked over the obstruction, and the plaintiff obeyed the order, and the jerk resulting threw him off the engine and injured him, there being no evidence that the foreman knew that the plaintiff was riding on the handles, these circumstances shewed no negligence within subs. 3 of s. 3 of the British Columbia Employers' Liability Act, providing that a workman injured by reason of the negligence of any person in the service of the employer to whose orders the workman was bound to conform, and did conform, where such injury resulted from his having so conformed, shall have the same remedies against his employer as if he had not been in his employ.

Latham v. Heaps, 2 D.L.R. 313, 17 B.C. R. 211, 20 W.L.R. 819, 2 W.W.R. 83.

It is immaterial, under the Quebec Workmen's Compensation Act, that the workman is paid by the piece or by the foot, provided the work is done on the premises, and under the supervision of the employer.

Beaulieu v. Picard, 7 D.L.R. 2, 42 Que. S.C. 455.

(§ II B—171)—In ditch or trench.

In order to establish a case under the Workmen's Compensation for Injuries Act (R.S.O. 1897, c. 160), of liability for the negligence of a superintendent, it is not necessary that such superintendence should be exercised directly over the workman injured, or that the workman should be acting under the immediate orders of such superintendent; it is enough if the superintendent and the workman are both employed in the furtherance of the common object of the employer, though each may be occupied in distinct departments of that common object. [Kearney v. Nicholls, 76 L.T. News, 63, followed.]

Magnussen v. L'Abbé, 4 D.L.R. 857, 3 O.W.N. 864, 21 O.W.R. 376.

Where a foreman in charge of blasting operations charges a drill hole with dynamite, and, forgetting that he has done so, orders one of the workmen to clean out the hole, and where the workman had been told by his employer to obey the orders of the foreman, and did obey, the employer may be held liable in damages under subs. 3 (as well as under subs. 2) of s. 3 of the Workman's Compensation for Injuries Act, R.S.O. 1897, c. 160.

Nigro v. Donati, 8 D.L.R. 213, 4 O.W.N. 453, affirming 6 D.L.R. 316, 4 O.W.N. 22.

(§ II B—173)—Machinery generally.

Negligence on the part of an employer resulting in injury to one of his employees is shewn where it appears that his foreman, while men under him were engaged in moving across the floor of the master's works a heavy iron beam with hooks large and adequate enough to carry the beam, ordered the men to use smaller hooks because the larger hooks, on account fo their length, would not lift the beam over a pile of iron stringers on the floor, and where it was proved that the smaller hooks were insufficient for the purpose and permitted the beam to fall, injuring one of the men engaged in the work of removing it.

Smith v. Hamilton Bridge Works Co., 5 D.L.R. 216, 3 O.W.N. 1524, 22 O.W.R. 872, affirming 3 O.W.N. 177, 20 O.W.R. 227.

(§ II B—175)—Negligence of fellow-servant—Person in control of machine upon tramway.

Dunlop v. Canada Foundry Co., 12 D.L.R. 791, 28 O.L.R. 140, affirming 2 D.L.R. 886, 28 O.L.R. 140.

Negligence of foreman of master's works—Contributory negligence of servant.

Shondra v. Winnipeg Electric R. Co., 19 W.L.R. 13, 578.

(§ II B—180)—Negligence—Fellow-servant's negligence.

It is actionable negligence when defendant's servants placed a plank in a weak and insecure position for the workmen to walk up so that it tilted while the plaintiff was turning over a box of bolts end over end upon it in loading a dray, alongside his employer's warehouse, with the result that the plaintiff, who did not know that it was insecure, fell and was injured, particularly where by statute the employer is held liable for the negligence of a fellow-workman of the injured party (N.W. Ord. Alta. 1911, c. 98.)

Ross v. Brand: Brand v. Ross, 11 D.L.R. 146, 4 W.W.R. 290, affirming 8 D.L.R. 256, 6 A.L.R. 121, 26 W.L.R. 781, 3 W.W.R. 561.

Fellow-servant's negligence—Master's own negligence.

The liability of a master to a third person or to the general public for injuries resulting through the negligence of his servant is a matter of tort, but the liability of the master for injuries to the servant himself is based on an implied obligation in the contract of hiring whereby the master indemnifies the servant against the negligence of the master himself or someone standing in his place but not against the negligence of a fellow-servant, and hence the workman is not entitled at common law to obtain indemnity where the injury is occasioned through the negligence of a fellow-workman. The claims of a man injured in the service of his master depend on the contract of service, and the implied contract of the master does not extend to indemnify the servant against the negligence of any but the master himself, nor to include the workman's assumed risks as to a fellow-servant's negligence.

Klem v. Puget Sound Lumber Co., 11 D.L.R. 83, 24 W.L.R. 61, 4 W.W.R. 516.

Common employment—Master's breach of duty.

The defence of common employment is not available to the master in a case in which injury has been caused to a servant by the negligence of a fellow-servant selected by the master in breach of a statutory duty to employ in the particular service only persons who have passed a qualifying test, if the injury be the natural consequence of the lack of capability which the test should have disclosed. [Groves v. Wimborne, [1898] 2 Q.B. 402, applied.]

Jones v. C.P.R. Co., 13 D.L.R. 900, 30 O.L.R. 331, 24 O.W.R. 917, reversing 5 D.L.R. 332, 3 O.W.N. 1404.

Negligence of fellow-servant—Acting in place of foreman.

That a fellow workman as the senior and more experienced of those employed in painting a building had assumed in the temporary absence of the foreman to give directions to a fellow employee, will not support an action in negligence under the Employers' Liability Act, R.S.M. 1913, c. 61, against the employer in respect of such directions where in fact the employees were upon an equal status. [Garland v. Toronto, 23 A.R. (Ont.) 238, applied; Shea v. Inglis, 11 O.L.R. 124, distinguished.]

Hill v. Carter-Halls, 21 D.L.R. 570, 25 Man. L.R. 145, 30 W.L.R. 365, 7 W.W.R. 1024.

Servant's assumption of risks—Fellow-servant's negligence.

An employee who permits a fellow-servant to do part of the work allotted to be personally performed by the former, and which it was no part of the fellow-servant's line of duty to do, cannot hold their common employer liable in negligence (apart from the Workmen's Compensation Act, Alta.), for personal injuries sustained by the negligence of the fellow-servant so assisting, although a superior foreman to both was aware that the latter had been in the habit of so assisting and had given no orders to prevent the continuance of that course of working.

Berge v. MacKenzie, Mann. & Co., 20 D.L.R. 1, 8 A.L.R. 235, 7 W.W.R. 866.

Verdict under common-law liability—"Defective system" — Fellow-servant's negligence.

A verdict under the common-law liability of an employer for negligence in not maintaining an adequate system of warning the employees engaged in hoisting operations with a "skip," is not sustainable where the signalman employed was competent, careful and experienced and the system of verbal warning to the workmen to stand clear followed by a signal with the hand to the engineer to raise the skip was an adequate one if followed; the fact that the jury declined to find that the signal had or had not been given as sworn to, does not entitle the plaintiff to damages as even if the signal had not been given the injury was attributable to the negligence of the signalman a fellow-servant of the plaintiff and not a superintendent and the employer was not liable.

Huynczak v. B.C. Electric R. Co., 20 D.L.R. 127, 20 B.C.R. 31.

(§ II B—181)—Breach of statutory duty — Contributory negligence of servant.

Linazuk v. Canadian Northern Coal, etc., Co., 16 D.L.R. 869, 6 O.W.N. 150.

C. Contributory negligence of servant.

(§ II C—185)—Projecting set screw—Contributory negligence.

In an action for injury to a workman in a saw-mill through alleged negligence in not guarding a projecting "set screw" in the machinery as required by the Nova Scotia Factories Act, 1901, it is not sufficient to entitle plaintiff to judgment that the jury in answer to questions found that the "set screw" should have been countersunk and had that been done it would have been a

protection, if the jury also answered that the accident occurred through the plaintiff's own negligence.

Zwicker v. McKay, 15 D.L.R. 491, 47 N.S.R. 459, 14 E.L.R. 69. [See 11 D.L.R. 616, 47 N.S.R. 144, 13 E.L.R. 1.]

INJURY TO LINEMAN CLIMBING POLE—DISREGARD OF PRACTICE.

The disregard by a lineman of a practice, not a rule, in not ascending an old pole before it was lashed to the new pole is not in itself contributory negligence to warrant a withdrawal of the case from the jury. [Randall v. Ahearn & Soper, 34 Can. S.C.R. 698, applied.]

Christie v. London Electric Co., 23 D.L.R. 476, 33 O.L.R. 395.

KNOWLEDGE OF DANGER — ASSUMPTION OF RISK.

A workman who, in pursuance of orders, operates a machine which he knows to be dangerous and unguarded, is not necessarily guilty of such contributory negligence as should absolve his employer from liability, unless the workman has in fact agreed to assume the risk involved.

Fornell v. Nelson, 27 D.L.R. 577, 26 Man. L.R. 308, 34 W.L.R. 658, 10 W.W.R. 560.

In the absence of an express finding by the jury that a servant at the time he was killed was guilty of contributory negligence a master will not be liable therefor on the theory that his death was the result of a mere act of inadvertence upon the servant's part during the course of his employment.

Mercantile Trust Co. v. Canada Steel Co., 3 D.L.R. 518, 3 O.W.N. 980, 21 O.W.R. 808.

FAILURE TO SUGGEST REMEDY FOR DEFECTS—CIRCULAR SAW.

An employer is obliged to take the utmost care to prevent injuries being caused to his employees through the use of a circular saw, by adopting devices to that end, as by providing it with a guard; if he does not take this precaution, he is responsible in damage in case of accident. But where the employee is a skilled and experienced mechanic in charge of the machine, who knowing the danger never suggested that a guard should be installed, although it was within his power to obtain one from his employer, he is guilty of contributory negligence.

Stewart v. St. Lawrence Flour Mills Co., 26 Que. K.B. 476. [Affirmed 39 D.L.R. 760, 55 Can. S.C.R. 624.]

DANGEROUS METHOD WHEN SAFER COURSE AVAILABLE.

A workman who, with full knowledge of the risk he is taking, deliberately adopts a dangerous method of doing his work, when there is open to him another method of doing it which is free from risk, cannot impose liability upon his employer for personal injuries resulting entirely from his adoption of the unsafe course.

Powell v. Thomas, [1918] 3 W.W.R. 901.

DEATH OF SERVANT — ELECTRIC SHOCK — WORKMAN EMPLOYED IN REPAIRING ELECTRIC MOTORS—REGULATIONS OF EMPLOYERS — EVIDENCE — NEGLIGENCE OF EMPLOYERS — ACTION UNDER WORKMEN'S COMPENSATION FOR INJURIES ACT, R.S.O. 1914, c. 146, AND AT COMMON LAW — NEGLIGENCE OF DECEASED — DISMISSAL OF ACTION—JURY.

O'Neil v. G.T.R. Co., 14 O.W.N. 47.

INJURY TO SERVANT—NONSUIT.

Phillips v. Canada Cement Co., 5 O.W.N. 549, 25 O.W.R. 426.

PERSON INJURED UNLOADING FREIGHTER AT DOCK — SUPERINTENDENCE — CARELESS OPERATION OF MACHINERY—DAMAGES.

Melynk v. Canadian Northern Coal & Ore Dock Co., 3 O.W.N. 371, 20 O.W.R. 613.

NEGLIGENCE — SERVANT INJURED — ACTION FOR DAMAGES—USING SMALLER HOOKS FOR LARGER ONES.

Smith v. Hamilton Bridge Works Co., 3 O.W.N. 177, 20 O.W.R. 227.

SERVANT INJURED BY EXPLOSION OF SHELL FOR SMALL CANNON — CONTRIBUTORY NEGLIGENCE.

Smith v. Royal Canadian Yacht Club, 19 O.W.R. 1001, 3 O.W.N. 19.

STEAM SHOVEL—QUARRY—INJURY TO WORKMEN—CONTRIBUTORY NEGLIGENCE.

McDowell v. Wentworth Gypsum Co., 45 N.S.R. 85, 9 E.L.R. 245.

DANGEROUS WORKS—DUTY OF EMPLOYER—CONTRIBUTORY NEGLIGENCE.

Loomis v. Bédard, 20 Que. K.B. 28.

CONTRIBUTORY NEGLIGENCE — FAUTE COMMUNE.

Jodoin v. The Dominion Bridge Co., 39 Que. S.C. 103.

FAULT OF FELLOW-SERVANT—NEGLIGENCE—DEFECTIVE SYSTEM.

McDonald v. B.C. Electric R. Co., 16 B.C.R. 386.

INJURY TO EMPLOYEE—BRAKEMAN—NEGLIGENCE OF ENGINEER—FINDINGS OF JURY—WORKMEN'S COMPENSATION FOR INJURIES ACT R.S.O. 1914, c. 146, s. 3 (E)—FAILURE TO PROVIDE EFFICIENT APPLIANCE—RAILWAY ACT, R.S.C. 1906, c. 37, s. 264 (c)—EVIDENCE—APPEAL—EQUAL DIVISION OF COURT.

McCauley v. G.T.R. Co., 7 O.W.N. 336.

DEATH OF SERVANT—CONTRIBUTORY NEGLIGENCE — ACTION UNDER FATAL ACCIDENTS ACT—FAILURE TO ESTABLISH RELATIONSHIP OF MASTER AND SERVANT—ABSENCE OF CONTRACT — FINDINGS OF JURY—NEGLIGENCE—DANGEROUS PLACE—INVITEE—DUTY OF OWNER—PATENT DANGER — KNOWLEDGE OF INVITEE — CAUSE OF DEATH.

Beckerton v. C.P.R. Co., 7 O.W.N. 51.

DEATH OF SERVANT — BRAKEMAN — ACTION UNDER FATAL ACCIDENTS ACT—CAUSE OF DEATH—FAULT OF DECEASED.

Cook v. G.T.R. Co., 5 O.W.N. 347, 25 O.W.R. 253.

In an action for damages for injuries sustained by the plaintiff, while working for the defendants in the woods as a rigging slinger, the jury found that a part of the defendants' plant was defective and that the plaintiff was not guilty of contributory negligence:—Held, on the evidence, that the case was brought within the Employers' Liability Act; and that the judgment entered for the plaintiff, upon the jury's findings should not be disturbed: Irving dissenting. Answers given in re-examination to leading questions, expressed in terms which conflict with what the witness has said in cross-examination, are no guide in arriving at the truth.

Calneck v. Vancouver Timber & Trading Co., 18 W.L.R. 318.

ACCIDENT—TEMPORARY OR PERMANENT INCAPACITY—CONTRIBUTORY NEGLIGENCE.

Giguère v. Fréchette, 40 Que. S.C. 37.

INJURY TO SERVANT—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—FINDINGS.

Mitchell v. Rat Portage Lumber Co., 19 W.L.R. 314.

REPAIRS TO FACTORY—ACCIDENT TO WORKMAN—CONTRIBUTORY NEGLIGENCE.

Croteau v. Victoriaville Furniture Co., 40 Que. S.C. 44.

(§ II C—186)—MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE OF INFANT—SPEEDY DRIVING—BREACH OF STATUTORY DUTY — ACTION AGAINST EMPLOYER — LIABILITY.

A by-law of the city of Toronto, passed pursuant to the clause of the Municipal Act, now R.S.O. 1914, c. 192, s. 400, subs. 49, authorizing a municipality to pass by-laws to regulate traffic in the public streets, provided that no vehicle should be driven upon any street in the city in charge of any driver less than 16 years old:—Held, that the prohibition of the by-law was not for the protection of the driver, but for the protection of the public; and the breach of it by the employer of a boy under 16 in permitting the boy to drive a horse in the public streets, did not give the boy a cause of action against his employer for injury sustained while so driving. [Fahey v. Jephcott, 2 O.L.R. 449; Hagle v. Laplante, 20 O.L.R. 339; Fowell v. Grafton, 22 O.L.R. 550, distinguished.]

Milligan v. Thorne, 32 O.L.R. 195.

(§ II C—191)—UNEXPLODED HOLE IN MINE —FAILURE TO LOOK.

The fact that an employee in a mine did not look to see whether or not a hole charged with dynamite was unexploded, does not establish contributory negligence in bar of his action for personal injuries, where there were no warnings leading him to such inquiry.

Doyle v. Foley-O'Brien, 22 D.L.R. 872, 34 O.L.R. 42. [Affirmed by Can. Sup. Ct. December 29, 1915; see 9 O.W.N. 494.]

(§ II C—192)—RIGHT TO SET UP, VIOLATION OF STATUTE.

A servant, whose duty required him to work in a restricted place at a table in close proximity to a setscrew in a revolving shaft that was not guarded, as required by s. 20 of c. 1 of the Nova Scotia Factories Act, 1901, is not guilty of contributory negligence, where, while passing over the table in the discharge of his duties, his clothing was caught by such setscrew and he was seriously injured.

Kizer v. Kent Lumber Co., 5 D.L.R. 317, 46 N.S.R. 83, 11 E.L.R. 41.

(§ II C—195)—RAILWAY AND STREET RAILWAY CASES.

An employee of a railway company is guilty of contributory negligence, which will bar a recovery of damges by his personal representatives aginst the company for his death in the course of his employment, where the deceased was walking between two parallel tracks in a railway yard, and, without looking to ascertain if any train was approaching, stepped upon a track on which a freight train was moving and where the yard helper on one of the moving cars endeavoured to warn the deceased, and caused the brakes to be applied, but not in time to prevent the deceased being struck.

McEachen v. G.T.R. Co., 2 D.L.R. 588, 3 O.W.N. 628, 21 O.W.R. 187.

The deceased, a brakeman, in the employ of the defendants, while walking on a siding in express violation of one of the defendants' rules, was run over by a car of the defendants and killed by a moving train. Held, that the deceased took the risk of accident by disobedience to the orders of the defendants and no action for negligence would lie.

Pettigrew v. G.T.R. Co., 13 Can. Ry. Cas. 118.

(§ II C—198)—INJURIES TO SWITCHMAN—DEFECTIVE ENGINE—UNAUTHORIZED USE —PROXIMATE CAUSE.

There can be no recovery either at common law or under the statute where the real and basic cause of an accident and the resultant injuries to a switchman is the unauthorized taking and using of an untested and defective engine by the switching crew whom he voluntarily assisted in the taking and using of the engine with knowledge of its defective condition.

Hile v. G.T.P.R. Co., 24 D.L.R. 9, 8 W.W.R. 403.

(§ II C—199)—UNPROTECTED FROG—UNCOUPLING CARS IN MOTION.

An unprotected frog is not of itself negligence where the deceased met his death in an attempt to uncouple cars while in motion, unless his duties required him to do so.

Western Trust Co. v. Regina, 24 D.L.R. 26, 32 W.L.R. 307. [Affirmed, 39 D.L.R. 759, 55 Can. S.C.R. 628, [1917] 3 W.W.R. 1055.

RAILWAY COMPANY—OPENING COUPLERS AS VIOLATION OF RULE AGAINST ADJUSTING COUPLERS OF MOVING CARS.

For a brakeman, while standing on the side ladder of a freight car, to lean around the end of the car in order to open the coupler, the lever of which was too short to be worked from the side of the car, is not a violation of a rule against going between moving cars to adjust couplers. It is not contributory negligence for a brakeman, while standing in a crouching position on the side of a moving freight car with one foot on a loose step 6½ inches below the bottom of the car, and holding with one hand to a rung of a side ladder 14 inches above the bottom of the car to attempt to open the car coupler, by reaching around the end of the car in order to work the lever operating the coupling apparatus, which was considerably shorter than the levers commonly used on other cars.

Stone v. C.P.R. Co., 13 D.L.R. 93, 15 Can. Ry. Cas. 408, 47 Can. S.C.R. 634, reversing 4 D.L.R. 789, 14 Can. Ry. Cas. 61, 26 O.L.R. 121.

(§ II C—201)—DANGEROUS POSITION ON CAR.

Where one employed by another as a car repairer was ordered by another employee to assist him in repairing a car standing upon a track in the yard when other cars were propelled aginst it and injured him, the master, in the absence of a plea of volens or evidence that the negligence of the servant contributed to the injury, is liable in an action under the Workmen's Compensation Act (Ont.) for the injuries thus sustained.

G.T.R. Co. v. Brulott, 46 Can. S.C.R. 629, affirming Brulott v. G.T.R. Co., 24 O.W.R. 154, 19 O.W.R. 514.

D. DISOBEDIENCE OF RULES.

(§ II D—205)—CROWN EMPLOYEE.

An injury to an employee of the Crown while adjusting a machine, contrary to instructions and which he knew to be the duty of another, is not attributable to the negligence of any officer or servant of the Crown acting within the scope of his duties within the meaning of s. 20 of the Exchequer Court Act (R.S.C. 1906, c. 140).

Girard v. The King, 34 D.L.R. 509, 16 Can. Ex. 95.

LOADING VESSEL.

A finding that the employing shipowners had not taken the necessary precautions to enforce their rule that labourers employed in loading the vessel should use the companion-way and not the hatchway in descending to work, will, if supported by the evidence, be sufficient on which to make the employers liable for injury causing the foreman's death, where a labourer in attempting the dangerous mode of descent by the hatchway from the upper to the main deck fell into the hold and upon the foreman who was there in the discharge of his duties and caused injuries to the latter from which his death resulted, where the circumstances shewed that the accident occurred before the labourer became subject to the control of the deceased foreman, and that the enforcement of the rules prohibiting the use of the hatchway as a means of descent was a matter for the general superintendent and others in authority who would have known, if they had exercised proper supervision, that the practice of descending by the hatchway in contravention of the rules had become common amongst the labourers employed.

Donaldson v. Deschenes, 16 D.L.R. 656, 49 Can. S.C.R. 136.

CONTRIBUTORY NEGLIGENCE.

An application by a workman for compensation for personal injury under the Workmen's Compensation Act, R.S.B.C. 1911, c. 244, will be refused where the accident, basing the claim, is the result of the serious and wilful misconduct of the plaintiff, e. g., his disobedience of repeated warnings not to do the work in question without first throwing back the lever of the machine which he was cleaning and turning off the power.

Clayton v. Hanbury, 17 D.L.R. 384, 27 W.L.R. 893.

LOCUS OF ACCIDENT — CAUSE — COMPENSATION.

The fact that a workman, despite warnings, persists in remaining in a place of danger where he is killed is inexcusable fault on his part for which the damages should be reduced, but it does not mean that the accident was intentionally induced by him so as to deprive his representatives of the right to compensation. When an accident happens during working hours it is not necessary that it should occur in the immediate vicinity of the place assigned to the workman who is its victim; it suffices that it was occasioned by the work. If the deceased was the sole support of the ascendant who claims compensation, the latter is entitled to compensation though the deceased contributed to the maintenance of others.

Dominion Quarry Co. v. Morin, 21 Que. K.B. 147.

EMPLOYERS' LIABILITY — VOLENTI NON FIT INJURIA — MINER INJURED THROUGH USING WRONG TOOL.

The plaintiff, in mining coal for defendants was injured by an explosion caused by his using an iron scraper instead of a wooden taming rod in packing clay while preparing for exploding the coal. He knew the use of the scraper for such purpose was prohibited by law and was dangerous to life. He had broken his tamping rod the day previous and had failed to get another. He said he had not applied to the defendants' office as he knew they had none in store. Held even if, under the terms of the order of the coal director, the defendants were bound to supply the rod (which the court doubted) their failure to do so did not excuse plaintiff in wilfully subjecting him-

self to the risk taken and defendants were not liable for common-law damages. The rule volenti non fit injuria applied.

Garbonia v. Western Commercial Co., [1919] 2 W.W.R. 52.

(§ II D—206)—Workman—Prohibited action — Injury — No compensation—Damages.

Where a workman deliberately performs an act prohibited by his employers, the transgression committed carries him outside the sphere of his employment and as he is not required or expected to perform such act he is not entitled to compensation for injuries resulting from such act.

Jackson v. C.P.R. Co., 49 D.L.R. 320, 12 S.L.R. 433, [1919] 3 W.W.R. 706.

Injury to servant boarding moving train contrary to rules—Proximate cause.

The premature starting of a train without ascertaining that all the train-crew were aboard will not render the Crown liable for injuries sustained by an employee on its railway, where the accident resulted from an attempt to board the train while in motion in violation of a Crown regulation.

Turgeon v. The King, 25 D.L.R. 475, 51 Can. S.C.R. 588, affirming 15 Can. Ex. 331.

E. Fellow-servants and their negligence.

(§ II E—210)—Fellow-servants and their negligence.

Where an employee, while engaged with fellow-workmen in rolling up timbers on flat cars, which timbers were similar to telegraph poles, being larger at one end than the other, and the only inference to be drawn from the evidence as to the cause of the accident is one of three alternatives: —(1) The small end was rushed up too fast; or (2) the fellow-employees of the plaintiff let go the big end when they should and could have held it; or (3) there was not sufficient men on the job to hold the timber up, a judgment by the Trial Court in favour of the defendant will be reversed on appeal and judgment entered for the plaintiff for his damages sustained. [Rostrom v. C.N.R., 3 D.L.R. 302, 21 W.L.R. 225, distinguished.]

Torangue v. C.P.R. Co., 8 D.L.R. 211, 3 W.W.R. 214.

Fellow-servants — Public works — Government railway — Negligence of Crown's servants—Common employment—R.S.N.S. c. 178, s. 10—Interruption of prescription.

C., who was primarily employed with a gang of labourers on a certain work, was lent by his foreman to the foreman of another gang engaged in another work. Owing to the negligence of the foreman last mentioned in using a certain piece of machinery for the purpose, an accident occurred whereby C. was killed. In an action by the representatives of the deceased: —Held, that the case having arisen in the province of Nova Scotia, and the negligence complained of being that of a fellow-servant of deceased, the Crown was entitled to raise the defence of common employment. [Ryder v. The King, 9 Can. Ex. 330, 36 Can. S.C.R. 462, followed.] The act of leaving a petition of right with the Secretary of State under the provisions of s. 4 of the Petition of Right Act interrupts the prescription mentioned in s. 10 of c. 178 of R.S.N.S. 1900.

Conrad v. The King, 14 Can. Ex. 472.

Injury to servant — Negligence — Findings of jury—Evidence—Incompetence of fellow-servant—Common employment.

Ballantyne v. Eansor, 8 O.W.N. 297, 9 O.W.N. 26.

Fellow-servant — Common-law liability —Workmen's Compensation for Injuries Act.

Eagle v. Meade, 4 O.W.N. 948, 1497, 24 O.W.R. 259, 811.

(§ II E—215)—Bridge operations—Safeguards — Negligence of foreman — Liability—Statute—Common law.

Where operations for the lowering a wooden approach to a bridge have been placed under the competent management of men experienced in the work, and all materials and appliances for taking every needed precaution against accidents provided, an omission of the superintendent or foreman to sufficiently safeguard a false bent in the structure resulting in an injury to an employee, not attributable to a defect in any permanent structure in respect of which the master owes a duty to safeguard, is negligence of the management and not of the master, for which the latter cannot be held liable at common law, and recovery in such case can only be had under the Employers' Liability Act, R.S.M. 1913, c. 61. [C.N.R. Co. v. Anderson, 45 Can. S.C.R. 355; Smith v. Baker, [1891] A.C. 325, distinguished; Wilson v. Merry, L.R. 1 H.L. (Sc.) 326; Bergklint v. West. Can. Power Co., 50 Can. S.C.R. 39, applied.]

Koski v. C.N.R., 27 D.L.R. 473, 26 Man. L.R. 214, 34 W.L.R. 146.

(§ II E—216)—In mine.

The defence of common employment has no application to the breach of the statutory duty to supply a "pentice" to protect a shaft, imposed by statutory r. 17 of s. 164 of the Mining Act of Ontario, 8 Edw. VII. c. 21. [Sault Ste. Marie Pulp & Paper Co. v. Myers, 33 Can. S.C.R. 23, followed.]

Siven v. Temiskaming Mining Co., 2 D.L.R. 164, 25 O.L.R. 524, 21 O.W.R. 454. [Affirmed, 8 D.L.R. 1030, 46 Can. S.C.R. 643.]

(§ II E—225)—Statutory duty—Railway employees passing test.

Where a railway company in breach of the duty imposed by order no. 12225 of the Railway Board, permits an employee to engage in the operation of trains without the

specified examination and test, the company is, under s. 427 of the Railway Act, 1906, liable in damages to any person injured as a result of such breach of duty.

Jones v. C.P.R. Co., 13 D.L.R. 900, 30 O.L.R. 331, 49 C.L.J. 694, 24 O.W.R. 917, reversing 5 D.L.R. 332, 3 O.W.N. 1404.

NEGLIGENCE OF FELLOW-SERVANT — STATUTORY LIABILITY.

The effect of the Judicature Act, R.S.S. 1909, c. 52, s. 31 (14), is to make the employer liable to a workman if the accident whereby the latter sustains personal injuries in the course of his employment is due to the negligence of a fellow-servant.

Scotney v. Smith, 14 D.L.R. 786, 6 S.L.R. 390, 26 W.L.R. 163, 5 W.W.R. 660.

ACCIDENT IN ONE PROVINCE—SUIT IN ANOTHER—NEGLIGENCE ALLEGED—REMEDY AT COMMON LAW—DAMAGES.

An employee bringing an action in Manitoba to recover damages for alleged negligence taking place in Alberta cannot succeed under the Workmen's Compensation Act (Man.), 6 Geo. V. 1916, c. 125. He must find his remedy, if any, at common law. [Simonson v. C.N.R., 15 D.L.R. 24, applied.]

Jones v. C.P.R. Co., 49 D.L.R. 335, [1919] 3 W.W.R. 994.

COMMON EMPLOYMENT — COMMON LAW — CHANGE OF RULE BY WORKMEN'S COMPENSATION ENACTMENTS.

Although an employer is not liable at common law for injuries to an employee sustained by reason of the negligent act of a foreman, if the machinery supplied is proper and usual and the employer has taken reasonable precautions to insure the safety of his employee; yet, under the Workmen's Compensation for Injuries Act, R.S.O. 1897, c. 160, there may be liability in such cases, where the plaintiff (at the instance of a third party, employed by the defendants, to whose orders the plaintiff, in the same employment, was bound to conform) is required by such third party to do, and does, certain work in the doing of which the plaintiff is injured through such third party's negligence.

Scott v. University of Toronto, 10 D.L.R. 154, 49 C.L.J. 335, 4 O.W.N. 994, 24 O.W.R. 325.

NEGLIGENCE CAUSING DEATH—LIMITATION TO INJURIES WITHIN PROVINCE — EMPLOYERS' LIABILITY ACT (MAN.)

The Employers' Liability Act, R.S.M. 1913, c. 61 was intended to be confined in its operation to injuries occurring in the province of Manitoba, and is not available in an action against a railway company for negligence causing death brought in Manitoba by a Manitoba administratrix in respect of a fatal accident occurring on a part of the railway in Ontario; nor will an action in Manitoba be available under the corresponding Ontario statute unless the plaintiff has given the notice of injury which the latter requires. [Simonson v. C.N.R. Co., 17 D.L.R. 516, 24 Man. L.R. 267; Johnson v. C.N.R. Co., 19 Man. L.R. 179, followed.]

Lewis v. G.T.P.R. Co., 19 D.L.R. 606, 24 Man. L.R. 807, 29 W.L.R. 969, 7 W.W.R. 504.

NEGLIGENCE OF FELLOW-SERVANT — CHANGE OF RULE BY STATUTE IN PROVINCE WHERE INJURY SUSTAINED — ACTION IN ANOTHER PROVINCE.

R.S.S. 1909, c. 52, s. 31, subs. 14, which declares in effect that the defence of common employment shall no longer obtain in an action against an employer for injuries resulting to the employee from the negligence of another employee engaged in the same service, applies only to actions in Saskatchewan, and will not sustain an action by the employee in Manitoba for injuries sustained in Saskatchewan in the course of his employment, to which action there was in Manitoba as regards injuries sustained outside of the province, a defence at common law on the ground that the injury was received from the act or default of a fellow-servant constituting an ordinary risk incident to the service. The Employers' Liability Act, R.S.M. 1913, c. 61, giving an employee a right of action which did not exist at common law in respect of the negligence of a fellow-servant, does not apply to injuries suffered by the employee outside of Manitoba.

Simonson v. C.N.R. Co., 17 D.L.R. 516, 24 Man. L.R. 267, 28 W.L.R. 310, 6 W.W.R. 898.

WORKMEN'S COMPENSATION ACT.

In order to recover under the Workmen's Compensation for Injuries Act, C.S.N.B. 1903, c. 146, as amended by 8 Edw. VII., c. 31, s. 3 (a) for injuries caused by a defect in the condition or arrangement of the gear, etc., connected with, intended for, or used in the business of the employer, the workman must prove that the defect was due to negligence on the part of the employer.

Campbell v. Donaldson, 40 N.B.R. 525.

(§ II E—230)—OPERATION OF RAILROADS.

Where the jury found that the defendants were negligent and the plaintiff free from contributory negligence, there is necessarily precluded a finding that the plaintiff was volens.

G.T.P.R. Co. v. Brulott, 13 Can. Ry. Cas. 95, 21 O.W.R. 206.

The plaintiff and T. were both employed by the defendants. The plaintiff was assisting T. in repairing a car standing on a track in the defendants' yard, when the yard-engine propelled other cars against the car under repair, and injured the plaintiff, who sued for damages for his injuries, under the Workmen's Compensation for Injuries Act, alleging negligence on the part of T., a person in a position of superintendence to whose orders the plaintiff was bound to conform in not placing a flag in a position to give warning that work was

going on upon the track. The jury found:—(1) that the plaintiff's injuries were caused by the neglect of T. in not placing the flag for protection; (2) that T. was a person in a position of superintendence over the plaintiff and to whose orders he was bound to conform; (3) that the plaintiff's injuries were not caused by his own want of care; "it was no part of his duty to place these flags;"—Held, that, notwithstanding that the jury had not found that T. was exercising superintendence at the time of the injury, and had not found that the plaintiff did conform to T.'s orders, yet, having regard to the evidence and the judge's charge, the findings were sufficient, under the said Act, to support a judgment for the plaintiff. When the judge was about to begin his charge, a discussion arose about the frame of two of the questions proposed to be submitted to the jury, and the defendants' counsel suggested another question:—"Did the plaintiff voluntarily perform the acts which caused his accident, knowing of the dangers which he ran?" This defence was not set up in the pleadings nor previously at the trial; and no application was made for leave to amend or to reopen the case or postpone the trial. The judge declined to submit the question, saying that he did not think it fair to introduce it at that stage.

Brulott v. G.T.R. Co., 13 Can. Ry. Cas. 76, 24 O.L.R. 154, affirming judgment of Falconbridge, C.J.

Subsection 5 of s. 3 of the Workmen's Compensation for Injuries Act, R.S.O. 1897, c. 160, should receive a liberal construction in the interests of the workman. An employer may be responsible for the negligence of an employee resulting in injury to another employee, although the one injured is in authority over the other. The plaintiff was foreman of a railway yard of the defendants, and M. was his assistant and subject to his orders. In carrying out the plaintiff's orders, M. gave a wrong direction to the driver of the yard engine, by reason of which the plaintiff was struck by the engine and injured. The engine driver testified that he took his instructions from M.:—Held, that there was reasonable evidence that M. was, on the occasion in question, a person in charge or control of the engine, within the meaning of subs. 5; and the defendants were responsible for the negligence of M.

Martin v. G.T.R. Co., 27 O.L.R. 165, affirming judgment of Mulock, C.J.

(§ II E—240)—WHO ARE FELLOW-SERVANTS —IMMUNITY OF MASTER.

Under the fellow-servant rule, the immunity of the master is not limited, at common law, to those cases where the injured servant and the one through whose negligence he was injured have been actually engaged at the same work or at work on a common immediate object or near one another or in the employment of the master at the same time.

Klem v. Puget Sound Lumber Co., 11 D.L.R. 84, 24 W.L.R. 61, 4 W.W.R. 516.

(§ II E—245)—FELLOW-SERVANTS — COMMON EMPLOYMENT—SELECTION OF WORKMEN BY A TRADE UNION—ASSIGNMENT TO SERVICE.

Where an agreement has been made between shipowners and a society or union of longshoremen whereby the latter undertook to supply to the shipowners the requisite number of men as and when required at a stated rate of wages payable individually to each man employed and for the time only for which he worked, the fact that the selection of the employees was left to the union and that the shipowners had agreed not to discharge any of the men except through the union's foreman employed along with them does not prevent their being employees of the shipowners when they are assigned for duty and enter upon the work, where the foreman himself might have been dismissed by the shipowners and the latter were not only the paymasters but retained the power of controlling the work; and the longshoremen are, therefore, to be considered fellow-servants with the officers and men of the ship in a common employment.

O'Regan v. C.P.R. Co., 9 D.L.R. 849, 41 N.B.R. 347, 11 E.L.R. 457.

(§ II E—247)—HIRED CREW.

The crew furnished with the hiring of a crane do not necessarily become the servants of the hirer or the fellow-servants with those in his employ.

Dubé v. Algoma Steel Co., 27 D.L.R. 65, 35 O.L.R. 371. [Affirmed in part, 31 D.L.R. 178, 53 Can. S.C.R. 481.]

(§ II E—250) — INJURY TO BRAKEMAN STANDING ON GANGWAY OF LOCOMOTIVE —NEGLIGENCE OF FELLOW SERVANT.

The personal injuries received by the plaintiff, a front-end brakeman, while in the performance of his duty standing on the gangway between the locomotive and tender, looking for signals on the approach to a station, and observing if there were any hot boxes in the trucks of the cars, by being knocked from the train by a poker in the hands of the fireman, and run over, were not due to the negligence of the defendants at common law, or the use of an alleged dangerous system by them.

McIntyre v. G.T.R. Co., 18 Can. Ry. Cas. 160, 6 O.W.N. 618.

INJURY TO SERVANT—RAILWAY—"HOSTLER'S HELPER"—NEGLIGENCE OF FELLOW-SERVANT — EMPLOYMENT OF INCOMPETENT PERSON—FINDINGS OF JURY.

Levack v. C.P.R. Co., 8 O.W.N. 270.

(§ II E—252)—TRACKMEN AND TRAINMEN — WATCHMAN AT LEVEL CROSSING — TRAIN CREW — COMMON-LAW REMEDY.

Pettit v. C.N.R. Co., 11 D.L.R. 316, 23 Man. L.R. 213, 24 W.L.R. 196, 4 W.W.R.

566, varying, 7 D.L.R. 645, 22 W.L.R. 265, 3 W.W.R. 74.

(§ II E—255)—Employers' Liability Act —Negligence of foreman.

Moncreiff v. Barnett-McQueen Co., 34 D.L.R. 737, 24 B.C.R. 185, [1917] 2 W.W.R. 625.

Vice-principal.

A teamster employed by a company to carry its workmen to and from their work, has not "superintendence entrusted to him" over the workmen whom he is carrying, within the meaning of the Workmen's Compensation for Injuries Act (R.S.O. 1897, c. 160, s. 3), and a workman injured by his negligence has no right of action against the company under that statute.

Demers v. Nova Scotia Silver Cobalt Co., 3 D.L.R. 346, 3 O.W.N. 1206, 22 O.W.R. 97.

The application of the rule respondeat superior to each particular case depends upon facts and is a question of fact.

Pattison v. C.P.R. Co., 5 D.L.R. 582, 26 O.L.R. 410, 14 Can. Ry. Cas. 405, 22 O.W.R. 131.

(§ II E—256)—Superintendent.

Under subs. 2 of s. 3, Workmen's Compensation for Injuries Act, R.S.O. 1897, c. 160, giving to workmen the same right of compensation and remedies against the employer as if the workman was not in the service of the employer for personal injuries caused by reason of the negligence of any person in the service of the employer who has any superintendence intrusted to him whilst in the exercise of such superintendence, it is not necessary that such superintendence should be exercised directly over the workman injured, or that the workman should be acting under immediate orders of such superintendence, and it is enough if the superintendent and the workman are both employed in the furtherance of the common object of the employer, although each may be occupied in distinct departments of that common object; but the case is much stronger where the plaintiff was under the orders of the foreman doing the work in question. [Darke v. Canadian General Electric Co., 4 D.L.R. 259, 3 O.W.N. 817; Kearney v. Nichols, 76 L.T. 63, followed.]

Nigro v. Donati, 8 D.L.R. 213, 4 O.W.N. 453, 23 O.W.R. 438.

It is inexcusable fault, involving the employer's liability, for a foreman to do a direct act of disobedience to the well-known rules of the establishment (e.g., giving orders to a workman to enter a "cyclone" stone-crushing machine without previously removing the transmission belt therefrom, and later putting the machine in motion without ascertaining whether such workman had left it).

Houle v. Asbestos & Asbestic Co., 3 D.L.R. 466, 42 Que. S.C. 176.

Liability of master for death of servant—Negligence of person having superintendence—Starting machine while servant in position of danger.

Under the Workmen's Compensation Act, R.S.O. 1897, c. 160, an employer is liable for the death of a servant as the result of the negligence of an expert electrician, charged with the duty of testing an electric generator, in starting it without ascertaining whether the deceased, who was detailed from a different department to assist in making the test, was in a place of safety; since the tester was a person having superintendence over the deceased within the meaning of the Act. One whose duty it was to set in motion a machine he was testing is a person charged with superintendence, within the meaning of s. 3 (2) of the Act, over a workman from a different department of a factory detailed to assist in the test, although the former did not have general superintendence over such workman.

Darke v. Canadian General Electric Co., 12 D.L.R. 705, 28 O.L.R. 240, affirming 4 D.L.R. 259.

Foreman.

No common law liability on the part of the employer is shewn where the foreman in charge was a competent man and the injury to the workman was caused by the failure of the foreman to use certain protective measures for which the foreman had been supplied with adequate materials which he neglected to use either wilfully or by inadvertence.

Murray v. Eburne Saw Mills Co., 8 D.L.R. 71, 2 W.W.R. 1016.

In negligence cases the plaintiff must establish as an affirmative fact that the defendant was guilty of negligence, but when an accident causing injury is the work of a moment, and the eye is incapable of detecting its origin or following its course, the general rule cannot be of universal application or utter destruction would carry with it complete immunity for the employer. [McArthur v. Dominion Cartridge Co., [1905] A.C. 72, applied.]

Teela v. Burns, [1917] 1 W.W.R. 639, reversing 27 D.L.R. 109, 22 B.C.R. 460, 10 W.W.R. 101.

(§ II E—265)—Signalman.

Where a railway company applies to the Railway Board under s. 227 of the Railway Act, 1906, for leave to cross the line of another railway company, and the Board, by its order giving leave to cross, directs that an interlocking plant shall be established at the crossing at the expense of the applicant company, and that the other company, whenever it desires to make use of the crossing, shall be entitled, upon notice to the applicant company, to place a signalman in charge thereof, whose wages are paid by the company, the signalman so appointed is the servant of the company appointing him, and that company, and not the applicant company, is liable to a serv-

ant of the applicant company who is injured by the negligence of the signalman in passing a train of the applicant company over the crossing.

Pattison v. C.P.R. Co., 5 D.L.R. 582, 26 O.L.R. 410, 14 Can. Ry. Cas. 405, 22 O.W. R. 131, reversing 24 O.L.R. 482.

(§ II E—266) — LIABILITY — PERSON IN CHARGE—BRAKEMAN GIVING SIGNALS.

A brakeman standing on the ground and giving signals to the engineer of a locomotive engaged in transferring cars from one track to another, is a person in charge or control of the engine, within the meaning of s. 3, subs. 5 of the Workmen's Compensation for Injuries Act, R.S.O. 1897, c. 160. [Allan v. G.T.R. Co., 8 D.L.R. 697; Martin v. G.T.R. Co., 8 D.L.R. 590, applied.]

Simmerson v. G.T.R. Co., 11 D.L.R. 104, 4 O.W.N. 1082, 24 O.W.R. 403. [Affirmed, 12 D.L.R. 847, 4 O.W.N. 1529, 24 O.W.R. 816.]

RAILWAY—INJURY TO SERVANT—BRAKESMAN — NEGLIGENCE — CONTRIBUTORY NEGLIGENCE.

Clark v. C.P.R. Co., 18 W.L.R. 467.

(§ II E—275)—FOR WHAT ACTS OF FELLOW-SERVANT MASTER IS LIABLE.

The doctrine of common employment does not prevail under the law of the Province of Quebec. [Asbestos & Asbestic Co. v. Durand, 30 Can. S.C.R. 285, 292; Filion v. The Queen, 24 Can. S.C.R. 482, applied.]

Story v. Stratford Mill Bldg. Co., 11 D.L.R. 49, 30 O.L.R. 271, 24 O.W.R. 552.

FOREMAN AS FELLOW-SERVANT — NEGLIGENCE—WORK OF LIFTING IRON PLATES.

Where a foreman has, from his master, discretion as to how many men shall be employed from time to time in lifting iron plates in a factory, the master is not liable for the foreman's error of judgment or negligence in putting on the men too heavy a load, where the foreman is no more than a fellow-servant.

Lear v. Canadian Westinghouse Co., 15 D.L.R. 544, 5 O.W.N. 769, 25 O.W.R. 698.

FOR WHAT ACTS OF SUPERINTENDENT MASTER IS LIABLE—WORKMEN'S COMPENSATION FOR INJURIES ACT, R.S.O. 1897, c. 160.

Where a contractor is digging a trench and it is the duty of the man in charge of the blasting to place logs over the drill-holes to prevent the scattering of debris by the blast, and he negligently rolls a log upon and injures a man working in the trench, the contractor is liable under the Workmen's Compensation for Injuries Act (R.S.O. 1897, c. 160) for his negligence, even though the injured workman be not in the blasting department.

Magnussen v. L'Abbé, 4 D.L.R. 857, 3 O.W.N. 864, 21 O.W.R. 376.

NEGLIGENCE OF FOREMAN.

An employer is not liable at common law for an injury to a servant caused by the carelessness of a competent subforeman in the employ of the master.

Dunlop v. Canada Foundry Co., 12 D.L. R. 791, 28 O.L.R. 140, affirming 2 D.L.R. 887, 4 O.W.N. 791.

Where a servant, who was directed to test a machine manufactured by the defendant, called the attention of the defendant's foreman to the danger of doing so without the guarding of rapidly moving saws, and was thereby injured while making such test, the jury may find a verdict against the master under the Employers' Liability Act (B.C.).

Everett v. Schaake, 4 D.L.R. 147, 17 B. C.R. 271, 21 W.L.R. 525, 2 W.W.R. 572.

SERVANTS AT PLAY—INJURY TO FELLOW SERVANT.

If some servants leave their work and indulge in "larking" to the injury of a fellow servant, that does not infer liability on the employer for damages at common law or under the Employers' Liability Act (N.S.), or the Workmen's Compensation Act, 1910 (N.S.), c. 3. [Armitage v. Lancashire & Yorkshire R. Co., [1902] 2 K.B. 178; Fitzgerald v. Clarke, [1908] 2 K.B. 796, applied.]

Doyle v. Moirs, 22 D.L.R. 767, 48 N.S.R. 473. [Leave to appeal to Privy Council refused, March 27, 1915.]

ACTION TO RECOVER DAMAGES—FOR INJURIES—NEGLIGENCE OF MAN IN SUPERINTENDENCE.

Flocks v. Canadian Northern Coal & Ore Docks Co., 3 O.W.N. 381, 20 O.W.R. 652.

(§ II E—276)—IN MINE—NEGLIGENCE OF FELLOW-SERVANT — COMMON EMPLOYMENT.

For the breach by the mining company of a statutory duty to guard an opening or shaft in a mine, which neglect was the cause of a mine employee falling down the opening, it is no defence that the failure to guard was due to the negligence of a fellow servant in the course of their common employment. [Groves v. Wimborne, [1898] 2 Q.B. 402, applied.]

Pressick v. Cordova Mines, 14 D.L.R. 515, 5 O.W.N. 263, 25 O.W.R. 228.

An employer who has provided for the inspection as to the safety of a mining tunnel, is not answerable as for negligence to his workman who was injured by sticking his pick into a piece of dynamite, if the failure to discover its presence was due to the neglect of a fellow servant to whom the duty of inspection had been assigned; and no facts were disclosed which would be inconsistent with the theory that the dynamite was left at the place of the accident through the carelessness of a fellow workman. [Priestley v. Fowler, 3 M. & W. 1, applied.]

Root v. Vancouver Power Co., 2 D.L.R. 303, 17 B.C.R. 203, 20 W.L.R. 847, 1 W.W. R. 1111.

INJURY TO SERVANT—NEGLIGENCE OF FOREMAN—MINE—ASSUMPTION OF RISK.

Skoropata v. Yukon Gold Co., 16 W.L.R. 178.

IN MINE—INJURY TO SERVANT—FAILURE TO COMPLETE SCALING—DAMAGES.

Matson v. Mond Nickel Co., 5 O.W.N. 652, 25 O.W.R. 549.

(§ II E—280)—DUTY OF RAILWAY TO EMPLOYEES — NEGLIGENCE — IMPROPER LIGHT—TRAIN AHEAD OF TIME—EXCESSIVE SPEED.

Paquette v. G.T.R. Co., 19 O.W.R. 305, 2 O.W.N. 1133.

III. Liability of master to strangers for acts of servant or independent contractor.

A. FOR ACTS OF SERVANT OR AGENT.

See Municipal Corporations, II G—222.

Liability for misrepresentations of traveling salesman, see Principal and Agent, II C—20.

(§ III A—285)—INJURY—FINDING OF JURY—NEGLIGENCE OF EMPLOYEES OF TWO DIFFERENT COMPANIES—JOINT AND SEVERAL LIABILITY.

The jury having found on sufficient evidence that an accident resulted from the common negligence of the employees of two different companies, such companies are in law jointly and severally liable for the damage. [Jeannotte v. Couillard, 3 Que. Q.B. 461, distinguished.]

G.T.R. Co. and Montreal v. McDonald, 44 D.L.R. 189, 57 Can. S.C.R. 268, 23 Can. Ry. Cas. 361, affirming 40 D.L.R. 749, 53 Que. S.C. 460.

MASTER'S LIABILITY TO STRANGER FOR SERVANT'S TORT.

A prima facie case of negligence is made out against the owner of a vehicle where it is shewn that the vehicle while being driven by one of his servants ran into the plaintiff, who was standing on the sidewalk, and who was injured as the result thereof. [Crawford v. Upper, 16 A.R. (Ont.) 440, applied, and Manzoni v. Douglas, 50 L.J.Q.B. 289, distinguished.]

Amundsen v. Ward, 11 D.L.R. 167, 24 W.L.R. 280. [Affirmed, 16 D.L.R. 558, 6 A.L.R. 46, 28 W.L.R. 654, 6 W.W.R. 1022, 7 W.W.R. 311.]

INJURY TO PERSON WORKING ON HIGHWAY—NEGLIGENCE OF DRIVER OF VEHICLE OWNED BY DEFENDANT.

Kettle v. Dempster, 5 O.W.N. 149, 25 O.W.R. 115.

NEGLIGENCE—DEATH OF SERVANT OF CONTRACTOR ENGAGED IN DEMOLISHING BUILDING—COLLAPSE OF WALL—DANGEROUS CONDITION—ACTION UNDER FATAL ACCIDENTS ACT AGAINST CONTRACTOR AND OWNER—INDEPENDENT CONTRACTOR—WORKMEN'S COMPENSATION FOR INJURIES ACT—FINDINGS OF JURY—APPEAL.

Simberg v. Wallberg, 7 O.W.N. 100.

(§ III A—286)—RAILWAYS—TRAIN RUN JOINTLY BY TWO COMPANIES—NEGLIGENCE OF ENGINEER—INJURIES—DAMAGES—CONTROL OF SERVANT AT TIME OF ACCIDENT—LIABILITY OF COMPANY.

An agreement was entered into between the Central Vermont R. Co., which was operating a line between St. Albans, U.S.A., and St. Johns, Que., and the G.T.R. Co., which was operating a line between St. Johns and Montreal whereby they were to run a train jointly between St. Albans and Montreal. The same train crew was to remain in charge during the trip, but each company were to pay the crew while running over its own line and each company was to assume all liability for loss or damages sustained in operating trains on its own line. The court held that the Central Vermont R. Co. could not be held liable for damages for injuries caused by the negligence of the engineer while running on the G.T.R. Co.'s line between St. Johns and Montreal. As the engineer was at the time of the accident under the control of, and paid by the G.T.R. Co., it alone was liable.

Central Vermont R. Co. v. Bain; G.T.R. Co. v. Bain, 48 D.L.R. 199, 58 Can. S.C.R. 433, reversing 28 Que. K.B. 45.

(§ III A—289)—WAR REVENUE ACT—PROPRIETOR OF DRUG STORE RESPONSIBLE FOR CLERK'S FAILURE TO AFFIX STAMP—REVENUE OFFICER—CONSUMER.

Under the Special War Revenue Act, 1915 (Can.), the proprietor of a drug store is responsible for the failure of one of his clerks to affix a revenue stamp on goods sold which require the stamp to be affixed although the sale was made without his knowledge, and the clerk had instructions always to affix stamps where they were required. A revenue officer buying goods requiring stamps to be affixed with a view of taking out a summons for violation of the Act is a consumer within the meaning of the Act.

Minister of Inland Revenue v. Bourke; Caldani & Rocca; Casgrain & Pruneau; Fabien; Gagnon, 45 D.L.R. 335, 31 Can. Cr. Cas. 48.

CRIMINAL LIABILITY—REVENUE LAWS.

A company operating a retail store in which perfumes are sold is not liable to fine under the Special War Revenue Act 1915, for the default of its salesman to affix a stamp to a package of perfume making a sale of same, if it has given all proper directions and facilities for carrying out the provisions of the Statute; the penal liability which the Statute provides is upon the "person selling" and the statute has not in this case made the Master criminally responsible for the act of his servant done without his connivance or knowledge. [Somerset v. Hart, 12 Q.B.D. 360, 53 L.J. M.C. 77, applied.

Patenaude v. Paquet Co., 31 D.L.R. 229, 26 Can. Cr. Cas. 205.

MASTER'S PENAL LIABILITY—WAR REVENUE ACT.

The scheme of the War Revenue Act, 1915 (Can.) is to make the employer liable for the penalties which it provides in respect of failure to affix revenue stamps on the retail sale of certain drug preparations, in respect of sales made in his store by his employees, although he was absent at the time of sale and although general directions had been given the employees not to sell such goods without affixing and cancelling the stamp. [Patenaude v. Paquet Co., 31 D.L.R. 229, 26 Can. Cr. Cas. 204, disapproved.]

Ethier v. Minister of Inland Revenue (Que.), 32 D.L.R. 320, 27 Can. Cr. Cas. 12.

The Special War Revenue Act, 1915, Can., makes the employer liable for the penalties which it provides in respect of failure of his employee in the course of his employment to affix revenue stamps on the retail sale of certain drug preparations, although general directions had been given by the employer to the employee not to sell such goods without affixing and cancelling the stamp. [Ethier v. Minister of Inland Revenue, 27 Can. Cr. Cas. 12, 32 D.L.R. 320, approved.]

Minister of Inland Revenue v. Nairn, 35 D.L.R. 224, 28 Can. Cr. Cas. 1, 11 O.W.N. 422.

(§ III A—290)—SCOPE OF EMPLOYMENT—NEGLIGENT DRIVING.

A "sales-agent" who sells and delivers wares of his employer, and rents a horse and conveyance from him for delivering the goods, although not required to devote any specified time to the work, and paid entirely by commissions, is acting within the scope of his employment when taking the horse and conveyance to the stable after a day's work on his employer's business, and the employer is liable for his negligence.

Duffield v. Peers, 32 D.L.R. 339, 37 O.L.R. 652.

RECKLESS DRIVING—HIRED TEAM.

A driver furnished by a liveryman with the hiring of a team who assists in the work of the hirer and operates, except as to driving, under the latter's directions, will, in the event of an accident resulting from reckless driving, render the liveryman, not the hirer, liable for damages resulting therefrom. [Consolidated Plate Glass Co. v. Caston, 29 Can. S.C.R. 624, followed.]

Balfour v. Bell Telephone Co., 24 D.L.R. 395, 34 O.L.R. 149.

SCOPE OF EMPLOYMENT.

Where an incorporated company is authorized to engage in the business of company promotion and of buying and selling corporate shares, its sales agent has no implied authority to bind the company to repurchase at a premium the shares of another company which it is promoting, although such agreement is made as part of or collateral to the agreement of sale and forms a part of the consideration thereof.

Whaley v. O'Grady, 1 D.L.R. 224, 19 W.L.R. 885, 1 W.W.R. 535. [See 4 D.L.R. 485, 22 Man. L.R. 379, 21 W.L.R. 617, 2 W.W.R. 663.]

NEGLIGENCE — SUPERINTENDENCE — EMPLOYERS' LIABILITY ACT, R.S.B.C. 1911, c. 74, s. 3 (2).

C. who was acting as superintendent of the work of loading logs on to trucks by means of a donkey-engine, temporarily took charge of the engine owing to the incompetence of the engineer, and instructed him how to work it. While so engaged, a man employed as a loader was struck by a log that was improperly lowered, and was killed. The plaintiff obtained judgment in an action for damages under the Employers' Liability Act. Held, on appeal that C., being so engaged, was "a person having superintendence intrusted to him" within the meaning of s. 3, subs. 2 of the Act, and the appeal should be dismissed.

Willard v. International Timber Co., 25 B.C.R. 210.

BRUSH FIRE—SCOPE OF EMPLOYMENT.

The relation of commettant and préposé exists between a father and his married son, living with him and working on his farm, under his direction and control. The act of the son, in setting fire to the brush on his father's land, though against the latter's will, is part of the work for which he is employed, and implies responsibility in the father.

Doyon v. Poulin, 50 Que. S.C. 117.

RESPONDEAT SUPERIOR.

A responsibility arises from the power of control at the moment of the tort; and the wrongdoer, though in the general service of a third person, may momentarily be the servant of the defendant and be under his control in so far as to render the latter responsible as his master.

Gest v. Berghauser, 25 Que. K.B. 200.

EMPLOYER'S LIABILITY FOR ACTS OF WORKMAN—DAY WORKMEN ON RAILWAY CONSTRUCTION—ACTS DONE DURING MEAL HOUR—QUE. C.C. 1054.

Workmen hired by the day or hour by contractors constructing a railway are "in the performance of the work for which they are employed" during the mid-day recess for their meal and rest; particularly if they are ordered to take such meal and rest at a place indicated, and under the superintendence of a foreman. Accordingly, their employers are responsible for damages caused by them during this interval.

Poliquin v. Davis, 45 Que. S.C. 409.

(§ III A—291)—WANTON OR MALICIOUS ACTS.

A master is answerable in damages for the act of a driver in his employ who, while driving a waggon on car tracks just ahead of a street car, turned out for it at a street intersection, where many people were standing in the roadway waiting to board the car, shouted for them to get out

of his way, and drove through the crowd in such a reckless manner as to strike the plaintiff, a person attempting to board the car, which was then opposite the waggon, and knock him down, so that the car ran over and crushed his foot.

Baillargeon v. St. George's, 4 D.L.R. 894, 22 Que. K.B. 6.

Where servants are employed to build a cabin on uncleared land, the clearing of the site for the erecting of the cabin is presumably within the scope of their employment.

Derby v. Ellison, 2 D.L.R. 279, 20 W.L.R. 794, 2 W.W.R. 99.

ACT OF EMPLOYEE BEYOND SCOPE OF EMPLOYMENT.

A teamster who is hired with his team and waggon by a wood-dealer at a fixed rate per day to deliver wood, is not the servant of the wood-dealer so as to render him liable for damages where in making delivery of a load, the teamster, under the special direction of the buyer of the wood, took the load down an excavation into a basement under a building which was being moved, and after unloading it, and with assistance getting his teams and waggon turned around, on going out from the basement caught and knocked out one of the supports, and caused the floor above, which was heavily weighted with merchandise and machinery, to collapse. [Jones v. Mayor, etc., of Liverpool, 14 Q.B.D. 890, applied.]

Edmonton Vinegar Co. v. Friedrichs, 9 D.L.R. 445, 5 A.L.R. 460, 23 W.L.R. 572, 3 W.W.R. 1043.

AUTOMOBILE TAKEN OUT OF SALE-ROOM BY SERVANT—FOR HIS OWN PURPOSES—WITHOUT KNOWLEDGE OR PERMISSION OF OWNER—PERSON INJURED BY CARELESS DRIVING—EXCESSIVE SPEED—LIABILITY OF OWNER — NEGLECT TO PREVENT WRONGFUL USE OF AUTOMOBILE—MOTOR VEHICLES ACT (ONT.).

Verrall v. Dominion Automobile Co., 3 O.W.N. 108, 20 O.W.R. 178.

(§ III A—294)—EMERGENCY—DANGEROUS COURSES—SCOPE OF EMPLOYMENT.

If in the case of emergency an employee in the course of his employment has two courses open to him, either of which may be dangerous, and in the emergency adopts the more dangerous and is injured, this does not put him outside the scope of his employment, and he is entitled to damages under the Workmen's Compensation Act (Sask.).

Cameron v. C.P.R. Co., 42 D.L.R. 445, 11 S.L.R. 277, [1918] 2 W.W.R. 1025.

B. FOR ACTS OF INDEPENDENT CONTRACTOR.

See Municipal Corporations, II G—210; Negligence, I B—16.

(§ III B—295)—WORK OF DANGEROUS NATURE.

A person cannot divest himself of liability for negligence in leaving an excavation in building operations unprotected as regards persons using the adjoining public highway or lane, by making it a part of the contract with an independent contractor for the excavation work which extended to the street line, and was necessarily dangerous to users of the highway, to provide a sufficient barricade in respect thereof; it is the duty of the former to see that the contractor takes all necessary precautions to prevent injury to third persons from the necessarily dangerous excavations which he has directed to be made.

McLean v. Crown Tailoring Co., 15 D.L.R. 353, 29 O.L.R. 455.

WORK SUPERINTENDED BY EMPLOYER.

The owner of the right to cut timber, who entrusts to a contractor the hauling of the timber from the woods, is responsible for damages caused to third parties by the contractor in the execution of the work if he reserves to himself the control and direction of the enterprise; in such case the relation of master and servant subsists.

Lortie v. Wright, 26 Que. K.B. 18.

(§ III B—297)—LEASE AND HIRE OF WORK — PRINCIPAL CONTRACTOR — SUBCONTRACTOR—WORKS BADLY DONE—DAMPNESS—C.C. QUE. 1688, 1690, 1696.

When a plasterer, subcontractor, plasters certain ceilings upon some concrete put on by another workman, and the plaster falls, he must give explanations and good reasons to avoid liability for the consequent damages. But he is not liable if the principal contractor forced him, in spite of his protests, to do the work on concrete which was too damp, especially when the roof was not finished, and the water was running down on the ceilings.

Quinlan v. Morrison, 23 Que. K.B. 481.

(§ III B—300)—CONSTRUCTION WORK BY CONTRACTOR—EMPLOYER'S DUTY TO PROTECT PASSERS-BY—FOR WHAT ACTS OF CONTRACTOR EMPLOYER IS LIABLE—EMPLOYING COMPETENT CONTRACTOR—EFFECT OF.

Where a person employs another to do construction work which, in the natural course of things, will involve a duty towards passers-by on the adjacent street to reasonably protect them from material falling upon them during the work of erecting the building, the owner for whom the work is being done is not relieved from responsibility for the performance of that duty by employing an independent contractor to perform it and to assume the whole responsibility for such protection, however competent the contractor may be.

Vail v. Bank of B.N.A., 20 D.L.R. 630.

JOINT LIABILITY OF PROPRIETOR AND OF INDEPENDENT CONTRACTOR — INJURY TO SERVANT OF CONTRACTOR.

A railway company's reservation by contract of complete control over and the right to direct an independent contractor in respect of railway tunneling work, renders the former jointly liable with the contractor (notwithstanding the latter's individual liability under the Workmen's Compensation

Act, R.S.O. 1897, c. 160) to a servant of the contractor for injuries sustained as the result of being required to work in a place known by both defendants to be one of danger by reason of the omission of the railway company or the contractors to provide safeguards against the falling of rock upon the workmen.

Dallontania v. McCormick, 14 D.L.R. 613, 29 O.L.R. 319. [Affirming, 8 D.L.R. 757, 29 O.L.R. 319, 23 O.W.R. 861.]

EMPLOYER — DUTY INCUMBENT ON — INDEPENDENT CONTRACTOR—DUTY ENTRUSTED TO—INJURIES—DAMAGES.

The rule by which a person is absolved from liability for the negligence of an independent contractor doing work for him, does not apply where the neglect which occasioned the injury was of a duty which was incumbent upon the employer and which duty he intrusted to the contractor to perform for him. [Pickard v. Smith, 10 C.B. N.S. 470, applied.]

Wallich v. Great West Construction Co., 20 D.L.R. 553, 24 Man. L.R. 646, 29 W.L.R. 41, 6 W.W.R. 1404.

INJURY TO SERVANT OF CONTRACTOR—JOINT LIABILITY OF PROPRIETOR AND OF INDEPENDENT CONTRACTOR, WHEN NEGATIVED — ABSENCE OF SUPERVISION — TESTS.

Rock-filling in a bay for the protection of a railway embankment is not work of such a dangerous character as to impose upon the railway company any duty to safeguard the servants of independent contractors executing the work under the general supervision of the railway company's engineer as to the actual construction of the "fill," where the injury took place from the fall of rock in quarrying the material upon the railway lands with the company's permission, but the latter had under the contract no control over the manner in which the material should be taken out nor as to where or how the contractors should procure the material, and, in fact, exercised no supervision over the quarrying. [Dallantonia v. McCormick, 8 D.L.R. 757, 14 D.L.R. 613, 29 O.L.R. 319, and Penny v. Wimbledon Council, [1899] 2 Q.B. 72, distinguished; Hole v. Sittingbourne, 6 H. & N. 488, applied.]

Romaniuk v. G.T.P.R. Co., 20 D.L.R. 301, 24 Man. L.R. 797, 18 Can. Ry. Cas. 170, 29 W.L.R. 766, 7 W.W.R. 399.

(§ III B—302)—JOINT LIABILITY OF PROPRIETOR AND OF INDEPENDENT CONTRACTOR—INJURY TO SERVANT OF CONTRACTOR.

A municipality's reservation by its contract with an independent contractor of control over the way in which the contractor's work shall be done and the kind of material that should be used and its stipulation for the right under certain circumstances to dismiss workmen engaged thereat, does not render such municipality jointly liable with the contractor to a servant of the contractor for injuries sustained as the result of mere collateral negligence of the contractor in the performance of the contract, such as the latter's failure to provide an efficient method of marking the location of unexploded dynamite charges or giving notice thereof to his workmen engaged in excavating at places where dynamiting had been done. [Reedie v. London and N.W. Ry. Co., 4 Ex. 244, 20 L.J. Ex. 65, applied.]

Smith v. Ulen, 17 D.L.R. 400, 28 W.L.R. 133, 6 W.W.R. 678.

(§ III B — 303) — INJURY TO ADJOINING OWNER.

The act of committing work to a contractor to be executed, from which, if properly done, no injurious consequences can arise, is to be differentiated from the act of turning over to him work to be done from which mischievous consequences will arise unless preventive measures are adopted; and while it may be just to hold the party authorizing the work in the former case exempt from liability for injury resulting from negligence which he had no reason to anticipate, there is, on the other hand, good ground for holding him liable for injury caused by an act certain to be attended with injurious consequences, if safeguards are not provided, no matter through whose fault the omission to take the necessary measures for such prevention may arise; and, where the owner of lands, in the construction of works thereon for which injury to the adjoining premises must be expected to result, himself omits to take the necessary measures to prevent such mischief, he may be held liable upon a plea alleging such omission. [Bower v. Peate, 1 Q.B.D. 321, 326, applied.] The liability of a master for an omission to do something depends entirely upon the extent to which a duty is imposed to cause that thing to be done, and in such a case it is quite immaterial whether the actual actors are servants or not.

Cockshutt Plow Co. v. MacDonald, 8 D.L.R. 112, 5 A.L.R. 184, at 189, 22 W.L.R. 798, 2 W.W.R. 488.

INDEPENDENT CONTRACTOR — LIABILITY OF EMPLOYER — INJURIES TO ADJOINING OWNER—RAILWAYS.

A railway company will be liable for damage to land adjoining its right of way occasioned by the negligent operations of its contractors for the construction of the roadbed, if in letting the contract no care was exercised by the railway company to provide that in the blasting operations which were an essential part of the contract the "top-lofting" method which would throw debris upon the lands of the adjoining owner should not be adopted, and the contractors damaged the adjoining property by following that method where another course of operations was open to them under which the injury might have been avoided.

Vancouver Power Co. v. Hounsome, 19 D.L.R. 200, 49 Can. S.C.R. 430, affirming

9 D.L.R. 823, 18 B.C.R. 81, 15 Can. Ry. Cas. 69, 23 W.L.R. 167, 404, 3 W.W.R. 953.

(§ III B—305)—WHO ARE INDEPENDENT CONTRACTORS—LIABILITY OF MASTER FOR INJURIES TO EMPLOYEE OF INDEPENDENT CONTRACTOR—CONTRACT UNDER SUPERVISION OF MINE SUPERINTENDENT—DRIVING A TUNNEL.

Bradshaw v. Britannia, 7 D.L.R. 878, 2 W.W.R. 20.

In order to be an independent contractor a workman must be free from control and must not be subject to the orders of anyone as to the manner in which the work is to be done.

Beaulieu v. Picard, 7 D.L.R. 2, 42 Que. S.C. 455.

Where a municipal corporation enters into a contract with certain contractors for the construction of a bridge, but some difficulty arising as to the remuneration for the piling, a $6 per diem charge was by a subsequent agreement allowed for the contractor's own time and the use of his piling plant, but the contractor still retained complete control over the entire work and he could select his own employees, he is in law an independent contractor and not an employee of the municipality, and the municipal corporation is not liable for his negligence.

Johnston v. Clark, 7 D.L.R. 361, 4 O.W.N. 202, 23 O.W.R. 196.

IV. Liability of servants.

(§ IV—310)—WORKMAN.

When a workman has supplied his materials and done his work and payment thereof has been made, he has no responsibility in case of damages resulting to the structure put up, either from a defect of construction or the nature of the soil, and no presumption of fault at all rests on his shoulders, either of acquilian or of contractual fault under C.C. (Que.) 1688.

Stilwell-Bierce v. Lyall, 3 D.L.R. 369.

ACCOUNTING BY EMPLOYEE—BOTTLES LEFT WITH CUSTOMERS.

In the absence of a written agreement and in accordance with commercial usage, an employee whose duty it is to deliver goods sold is not responsible for bottles or cases left with customers, and an account of them cannot be demanded at the expiration of his engagement or when he leaves his employ, especially if, each day, he has given in a list of the full bottles delivered during the day, as well as the empty bottles brought back.

Brunel v. Plamondon, 46 Que. S.C. 385.

(§ IV—312)—DAMAGES — NEGLIGENCE OF FELLOW-SERVANT — INFRINGEMENT OF MUNICIPAL BY-LAW — PROTECTION OF PUBLIC.

The infringement of a general prohibition in a municipal by-law prohibiting blasting operations without a permit from a municipal officer will not make liable the proprietors on whose behalf the operations are conducted, for injury to a workman occasioned by the negligent act of a fellow-workman under circumstances in which the fellow-servant doctrine would otherwise apply; such by-law is not one particularly designed to benefit or protect a class but is intended as a protection of the public at large. [Bell v. G.T.R., 15 D.L.R. 874, 48 Can. S.C.R. 561; Butler v. Fife Coal Co., [1912] A.C. 149 and Watkins v. Naval Colliery Co., [1912] A.C. 693, followed.]

Singh v. C.P.R. Co., 20 D.L.R. 511, 19 B.C.R. 575 at 578, affirming 15 D.L.R. 487, 19 B.C.R. 575, 5 W.W.R. 125.

(§ IV—313)—LIABILITY OF INDEPENDENT CONTRACTORS.

One who employs a contractor to erect a building is not answerable for damages sustained by an adjoining property owner through the falling of a wall as the result of the negligence of the contractor in building it, the maxim, qui facit per alium facit per se, not being applicable. [Reedie v. London & N.W. R. Co., 4 Ex. 244, and Gayford v. Nicholls, 9 Ex. 702, followed.]

Cockshutt Plow Co. v. MacDonald, 5 D.L.R. 365, 5 A.L.R. 184, 20 W.L.R. 197, 3 W.W.R. 529.

V. Workmen's compensation cases.

Total disability, see Insurance, VI B—345.

(§ V—340)—APPLICATION OF ACTS GENERALLY—ACCIDENT ON DAY MILL WAS STOPPED.

The Workmen's Compensation Act (Que.) does not apply to an accident happening to a workman, outside of the factory, on a day when the mills were stopped, when he gave his assistance to a work which was purely one of recreation, upon the courteous invitation of his foreman, and at the latter's private residence.

Brown v. Carrier, 27 Que. K.B. 17, reversing 52 Que. S.C. 44.

MANUFACTURER AND TRADER — JOINT EMPLOYMENT.

Where an employer is both a trader and manufacturer, a workman or his representatives who make a claim under the Workmen's Compensation Act (Que.), must establish that, at the time of the accident, the workman in question was assisting in the industrial operations of the employer, as well as in his commercial work, and that the accident occurred in the course of the industrial operation. So, a night watchman, employed by a company whose business is the manufacture and sale of petroleum products, and to whom it was ordered by his employer to deliver a wagon loaded with gasoline to certain districts outside of Montreal, has no claim under the above law if he is killed by a passing train while returning from his duty.

Caron v. Imperial Oil Co., 54 Que. S.C. 394.

RIGHT TO VIEW PLACE OF ACCIDENT.

A plaintiff in an action under the Work-

men's Compensation Act (Que.) cannot, before the trial, obtain permission to visit the place where the accident occurred.

Stychlinsky v. Canadian Steel Foundries, 20 Que. P.R. 130. [See 25 Rev. Leg. 135.]

REMEDIES—STATUTORY—COMMON LAW.

The sole recourse which the law gives a workman, the victim of an accident in the course of employment, is by proceeding under the Workmen's Compensation Act (Que.), with the authorization of a judge of the Superior Court. He cannot sue under the common law.

Goupil v. Van, 24 Rev. Leg. 192.

COMMON LAW ACTION—DAMAGES.

Where an accident happened while plaintiff was working for defendants, it was held that he could only proceed under the Workmen's Compensation Act (Que.); and must prove inexcusable fault on the part of defendants. An action brought under the common law must be declared unfounded.

Desormeaux v. Dupre, 24 Rev. de Jur. 196.

ACTION BY MINOR.

A minor over 14 may, with the authority of a judge, bring an action under the Workmen's Compensation Act (Que.).

Therriault v. Caron, 19 Que. P.R. 213.

An action under the Workmen's Compensation Act (Que.) is not based on the contract of hire of services, but on the fault of the employer; and a minor can only bring such action through his guardian.

Delangie v. Montreal Machine Shop, 20 Que. P.R. 208, 55 Que. S.C. 132.

REMEDY OF ASCENDANTS—SOLE SUPPORT.

The only ascendants who have a right to an indemnity for the death of their child, in an accident to a workman, are those of whom the victim was their sole support at the moment of the accident. A right of action is not open to those of whom the victim was one support, even if the chief one. Whenever the Workmen's Compensation Act (Que.) differs from the common law, the former should be interpreted in a restrictive sense.

Price v. Saint-Louis, 27 Que. K.B. 174.

Compensation should not be granted to the father and mother of an employee killed in the service of his employer, under par. c. of art. 7323 of the Workmen's Compensation Act (Que.), upon the ground that their son was their only support at the moment of the accident, if they were not in want. A father and mother who own in the country a farm which is paid for, worth $1,575, the father earning also wages of $400 a year, and their youngest child being 15 years old, are not in want.

Montreal Public Service Corp. v. Picard, 27 Que. K.B. 188.

PAYMENT OF RENT — INSURANCE — JUDGMENT—EXAMINATION OF DEFENDANT.

A defendant, condemned to pay a plaintiff a rent under the Workmen's Compensation Act (Que.), cannot, even if he has paid all he is bound to pay up to date, escape by offering to have the payment of the rent secured by an insurance company approved by an order-in-council, or by conservatory measures such as the registering of the judgment against his property, or the examining of the defendant concerning his assets.

Smith v. Weir, 19 Que. P.R. 134. [See 53 Que. S.C. 51.]

CAPITAL—DELAY—COSTS—INSURANCE.

One suing under the Workmen's Compensation Act (Que.) may, within a month from the judgment condemning his employer to pay an annual rent, ask that the capital be paid to him. The capital of a rent, granted to an employee under the Act must not be diminished by the costs which an insurance company would deduct for administering the capital and distributing it in periodical payments.

Okopny v. Atlas Construction Co., 24 Rev. Leg. 371.

FRENCH AND QUEBEC LAW — RIGHTS OF PARENTS.

The French law relating to accidents to workmen is different from the law of the Province of Quebec as to the rights of parents to claim compensation. Under the French law it suffices that the parents are in need, but under the law of Quebec the victim must have been the sole support of the parents.

Picard v. Montreal Public Service Corp., 24 Rev. de Jur. 142.

CONFLICT OF LAWS.

An employee, the victim of an accident, who had been engaged at Montreal to go and work in a workshop at Port Arthur, Ontario, may invoke the benefits of the Workmen's Compensation Act of Quebec, even if he has already obtained compensation under the Workmen's Compensation Act of Ontario. But the court should take into account what he has already received.

Burdeau v. Dominion Bridge Co., 54 Que. S.C. 363.

(§ V — 341) — WORKMEN'S COMPENSATION ACT — PROCEDURE — EVIDENCE — JURISDICTION OF COURT.

Under the Alberta Workmen's Compensation Act, a District Court Judge acting thereunder as the statutory arbitrator, has the power to direct the issue of a commission to take the evidence of witnesses in order that the evidence so taken may be used before him as part of the evidence on which to base his reward. [Sutton v. Great Northern R. Co., [1909] 2 K.B. 791, distinguished.]

Bodner v. West Canadian Collieries, 8 D.L.R. 462, 5 A.L.R. 163, 22 W.L.R. 765, 3 W.W.R. 529.

CLAIM FOR WAGES—CONTRACT OF LEASE—ACTION DURING LONG VACATION—(QUEBEC).

A workman's claim for wages is upon a contract of lease or hire of work and may be tried in the long vacation under the ex-

ception of art. 15, C.C.P. of "actions arising from the relation of lessor and lessee," the latter term being recognized by art. 1600, C.C. (Que.) as including both a lease of things or a lease of work.

Pare v. Baker, 20 D.L.R. 663.

INDEPENDENT CONTRACTOR — WORKMEN'S COMPENSATION.

The liability to others than employees (e.g., employees of contractors of the principal employer) under the Workmen's Compensation Act (Alta.), 1908, c. 12 is limited by the character of the work with relation to the principal employer and not to the manner or nature of the accident.

Ringwood v. G.T.P.R. Co., 17 D.L.R. 202, 7 A.L.R. 226, 28 W.L.R. 383, 7 W.W.R. 15.

PERSONAL INJURY — NEGLIGENT ORDER OF SUPERINTENDENT — WORKMEN'S COMPENSATION FOR INJURIES ACT.

The master is liable for personal injuries sustained by the workman by reason of conformity to the negligent order of the superintendent under the Workmen's Compensation for Injuries Act, R.S.O. 1914, c. 146, s. 3, but it is not essential that conformity to the order should be the causa causans of the injury, if it were a sina qua non. [Wild v. Waygood, [1892] 1 Q.B. 783, followed.]

Turner v. East, 20 D.L.R. 332, 32 O.L.R. 375.

WORKMEN'S COMPENSATION ACT—DAMAGES —"LIMIT" AS DISTINCT FROM "MEASURE."

Section 15 of the Saskatchewan Workmen's Compensation Act fixes the limit and not the measure of damages and where these are shewn to an amount not exceeding $1,800 it is not necessary to take into consideration the estimated earnings during a three-year period.

Kier v. Benell, 18 D.L.R. 479, 7 S.L.R. 78, 29 W.L.R. 383, 7 W.W.R. 15.

WORKMEN'S COMPENSATION ACT — PROCEDURE—ARBITRATOR — SUBMITTING QUESTIONS OF JUDGE—TIME FOR—APPEAL—ERROR OF FACT.

Where parties have an opportunity to ask the arbitrator to state his award under the Workmen's Compensation Act, R.S.B.C. 1911, c. 244, in the form of a special case and neglect to do so, the award should not, in the absence of misconduct, be set aside so as to enable him to obtain the opinion of the court on a point of law not open at the hearing. After the publication of an arbitrator's award under the Workmen's Compensation Act, R.S.B.C. 1911, c. 244, the arbitrator cannot submit questions under s. 4 of the Act to a Judge of the Supreme Court. [Lewis v. G.T.P., 13 D.L.R. 152, 18 B.C.R. 329, followed.]

Cozoff v. Welsh, 20 D.L.R. 20, 20 B.C.R. 532, 7 W.W.R. 531, reversing 18 D.L.R. 8, 28 W.L.R. 449, 6 W.W.R. 1081.

WORKMEN'S COMPENSATION ACT—ARBITRATOR—SUBMITTING QUESTIONS TO JUDGE —TIME FOR.

After an award of an arbitrator appointed under the Workmen's Compensation Act, R.S.B.C. 1911, c. 244, has been reduced to writing and published, he cannot submit questions under s. 4 of the Act, to a Judge of the Supreme Court.

Lewis v. G.T.P.R. Co., 13 D.L.R. 152, 18 B.C.R. 329, 15 Can. Ry. Cas. 173, 25 W.L.R. 118, 4 W.W.R. 1246.

ASSESSMENT OF DAMAGES AFTER DISMISSAL OF NEGLIGENCE ACTION.

Where an independent action for damages for personal injury to a workman alleged to have resulted from the negligence of the employer is dismissed at the trial for lack of evidence to shew negligence, the trial judge may, on the application of the plaintiff, proceed to assess and award compensation under the Workmen's Compensation Act (Sask.).

Uhlenburgh v. Prince Albert Lumber Co., 9 D.L.R. 639, 6 S.L.R. 270, 23 W.L.R. 539, 3 W.W.R. 1146.

WORKMEN'S COMPENSATION ACT B.C.— UNSUCCESSFUL NEGLIGENCE ACTION.

The rule that where an action for personal injuries which has been brought under the common law has been disposed of, the plaintiff has no right to ask for an assessment under the Workmen's Compensation Act (B. C.), unless he does so immediately after trial of the action at common law, is applicable only where the judgment was rendered against the plaintiff, but where the plaintiff had obtained a verdict under the common law and the verdict was set aside on appeal and he subsequently applied to the Trial Judge for an assessment of damages under the Act, such application is allowable. The act of a workman employed as a fireman tending a furnace, in adjusting a belt attached to a carrier, which fed the furnace with fuel, in the absence of the chief engineer, whose duty it was to adjust the belt, is an act done in the course of the workman's employment, so as to entitle the workman to compensation under the Workmen's Compensation Act for injuries incurred during the progress of the work. [Barnes v. Nunnery Colliery Co., 81 L.J.Q.B. 213, distinguished.]

McCormick v. Kelliher, 9 D.L.R. 392, 18 B.C.R. 57, 23 W.L.R. 10, 3 W.W.R. 722, affirming 7 D.L.R. 732, 18 B.C.R. 57, 2 W.W.R. 719.

WORKMEN'S COMPENSATION FOR INJURIES ACT—PROCEDURE.

Where a brakeman engaged in coupling cars at night is injured by reason of the negligence of the engineer in charge of the locomotive in failing to wait for a new signal to start, it having been prearranged between the two that the brakeman was to give such signal by lantern, the master is liable under subs. 5 of s. 3 of the Workmen's Compensation for Injuries Act, making an employer responsible "by reason of negligence of any person in the service of the employer who has the charge or control of any points, signal, locomotive, en-

gine, machine or train upon a railway, tramway or street railway." [Martin v. G.T.R. Co., 4 O.W.N. 51, applied.]

Allan v. G.T.R. Co., 8 D.L.R. 697, 4 O.W.N. 325, 15 Can. Ry. Cas. 14, 23 O.W.R. 453.

BOARD — JURISDICTION — FINALITY OF DECISION.

Where the Workmen's Compensation Board (Man.) has jurisdiction over any matter brought before it, its action or decision is final and not subject to question or review in any court. If, however, the Board attempts to deal with a matter over which it has not acquired jurisdiction, or if it fails to be governed by the provisions of the Workmen's Compensation Act according to their true intent and meaning, its actions, decisions or proceedings are not protected by s. 57 of the Act, and a party affected may seek the remedies available to him in the courts. An enquiry held by the Board as to the compensation to be allowed the representatives of a deceased workman, is a judicial one, and the employer should be given notice of the time and place of such enquiry. Failure to give such notice is not a ground for setting aside the order, if the Board has jurisdiction to deal with the matter.

C.N.R. Co. v. Wilson, 43 D.L.R. 412, 29 Man. L.R. 193, [1918] 3 W.W.R. 730.

INJURY—MISTAKE—RATIFICATION — WORKMEN'S COMPENSATION ACT, R.S.Q. 1909.

Before a workman or his representative can claim the benefit of the Workmen's Compensation Act R.S.Q. 1909, art. 7321, he must prove the existence of the contractual relationship of employer and employee; and an action under the Act cannot be maintained if the workman, mistaking the place to which he was sent, misrepresented to defendant's foreman that defendant had sent him to work and had consequently been permitted to work and there was no ratification as the injury occurred before the employer had learned that he was there.

Cooney v. Morel, 20 D.L.R. 656, 45 Que. S.C. 458.

MUNICIPAL WORKS — NOTICE OF ACTION — LIMITATIONS.

The Workmen's Compensation Act (R.S. Q. 1909, arts. 7321-47) applies to persons employed by a municipality in its works, and entitles an employee injured in the course of his work to his statutory indemnity, notwithstanding his failure to give notice of the action within the time prescribed by the municipal charter (2 Geo. V. 1912, c. 65, s. 4) or by a special statute applicable to actions against municipalities (Cities and Towns Act, R.S.Q. 1909, art. 5864); the provisions of the first named Act, in cases falling within it, override the provisions of the other statutes, and are governed by the prescription of 1 year provided therein. In awarding the indemnity under the Act, the court cannot, if the capital of the annuity is preferred, condemn the employer to pay an annuity only.

Page v. Joliette, 29 D.L.R. 240, 49 Que. S.C. 437.

NOTICE OF INJURY—ELECTION OF REMEDIES.

The fact that a notice of injury served on the employer is headed as being in the matter of the Workmen's Compensation Act, 1908 (Alta.), and also with the words "application for compensation," are not sufficient to constitute a definite election on the part of the workman to take his remedy under the Act alone and to abandon his common law remedy for negligence where no such inference could be drawn from the statements contained in the notice itself apart from the headings.

Klukas v. Thompson, 24 D.L.R. 67, 8 W.W.R. 778, 31 W.L.R. 438, reversing 21 D.L.R. 312, 7 W.W.R. 1102.

ELECTION OF REMEDIES—WORKMEN'S COMPENSATION OR LORD CAMPBELL'S ACT.

A plaintiff is not bound to elect at the trial whether he will proceed under the Workmen's Compensation Act or under the Act respecting compensation to relatives of persons killed by wrongful act, C.S.N.B. 1903, c. 79, but the action can be brought and proceeded with under both Acts, and the damages assessed under either Act as the evidence might warrant.

Wentzell v. New Brunswick, etc., R. Co., 43 N.B.R. 475.

FAILURE TO ESTABLISH COMMON LAW LIABILITY—LEAVE TO PROCEED UNDER STATUTE—TIME TO ELECT.

In an action by an employee for damages at common law and under the Employers' Liability Act, judgment was entered for the defendant by the trial judge. Counsel for the plaintiff then asked the judge to make an order that this judgment should be without prejudice to his rights to apply for compensation under the Workmen's Compensation Act, as he wished to appeal to the Court of Appeals from the judge's decision. The judge said there seemed to be no doubt that plaintiff should elect to appeal or apply for compensation under the Workmen's Compensation Act at the conclusion of the trial.

Lilja v. Granby Consolidated, 21 B.C.R. 384, 8 W.W.R. 690.

INJURY TO SERVANT—FALLING INTO ELEVATOR SHAFT—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE — REMEDY — WORKMEN'S COMPENSATION — POWER OF COURT TO DETERMINE LIABILITY.

Garment v. Austin, 25 D.L.R. 833, 34 O.L.R. 417.

PRELIMINARIES—PETITION TO SUE.

The petition for authority to sue under the Workmen's Compensation Act is the act preliminary to an action.

Fontaine v. Cabana, 48 Que. S.C. 230.

WRIT OF SUMMONS—FAILURE TO SERVE—NEGLIGENCE OF SOLICITORS—RENEWAL AFTER EXPIRY OF YEAR—POWER OF JUDGE OR MASTER IN CHAMBERS—ACTION UNDER WORKMEN'S COMPENSATION FOR INJURIES ACT—EXPIRY OF STATUTORY PERIOD—BAR TO NEW ACTION—DISCRETION.

Travato v. Dominion Canners, 9 O.W.N. 7, 15.

REVIEW OF PROCEEDINGS UNDER ACT—APPEAL—DISCRETIONARY MATTERS.

No motion by way of appeal or application to the equitable jurisdiction of the court to correct an error in a matter before a judge acting within his jurisdiction under the Workmen's Compensation for Injuries Act will be entertained, except where the amount allowed the claimant is greater than is provided by the Act. On the hearing of a petition under the Act the judge may, in the exercise of his discretion, apply any of the rules of the Supreme Court, 1909, which he may consider applicable to the circumstances of the case, and is not confined to rules ejusdem generis with the subjects dealt with by the rules especially referred to in the Act.

Merritt v. St. John R. Co., 42 N.B.R. 667.

INDEMNITY, HOW ESTABLISHED—THIRD PARTIES — POWER TO AWARD — VOLUNTARY ADMISSION OF PARTIES.

In order to succeed upon a claim for indemnity against an award under the Workmen's Compensation Act, it must be established that the damages are paid by reason of and for the liabilities enumerated in the Act. An award for a lump sum under the Workmen's Compensation Act (B.C.) cannot be made under s. 10, without the acquiescence of all parties in the character of compensation, and no award for indemnity against a third party in respect of the liability may therefore be made without the latter's consent. Unless the employment is within the purview of the Workmen's Compensation Act (B.C.), and properly established, the court has no jurisdiction under the Act to award compensation merely upon the voluntary admission of the parties to such award in an action for negligence.

Atkinson v. Pacific Stevedoring & Contracting Co., 24 D.L.R. 400, 22 B.C.R. 109, 32 W.L.R. 154, 8 W.W.R. 1339.

SECOND ACTION—PRESCRIPTION.

An employee, who has recovered a first judgment under the Workmen's Compensation Act, may institute another action if, subsequently, it is shewn that he has sustained permanent injuries. In such a case, prescription does not commence to run from the date of the accident but only from the date when the aggravation of the injuries of the victim has been discovered.

Pelland v. Touzin Sand Co., 50 Que. S.C. 280.

Upon an application to be authorized to bring an action under the Workmen's Compensation Act, it is not necessary to decide whether it is the law of the foreign province, which will apply in such case from the moment that the petitioner shews that he has a sufficient cause of action. [Gabella v. G.T.R. Co., 12 Que. P.R. 329.]

Bonidetti v. C.P.R. Co., 13 Que. P.R. 236.

JUDGMENT BY CONSENT—APPEAL—INDEMNITY.

Proceedings by appeal and in review, provided for by art. 22 of the Workmen's Compensation Act (Que.), (now art. 7342, R.S.Q. 1909) are not permissible against the judgment by consent under art. 27 (now art. 7347), where the parties have acquiesced in it, and the Act does not distinguish between acquiescence given before and that given after the judgment. Such a judgment can from that time only be set aside by requête civile, as the direct action has never been recognized in the French law as a mode of proceeding against judgments. Apart from the requête civile there is no other recourse against this judgment than the action to revise the compensation given to each party by art. 26 (now art. 7346).

St. Jacques v. St. Jean Berchmans, 52 Que. S.C. 104.

A petition to sue under the Workmen's Compensation Act will be dismissed if it only alleges that the accident occurred while the deceased was employed by the city of Montreal in the making or repairing the roadway, directing a machine, which serves to mix concrete, said machine being propelled by mechanical force other than hand or horse power.

Caillé v. Montreal, 14 Que. P.R. 82.

ACTION BY FATHER—RIGHT TO—EXCLUSION OF COMMON LAW REMEDIES.

The Workmen's Compensation Act (arts. 7321, et seq. R.S.Q., 1909), limits the remedies it gives for labour accidents and takes away from the parties who claim damages all the common law remedies. Therefore, the father of a victim, killed in an accident, who was not his only support, has no action in liability against the employer.

Quebec Ry. Light & Power Co. v. Lamontagne, 23 Que. K.B. 212.

MINOR INJURIES—AMOUNT—EVIDENCE.

An accident of minor importance and which causes no appreciable injury to an employee does not give the latter any recourse for damages under the statute. In order to establish the amount of the capital upon which an annuity is to be calculated, the evidence afforded by actuarial tables of insurance companies, giving the probable expectation of life should not alone be taken into consideration, but there ought also to be considered what might be the prospective capacity of the workman in continuing to do work. In estimating the amount of the capital, the cost of administration of such capital which would be required by an insurance company should also be taken into consideration, because the employee, in case he does not directly receive the capital, would not be obliged to incur such expenses.

Moineau v. Antonessa Employers Liability Ass'ce Corp. v. Moineau, 25 Que. K. B. 334.

CAPITAL OR RENT—ELECTION—TIME—RES JUDICATA.

Under the amendment (4 Geo. V. c. 57) to the Workmen's Compensation Act (Que.), the option of the person injured to obtain the payment of the capital instead of the rent, must be made by his action, and it cannot be done after issue joined and enquête closed, nor after judgment rendered. If the option is refused, and judgment is rendered granting an annual rent to the plaintiff, which judgment is affirmed in review, there is res judicata as to the right to obtain the capital, and the plaintiff cannot subsequently renew his demand.

Torovik v. Steel Company of Canada, 51 Que. S.C. 512.

PARTIES.

Under the Workmen's Compensation Act, the compensation provided for in case of death should be apportioned by the court among those entitled to it, and therefore all persons who may have a claim to it should be made parties to an action brought by one of them. If all such persons are not made parties, the defendant may, by dilatory exception, apply to have the proceedings stayed until the plaintiff has brought them in.

Drouin v. Wallbert, 49 Que. S.C. 6.

LIS PENDENS—COMMON LAW ACTION.

A party obtaining judgment under the Workmen's Compensation Act (Que.) may, if this judgment is dismissed on appeal before the expiration of the time fixed for prescription, take an action at common law based on the same facts, which he declares that he is ready to abandon if the judgment given in his favour is eventually confirmed, and this second action will not be dismissed on a plea of lis pendens.

Langlois v. G.T.R., 18 Que. P.R. 330.

ACCIDENT TO WORKMEN—AUTHORIZATION—PRESCRIPTION — INTERRUPTION — C.C. (QUE.) ART. 2224 R.S.O. [1909], ARTS. 7345, 7347.

The notices of a petition to authorize the institution of an action given by a judge under art. 27 of the Workmen's Compensation Act, interrupts the prescription mentioned in art. 25 of that Act. Thus an action commenced on Nov. 30, 1914 is not prescribed if the accident happened on Nov. 29, 1913, and the request for authorization was commenced on Nov. 25, 1914 and granted on Nov. 30, following.

Dupuis v. C.P.R. Co., 55 Que. S.C. 59.

WORKMEN'S COMPENSATION ACT, B.C., 1916, C. 77, S. 67—WHETHER "EMPLOYERS"—DECISION OF BOARD—PAYMENT OF ASSESSMENT—COURT WITHOUT JURISDICTION.

The court is without jurisdiction to quash assessment made by the Workmen's Compensation Board, by reason of s. 67 of the Workmen's Compensation Act, the applicants having after a hearing, been assessed as employers and paid the assessment.

Re Workmen's Compensation Act & Blue Funnel Motor Line, [1919] 3 W.W.R. 426.

WORKMEN'S COMPENSATION—REMISSION OF AWARD—REFUSAL TO HEAR FURTHER EVIDENCE.

Where an order of the Supreme Court remits a matter to an arbitrator under the Workmen's Compensation Act "for a new award," the arbitrator may, in the absence of an express order directing him to rehear the matter, refuse to hear any further evidence than that on which he has already given a finding of fact.

Major v. Stewart, 6 W.W.R. 687.

WORKMEN'S COMPENSATION ACT, B.C.—MOTION TO SET ASIDE AWARD UNDER—REVIEW OF ARBITRATOR'S FINDING—CASE STATED.

Basanta v. C.P.R. Co., 16 B.C.R. 304.

WORKMEN'S COMPENSATION — ACCIDENTS — EVIDENCE REQUIRED.

Durocher v. Kinsella, 40 Que. S.C. 459.

WORKMEN'S COMPENSATION — PETITION TO SUE GENERALLY ALLOWED — JOINING COMMON LAW ACTION.

McMullen v. G.T.R. Co., 13 Que. P.R. 175.

SETTLEMENT OF DAMAGE CLAIM—CONDITIONAL OBLIGATION.

McKinstry v. Irvine, 39 Que. S.C. 426.

(§ V—342)—WHO PROTECTED BY—WHO LIABLE UNDER.

A master is liable, under subs. 5 of s. 3 of the Workmen's Compensation for Injuries Act, R.S.O. 1897, c. 160, making the employer liable where the injury is caused "by reason of the negligence of any person in the service of the employer who has the charge or control of any points, signal, locomotive, engine, machine or train upon any railway, tramway or street railway," where a yard foreman is injured by being struck by an engine engaged in shunting operations and under the control of his assistant by reason of the negligence of the assistant in failing to carry out an order of the foreman.

Martin v. G.T.R. Co., 8 D.L.R. 590, 27 O.L.R. 165, 15 Can. Ry. Cas. 1.

WORKMEN'S COMPENSATION FOR INJURIES ACT, R.S.O. 1914, C. 146, S. 4—INJURY TO SERVANT—"WORKMAN"—"CONTRACTOR."

Hallett v. Abraham, 17 D.L.R. 854, 6 O. W.N. 355.

DEATH OF BOY—FATHER PARTIALLY DEPENDENT.

The compensation awarded for the death of a fifteen year old boy, who lived at home with his father and mother, and on whose earnings the father is partially dependent for the support of his family, should be the maximum amount allowed by the Work-

men's Compensation Act (Sask., 1910-11 c. 9, s. 15).

Mills v. Sherwood Stores, 42 D.L.R. 666, [1918] 2 W.W.R. 1030. [See 11 S.L.R. 119.]

RIGHTS OF FOREIGNER—TEMPORARY RESIDENCE.

Temporary residence in Canada, while looking for a re-engagement on lake vessels, does not entitle a foreigner to the benefit of the Workmen's Compensation Act under art. 7324, R.S.Q. 1909, as a resident of Canada.

McCarthy v. Mathews Steamship Co., 41 D.L.R. 122, 24 Rev. de Jur. 191. [See 24 Rev. Leg. 325.]

WORKMEN'S COMPENSATION — FAILURE OF COMMON LAW ACTION—APPLICATION FOR COMPENSATION—LIABILITY OF MUNICIPAL STREET RAILWAY.

Regina v. Western Trust Co., 39 D.L.R. 759, 55 Can. S.C.R. 628, [1917] 3 W.W.R. 1055, affirming 30 D.L.R. 548, 9 S.L.R. 336, 34 W.L.R. 1125, [1917] 1 W.W.R. 1274, 24 D.L.R. 26, 32 W.L.R. 307.

RELEASE—BEFORE AND AFTER INJURY.

Section 4 (2) of the Workmen's Compensation Act (Sask.) 1910-11, c. 9) applies to contracts entered into before injury, by which a workman contracts himself out of the Act, but not to contracts in settlement, after the injury has been received.

Carr v. Imperial Oil Co., 38 D.L.R. 154, 10 S.L.R. 429, [1918] 1 W.W.R. 89.

EMPLOYEES' RELIEF FUND—VALIDITY OF CONTRACT—ESTOPPEL.

The agreement of an employee of the Intercolonial Ry., as a condition to his employment, to become a member of the temporary employees' relief and insurance association, and under its constitution and by-laws to accept its benefits in lieu of all claims for personal injury, is perfectly valid and may be set up as a complete bar to his action against the Crown for injuries sustained in the course of employment; by accepting the benefits he will be estopped from setting up any claim inconsistent with the rules and regulations.

Gagnon v. The King, 41 D.L.R. 493, 17 Can. Ex. 301.

CHILDREN—PROOF OF RELATIONSHIP.

The relationship of parent and child, to entitle an illegitimate child of a deceased worker, acknowledged before the accident, to claim indemnity under the Quebec Workman's Compensation Act (R.S.Q. 1909, art. 7323), is sufficiently established by possession of the filial status, which constitutes a recognition of the child by the parent as a natural child; the degree of proof is the same as that in an action for support.

Canada Cement Co. v. Hanchuk, 37 D.L.R. 422, 26 Que. K.B. 434.

BAKERY DRIVER.

One employed as an assistant on a bakery waggon is protected by the provisions of the Quebec Workmen's Compensation Act (R.S.Q. 1909, art. 7321), and is entitled to compensation for a partial permanent disability sustained in an accident in the course of employment.

Ladouceur v. Aird, 35 D.L.R. 615, 52 Que. S.C. 62.

SEAMEN SWEPT FROM SHIP AND DROWNED—ACTION UNDER FATAL ACCIDENTS ACT—FAILURE TO PROVE NEGLIGENCE CAUSING DEATH—ACTS OR OMISSIONS OF FELLOW-SEAMEN — COMMON EMPLOYMENT — WORKMEN'S COMPENSATION ACT.

Wedemeyer v. Canada Steamship Lines, 10 O.W.N. 284, 11 O.W.N. 40.

WHO PROTECTED BY, OR LIABLE UNDER—MANUFACTURE — CONTRACTOR — EMPLOYEE OF THE LATTER—R.S.Q. [1909], ART. 7321.

An infant minor who works in a shoe factory at the manufacture of heels, is not employed by the owner of the factory, when the owner has given the heels to a contractor to be done at so much a case, and when it is the latter who has employed the infant, even when this contractor and his employees work in the factory and with the machines belonging to the owner. In this case, the latter is not liable under the Workmen's Compensation Act.

Pauzé v. Bergeron, 55 Que. S.C. 245.

WORKMEN'S COMPENSATION—APPRENTICE—R.S.Q. 1909, ARTS. 7321, 7327.

The recourse given under art. 7321, R.S.Q. 1909, depends upon the existence of an express or implied contract between the victim and the party against whom the demand is directed and the plaintiff must prove such contract. An apprenticeship is a contract in virtue of which a person undertakes to teach another a profession, trade or calling upon certain conditions, during a stipulated term, which contract creates reciprocal obligations between the contracting parties.

Wilston v. G.T.R. Co., 47 Que. S.C. 67.

WORKMEN'S COMPENSATION — CLASSES OF PERSONS INDEMNIFIED — R.S.Q. 1909, ART. 7323.

Art. 4 of (9 Edw. VII., c. 66 (Que.), now art. 7323 R.S.Q. 1909), names, under the letters, a. b. and c. three classes of persons to whom the compensation provided in the case of death of the victim of an accident is payable, and in which, in the order indicated, each class excludes those which follow. Consequently, when one of a married couple survives, neither the children nor the ascendants who are within the prescribed conditions can lay claim to any part of the compensation. [Robinson v. C.P.R. Co., [1892] A.C. 481; Re United Collieries v. Hendry, [1909] A.C. 383; Darlington v. Roscoe, 96 L.T. 179, followed.]

Roberge v. Jacobs Asbestos Mining Co., 45 Que. S.C. 304.

WORKMEN'S COMPENSATION—WORKMAN ENGAGED IN QUEBEC BY EMPLOYER WITH HEAD OFFICE THERE—ACCIDENT HAPPENING IN ONTARIO.

The law of Quebec respecting accidents to workmen applies to the case of an accident which happened in Ontario to a workman hired in Quebec by an employer who had his head office in Quebec for work to be done in both provinces.

Vincent v. G.T.R. Co., 45 Que. S.C. 353.

WORKMEN'S COMPENSATION — CLASSES OF CLAIMANTS—WIDOW'S RIGHTS.

The three classes of people designated in art. 7323 R.S.Q. 1909, by the letters a, b, c, have the right concurrently to the indemnity provided for in the article, in the proportion fixed by a court of competent jurisdiction failing an agreement among themselves. Consequently, the widow of the deceased workman can only claim the entire compensation by shewing that there are no other persons who have a right to benefit under the law.

Huard v. Clarke, 45 Que. S.C. 397.

ACCIDENT TO WORKMAN—DISEASE—LIABILITY — FAULT — C.C. s. 1053—S. REF. [1909] s. 7321.

Sickness not being an accident, a person who contracts typhoid fever while at his work, after drinking water taken from a tap on the property of his employer, has no claim either under the Workmen's Compensation Act, or in common law, unless he proves some neglect on the part of his master.

Charron v. C.P.R. Co., 55 Que. S.C. 134.

LUMBERING—FACTORY—"SOLE SUPPORT."

A paper manufacturing company, cutting timber in the woods to supply a factory, does not carry on an agricultural industry; such accessory operations are part of the main business and are subject to the Quebec Workmen's Compensation Act. The term "sole support" in art. 7323, R.S.Q. 1909, applies to a minor providing exclusively for the needs of the ascendant, without taking into account the obligations for maintenance which might be imposed upon others.

Barrette v. News Pulp & Paper Co., 51 Que. S.C. 103.

Lumbering, carried on for the sole purpose of procuring an immediate maximum supply and without regard to the integral preservation of the forest, is not of the character of forestry or agricultural work properly speaking. Such a business is essentially industrial in its nature and as such is subject to the Workmen's Compensation Act (Que.).

Pelletier v. Pronovost, 51 Que. S.C. 97.

A joint stock company which engages in the business of cutting lumber on timber limits to carry it to market, carries on a commercial and industrial business under the provisions of the Workmen's Compensation Act (Que.).

Larocque v. Maclaren, 51 Que. S.C. 285.

INDEPENDENT CONTRACTOR.

Under the Workmen's Compensation Act (Que.) one employed in absolute independence of his employer becomes a contractor or subcontractor, and is not subject to the Act. But if the employer retains the control of the work of his employee, and if he can dismiss him, the latter can claim the benefit of the Act whether he works at a fixed salary or at so much a piece.

Laurentian Granite Co. v. Hendry, 25 Que. K.B. 194.

WORKMEN EMPLOYED BY CITY.

A carpenter employed by a municipal corporation, who suffers an accident while repairing a door of an employees' boarding house in connection with the aqueduct under construction, is subject to the Workmen's Compensation Act (Que.).

Giroux v. Montreal, 51 Que. S.C. 77.

MUNICIPAL WORK—HIGHWAYS.

An employee of the city of Montreal working on the repair of its public streets does not, in case of accident, come under the operation of the Workmen's Compensation Act: and an action under that Act may be dismissed on inscription en droit.

Trudeau v. Montreal, 49 Que. S.C. 62.

DIGGING WELL.

The Workmen's Compensation Act applies to the work of digging a well.

Larouche v. Jobidon, 49 Que. S.C. 10.

HOTEL WORK—MANUFACTURE.

An employee of a hotelkeeper, who as well as working as a bar tender is employed in the manufacture of aerated waters which his employer sells in his hotel, is entitled to the benefit of the Workmen's Compensation Act, if, while he is employed in the manufacture of such aerated waters, he meets with an accident, whatever may be the quantity of such aerated waters which are manufactured by the hotelkeeper.

Chamberland v. Chamberland, 50 Que. S.C. 285.

TRANSPORTATION—LOADING—DELIVERIES.

The words "transportation business" mentioned in the Act respecting accidents to workmen (R.S.Q. 1909, art. 7321), do not include such services performed by a merchant for his own purposes in carrying on his business; they include only the transportation of goods for third persons; likewise in regard to "business of loading and unloading." It would be otherwise if the employer was a manufacturer or other person subject to the operation of the Act. A driver of a delivery waggon, who is employed by an importer for the delivery of merchandise, cannot invoke the provisions of that Act in an action to recover damages sustained from an automobile while he is engaged in unloading goods from his waggon.

Rosenbloom v. Lavut, 50 Que. S.C. 48.

RELEASE—NULLITY—ERROR.

An employee is not bound by a release to his employer from all liability in connection with the compensation to which he

is entitled under the Workmen's Compensation Act. If, through an error as to his true pathological condition, he acknowledges that his disability to work has ceased, he is not bound by such declaration.

Trudel v. Levasseur, 49 Que. S.C. 319.

INDUSTRIAL WORK—SHOP FOR REPAIRING GOODS OF MANUFACTURER — LOADING — R.S.Q. ART. 7321.

A merchant, who keeps a workshop only for the repair of damaged furniture which he receives from a manufacturer, is not an industrial workmen subject to the Workmen's Compensation Act. The operations of loading and unloading only fall within the operation of the Act in so far as they are performed by persons who make it their business. But the loading by a merchant of goods which form the object of his business for delivery to his customers does not constitute a business of loading.

Labbé v. Julien, 48 Que. S.C. 322.

INDUSTRIAL OPERATIONS—LUMBERING.

Cutting wood in the bush by lumbermen does not constitute an industrial operation to which the Workmen's Compensation Act (Que.) applies.

Michaud v. Trembly, 48 Que. S.C. 289.

ALIEN DEPENDANTS RESIDING IN A FOREIGN COUNTRY.

Krzus v. Crow's Nest Pass Coal Co., 16 B.C.R. 120, 17 W.L.R. 687.

WORKMEN'S COMPENSATION — WORKMEN, MEANING OF—SALES CLERK NOT A WORKMAN—TRIAL BY JURY.

Hewitt v. Hudson's Bay Co., 20 Man. L.R. 126, 15 W.L.R. 372.

JURY—WORKMEN'S COMPENSATION ACT, R.S.M. 1902, C. 178—JOINDER OF CAUSE OF ACTION AT COMMON LAW.

Schultz v. Lyall Mitchell Co., 20 Man. L.R. 429, 17 W.L.R. 103.

WORKMEN'S COMPENSATION ACT (QUE.)—LUMBER INDUSTRY.

A petition to sue under the Workmen's Compensation Act will be dismissed if it relates to an accident in lumber "chantiers."

Novico v. Eddy, 12 Que. P.R. 319.

WORKMEN'S COMPENSATION ACT—LUMBERING.

Lumbering operations do not come within the provisions of the Workmen's Compensation Act of Quebec.

Provost v. St. Gabriel Lumber Co., 12 Que. P.R. 285.

WORKMEN'S COMPENSATION ACT, ALTA.—LIABILITY OF INFANT EMPLOYER.

Re Smith and Link, 17 W.L.R. 550.

WORKMEN'S COMPENSATION—INDEMNITY OF MASTER — LIABILITY OF STRANGER — JOINT WRONGDOERS.

Section 8 of the Workmen's Compensation Act, giving a right of indemnity to an employer, who has been called upon to pay compensation, an indemnity against strangers under "a legal liability" must be confined to cases where there is a legal liability in the stranger to the exclusion of cases, where there is a legal liability to pay damages in a stranger and the employer himself. [Cory v. France, 80 L.J.K.B. 341, applied.]

C.P.R. Co. v. Alta. Clay Products Co., 7 W.W.R. 948.

WORKMEN'S COMPENSATION—COMPENSATION TO ILLEGITIMATE CHILDREN—EVIDENCE OF MOTHER—NOTICE OF ACCIDENT AND OF CLAIM—"OUT OF AND IN THE COURSE OF"—R.S.M. 1914, C. 209, S. 8, SUBSS. 2, 3.

As the Workmen's Compensation Act, s. 4, treats an illegitimate child as a legitimate one, the evidence of the father or mother should be received, if corroborated. Where notice of a claim for compensation is given in due time, but the notice of the accident is given too late, it is incumbent upon the person making the claim to prove, that such failure was occasioned by mistake, absence from the province, or other reasonable cause. [Bruno v. International Coal & Coke Co., 4 W.W.R. 888, followed.]

Smith v. C.N.R., 7 W.W.R. 596.

(§ V—343)—RIGHTS OF BENEFICIARIES—ALIEN — WORKMEN'S COMPENSATION — MOTHER DEPENDING ON SON — C.C. (QUE.) ARTS. 6, 27, 28.

A mother residing in a foreign country and depending partly upon the earning of her son for her living, can sue before the Courts of Quebec, under the Workmen's Compensation Act of Alberta, when her son has been killed in the service of a railway company having its principal place of business in Montreal. Under the Act, the employer becomes liable to pay compensation to his employee by the sole fact of his being killed during his service, and the claim dates from the date of the accident. Under the same Act, the absence in a foreign country far away, is a justification for not filing a claim within the delay fixed by law.

Johansdotter v. C.P.R. Co., 47 Que. S.C. 76.

PARENT'S RIGHT TO INDEMNITY—CHILD NOT MEANS OF SUPPORT.

A father, whose son was drowned by the fault of a navigation company for which he worked, but who was not his sole means of support, cannot maintain action against the latter for indemnity under the Workmen's Compensation Act, but he may hold it liable in damages under art. 1056 C.C. (Que.).

Laflamme v. Levis Ferry, 47 Que. S.C. 291.

RIGHT OF PARENTS TO RECOVER FOR DEATH OF CHILD—COMMUNITY MAINTENANCE.

The right to maintenance is a claim attached to the person itself of the consorts, and the fulfilment of this obligation can be demanded, by either or both of them, for one of their children, when they are in community; but it does not follow that the obligation to furnish maintenance is a debt due to their community of property. Thus a wife in community as to property can, with her husband, bring an action for in-

demnity under the Workmen's Compensation Act on account of the death of their son, this action being of the nature of a demand for maintenance.

Sullivan v. Furness Withy, 47 Que. S.C. 289.

BENEFICIARIES.

The statute relating to accidents to workmen is exceptional legislation; a person who claims the benefit of its provisions is obliged to establish that he belongs to the class mentioned in the conditions requisite to the making of a claim. Where the plaintiff is an ascendant relative of the person whose death was caused by the accident, he must produce evidence establishing that the deceased was his only support, at the time of his death, and that deceased's wages did not exceed the sum of $1,000 per year.

Thompson v. Kearney, 25 Que. K.B. 220.

FAULT OF VICTIM—DEATH OF WORKMAN—RIGHT OF MOTHER.

Jetté v. G.T.R. Co., 40 Que. S.C. 204.

INSURER'S SUBROGATION.

The recourse of the person injured, under art. 7534, R.S.Q. 1909, against the person responsible for the accident other than the employer, his servants or agents, being a right which is exclusively attached to his person, cannot be exercised by the insurer of the employer who has obtained from the representatives of the workmen a subrogation. But the insurer may exercise such a recourse if he has reimbursed the employer what he has paid, and has obtained from him a subrogation of all its rights.

Maryland Casualty Co. v. Dominion Flour Mills Co., 49 Que. S.C. 262.

(§ V—344)—SUBMITTING TO MEDICAL EXAMINATION.

The victim of an accident in the course of his work is only obliged to undergo one medical examination at the request of his employer and cannot be compelled to undergo a second.

Ferrari v. C.P.R. Co. 18 Que. P.R. 412.

MEDICAL TREATMENT—LIABILITY.

An employer is not responsible for doctor's and druggist's bills when the accident did not cause the death of the victim. If he himself chose a doctor and made arrangements with the authorities of a hospital, without consulting the victim, he cannot keep from the latter what he paid to those ends.

St. Maurice Lumber Co. v. Cadorette, 25 Que. K.B. 410.

SUBMITTING TO MEDICAL TREATMENT.

Although in ordinary circumstances errors in the treatment do not cause the loss of recourse of the victim, the injury resulting from the employment of a quack in preference to a doctor cannot give rise to a recourse for indemnity. An employer is bound to pay compensation to his employee for disability resulting from an accident, even if the accident is the result of a fault on the part of the workman, but not for disability resulting from facts subsequent to the accident and depending upon the will of the victim. Where the employer renders possible the intervention of a bonesetter in the treatment of his employee, by guaranteeing security for the penalty to which the bonesetter exposes himself, but who while so doing puts his employee on his guard, does not assume the responsibility of the consequences of the treatment of the bonesetter.

Pelletier v. Lachance, 49 Que. S.C. 122, reversing 47 Que. S.C. 526.

MEDICAL EXAMINATION.

If a plaintiff, in case under the Workmen's Compensation Act, has been examined by physicians in support of a petition for provisional allowance, the defendant is not thereby deprived of the right to have him examined by a physician chosen and paid by the employer.

Catzo v. C.P.R. Co., 17 Que. P.R. 302.

(V—345)—IN COURSE OF EMPLOYMENT—WORKMEN'S COMPENSATION BOARD (MAN.)—WORKMAN ACTING WITHIN COURSE OF EMPLOYMENT—POWERS OF BOARD—FINALITY OF DECISION.

The Workmen's Compensation Board (Man.), is empowered by the Workmen's Compensation Act and amendments to determine whether at the time of the accident the injured workman was or was not acting in the course of his employment and the finding of the Board is by the Act made final and conclusive. [Workmen's Compensation Act, 1916, Man. c. 125, authorizing the appointment of the Board held to be intra vires the Manitoba Legislature. The decision in Winnipeg Electric R. Co. v. Winnipeg, 30 D.L.R. 159, being accepted.]

C.N.R. Co. v. Wilson, Givens' Case, 49 D.L.R. 440, [1919] 3 W.W.R. 742.

INJURY IN COURSE OF EMPLOYMENT.

An accident to a train conductor, while he is in the act of ascertaining whether a particular train is one for which he has been ordered to wait, arises "out of and in the course of his employment;" and a Trial Judge is justified in finding that it so arose —though not direct—if sufficiently circumstantial to lead a reasonable man to that conclusion; with such a finding an appellate court will not interfere.

Morton v. G.T.P. Branch Lines Co., 33 D.L.R. 27, 10 S.L.R. 8, [1917] 1 W.W.R. 1125.

An injury sustained by a plumber employed in one department of a business while helping himself to material in another department thereof, instead of applying for it to the clerk in charge, as required by the shop rules, is not one "arising out of and in the course of employment," nor caused "while in the discharge of his duty," within the meaning of the New Brunswick Workmen's Compensation Act.

McMannamin v. Chestnut, 37 D.L.R. 302, 44 N.B.R. 571.

An injury to an employee while proceed-

ing to his work sustained at a place adjacent to the road ordinarily used by employees, is not one "arising out of or in the course of employment" within the meaning of the Workmen's Compensation Act, R.S.M. 1913, c. 209.

Gousick v. C.P.R. Co., 37 D.L.R. 601, 28 Man. L.R. 246, [1917] 3 W.W.R. 807.

A general labourer in a pickle factory, who in the absence of the hostler is ordered by a daughter of his employer to look after the horses of the establishment, has a claim under the Quebec Workmen's Compensation Act, when in doing so he meets with an accident.

Pillette v. Pigeon, 52 Que. S.C. 206.

COURSE OF EMPLOYMENT — "TRANSPORTATION"—"LOADING OR UNLOADING."

A driver of a delivery wagon employed by a mercantile house is not engaged in the work of "transportation business," or in that of "loading or unloading," within the meaning of the Quebec Workmen's Compensation Act (R.S.Q. 1909, art. 7321), and he is not entitled to compensation under the Act for injuries sustained in the course of delivering goods for his employer.

Rosenbloom v. Lavut, 33 D.L.R. 470, 50 Que. S.C. 48.

WORKMEN'S COMPENSATION ACT, ONT., 4 GEO. V. 1914, C. 25, S. 3 (2)—"ACCIDENT ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT"—HEART DISEASE.

Clark v. Chatham, Wallaceburg & Lake Erie R. Co. (Re Workmen's Compensation Act), 33 D.L.R. 786.

COURSE OF EMPLOYMENT—DISOBEDIENCE—COMPENSATION.

No action will lie under the Workmen's Compensation Act (N.S. 1910, c. 3), for the death of a workman who wilfully, and in violation of express orders, remains in a dangerous place while a blast is being fired, and is killed; the accident does not arise in the course of his employment, but is caused by his wilful misconduct. The effect of s. 5, subs. 4 of the Act, is to give the court power to assess compensation in the plaintiff's favour, where the action has been brought independently of the Act, provided the employers would have been liable if proceedings had been instituted under the Act.

Rudland v. Smith, 33 D.L.R. 536, 50 N.S.R. 434.

COMPENSATION — INJURY TO EMPLOYEE — ELECTION—WORKMEN'S COMPENSATION ACT, 4 GEO. V. C. 25 (ONT.) — SUIT AGAINST THIRD PARTY—RIGHT OF ACTION.

A workman injured in the course of his employment, and entitled to bring an action against a person not his employer, may bring such an action or elect to claim compensation under The Workmen's Compensation Act. On obtaining permission from the Compensation Board to withdraw his election, his right of action is not barred.

Toronto R. Co. v. Hutton, 50 D.L.R. 785, 59 Can. S.C.R. 413, affirming 49 D.L.R. 216, 45 O.L.R. 550.

INJURY IN COURSE OF EMPLOYMENT.

Injury to the eye of an employee caused by work on the door of a warehouse arises "out of and in the course of employment," within the meaning of the Workmen's Compensation Act (Man.), even though the work be in the nature of an improvement or alteration the employee was not ordered to do and which was performed outside the building in which the employee usually worked, if done for the purpose of expediting some work within the scope of the employee's duties.

Holland v. Rumely Products, 31 D.L.R. 426, [1917] 1 W.W.R. 454.

FROST BITE.

Where a Trial Judge finds that frost bite to the feet of a workman incurred in the course of his employment upon a very cold day constitutes an "injury arising out of his employment" within the meaning of the Workmen's Compensation Act (Alta.) 1908, c. 12, s. 3, the finding will not be reversed on appeal. [Warner v. Couchman, [1912] A.C. 35, distinguished.]

Nikkiczuk v. McArthur, 28 D.L.R. 279, 9 A.L.R. 503, 34 W.L.R. 674, 10 W.W.R. 712.

ALIGHTING WHILE TRAIN MOVING.

A workman engaged in taking wires up and down telegraph poles, and for that purpose travelling in a work train with a crew from place to place, is not justified in alighting from one car and attempting to get on another while the train is in motion, and between stations; and such conduct is not a "risk arising out of and incidental to the nature of the employment" within the meaning of s. 6 of the Workmen's Compensation Act, (Sask.) 1910–11, c. 9, so as to render the employer liable for injuries to the employee resulting therefrom, the employer's liability in such case being limited to the ordinary risks of travel. Plumb v. Cobden Flour Mills Co., [1914] A.C. 62; Barnes v. Nunnery Colliery Co., [1912] A. C. 44, followed.]

Bechtel v. C.P.R., 26 D.L.R. 339, 9 S.L.R. 3, 33 W.L.R. 426, 9 W.W.R. 1005.

WORKMEN'S COMPENSATION — INJURY TO WORKMAN—POISONOUS GASES — NEGLIGENCE — "ACCIDENT" — "WORKMEN'S COMPENSATION ACT" ONTARIO 4 GEO. V. C. 25.

A workman whose health is injured through inhaling fumes of poisonous gases while working in a munition factory is not barred from bringing an action even though an application was made for compensation under the Workmen's Compensation Act (Ont.) and refused by the Board. Such an injury is not one by "accident" within the meaning of that term in s. 15 of the Act.

Scotland v. Canadian Cartridge Co., 50

D.L.R. 666, 59 Can. S.C.R. 471, reversing 48 D.L.R. 655, 45 O.L.R. 586.

COURSE OF EMPLOYMENT — "ON, IN OR ABOUT"—FACTORY.

A stable in which machinery is installed for cutting and crushing grain for horses is a factory within the meaning of s. 2 of the Workmen's Compensation Act, (Sask.). An employee who is injured a quarter of a mile away from such factory while engaged in employment which is not part of the factory work, is not employed on or about such factory at the time of the injury. [Cornea v. National Paving & Construction Co., 26 D.L.R. 402, followed.]

Garrett v. Moose Jaw, 42 D.L.R. 621, 11 S.L.R. 307, [1918] 2 W.W.R. 1058.

MACHINERY—FIRE HALLS—FACTORY.

An apparatus for changing an alternating electric current into a direct current, and an instrument for recording fire alarms, are not "machinery used" within the meaning of the Workmen's Compensation Act (Sask.), and they, installed in a fire hall, and fire engines kept therein, do not constitute the fire hall a "factory" within the meaning of that Act.

Hook v. Prince Albert, 40 D.L.R. 1, 11 S.L.R. 85, [1918] 1 W.W.R. 922.

WORKMEN'S COMPENSATION — INJURY IN COURSE OF EMPLOYMENT — RAILWAY — SLEEPING QUARTERS—"DWELLING."

The suppliant's husband was employed on the I.C.R. as part of a gang of men engaged in the repairs and maintenance of the tracks. The railway had placed at the disposal of such men a box or freight car, which was fitted with bunks or beds as a dormitory and placed on a siding. After leaving off work at 6 P. M. the employees' entire time was at their disposal and they were at liberty, but not obliged, to sleep in this sleeping car. One night, the suppliant's husband went to sleep as usual in the car and was found dead in his bed in the morning. Held that this car was a "dwelling" and that the accident or death did not happen in the course of his employment, and that his widow was not therefore entitled to compensation.

Corriveau v. The King, 18 Can. Ex. 275.

WORKMEN'S COMPENSATION ACT—EMPLOYER —WORKMAN—WITHIN MEANING OF THE ACT—COMPENSATION—IN RESPECT TO LOSS OF WAGES ONLY.

The respondent, a travelling salesman, entered into a contract with the postmaster of Fredericton, to carry the mails between Fredericton and New Maryland, six round trips a week, at $4 per day. The arrangement was only a temporary one, pending the calling for tenders by the Post Office Department. It might only last for a day, or might last for a year. Held, on a claim for compensation by the petitioner, who had been hired by the respondent to carry and distribute the mail, for an injury received in the course of his employment, that the carrying of the mail was part of the regular business of the respondent, and the petitioner's employment was regular and permanent, and he was engaged in manual labor, within the meaning of the Workmen's Compensation Act (N.B.). Compensation under the Act is given in respect to wages only, and not in respect of personal suffering or for medical, surgical and hospital charges incurred by reason of the injury.

Bolden v. Chase, 46 N.B.R. 147.

ILLNESS CONTRACTED IN COURSE OF WORK.

In actions under the Workmen's Compensation Act (Que.) the burden is upon the plaintiff of proving the application of the Act. The Act is not applicable when the workman suffers not from the accident but on account of an illness contracted in the course of his work.

Pencis v. Girard, 47 Que. S.C. 406.

NAVIGATION WORK — "SAILING VESSEL" — "FOREIGNER"—"ALIEN."

A schooner assisted by a tow, and not using its sails, is not navigated as a sailing vessel. The captain drowned by falling from the ship, at a time when his services were not required, although he had been sleeping on board according to the terms of his employment, is nevertheless the victim of an accident in the course of his work. The remedy under the Workmen's Compensation Act is open to relatives of the workman, if he was engaged in work which was not continuous, and his annual earnings were less than $1,000. The words "foreign workman" in art. 7324, R.S.Q. 1909, have the same meaning as in art. 21, C.C. (Que.) and signify "alien."

Dallaire v. Quebec Salvage Co., 49 Que. S.C. 501.

TRANSPORTATION OF TROOPS—PATROL WORK —COMPENSATION.

The chartering of a steamship to the Government, by an ordinary charter-party, to serve for the transport of troops and the patrol of a port, does not affect the nature of the owner's business who, engaged in the work of transport by water, remains subject to the Workmen's Compensation Act. The head of the business who places his workmen at the disposal of a third party, and continued to pay their wages, does not cease to be responsible for the compensation to which the workmen are entitled on account of an accident in the course of their employment within these conditions. To establish the annual earnings which would serve as the basis of the compensation for permanent disability, when the employment is not continuous, it is necessary to add to the wages really earned by the workman during the period of actual employment the earnings which he really made in other businesses during the rest of the year, and not fictitious earning calculated by means of the wages that he could have earned in the time that he was disabled during a certain number of years.

Kennedy v. Thom, 49 Que. S.C. 211.

WORK ON SHIP—SEAMAN.

The enumeration in art. 7321, R.S.Q. 1909, is not limitative of the industries subject to the operation of the Workmen's Compensation Act, (Que.), and covers every business of a hazardous and commercial character. A sailor killed by falling from his ship, not in the course of working the ship, but when on board for the night according to the terms of his hiring, is nevertheless the victim of an accident in the course of his employment. The recourse under the Act is open to the parents of the victim, if he was engaged with an industry the work of which was not continuous and his annual income being less than $1,000.

Quebec Salvage Co. v. Dallaire, 26 Que. K.B. 253.

AGRICULTURAL OR INDUSTRIAL ENTERPRISE—CREAMERY—RELEASE—VALIDITY.

A creamery carried on by a manufacturer for his personal benefit is not of the character of an agricultural industry, but is an industrial enterprise subject to the Quebec Workmen's Compensation Act. An agreement between an employer and a workman, by which the latter, injured in the course of his work, renounces all claim that he may have against his employer, is void ab initio.

Laperriere v. Paquet, 51 Que. S.C. 99.

COURSE OF EMPLOYMENT—TEMPORARY RETIREMENT.

The work of a workman begins as soon as he is at the disposal of his employer, and ends when he, the employee, leaves the place of work and regains his complete liberty of action. An employee may temporarily suspend his labour and quit his post to go into other parts of the building connected with the business, without losing his right to compensation under the law, in case of accident. A fireman, on a locomotive in a yard, is still at his work, if he leaves it for a moment, without leave from his engineer, to get some drinking water, as it is customarily done at this place.

Greig v. G.T.R. Co., 51 Que. S.C. 50.

A temporary suspension of work does not always deprive the workman of his recourse under the Workmen's Compensation Act (Que.) if he is the victim of an accident during such suspension; but if the workman, notwithstanding the employer's orders to the contrary, withdraws from the latter's superintendence, leaves his work and traverses, in his own interest, a dangerous place, situated where the work is carried on, he loses his recourse against his employer.

Lavery v. G.T. Ry., 26 Que. K.B. 281.

WORKMEN'S COMPENSATION—WOOD—CUTTER — JOBBER — TIMBER-YARD — INDUSTRIAL OR AGRICULTURAL UNDERTAKING —APPLICABILITY OF WORKMEN'S COMPENSATION—R.S.Q., [1909] ART. 7321.

The Workmen's Compensation Act applies to accidents which happen to woodcutters engaged in lumberyards, where they cut logs for the company on the timber limits of an industrial concern. Such work is not agricultural, but industrial. It does not matter at all whether the woodcutter is engaged in the immediate service of the company or whether he is employed by a jobber.

Perron v. Veillette, 56 Que. S.C. 110, 309.

WORKMEN'S COMPENSATION ACT—WORKING FOR STRANGER—RESPONSIBILITY OF EMPLOYER — SECTION REF., [1909], ART. 7321.

If a workman is sent by his employer to a certain place to work, and while at such place he applies himself to other work at the request of strangers, and not for the benefit of his employer, he has no claim under the Workmen's Compensation Act if he sustains an accident.

Roy v. Lemieux, 56 Que. S.C. 341.

WORKMEN'S COMPENSATION ACT, R.S.B.C., C. 244—DEATH OF SERVANT—SERVANT RUN OVER BY ELECTRIC TRUCK—FELLOW-SERVANT — "WAREHOUSE"—"FACTORY" —"COURSE OF EMPLOYMENT."

A building used for the business of storing, charging, and repairing electric trucks which are the property of others than those who carry on said business is a factory within the meaning of the Workmen's Compensation Act, R.S.B.C. c. 244:—The course of a workman's employment embraces all the time occupied in coming, going, and stopping for any purpose ancillary to his work.

Evans v. B.C. Electric R. Co., 29 W.L.R. 435, 7 W.W.R. 121.

ACCIDENT IN COURSE OF EMPLOYMENT.

In considering whether an accident to a workman arose out of and in the course of his employment within the meaning of the Workmen's Compensation Act, (Alta.), c. 12, 1908, the following test, put by Lord Sumner in Lancashire & Yorkshire R. Co. v. Highley, [1917] A.C. 352, at p. 372: "Was it part of the injured person's employment to hazard, to suffer or to do that which caused his injury? If yea, the accident arose out of his employment. If nay, it did not, because while it was not part of the employment to hazard, to suffer or to do cannot well be the cause of an accident arising out of the employment" was applied and the employer held not liable.

Powell v. Thomas, [1918] 3 W.W.R. 901.

(§ V—346)—"UNDERTAKERS"—"ENGINEERING WORK"—EJUSDEM GENERIS.

The Workmen's Compensation Act (R.S. B.C. 1911, c. 244, s. 9), gives rights of action against the principal contractor coextensive with those against the employer himself, and both the subcontractor and the principal contractor are "undertakers" within the meaning of the Act. The expression "any other work" in the definition of "engineering work" is not necessarily limited to work ejusdem generis.

Morris v. Structural Steel Co., 35 D.L.R. 739, 24 B.C.R. 59, [1917] 2 W.W.R. 749.

MACHINERY—"ENGINEERING WORK."

The effect of s. 2 and subs. 4 of s. 3, of the Workmen's Compensation Act, (Sask. 1910-11, c. 9,) is that, if, in the construction of the particular work in which the injured servant is engaged at the time of the injury, machinery is used, though not being used at the particular time, he is entitled to recover, but if machinery is not ordinarily used in that work he cannot recover; a steam roller used in one part of paving work, but not used in another part of the work in connection with which the injury arose, is not an injury "on or about engineering work" within the meaning of the Act, and for which no recovery can therefore be had. [Lord v. Turner, 5 Mint-Sen. 87; Chambers v. Whitehaven Harbour Com., [1899] 2 Q.B. 132; Pattison v. White, 29 T.L.R. 775; Back v. Dick, [1906] A.C. 325, followed.]

Cornea v. National Paving & Contracting Co., 26 D.L.R. 402, 9 S.L.R. 40, 33 W.L.R. 462, 9 W.W.R. 1059.

"UNDERTAKERS" IN OR ABOUT CONSTRUCTION OF BUILDING—PIPING.

The work of piping forms a necessary part of the construction of a cold storage plant, even where the building itself is completed, and persons engaged in that work come within the phrase of "undertakers" within the purview of s. 4 of the Workmen's Compensation Act, R.S.B.C. 1911, c. 244, which makes the Act applicable to "employment by the undertakers in or about the construction of buildings." [Mason v. Dean (1900), 69 L.J.Q.B. 358, followed.]

Sanders v. Flick, 26 D.L.R. 685, 22 B.C. R. 472, 34 W.L.R. 65, 10 W.W.R. 163.

(§ V—347)—WORKMEN'S COMPENSATION ACT—LUMBERMAN—DEATH BY ACCIDENT.

Duquette v. Lake Megantic Pulp Co., 12 Que. P.R. 359.

(§ V—348)—INEXCUSABLE FAULT OF EMPLOYER OR EMPLOYEE.

The failure to remove a defective part of a ceiling deemed not dangerous while repairing it, though constituting negligence, does not amount to inexcusable fault of the employer under the Workmen's Compensation Act, art. 7325, R.S.Q. 1909, as rendering the employer liable to an increase of the amount of compensation for injuries to an employee resulting from a fall of the plaster.

Dougan v. Auer Incandescent Light Mfg. Co., 25 D.L.R. 429, 24 Que. K.B. 188.

WORKMEN'S COMPENSATION ACT (QUE.)—ADDITIONAL COMPENSATION—INEXCUSABLE FAULT OF MASTER OR FELLOW-SERVANT.

Poulin v. G.T.R. Co., 37 D.L.R. 792, 27 Que. K.B. 141.

WORKMEN'S COMMON LAW TORT CUMULATIVE TO STATUTORY RIGHT.

The indemnity allowed to injured workmen under the Workmen's Compensation Act may be greater than the sum of $2,000 where such injury results from the "inexcusable fault" of the employer; that is to say, in cases of "inexcusable fault" the injured party is not deprived of his common law action in tort although suing in virtue of the statute itself.

Poirier v. LeGrand, 9 D.L.R. 269, 22 Que. K.B. 193, 19 Rev. Leg. 266.

"SERIOUS NEGLECT"—TO TREAT INJURY—AGGRAVATION.

The meaning of the words "serious neglect" in subs. 2 (c) of s. 6 of the Workmen's Compensation Act, R.S.B.C. 1911, c. 244, in their ordinary and nonstatutory sense, import more than ordinary negligence; and while that section has no application to the conduct of the injured subsequent to the accident, a failure to continue treatment of an eye after the injury, which consequently results in its permanent loss, constitutes serious neglect which will preclude the right to claim further compensation in respect of that injury. [Humber Towing Co. v. Barclay, 5 B.W.C. Cas. 142, followed.]

Powell v. Crow's Nest Pass Coal Co., 26 D.L.R. 317, 22 B.C.R. 514, 34 W.L.R. 32, 10 W.W.R. 107, affirming 23 D.L.R. 57, 32 W.L.R. 218, 8 W.W.R. 1086.

INCREASED COMPENSATION.

A manufacturer who, in violation of the law, employs a minor, under 16 years of age, and sets him at work upon an automatic and dangerous machine, not in good order, is guilty of inexcusable fault, and is liable to be ordered to pay an increased compensation under the Workmen's Compensation Act (Que.).

Morrow v. Hinphy, 51 Que. S.C. 137.

COMMON LAW—STATUTE.

It is an established principle that a statute never abrogates the common law unless there is an express clause to that effect, or unless there are provisions which clearly show an intention of setting it aside. Thus, the Workmen's Compensation Act (Que.) having in no way, as far as the liability of the employer towards his men and employees is concerned, set aside the common law, the employer is liable for the inexcusable fault not only of all those appointed by him for the operation of his undertaking, but also of all those employed by him in whatsoever capacity.

Montreal Tramways Co. v. Savignac, 27 Que. K.B. 246.

"INEXCUSABLE FAULT."

An inexcusable fault is a greater, more serious and less pardonable fault than a gross mistake. It occupies an appropriate place between a gross mistake and fraud. It is more serious than a gross mistake, but less serious than fraud; it is not deceitful, but quasi-deceitful. So an employer who sets a boy of 17 at an easy work near a dangerous machine, without giving him special instructions, is not guilty of an in-

excusable fault if the danger from the machine is obvious and easy to avoid.

Belgo-Canadian Pulp and Paper Co. v. Millette, 27 Que. K.B. 11.

DUTY OF PROTECTION.

Under the Workmen's Compensation Act, (Que.) the inexcusable fault must contain as an element some voluntary act on the part of the person guilty, which is likely to produce injury or death. Therefore it is not inexcusable fault for an employer to have certain work performed by one man instead of by two, and not to furnish his employee, a boilermaker, with lunette to protect his eyes as provided by a city by-law, when this kind of work has been done for a number of years in the manner in which it was done during plaintiff's engagement without the occurrence of any accident.

Smith v. J.R. Weir, 53 Que. S.C. 51. [See 19 Que. P.R. 134.]

DISOBEDIENCE OF INSTRUCTIONS—ENGINEER.

It is only voluntary acts which are done with a knowledge of the danger and a carelessness for result which are considered inexcusable within the meaning of the Workmen's Compensation Act (Que.). So where the accident is the result of a negligent attention to instructions on the part of an engineer or upon some other cause which led him to think that an engine had to be started, there is no inexcusable fault.

Lennon v. Montreal Transportation Co., 53 Que. S.C. 239.

SAW MILL—CLOTHING.

The persistence of an employee in a workshop in clothing himself, in spite of his employer's remonstrances, in a long flowing dust coat to do his work in proximity to the saws and belts, constitutes an inexcusable fault of a nature to justify the court in reducing the compensation, when the workman is a victim of such gross imprudence in an accident while at work.

Fontaine v. Paradis, 54 Que. S.C. 468.

DANGEROUS ESTABLISHMENT—INEXCUSABLE FAULT—INFANT.

A manufacture of metallic corks for bottles falls within the class of dangerous establishments under art. 3833, R.S.Q. The owner who employs there an infant under 16 years of age is guilty of an inexcusable fault in the event of an accident.

Vanier v. Bouthillier, 54 Que. S.C. 407.

ELECTRIC SHOCK.

If a workman, working upon a scaffold erected outside a car, receives an electric shock and is thrown down, and suffers severe injuries, it is not inexcusable fault on the part of the company which placed the electric wires across the scaffold for the purpose of lighting the interior of its cars.

C.P.R. Co. v. Ferrari, 27 Que. K.B. 334.

PRECAUTIONS.

"Inexcusable fault," under the law of accidents to workmen, is a fault almost voluntarily and quasi-malicious. So it is not an inexcusable fault when (a) an employer appeared to have taken certain precautions to protect his workmen, as, for example, in explaining to them the workings of the machine at which the workman is required to work, and in ordering another workman in charge of a neighboring and similar machine to teach him his work; (b) but especially when the workman had already, before the accident, worked more than six hours at such machine, whose working was easy to understand and exhibited only a very obvious danger.

Rubber Regenerating Co. v. Manchuk, 27 Que. K.B. 129.

RAILWAY SWITCHMAN FALLING BENEATH MOVING CAR.

A switchman of a railway company who, in order to reach more quickly the place where he works, mounts on a car platform and, on reaching the switch which he was to operate, falls beneath the moving car and is fatally injured, is not guilty of an inexcusable fault by which he loses the benefit of the Workmen's Compensation Act (Que.).

Pepin v. G.T.R. Co., 47 Que. S.C. 223.

INJURY TO SERVANT RUNNING DANGEROUS ELEVATOR—EARNING POWER.

When an employee is working at an elevator, known to entail an element of danger while running, and a representative of his employer at his request undertakes to arrange with the person in charge of the building to have it stopped, and the employee, although the elevator did not stop, continues his work, and gets injured, he is not nevertheless guilty of an inexcusable fault under the Workmen's Compensation Act. The fact that an employee injured and seeking relief under that Act has found employment after the accident at his former rate of pay, is not decisive proof that his earning power has not been diminished.

Peterson v. Garth Co., 24 Que. K.B. 165.

ALLEGATIONS.

Claiming under the Workmen's Compensation Act a sum greater than the amount of the compensation fixed by the Act, it is necessary to prove that the accident was due to the inexcusable fault of the employer. An allegation of facts, which tend to establish inexcusable fault on the part of the employer, is not foreign to the case and will not be struck out on an inscription en droit.

Savignac v. Montreal Tramways Co., 18 Que. P.R. 125.

DROWNING WHEN RETURNING FROM WORK—LOGGING.

L. a driver of timber, returning to camp after his day's work, in a dark and rainy night, came to a river 35 feet in width, where the bridge had been carried away by the water during the day. At the same time the "searchers," sent from the camp to find him, having seen him, threw a tree across the river to form a bridge according to the custom in such circumstances. L. attempted to cross but the tree broke, he

was carried away by the current and drowned. Held, not inexcusable fault under the Workmen's Compensation Act. The accident, although happening after the day's work, occurred at the place of the work, by the fact and the performance of the work, inasmuch as the driver was returning to the general camp, of necessity, for his food and rest under the surveillance of his employer. A company engaged in cutting timber and driving it to sawmills, where it is manufactured into commercial lumber, is not exercising an agricultural industry, but is performing a commercial and manufacturing operation, and the "drivers" of its timber come within the provisions of the statute respecting accidents to workmen.

Baie St. Paul Lumber Co. v. Tremblay, 25 Que. K.B. 1.

PLEADING—PRAYERS—AMENDMENT.

Where in an action under the Workmen's Compensation Act, inexcusable fault is alleged and the plaintiff prays generally that the defendant be condemned to pay him $400, and in an incidental demand, for increased damages, he prays also generally, that damages be increased to $4,342, he cannot obtain a condemnation in his favour for general damages, and the délibéré will be discharged and the plaintiff given a delay to amend his conclusions.

Waters v. Cape., 51 Que. S.C. 151.

WORKMEN'S COMPENSATION — RAFTING — WORKING OF TIMBER AND SAWMILLS—DROWNING.

Under the law respecting accidents to workmen there is no "inexcusable fault" on the part of the victim under the following circumstances:—A raftsman, returning to camp after his day's work, on a dark and rainy night, came to a river 35 feet wide, where the bridge had been carried away during the day by the water. At the same time the searchers sent out from the camp to find him, having seen him, threw upon the river a tree to form a bridge, as is usual under such circumstances. The raftsman tried to cross, but the tree broke and he was carried away by the current and drowned. The accident above mentioned, though occurring after the day's work, happened at the place of work, by the fact and on account of the work, since the raftsman was, of necessity, returning to the general camp to get his meals, and to sleep there under the supervision of his employer. A company which cuts timber and rafts it to its saw-mill, where it is turned into lumber, is not engaged in an agricultural industry, but is a commercial and manufacturing undertaking, and its raftsman come within the provisions of the law respecting accidents to workmen.

Tremblay v. Baie Saint Paul Lumber Co., 46 Que. S.C. 203.

WORKMEN—COMPENSATION—DILATORY EXCEPTION—COMMON LAW.

If a plaintiff in an action for damages alleges that the accident was caused by reason of his work and by the inexcusable fault of defendant, and prays that the latter be condemned to pay him an annual rent under the Workmen's Compensation Act, or, in default of its applicability, to pay him the sum of $10,000, he must, on a dilatory motion, optate between the two rights of action set forth in his declaration.

Lesage v. Henderson, 15 Que. P.R. 328.

REDUCTION OF INDEMNITY.

An experience electrician, who disobeys the orders of his employer by failing to wear rubber gloves furnished him in order to work with electric wires charged with high voltage is guilty of inexcusable fault warranting a reduction of the indemnity in case of injury. When an employer has paid to his injured employee sums greater than the indemnity to which he is entitled for the period of total temporary incapacity, the indemnity for permanent diminution of his capacity to work may be reduced accordingly.

Caron v. Quebec R.L.H. & P. Co., 50 Que. S.C. 475.

WORKMEN'S COMPENSATION ACT — TEMPORARY INCAPACITY—INEXCUSABLE FAULT, R.S.Q. 1909, ART. 7321.

The Workmen's Compensation Act (Que.) differs from the French law in that it does not make any distinction, as to the effects of inexcusable fault, between the compensation to which the workman has a right, whether in a case of temporary or permanent incapacity, and consequently this inexcusable fault can be pleaded in both cases. The inexcusable fault of the employer includes also the inexcusable fault of his superintendent. One of the characteristics of an inexcusable fault is the knowledge of danger, and consists in culpable and intentional negligence, and a carelessness of the safety of the workman, and it cannot be pleaded in the case of an error of judgment or in the case of a wrong movement due to ignorance of immediate danger.

Archambault v. Labelle, 46 Que. S.C. 387.

(§ V—350) — COMPENSATION—AMENDMENT OF ACT — RETROACTIVENESS — CAPITAL RENT—CHOICE.

The Act of Geo. V. (1914), c. 57, amending the Workmen's Compensation Act (R.S. Que. 1909, art. 7329), which gives the person injured, or his representatives, the option to demand the payment direct to themselves of the amount of compensation or of the capital of the rent, has no retroactive effect and does not apply to an accident arising before the passing of the law, and the employer can only be required, as formerly, to pay the capital of the rent to an insurance company designated for that purpose by an Order-in-Council.

Martin v. Cape, 27 D.L.R. 113, 49 Que. S.C. 347.

CONSTRUCTION OF STATUTE — ANNUITIES—CAPITAL RENT.

The provision in sub-head 2 of art. 7322 of the Quebec Workmen's Compensation Act,

that "the capital of the rents," claimed in cases of total or partial incapacity, "shall not exceed the sum of $2,000," does not govern the amount of rent where it is claimed from the employer himself, but derives its meaning from the subsequent art. 7329, which gives the injured person or his representatives the option to demand that the capitalized value of the rent shall be paid over to an approved insurance company which will provide an annuity in lieu thereof. [G.T.R. Co. v. McDonald, 5 D.L.R. 65, 21 Que. K.B. 532, followed; 16 D.L.R. 830, 49 Can. S.C.R. 163, affirmed.]

C.P.R. v. McDonald, 23 D.L.R. 1, [1915] A.C. 1124, 24 Que. K.B. 495.

CAPITAL RENT.

Where under the Workmen's Compensation Act (art. 7321, R.S.Q. 1909) a workman who has been injured does not ask for the deposit of the capital sum, he is entitled to a rent the capital of which may exceed $2,000.

C.P.R. Co. v. Flore, 24 D.L.R. 710, 24 Que. K.B. 55.

SUSPENSION FROM WORK.

A workman who is paid by the hour for his work, but who is laid off temporarily through no fault of his, and who is afterwards recalled and resumes his work, is entitled to estimate the amount he would have earned had he not been laid off, and add it to the amount actually received in order to shew that the Workmen's Compensation Act does not apply, and that he is entitled to bring his action under the common law.

Reynolds v. Can. Light & Power Co., 25 D.L.R. 237, 48 Que. S.C. 500.

REDEMPTION OF WEEKLY PAYMENTS—MODE OF ASCERTAINMENT.

In estimating the total amount of compensation to be awarded in redemption of future weekly payments under the Workmen's Compensation Act, the amount should be based on the state of health and the probable expectation of life of the injured person at the time of the inquiry on the application for redemption, without any deduction of the antecedent payments, though agreed upon by counsel of the respective parties. [Victor Mills v. Shackleton, [1912] 1 K.B. 22, followed.]

Dutka v. Bankhead Mines, 23 D.L.R. 273, 8 W.W.R. 1041, 31 W.L.R. 687.

PERMANENT AND PARTIAL DISABILITY.

In determining the question of permanent incapacity under the Workmen's Compensation Act (Que.), whether partial or total, it must be taken in consideration what the injured could earn before the accident and the earning capacity after the accident, but the fact that the injured's earnings since the accident are as much as before is not conclusive on his ability to do the work, if his work is intermittent and the rate of his earnings varies according to the kinds of work he is engaged in.

Lariviere v. Girouard, 24 D.L.R. 532, 24 Que. K.B. 154.

AMPUTATION OF THUMB—PARTIALLY PERMANENT INCAPACITY.

The Workmen's Compensation Act is an Act of public order, and every agreement to the effect that the employer should be relieved of the obligation imposed upon him by this Act is ipso facto a nullity.

Girard v. Naud, 48 Que. S.C. 429.

PERMANENT AND PARTIAL INCAPACITY—DIMINUTION IN SALARY.

The Workmen's Compensation Act granting, in case of permanent and partial incapacity, a rent equal to half the sum by which the wages have been reduced in consequence of the accident, it is the duty of the court to ascertain the corresponding decrease in the salary; and where the accident caused only a slight incapacity which does not expose the victim to any diminution in his salary, he has no claim to an indemnity for permanent and partial incapacity.

Stack v. Whittal, 48 Que. S.C. 272.

WORKMEN'S COMPENSATION—TEMPORARY TOTAL INCAPACITY—PERMANENT PARTIAL INCAPACITY—R.S.Q. 1909, ARTS. 7322, 7346.

Bonneau v. Sevigny, 25 D.L.R. 855, 47 Que. S.C. 129.

INJURY IN COURSE OF EMPLOYMENT.

An accident caused by the tortious act of a fellow workman having no relation whatever to the employment, cannot be said to arise "out of and in the course of the employment" under the Workmen's Compensation Act, 1910, N.S., c. 3, s. 5. [Challis v. London & S.W.R. Co., [1905] 2 K.B. 154, distinguished.]

Doyle v. Moirs, 22 D.L.R. 767, 48 N.S.R. 473. [Leave to appeal to Privy Council refused, March 27, 1915.]

INJURIES IN COURSE OF EMPLOYMENT.

An accident cannot be said to have happened by reason of or in the course of his work, so as to make a claim under the Workmen's Compensation Act (Que.), where the employee, without the knowledge or permission of the employer, goes to a place where he is forbidden to go, and meets with an accident while there.

Lavery v. G.T.R. Co., 24 D.L.R. 522, 48 Que. S.C. 278.

COMMUNICATION OF DISEASE WHILE REMOVING CINDER FROM FELLOW-SERVANT'S EYE—COURSE OF EMPLOYMENT.

Where an infectious disease is communicated to a workman by his fellow-workman while trying to remove a piece of cinder which had got into his eye while he was at work, and such disease results in blindness, the accident may be said to have happened in the course of his employment so as to entitle him to compensation under art. 7321, R.S.Q. 1909.

C.P.R. v. Flore, 24 D.L.R. 710, 24 Que. K.B. 55.

INJURY TO TEAMSTER—IN OR ABOUT PLANT.

Compensation may be allowed under the

Workmen's Compensation Act, (N.S.) in respect of injury to a teamster while driving a truck and team of horses in the delivery of the output of the factory although at some distance therefrom, the horses and truck being a part of the factory "plant" under the extended meaning given by subs. 2 of s. 2 to the word "factory," so that an injury "on, in or about" any part of the plant is within the statute. [Yarmouth v. France, 19 Q.B.D. 647, and Carter v. Clarke, 14 Times L.R. 172, applied.]

O'Toole v. Brandram-Henderson, 21 D.L.R. 83, 48 N.S.R. 293.

INJURIES WHILE CHANGING CLOTHES — COURSE OF EMPLOYMENT.

A workman who was injured by the collapse of temporary stairs on which he was proceeding a few minutes before the hour for commencing his day's work to another floor for the purpose of changing into his working clothes left there on the previous day, is entitled to compensation as for an injury arising out of his employment under the Workmen's Compensation Act, Alta.

Klukas v. Thompson & Co., 21 D.L.R. 312, 7 W.W.R. 1102. [Reversed on another point, 24 D.L.R. 67, 8 W.W.R. 778, 31 W.L.R. 438.]

INJURY TO ONE EMPLOYED TO PAINT HOMESTEAD.

A painter employed to paint a homestead is precluded by the provisions of s. 10 of the Workmen's Compensation Act from recovering compensation for injuries sustained at that work.

Smid v. Townsend, 8 W.W.R. 474.

DEATH WHILE MOVING BUILDING.

The death of a workman employed by a contractor for moving a building who loses his life in consequence of an accident comes under the application of the Workmen's Compensation Act, the moving having relation to the industry carried on in the building.

Desilets v. Laplante, 48 Que. S.C. 385.

DROWNING WHILE RETURNING FROM WORK.

A workman who, at the end of his day's work in order to return home, embarks in a boat not belonging to his employer or under his control to return to his home, and who is drowned en route, is not the victim of an accident within the application of the Workmen's Compensation Act, and his widow and children have no recourse against his employer.

Menard v. Quinlan, 47 Que. S.C. 115.

POSTPONEMENT OF ADJUDICATION AS TO AMOUNT.

Where in an action under the Workmen's Compensation Act (Que.), the annual rent for a permanent partial incapacity cannot be properly ascertained at the trial, the court has power to postpone final adjudication to some future date and to grant a temporary allowance in the meantime.

Hyland v. Lake & River Transportation Co., 37 D.L.R. 467, 26 Que. K.B. 452.

AMOUNT—PRAYER.

A plaintiff suing under the Workmen's Compensation Act (Que.), cannot obtain a condemnation for general damages, but the court may on a proper prayer by him, fix and determine the annual rent to which he is entitled.

Waters v. Cape, 30 D.L.R. 718, 50 Que. S.C. 151.

ACTION FOR RENT OR CAPITAL.

A plaintiff, in an action under the Workmen's Compensation Act (Que.), as amended, may sue for either the annual rent or the capital, and even if he elects to sue for the annual rent he may, at any time, even after judgment, make option for and recover the capital representing such rent.

Freeman v. Montreal Locomotive Works, 39 D.L.R. 239, 24 Rev. de Jur. 67.

AWARD OF LUMP SUM—VALIDITY—NEGLECT OF CURE.

Under the Workmen's Compensation Act, R.S.B.C., 1911, c. 244, an award of a lump sum should be upheld where it is not awarded as such but is merely the result of the addition of the several amounts of a weekly allowance. An applicant for compensation under the Workmen's Compensation Act, R.S.B.C., 1911, c. 244, is not entitled to compensation beyond the date when he neglected to follow the instruction of his medical advisers which would, if followed, have effected a cure. The applicant who is cured, and he who refuses to be cured, are on the same legal footing.

Gorgnigiani v. Welch, 26 B.C.R. 195, [1918] 3 W.W.R. 797.

WORKMEN'S COMPENSATION ACT, (QUE.)—YEARLY WAGES — ASCERTAINMENT — INEXCUSABLE FAULTS.

To fix the yearly wages in order to apply the Workmen's Compensation Act (Que.) it is not sufficient to take the wages that the victim earned at the time of the accident and multiply it by the number of working days of the year, but the real wages must be ascertained, i.e., the wages without taking into account the accident which the workman received during the time he was employed; and when the workman has worked for less than 12 months prior to the accident, there must be added to the wages which the workman has earned the average remuneration of a workman of the same class in order to complete the 12 months and form the yearly wage that, in the normal conditions of his work, the workman should have earned during the year. A workman whom his employer places at the head of his companions, to represent him as checker or foreman, and to whom he has given, in his absence, the direction of the works, but who himself works with the other labourers, does not lose his quality of workman towards his employer, and retains the benefit of the Act. When a case falls under the Act the principles of the civil law on

the fault do not apply, save in a case in which an intentional or inexcusable fault is alleged. An inexcusable fault is an especially gross mistake, which consists in voluntarily doing a dangerous act of which the danger is known or ought to be known. It also consists in not seeing or foreseeing what another person, under the same circumstances, would have seen or foreseen. That fault supposes the knowledge of the danger and the will to run it, and implies a neglect of care or a lack of precaution which might easily prevent an accident. In cases under the Act the jurisdiction of the court is not limited to decision of the parties' rights at the time the action commenced, as in the ordinary cases, but it must determine those they have at the time of the judgment and also the probable future duration of the victim's incapacity. When a plaintiff includes in his claim the whole compensation to which he may be entitled, and his action implies the assertion of the creditor's total rights, it interrupts prescription not only as to the daily compensation due at the time but also as to what might become due later on the same ground of action.

Foucher v. Morache, 46 Que. S.C. 498.

ACCIDENT OF WORK—CALCULATION OF SALARY—CONTINUOUS WORK—CATEGORY—PROOF—REFERRED TO THE SUPERIOR COURT—S. REF. ART. 7328, 2 AND 3.

A labourer who works in a munition plant established for more than one year at seventy-two and a half cents an hour, for seven months thus earning a salary of $615.45, does an uninterrupted work and is subjected in so far as the manner of calculating his salary, to art. 7328, 1909, S. ref., [1909] (Workmen's Compensation Act), and not to s. 3 of the same article. It is for a labourer who sues by virtue of the law of accidents of work and whose demand is rejected by the aforesaid art. 7328 s. 2, to prove the average salary of labourers in the same category during a period necessary to complete the twelve months. If he does not prove this the court can send back the "brief" to the Superior Court, to permit the latter to make this proof.

Pelletier v. Montreal Locomotive Works, 25 Rev. Leg. 76.

MILL HAND—COMMON LAW—SALARY LESS THAN $1000—REJECTED ACTION—C.C. 1053 A, ART. 7326, S. REF. [1909].

An employee in a mill whose salary is less than $1000 a year can sue for damages in virtue of the Common Law. He ought to form his demand according to the disposition of the law of accidents of work otherwise the action will be dismissed subject to proof.

Canadian Steel Foundries v. Stychlinsky, 25 Rev. Leg. 135. [See 20 Que. P.R. 131.]

When art. 2 of 9 Edw. VII. c. 66, respecting workmen's compensation for injuries, allows to an employee an income in a case when he receives an injury during his employment, which injury carries with it a permanent partial incapacity, it is on condition that his professional capacity would decrease, and be lasting in reduction of his salary. It is this reduction of salary that should be the basis of figuring the income to which the employee will have a right, income which will amount to one-half the reduction in salary which he suffered through the accident. This essential condition required by law will not apply when, after the accident the plaintiff voluntarily renewed his employment with the same salary as he received before the accident. In such circumstances, he will find that art. 2 of the above law, is, by voluntary act of the plaintiff, rendered inapplicable, and that, in the present state of the legislation, he has no right to any income.

Cater v. G.T.R. Co., 18 Rev. de Jur. 27.

The Act, 4 Geo. V., c. 57 (Que.), amending the Act respecting accidents to workmen, which allows the workman, in a case of permanent disability, to demand the capital of the amount of compensation awarded in lieu of an annuity, has no retrospective effect. The Act cannot be considered declaratory and interpretative, except in regard to the fact that the statute did not take away the common law remedy of persons who could not take advantage of the statute. The amendment does not prevent the employer from having the awarded compensation revised under art. 7346, R.S.Q. 1909, even if he pays the amount of the capital to the workman.

Jennings v. Brissette, 25 Que. K.B. 21.

COMPUTATION OF INDEMNITY—R.S.Q. 1909, ARTS. 7322, 7326, 7329, 7349—"DAILY WAGES RECEIVED AT THE TIME OF THE ACCIDENT"—ANNUAL WAGES—AVERAGE—CAPITAL.

Trudel v. Rhéaume, 52 Que. S.C. 207.

SETTLEMENT — PRESCRIPTION — INTERRUPTION.

An agreement between employer and employee, in settlement of a claim under the Workmen's Compensation Act, (Que.) by which the employer is to pay the victim a sum in addition to the amount already received and to keep him in his employ as long as he had work to give him and he did his duty properly, is not a settlement of the claim and neither affects a novation nor an extinguishment of it. Such agreement interrupts the prescription. From the time it was made until it was set aside, the prescription is suspended and only begins to run again at the latter date.

Tremblay v. Canada Cement Co., 52 Que. S.C. 183.

INTERRUPTION OF PRESCRIPTION—COMPUTATION OF INDEMNITY.

Service of the petition to obtain authority to bring an action under the Workmen's Compensation Act (Que.), interrupts the prescription declared by art. 7345 of the Act. To determine the wages of the

workman as the basis of the indemnity to be given, the court should take into consideration the total of what he had earned during the 12 months before the accident, without deducting from these wages the amount which he had paid to his employer on account of the pension fund.

Squizzato v. Brennan, 51 Que. S.C. 301.

WORKMEN'S COMPENSATION ACT — WORKMAN EARNING SALARY—OVER $1,000—COMMON LAW RIGHT—R.S.Q. 7326, 7328.

When the victim cannot sue under the Workmen's Compensation Act (Que.), because his salary is over $1,000, his action lies under the common law, and suit taken under the Act will be dismissed.

Couture v. G.T.R. Co., 16 Que. P.R. 221.

WORKMEN'S COMPENSATION ACT—EARNING CAPACITY REDUCED — COMPENSATION — ANNUITY — AVERAGE SALARY—SETTLEMENT.

Sentimental considerations cannot overrule the law, and, in the case of an accident to a workman the rule de minimis non curat lex does not apply when an annuity, representing a capital of over $200, is at stake. In the case of a workman employed for less than 12 months previous to the accident, the average salary of workmen of the same class, together with the victim's earnings since his employment, taken as a basis to calculate an annuity for the reduction of earning capacity, is the salary which has been really earned, and not which should have been earned; and the court cannot presume that salary if no evidence is given on the point. Neither the offer of a settlement before the judge, whom the law authorizes to try and get the parties to settle before he allows the action to be entered, nor the admissions nor concessions which have then been made in view of a settlement, can be taken advantage of against the parties at the trial.

Kopyi v. Jacobs Asbestos Mining Co., 46 Que. S.C. 466.

NONCONTINUOUS WORK—ANNUAL SALARY.

A factory which since its establishment has not been operated for 12 consecutive months, but only during irregular intervals, must be considered as an enterprise the work of which is not continuous. To determine the indemnity payable to a workman who is the victim of a labor accident therein, one must establish his annual salary by adding to the remuneration which he received during the period of work the earnings which he could have realized during the balance of the year. (R.S.Q. 1909, art. 7328.)

Naud v. Girard, 25 Que. K.B. 407.

WORKMEN'S COMPENSATION — SALARY — EXTRA EMPLOYEES—R.S.Q. [1909], ART. 7321, 7323, 7328 WORKMEN'S COMPENSATION ACT.

When an employer employs two classes of workmen of the same category: the first called regular employees, the second called extra employees, the latter not working continuously, and receiving a lower salary than those of the first class, it is necessary in order to determine the annual salary of the workmen for the full twelve months, by virtue of the second paragraph of art. 7328 of the Workmen's Compensation Act (Que.) to take the average of the remuneration received by the extra employees without taking into consideration that of the regular employees.

Langlois v. G.T.R. Co., 55 Que. S.C. 251.

WORKMEN'S COMPENSATION — APPRENTICE —INDEMNITY—C. C. (QUE.) ART. 1915 —R.S.Q. [1909] ARTS. 7322, 7325, 7329.

An apprentice, in the sense in which the word is used in the Workmen's Compensation Act, is one who begins to work, and who only earns the minimum salary at first and gradually increases. He is not necessarily one engaged nominally under the name of apprentice.

Riendeau v. Labelle, 25 Rev. Leg. 391.

COMPUTATION OF YEARLY WAGES.

The yearly wages entitling one to invoke the Workmen's Compensation Act, (Que.) as also the yearly wages used as a basis to calculate the rents, mean the real wages allowed to the victim during the 12 months before the accident, and those wages must include the allowances granted for extra work according to contract.

Laferriere v. Frontenac Electric Laundry, 19 Que. P.R. 369.

AVERAGE WAGE—COMPUTATION.

Where a workman, the victim of an accident, has been less than 12 months in his employment, in order to fix his yearly wages there must be added to what he actually earned during the period of his employment the average wages received by workmen of the same class during the period required to complete the 12 months. Such average wage is computed, when the workmen are paid by the hour, by dividing the total amount which they received during the supplementary period by the number of hours which they worked during the same period.

St. Maurice Paper Co. v. Marcotte, 27 Que. K.B. 394.

PERMANENT PARTIAL INCAPACITY—ANNUAL RENT.

The right of the victim of an accident under the Workmen's Compensation Act, (Que.) to recover for permanent partial incapacity, depends upon the amount by which his wages have been reduced in consequence of the accident.

Smith v. G.T.R. Co., 53 Que. S.C. 334.

PARTIAL PERMANENT INCAPACITY — APPEAL —PROVISIONAL ALLOWANCE.

If a final judgment of the superior court has declared that the plaintiff is partially and permanently incapacitated, and it is not claimed that his condition has altered since the judgment, he will not be granted a daily provisional allowance during the proceedings in review.

Sabatino v. Peck Rolling Mills, 20 Que. P.R. 148.

AMOUNT ADMITTED—JUDGMENT.

In an action under the Workmen's Compensation Act, (Que.) if the defendant admits owing a certain amount, and consents to a judgment being given for such amount, the court can give judgment for such amount upon the plaintiff's petition during the litigation, reserving to him the right to continue the action for the remainder of the claim.

Rossi v. Scottish Canadian Magnesite Co., 54 Que. S.C. 511.

SETTLEMENT OF CASE — CONFIRMATION — CAPITAL—VALIDITY—CONTINUANCE.

After the service of the petition for authority to sue under the Workmen's Compensation Act, the parties may settle their dispute, with the sanction of the court, and such arrangement may extend to the payment of the capital. Such an agreement can only be set aside on the grounds which allow the cancellation of agreements. If an action under the Workmen's Compensation Act (Que.) is settled between the parties, and the plaintiff, complaining of the illegality of the settlement, continues the proceedings, the parties should proceed to prove the sufficiency of the amount paid.

Patenaude v. Canada Cement Co., 20 Que. P.R. 241. [See 54 Que. S.C. 216.]

COSTS AND INTEREST.

The compensation granted by art. 7332 of the Workmen's Compensation Act (Que.) is offset by the costs which the employee owes his employer; that is, the latter has a right to deduct the costs from the amount of the compensation. A court ought not to make a distinction where the law makes none, or to create exceptions which the law has evidently not wanted to declare by not including them in the law. The successful party must pay his attorney's costs; and should that party pay them, he is subrogated de jure by the sole effect of the law, to the rights of his attorney, and may execute the judgment for those costs without transfer or previous service, by complying with art. 555 C.C.P. As costs bear interest from the date of the judgment granting them, it is not necessary for the judge to add the words, "with interest."

Trudel v. Rhéaume, 54 Que. S.C. 292.

EXECUTION OF JUDGMENT—PREMATURITY.

An execution, obtained less than a month after the final judgment given under the Workmen's Compensation Act (Que.) in favor of a workman permanently incapacitated, is premature and illegal.

Manchuch v. Rubber Regenerating Co., 20 Que. P.R. 8.

WORKMEN'S COMPENSATION — PERSONAL INJURIES — PRINCIPLES OF ASSESSMENT AND DAMAGES.

An injured workman may shew that if he had not been injured, he might at the time of action be in receipt of larger wages than he is then getting, and should be allowed a fair amount of compensation for being deprived of the reasonable prospects he had of improving his condition in life. In an action for damages for personal injuries a jury should not award punitive or vindictive damages, and should take into account the accidents of life and other matters, including the fact that the plaintiff has not been completely disabled. They should not give the plaintiff the full amount of a perfect compensation for the pecuniary injury he has suffered, but only what they consider, under the circumstances, a fair compensation for his loss.

Anderson v. Forrester, 7 W.W.R. 1039.

WORKMEN'S COMPENSATION — ASSESSMENT OF DAMAGES FOR INJURY—TIME SPENT ON HOMESTEAD—PARTIAL INCAPACITY.

An injured workman should not be allowed damages in respect of the time during which he is compelled by the Dominion Lands regulation to live upon his homestead. The proper way to assess damages under the Workmen's Compensation Act is to estimate the earnings during 3 years preceding an injury without any consideration of sympathy, physical suffering or injury to the appearance. A plaintiff is not entitled to the full sum named in the Act, where his injury is such that his earning power is decreased one-quarter only.

Kier v. Bennell, 6 W.W.R. 739.

(§ V—351)—PARTIAL INCAPACITY.

Continued suffering from a broken leg after the bones have been joined and restored to normal condition, due to lack of proper medical treatment, is a temporary disability; the burden of proving permanent incapacity is upon the plaintiff.

Bodean v. Chagnon, 37 D.L.R. 392, 52 Que. S.C. 202.

LOSS OF HAND.

The loss of all the fingers on one hand amounts to the loss of the whole hand, and justifies the award of the full amount allowed for the loss of a hand under the Workmen's Compensation for Injuries Act (N.B. 1914, c. 34).

Pankhurst v. Smith, 33 D.L.R. 23, 44 N. B.R. 279.

THUMB AND FINGER CRUSHED—ACTION FOR DAMAGES — EVIDENCE — FINDINGS OF JURY—DAMAGES.

Simpson v. Tallman Brass & Metal Co., 3 O.W.N. 398, 20 O.W.R. 646.

PERMANENT PARTIAL INCAPACITY—PARALYSIS.

Where a workman suffers from the complete paralysis of his left arm and leg, due to a lesion of the nervous system caused by an accident while working, that is, by a shell weighing 18 pounds, which fell from a shelf and struck his left arm, which paralysis has resisted all attempts at cure, but which possibly may be cured, he is entitled to compensation for a permanent and partial disability. Such possibility of cure is uncertain and cannot be treated as a judicial fact of sufficient weight to establish

that the disability is merely temporary and not permanent.

Martha v. C.P.R., 51 Que. S.C. 443.

(§ V—352)—"Total incapacity."

A doctor's certificate that an injured person is "able to do light work" is not proof that he is "fit and capable of doing work," or that his "incapacity for work" or "total incapacity" has ceased, within the meaning of an agreement limiting the liability between master and servant.

Russell v. Twin City Coal Co., 36 D.L.R. 235.

Permanent incapacity — Annuity—Capital.

When a judgment, under the Workmen's Compensation Act, condemns an employer to pay an annual sum to his employee, the latter may, by motion, apply to the court, within 30 days from the date of the judgment, for an order directing that the capital be paid to him.

Demers v. Graillon, 51 Que. S.C. 42.

(§ V—353)—Provisional allowance.

A provisional allowance should not be granted to a plaintiff suing under the Workmen's Compensation Act (Que.), if his right of action is contested and doubtful, or if it is susceptible of only giving a reduced rent which would be absorbed by the provision paid during the trial.

Yukerviez v. G.T.R. Co., 19 Que. P.R. 151.

Article 7343, R.S.Q., authorizing a judge, in an action under the Workmen's Compensation Act (Que.), to grant the plaintiff a daily allowance, should be construed strictly. So, when the employer shews that that law does not apply because the employee earns more than $1,000 a year, the application will be refused.

Tremblay v. Canada Cement Co., 24 Rev. Leg. 444, 20 Que. P.R. 13.

If a defendant pleads that the plaintiff makes more than $1,000 a year, and does not fall under the Workmen's Compensation Act (Que.), a plea which appeared prima facie well founded, a daily allowance will be refused.

Sayed v. Canadian Tube & Iron Co., 19 Que. P.R. 1.

Stipulated judgment—Remedy—Revision of compensation—Daily allowance.

The stipulated judgment, under s. 27 of the Workmen's Compensation Act (Que.) (9 Ed. VII., c. 66), on a workman's petition asking authorization to sue, having the same effect as a final judgment from a proper tribunal, must be attacked by the same means and not by those provided to have transactions set aside. The means of appeal or review before three judges, granted by s. 22 of the Act, are not granted against the stipulated judgment rendered under s. 27, because the parties have acquiesced therein, and because the law makes no distinction between the acquiescence before or after the delivery of judgment. Such a judgment, therefore, can be withdrawn only by a petition in revocation, because the main action has never been recognized in the French law, as a means of attacking judgment. Such a judgment is none the less subject to be set aside, but according to the special provisions concerning transactions (arts. 1921, et seq., C.C. Que.), and not according to those concerning ordinary contracts (arts. 991 to 1001, C.C., Que.). So an error of law can never be a ground to have such a judgment withdrawn (art. 1921 C.C., Que.). There is no other remedy against such judgment, besides the petition in revocation, than the action to revise the compensation granted to each party by s. 26 of the Act. The Quebec Code, different from the French law, enacts the principle that a party may always desist from his claim or proceedings without the consent of the opposite party, provided he pays the costs, but only from a judgment given exclusively in his favor. A judgment condemning the defendants, with their consent, to pay the plaintiff the sum of $67.50, provided the latter renounces any damages suffered from the accident, is not exclusively in favor of the plaintiff, and he could not, except with the defendant's consent, desist from that judgment, which at his request, was ratified by the court under s. 27 of the Act. A workman, who takes an action to revise the compensation granted him by a stipulated judgment, cannot, during the trial in review, ask for alimony in the form of a daily allowance. The only compensation which s. 26 of the Act authorizes in cases of revision within four years from the agreement of the parties or the final judgment, are those of absolute and permanent incapacity, which have been fixed either by the stipulated judgment ratifying the agreement of the parties according to s. 27, or, in case of disagreement, by the judgment rendered under s. 3. In other words, the absolute and permanent incapacity, mentioned in subpar. (a) of s. 2 of the Act, is the only one which, in case of aggravation, may justify an action to revise.

St. Jacques v. St. Jean Berchmans, 19 Que. P.R. 30.

Provisional allowance.

An application for a provisional daily allowance, made during an action under the Workmen's Compensation Act (Que.), cannot be contested in writing without previous permission of a judge, but should be adjudged upon summarily, at the discretion of the court or a judge.

Blair v. Allen Scott Roofers, 20 Que. P.R. 114.

Where the plaintiff, after the accident complained of, was again able to work and settled with his employer, obtains permission to sue again, on alleging new facts, he has no right, during the new proceedings, to a provisional allowance.

Harris v. Peck Rolling Mills, 20 Que. P.R. 149.

The provisional daily allowance authorized by the Workmen's Compensation Act

(Que.), is left to the discretion of the court, which should only be exercised for important reasons, for example, when the liability of the employer is certain, or the employee is unable to work, etc.

Schinck v. Galibert, 19 Que. P.R. 130.

PROVISIONAL ALLOWANCE—WAGES.

An application for a provisional allowance under the Workmen's Compensation Act (Que.), made 6 days before the hearing, and the defendant denies the plaintiff's right for the reason that he earns a yearly wage of more than $1,000, will be transferred to the court seized of the case.

Jourdain v. Canada Box Board Co., 19 Que. P.R. 181.

WORKMEN'S COMPENSATION—TEMPORARY ALLOWANCE—DISCONTINUANCE.

Duval v. Vieus, 12 Que. P.R. 338.

Under the Workmen's Compensation Act (Que.), the plaintiff's provisional alimentary allowance pending the suit should be fixed as much as possible on the same basis as the final allowance will be determined.

Sutherland v. Phœnix Brass Works Co., 13 Que. P.R. 408.

INTERIM ALLOWANCE—PLEADING.

The Workmen's Compensation Act (Que.) gives complete discretion to the Superior Court or judge thereof to grant, during the action, a daily allowance to the plaintiff.

Canada Cement Co. v. McNally, 18 Que. P.R. 134.

In an action under the Workmen's Compensation Act, an interim allowance will not be granted if the defendant's pleading denying his liability is apparently very serious and if the court gravely doubts that the plaintiff will be able to obtain judgment against the defendant.

Piconlas v. Lachine Mfg. Co., 18 Que. P.R. 162.

WORKMEN'S COMPENSATION ACT — PROVISIONAL ALLOWANCE—PRIMA FACIE DEFENCE—R.S.Q. ART. 7322.

In an action under the Workmen's Compensation Act (Que.), no provisional allowance will be granted if the defendant's plea denying his liability is, at first sight, a very weighty one, and if the court has grave doubts as to whether the plaintiff can obtain judgment against the defendant.

Gagnon v. Demers, 15 Que. P.R. 416.

PROVISIONAL ALLOWANCE—COMPANY IN LIQUIDATION.

A demand for a provisional allowance under the Workmen's Compensation Act (Que.), will be granted even if the defendant company declares that it has been put into, and actually is in, liquidation.

Dugnay v. Canada Iron Corp. 15 Que. P.R. 290.

DAILY ALLOWANCE—COMPANY EMPLOYER.

A daily allowance during the trial will not be granted to the plaintiff in an action under the Workmen's Compensation Act (Que.), if it is proved that the defendant company, although possessing the majority of the shares in the company which employed the plaintiff and under the control of the same manager, is however an independent company with special powers and its own board of directors.

Manchuck v. Canadian Consolidated Rubber Co., 18 Que. P.R. 311.

(§ V—354)—REVISION OF COMPENSATION—AGREEMENT.

Under the Workmen's Compensation Act (Que.) the person injured may demand a revision of the compensation that he has received on account of aggravation of his disability, even though this compensation has been determined by agreement between the parties and not by judgment. The action for revision is open to him not only in case of aggravation of a disability already acknowledged to be permanent, but even when the disability first deemed to be only temporary has afterwards assumed a permanent character.

Desbecquets v. Doyle, 52 Que. S.C. 117.

COMPENSATION—DEMAND OF CAPITAL.

When a workman, injured in the course of his work, intends to demand from his employer the capital of the rent to which he is entitled by way of compensation, he should demand it by the conclusions of his action. The final judgment which awards compensation under the form of rent in conformity with his demand, constitutes res judicata between him and his employer and cannot be reformed on motion. The option given by art 7329, R.S.Q. 1909, exercisable within the month from the date of the final judgment fixing the compensation, is limited to the alternative of payment to the victim in conformity with the judgment, or of payment of the capital of the rent to an insurance company.

Burke v. Ross, 52 Que. S.C. 142.

(§ V—355)—APPEAL.

In an action under the Workmen's Compensation Act (Alta.), there is no appeal from the District Court Judge, except that given by par. 4 of the second schedule of the Act, which is by implication only, and limited to questions of law, by analogy to the English Workmen's Compensation Act of 1897. [Smith v. Lancashire & Yorkshire R. Co., [1899] 1 Q.B. 141, applied.]

Cargeme v. Alberta Coal & Mining Co., 6 D.L.R. 231, 5 A.L.R. 173, 22 W.L.R. 68, 2 W.W.R. 1058.

WORKMEN'S COMPENSATION BOARD—VALIDITY OF PROCEEDINGS—FINALITY—REVIEW—JURISDICTION.

Where a municipal corporation, sued by a contractor for work done, pleads payment of the amount sued on to the Workmen's Compensation Board, after having been notified of the plaintiff's liability under the Workmen's Compensation Act and the assessment of the amount against him, the court has jurisdiction to inquire into the proceedings of the Board to ascertain whether the corporation brought itself within the protection of the Act. After a decision

has been rendered and a valid assessment made by the Board, it is final and not subject to review by the courts an assessment by an officer of the Board becomes valid when confirmed by the Board.

Murphy v. Toronto, 45 D.L.R. 228, 43 O.L.R. 292, affirming 41 O.L.R. 156.

COMMON LAW ACTION—"DETERMINED."

A common law action for damages is not "determined" within the meaning of s. 3 (4) of the Workmen's Compensation Act, c. 19, so long as the right of appeal is open to the plaintiff and he has taken advantage of it. Therefore, where upon dismissal of the action in the Appellate Division the plaintiff appeals to the Supreme Court of Canada, he is not required to apply at once for an assessment under the Act and to have his claim for compensation stand over, until the judgment on such appeal, or be entertained. [Isaacson v. New Grand (Clapham Junction), 5 W.C.C., distinguished.]

Green v. G.T.P.R., [1917] 3 W.W.R. 251.

MATERIALMEN.

Lien of, see Mechanics' Liens.

MATURITY.

See Bills and Notes; Mortgage.

MAXIMS.

See Words and Phrases.

PRESUMPTION OF RIGHT AND NOT WRONG.

It is a maxim of the law to give effect to everything that appears to have been established for a considerable course of time and to presume that what has been done was done of right and not of wrong.

Berrard v. Bruneau, 22 D.L.R. 83, 25 Man. L.R. 400, 8 W.W.R. 635.

"NOSCITUR A SOCIIS" — "PRODUCE" IN INDIAN ACT, CONSTRUED.

The word "produce" in the phrase "grain, root crops, or other produce" embraced in s. 39 of the Indian Act, R.S.C. 1906, c. 81, is, under the maxim noscitur a sociis, limited to the meaning which it shares with its antecedents "grain" and "root crops" and should not be taken to cover "wild hay."

Prince v. Tracey, 13 D.L.R. 818, 25 W.L.R. 412.

"EXPRESSIO UNIUS."

The maxim "expressio unius est exclusio alterius" is not of universal application, but depends upon the intention of the parties as it can be discovered upon the face of the instrument or upon the transaction, and should not be applied when its application, having regard to the subject matter to which it is to be applied, leads to inconsistency or injustice.

Pearson v. Adams, 7 D.L.R. 139, 27 O.L.R. 87, 22 O.W.R. 909. [Reversed on another point, 12 D.L.R. 227, 28 O.L.R. 154.]

MECHANICS' LIENS.

I. CONSTRUCTION AND VALIDITY OF STATUTES.
II. THE RIGHT; WHEN LIEN EXISTS.
III. PRIORITIES.
IV. FOR WHAT WORK OR MATERIALS.
V. TO WHAT PROPERTY ATTACHES.
VI. OF SUBCONTRACTORS AND MATERIALMEN.
VII. HOW WAIVED OR DEFEATED.
VIII. ENFORCEMENT; PROCEDURE.

For liens in general, see Liens; Maritime Liens.

Annotations.

Percentage fund to protect subcontractors: 16 D.L.R. 121.

What persons have a right to file a mechanic's lien: 9 D.L.R. 105.

Enforceability of a mechanic's lien against the property of a married woman for work performed or materials furnished under a contract made with her husband: 52 D.L.R. 200.

I. Construction and validity of statutes.

(§ I—1)—"PREJUDICE"—"UNJUSTLY MADE TO SUFFER."

The word "prejudiced" as used in s. 14 of the Mechanics' Lien Act (Alta.), validating certain liens where there has been failure to strictly comply with the statute, means "unjustly made to suffer."

Rendall et al. v. Warren, 21 D.L.R. 801, 8 W.W.R. 113.

AMENDMENT OF STATUTE—CONSTRUCTION.

In order to enforce a mechanic's or materialman's lien under the Alberta Mechanics' Lien Act, s. 32, as amended in 1908, a "notice in writing of such lien and of the amount thereof" must be given to the "owner or person having superintendence of the work on behalf of the owner."

Calgary v. Dominion Radiator Co., 40 D.L.R. 65, 56 Can. S.C.R. 141, [1918] 1 W.W.R. 137, reversing 35 D.L.R. 410, 11 A.L.R. 532, [1917] 2 W.W.R. 974, sub nom. Dominion Radiator Co. v. Payne.

ENFORCING LIEN—DEFENDANT NOT APPEARING—JUDGMENT OF OFFICIAL REFEREE—MOTION TO SET ASIDE—JURISDICTION OF MASTER IN CHAMBERS—CON. RULES 42 (17) (d), 778—JURISDICTION OF REFEREE.

Guest v. Linden, 1 D.L.R. 908, 21 O.W.R. 303.

CONSTRUCTION OF STATUTES.

Section 32 of the Mechanics' Lien Act (Alta.), 1906, c. 21, as amended by s. 12, c. 20 of 1908, is for the protection of an owner who is under a personal contractual obligation to pay and not otherwise. "Owner" is a variable term and as used in s. 11 of the Mechanics' Lien Act (Alta.), 1906, will include "leaseholder" when read with the interpretation clause, s. 2, subs. 4, extending the term "owner" to a person having any estate or interest legal or equitable in the lands.

Prentice v. Brown, 17 D.L.R. 36, 7 A.L.R. 454, 28 W.L.R. 226, 6 W.W.R. 989.

CONSTRUCTION OF STATUTE—SASKATCHEWAN MECHANICS' LIEN ACT—IMPLIED REPEAL.

A mechanics' lien is the creature of statute and enforceable only as may be provided by the statute creating it. While, before the enactment of the Saskatchewan Mechanics' Lien Act of 1907, the Supreme Court of that province had statutory jurisdiction to entertain an action to enforce a mechanics' lien, the effect of s. 30 of that Act is to repeal by implication the former statutory jurisdiction and to confer jurisdiction on the District Court alone. Therefore, in an action in the Supreme Court by a vendor for payment of purchase money and other relief, a counterclaim for the enforcement of a mechanics' lien was set aside. [Martin v. Russell, 2 B.C.R. 98, applied and followed. Dictum in McKenzie v. Murray, 11 W.L.R. 123, not followed.]

Shuttleworth v. Seymour, 28 W.L.R. 282.

MECHANICS AND WAGE-EARNERS LIEN ACT, R.S.O. 1914, c. 140—CONSTITUTIONALITY—POWER OF PROVINCE TO CREATE LEIN EFFECTIVE AGAINST DOMINION RAILWAY—POWER TO CONFER UPON REFEREE JURISDICTION TO TRY ACTION.

Johnson v. C.N.R. Co., 10 O.W.N. 372.

NATURE OF LIEN—CONSTRUCTION OF MECHANICS' LIEN ACT—SUBSTANTIAL COMPLIANCE WITH FORM—"OWNER."

Sections creating the right to a lien are to be strictly construed, while provisions dealing with procedure on the enforcement of the lien are to receive a broad and liberal construction. The lien given by the Mechanics' Lien Act is a lien upon the building or erection, i.e., is against the property no matter who owns it or has interest in it. The true tenor and intent of the instrument claiming a mechanics' lien is a claim of a lien upon certain specified lands and not a claim of lien upon the estate or interest in the lands of certain named persons. [Barrington v. Martin, 16 O.L.R. 135, followed.] An error in naming the owner of the lands with respect to which a lien is claimed, is not sufficient to prevent the instrument claiming the lien from shewing the substantial compliance with the statutory form, as desiderated by s. 17 of the Act. A sub-contractor has a lien on the interest of his principal acquired through his (the principal's) lien.

Nobbs v. C.P.R., 6 W.W.R. 759.

CLAIM OF LIEN — EXECUTION — CORPORATE SEAL OF CLAIMANT-COMPANY.

Monarch Lumber Co. v. Garrison, 18 W. L.R. 686.

II. The right; when lien exists.

(§ II—5)—WHEN EFFECTIVE AGAINST OWNER—MANITOBA MECHANICS' LIEN ACT.

Under the Mechanics' Lien Act, (Man.) the lien arises and takes effect against the owner from the commencement of the work or service.

Merrick v. Campbell, 17 D.L.R. 415, 24 Man. L.R. 446, 27 W.L.R. 836, 6 W.W.R. 722.

THE RIGHT—WHEN LIEN EXISTS—ACTION TO "REALIZE A LIEN"—CONDITIONS—MECHANICS' LIEN ACT, B.C.

An action to realize a lien under the Mechanics' Lien Act (B.C.), can be brought only when the money sought to be recovered has become payable and within 30 days after the filing of the lien; no action lies for the purpose of keeping the lien in esse where the due date is deferred beyond the time which is limited by the Act for actions to enforce a mechanics' lien, such cases not being provided for in the Act.

Champion v. World Bldg., 18 D.L.R. 555, 20 B.C.R. 156, 29 W.L.R. 299, 6 W.W.R. 1469.

SUBSTANTIAL PERFORMANCE OF CONTRACT.

Although an unimportant part of the contract remains unfinished, one who contracts to supply material or do work on a building is entitled to enforce a lien for the contract price less the cost of completing the contract.

Taylor Hardware Co. v. Hunt, 35 D.L.R. 504, 39 O.L.R. 85. [See also 36 D.L.R. 383.]

OWNER'S KNOWLEDGE OF WORK.

In an action to enforce a lien where the owner of the property did not contract for the work or improvements, it is incumbent upon the plaintiff, under s. 10 of the Mechanics' Lien Act (B.C.), to shew that the owner had knowledge of such works or improvements.

Baker v. Williams, 23 B.C.R. 124.

STATUTORY LIEN FUND—RIGHTS OF OWNER.

The statutory amount of payment which the owner may retain by virtue of s. 11 (1) of the Mechanics' Lien Act, R.S.S., c. 150, forms a fund available for the lienholders only, to which the owner cannot resort as security against or to make good any loss occasioned by the non-compliance of the contract. [Russell v. French, 28 O.R. 215; Rice Lewis v. Harvey, 9 D.L.R. 114, followed.]

Peart v. Battell, 23 D.L.R. 193, 8 S.L.R. 305, 8 W.W.R. 1159, 31 W.L.R. 956.

LANDS OF DIFFERENT OWNERS—"LIEN HOLDER"—WHO IS.

The Mechanics' and Wage Earners' Lien Act, R.S.M. 1913, c. 125, does not authorize the registration of one lien for one lump sum against the lands of different owners, although the work may have been done or the materials furnished under one contract for the building of houses on the lands of the different owners, unless, perhaps, in a case where the lien claimant did not know and had no means of ascertaining before filing his lien, that the lands were owned by different persons. [Fairclough v. Smith, 13 Man. L.R. 509; Oldfield v. Barbour, 12 P.R. 554, and Dunn v. McCallum, 14 O.L.R. 249, followed. Ontario Lime Ass'n v. Grimwood, 22 O.L.R. 17, distinguished.]

The expression "lien holder," in s. 33 of the Act, means a person having a lien which was valid at the time of commencing his action, so that when in an action commenced by a lien claimant, it is decided that he had no valid lien and no action was commenced within the time prescribed by s. 22 of the Act by any other person claiming a lien on the same property, all the liens upon it must fail. [Sear v. Woods, 23 O.R. 474, followed.]

Builders Supply Co. v. Huddlestone, 25 Man. L.R. 718.

RIGHT OF MINER AGAINST MINERAL CLAIM.

A miner may enforce a mechanics' lien against a mineral claim which has not been Crown granted. The 1910 amendment of s. 10 of the Mechanics' Lien Act has overcome the effect of the decision of the full court in Anderson v. Godsal, 7 B.C.R. 404.

Venness v. Stoddard, 9 W.W.R. 832.

UNREGISTERED FOREIGN COMPANY—SUPPLY OF COAL AS BASIS OF LIEN.

An unregistered foreign company is entitled to a mechanics' lien inasmuch as the enforcement of the lien does not involve the acquisition of holding of lands or any interest therein or the registration of any title thereto under the Land Titles Act within the meaning of subs. 2 of s. 11 of the Foreign Companies Ordinance. A person who supplies coal to a building contractor for generating steam for the purpose of hoisting material and to dry the building in course of construction may be entitled to a mechanics' lien.

Wortman v. Frid Lewis Co., 9 W.W.R. 812, 33 W.L.R. 119.

ILLEGALITY OF CONTRACT.

Making additions to a house of ill-fame with knowledge that they are intended to increase the immoral business, will defeat a contractor's right to a mechanics' lien therefor.

Miller v. Moore, 3 A.L.R. 297.

REGISTRATION OF GRANT FROM CROWN—MECHANICS' LIEN FILED AGAINST INTEREST OF PERSON OTHER THAN GRANTEE—WHETHER MECHANICS' LIEN FOLLOWS ON TITLE.

Upon the registration of a grant from the crown where a mechanics' lien is filed against the interest in the land of a person other than the grantee, the mechanics' lien should be followed on the title unless the grant shows on its face that it is a homestead grant in which case (unless the grant is to the personal representative of the person against whose possessory interest the mechanics' lien has been filed) the mechanics' lien should not be followed on the title.

Re Land Titles Act, [1919] 2 W.W.R. 39.

REQUEST OF OWNER—AGREEMENT OF SALE—COVENANT TO BUILD—LIEN FOR PREPARING WORK.

An agreement for the sale of land which contains a covenant binding the purchaser to erect certain works on the land at a certain cost and contains a covenant by the vendor, the owner, to remit a specified amount from the purchase price on the completion of said undertaking, is such a request in writing as gives a mechanics' lien arising from the erection of the said works general application under s. 6 of the Mechanics' Lien Act (B.C.), 1916, c. 154, and therefore the lien is not restricted to the increase in value of the premises by reason of such works. There is no lien under the Mechanics' Lien Act, R.S.B.C. 1911, c. 154, in respect to the cost of preparing for work to be done upon a site, although such work has been frustrated without fault of the contractor.

B.C.Granitoid Co. v. Dominion Shipbuilding, etc., Co., [1918] 2 W.W.R. 919.

REAL PROPERTY — CROWN LANDS — LIEN AGAINST INTEREST OF ENTRANT—CROWN GRANT TO ANOTHER PERSON—LIEN NOT FOLLOWING ON TITLE—DUTY OF REGISTRAR—PRINCIPLE AS TO REGISTRAR'S DISCRETION AS TO REGISTERED INSTRUMENT FOLLOWING ON SUBSEQUENT TITLES.

A mechanics' lien filed against the possessory interest of an entrant to Crown lands does not follow on the title if the Crown grant issues to another person. In such case the registrar has the right to register the grant and issue the certificate of title thereon clear of the mechanics' lien. It is a sound principle in registration that the registrar, having exercised his discretion in accepting for registration an instrument, should not subsequently exercise a further discretion as to whether the instrument should follow on subsequent titles. It does so as a matter of course until disposed of by a judicial tribunal or removed by act of the parties. But this does not apply to the case of a mechanics' lien filed before issue of the grant.

Re Land Titles Act, [1919] 1 W.W.R. 628.

(§ II—7)—"PRIVITY AND CONSENT" OF OWNER—CONTRACT WITH LESSEE.

To create a lien against the interest of an "owner," for work done and materials furnished with his "privity and consent," there must be something in the nature of a direct dealing between the contractor and the owner or person whose estate is to be charged; when the latter merely has knowledge that the work is being done or materials furnished, and silently assents thereto and benefits thereby, a lien is not thereby created against his interest. Such lien is not created for work done and materials furnished under a contract exclusively with a lessee of the property.

Eddy v. Chamberlain, 37 D.L.R. 711, 45 N.B.R. 261.

"OWNER"—"MORTGAGEE"—UNPAID VENDOR—PRIORITIES.

An unpaid vendor who advances funds to the purchaser to build upon the land is not an "owner" within the meaning of s. (c)

of the Mechanics' Lien Act (R.S.O. 1914, c. 140), so as to subject the land to mechanics' lien for work done and materials furnished under contracts with the purchaser; but by virtue of s. (2) of the Act, such vendor is deemed a "mortgagee" for the purpose of giving priority to the liens upon the increased selling value of the land caused by the improvements.

Marshall Brick Co. v. York Farmers Colonization Co., 36 D.L.R. 420, 54 Can. S.C.R. 569, affirming 28 D.L.R. 464, 35 O.L.R. 542.

WORK CONTRACTED BY LESSEE—REQUEST OF LESSOR.

Work contracted by a sublessee in pursuance of an agreement with his lessor authorizing him to build upon the land, constitutes a "request" on the part of the lessor within the meaning of s. 2 (e) of the Mechanics' Lien Act, R.S.O. 1914, c. 140, which extends the operation of the statute to the estate of any person at whose request work is done or materials furnished.

Orr v. Robertson, 23 D.L.R. 17, 34 O.L.R. 147.

ERECTION OF FIRE SPRINKLER UNDER LEASE —RIGHT OF LESSOR.

One who erects a fire sprinkler system under an agreement whereby the equipment is merely leased to the owner of the premises with a right to purchase, reserving the title and ownership thereto until paid in the lessor, is not precluded from claiming the statutory mechanics' lien against the premises of which the erection has been made part. [Chicago & Alton R. Co. v. Union, etc., Co., 109 U.S. 702, followed.]

U.S. Construction Co. v. Rat Portage Lumber Co., 25 D.L.R. 162, 25 Man. L.R. 793, 9 W.W.R. 657, 33 W.L.R. 191.

LANDLORD AND TENANT—IMPROVEMENTS UNDER CONTRACT WITH LESSEE—TRADE FIXTURES.

A mechanics' lien cannot be acquired under s. 11 of the Mechanics' Lien Act, Stat. Alta. 1906, c. 21, on demised premises for building or placing therein at the request of the tenant chattels or trade fixtures which he may remove at the expiry of his term. The right to a mechanics' lien on demised premises for making alterations therein under a contract with the lessee, is not limited by s. 11 of the Mechanics' Lien Act, Stat. Alta. 1906, c. 21, to such alterations as are beneficial to and which increase the landlord's interest in the property.

Roll & Co. v. MacLean, 13 D.L.R. 519, 6 A.L.R. 250, 25 W.L.R. 358, 5 W.W.R. 33.

MECHANICS' LIEN — BUILDING ERECTED BY LESSEE—LIABILITY OF "OWNER."

Limoges v. Scratch, 44 Can. S.C.R. 86.

WORK DONE AT INSTANCE OF LESSEES—KNOWLEDGE OF LESSOR—ABSENCE OF NOTICE DISCLAIMING RESPONSIBILITY.

Scratch v. Anderson, 16 W.L.R. 145.

(§ II—8)—RIGHTS OF CONDITIONAL VENDOR —CONFLICTING LIENS.

Where the title to furnaces sold is retained by a vendor until the payment of the price, the rights of such parties are governed by s. 9 of the Conditional Sales Act, R.S.O. 1914, c. 136, and such vendor cannot rank as a lienholder under the provisions of the Mechanics' and Wage Earners' Lien Act, R.S.O. 1914, c. 140.

Hill v. Storey, 25 D.L.R. 247, 34 O.L.R. 489.

INTEREST OF "OWNER"—VENDOR AND PURCHASER—REQUEST.

The lien given by s. 6 of the Mechanics' Lien Act, R.S.O. 1914, c. 140, attaches to the estate or interest of the "owner," as defined by s. 2 (e) of the Act, and does not include a purchaser of land whereon improvements were made prior to his taking possession without his request express or implied. [Orr v. Robertson, 23 D.L.R. 17, 34 O.L.R. 147, distinguished.]

Cut-rate Plate Glass Co. v. Solodinski, 25 D.L.R. 533, 34 O.L.R. 604.

TRUE OR REGISTERED "OWNER"—VENDOR AND PURCHASER.

The word "owner" in the Mechanics' Lien Act does not necessarily mean registered owner, and that any person having an interest in the land, whether registered or not, at whose request, etc., work has been done, is an owner as defined by the Act and must be made a party. The case of Jones v. Barnett, [1900] 1 Ch. 370, 69 L.J. Ch. 242, was considered and followed, inasmuch as deciding that a purchaser cannot obtain a good title when the court inadvertently deals with the property of one person under the supposition that it belongs to another, and without notice to the true owner.

National Mortgage Co. v. Rolston, 8 W. W.R. 630.

(§ II—9)—COMPLETION OF WORK BY CONTRACTOR'S CREDITORS — FURNISHING PROOF THAT NO OTHER LIENS ARE CHARGEABLE—RIGHTS OF LIENOR'S ASSIGNEE OR REPRESENTATIVE.

The nominee of the contractor's creditors who by agreement with the owner takes over the unfinished contract and completes the same on the contractor's default, with a stipulation that he shall be entitled to the same amount as would be coming to such contractor had he himself completed the work, will not be held in an action brought by him to enforce a lien, to a strict compliance with a clause of the original contract requiring the contractor, before action brought, to supply evidence that no other undischarged liens than his own remain a charge of the property, if in fact there were no such liens and the owner raising such objection had knowledge that the creditors other than the plaintiff had agreed with the latter not to file mechanics' liens. The representative of the creditors of a building contractor who contracts with the owner to take over, as the nominee of the

contractor, the work of completing the contract, and obtains from the owner a stipulation whereby all moneys earned or to be earned under the contract were to become payable to such representative in the place of the original contractor, is entitled to file a mechanics' lien for the amount due on completion of the work in like manner as would the original contractor, notwithstanding that there was no express assignment in writing of the right to such lien from the latter.

Aslip v. Monkman, 9 D.L.R. 97, 22 Man. L.R. 779, 22 W.L.R. 667, 3 W.W.R. 459.

ASSIGNABILITY—LAND TITLES ACT—REGISTRATION OF ASSIGNMENT OF MECHANICS' LIEN.

An assignment of a mechanics' lien in Saskatchewan should be registered under the Land Titles Act.

Re Registration of Assignment of Mechanics' lien, 5 W.W.R. 1191.

CONTRACTOR — DISMISSAL—COMPLETION OF WORK BY DAY-LABOUR—"VALUE OF THE WORK DONE"—METHOD OF ASCERTAINMENT.

Farrell v. Gallagher, 23 O.L.R. 130, 18 O.W.R. 446. [Leave to appeal refused, 2 O.W.N. 815.]

LAND TRANSFERRED BY OWNER TO CONTRACTOR — EQUIVALENT OF PAYMENT IN MONEY — EFFECT AGAINST CLAIMS OF LIEN-HOLDERS.

False Creek Lumber Co. v. Sloan, 17 W. L.R. 525.

BUILDING CONTRACT—AGENCY OF HUSBAND—POSTING OF PAY-ROLL—TERMINATION OF CONTRACT—FAULT OF OWNER—RIGHT OF CONTRACTOR TO PAYMENT FOR WORK DONE.

Sidney v. Morgan, 16 W.L.R. 123.

III. Priorities.

(§ III—10)—OTHER ENCUMBRANCES—INCREASE IN VALUE—ENFORCEMENT.

Under s. 5 (3) of the Mechanics' Lien Act (R.S.M. 1913) prior encumbrances have priority over the mechanics' liens only to the extent of the actual value of the premises at the time the improvements are made, and the lien-holders have priority as to the increase in value effected by the improvements the rights of the latter cannot be worked out in an action for the foreclosure of a vendor's lien or mortgage, but can only be given effect to in an action brought to enforce their liens.

Dure v. Roed, 34 D.L.R. 38, 27 Man. L.R. 417, [1917] 1 W.W.R. 1395.

MATERIALMAN—PURCHASER.

Under arts. 2013-2013L, C.C. (Que.), no delay is fixed for registration of the privilege of a supplier of materials, and the latter has no priority in respect of his hypothecary privilege over a purchaser of the land who registered his title prior to the registration of the privilege. [Brunswick v. Courval, 49 Que. S.C. 50, distinguished.] Emard v. Gauthier, 29 D.L.R. 315, 49 Que. S.C. 413.

PURCHASER WITHOUT NOTICE—"OWNER."

A purchaser of an unfinished building whose deed is registered prior to the registration of any mechanics' liens without actual notice thereof thereby acquires a priority by virtue of the Registry Act (R.S.O. 1914, c. 124), and takes the property free of the liens. Mere knowledge that building was going on upon the land does not amount to actual notice; nor can the purchaser be deemed an owner within the meaning of that part of s. 2 (c) of the Mechanics and Wage-Earners Lien Act (R.S.O. 1914, c. 140), which depends upon privity, consent or benefit, in order to charge the land with the liens. [Cook v. Koldoffsky, 28 D.L.R. 346, 35 O.L.R. 555; Marshall Brick Co. v. Irving, 28 D.L.R. 464, 35 O.L.R. 542; Cut-Rate Plate Glass Co. v. Solodinski, 25 D. L.R. 533, 34 O.L.R. 604; Orr v. Robertson, 23 D.L.R. 17, 34 O.L.R. 147, applied.]

Sterling Lumber Co. v. Jones, 29 D.L.R. 288, 36 O.L.R. 153.

EXECUTIONS — SECOND MECHANICS' LIEN — PRIORITIES.

Beaver Lumber Co. v. Quebec Bank, 42 D.L.R. 779, 11 S.L.R. 320, [1918] 2 W.W. R. 1052.

CLAIM OF LIEN FOR WORK AND MATERIALS—INCREASE IN SELLING VALUE OF LAND—WORK DONE FOR COMPANY IN POSSESSION OF LAND UNDER AGREEMENT FOR PURCHASE—TITLE TO LAND REMAINING IN VENDOR—VENDOR NOT ORIGINALLY MADE PARTY TO ACTION FOR ENFORCEMENT OF LIEN, BUT SERVED WITH NOTICE OF TRIAL—LIEN AS AGAINST VENDOR THEN AT AN END—APPEAL—COSTS.

Metals Recovery Co. v. Molybdenum Products Co., 17 O.W.N. 262.

(§ III—11)—DELAY IN FILING—INTERVENING LIENS.

Section 23 of the Mechanics' Lien Act (Sask.), as amended by s. 4, c. 38, of 1913, providing that the failure to file a lien or to commence action thereon within the statutory period shall not defeat the lien except as against liens registered by intervening parties meanwhile, does not create a priority in favour of intervening liens for work not performed and materials not furnished.

St. Pierre v. Rekert, 23 D.L.R. 592, 8 S. L.R. 416, 31 W.L.R. 909.

SUBCONTRACTORS AND MATERIALMEN.

A notice given by a subcontractor under s. 32 of the Mechanics' Lien Act cannot avail to give the subcontractor a priority over those who by virtue of s. 30 have priority over him, but who have given no notice under s. 32. A person who has contracted to do a certain specified part of a building contractor's work and to supply all the needed material therefor for one set sum can only rank in priority as a subcontractor

and not as a materialman under s. 30 of the Mechanics' Lien Act.

Wortman v. Frid Lewis Co., 9 W.W.R. 812, 33 W.L.R. 119.

SUBCONTRACTORS AND MATERIALMEN—WAGE EARNERS.

The special provision for priority of wage-earners introduced into the Act, whereby it is declared that as against wage-earners the percentage required to be retained by the owner to answer liens shall not be applied by the owner to the completion of the contract on the contractor's default nor to the payment of damages for noncompletion (s. 15) does not affect the other provisions of the Act regarding mechanics' liens generally; and it is not to be implied from such prohibition that the owner may in cases other than for wages so apply the statutory percentage towards the cost of completion as against the liens of materialmen or subcontractors in the event of the contractor's default.

Rice Lewis v. Harvey, 9 D.L.R. 114, 27 O.L.R. 630.

(§ III—13)—RIGHTS OF LIEN HOLDERS—UNREGISTERED PURCHASER—PRIORITIES—MECHANICS' LIEN ACT—R.S.B.C. 1911, c. 154.

The claim of a mortgagee in respect of advances made subsequently to the commencement of the work done by lien holders is postponed to the rights of the lien holders. The mortgagee as a subsequent incumbrancee might have been entitled to be given an opportunity in the lien action to redeem the lien holders had it applied for registration at once, but having neglected to do so until after the sale of the land in question, any such right has been lost.

National Mortgage Co. v. Rolston, 49 D.L.R. 567, 59 Can. S.C.R. 219, affirming 32 D.L.R. 81, 23 B.C.R. 384, [1917] 1 W.W.R. 494.

OVER MORTGAGE—"INCREASE IN VALUE" BY WORK—MORTGAGE MONEY NOT ADVANCED WHEN WORK COMMENCED.

The limitation of the priority of mechanics' liens over mortgages declared by the Mechanics' Lien Act (Alta), 6 Edw. VII. c. 21, s. 9, to the amount whereby the premises have been increased in value by the work, does not apply where no money was advanced by the mortgagee until after the commencement of the work for which the lien is claimed. Under the Act, a mechanics' lien attaches to the interest which is vested in the owner at the time the work is commenced, or to any interest which he may acquire during the progress of the work; and the lien will take priority over a mortgage upon which no money was advanced until after the commencement of the work, although the mortgage had been registered before that time.

Colling v. Stimson: Wainwright Lumber Co. v. Logan, 10 D.L.R. 597, 6 A.L.R. 71, 23 W.L.R. 789, 4 W.W.R. 597.

MORTGAGE.

Where a mortgage has been duly registered, advances made thereunder after mechanics' liens on the mortgaged property have arisen, but before their registration, take precedence of the liens. A mortgage having been held to have priority over liens, both upon the land and the improvements, a lien-holder cannot take away that priority by shewing that the work and materials increased the selling value of the property.

Warwick v. Sheppard, 35 D.L.R. 98, 39 O.L.R. 99.

PRIORITY OVER MORTGAGE — INCREASE IN VALUE.

A lien-holder for materials supplied and used in the construction of a building upon land subject to an existing mortgage is entitled to rank upon the increased value in priority to the mortgage in the proportion only that the value of the materials supplied by him exclusively bears to the whole cost of the building, and not for any part of the increase brought about otherwise. In computing this proportionate amount, no regard should be taken to amounts paid the lienholder on account before the action was brought.

Security Lumber Co. v. Duplat, 29 D.L.R. 460, 9 S.L.R. 318, 34 W.L.R. 1131, 10 W.W.R. 1270.

Under s. 9 of the Mechanics' Lien Act, R.S.B.C. 1911, c. 154, the value of the property before the lien attached is to be taken for the purpose of fixing the upset price for which the lienholder would have priority over a mortgagee as aainst the increase in value of the mortgaged premises by reason of the work and improvements, the latter, however, must be limited only to the extent to which the specific contract enhances the selling value and not for work or improvements by others under independent contracts; if no greater sum than the upset price is obtained at the sale the lienholder has no priority, and his only recourse is against the equity of redemption.

Champion v. The World, 27 D.L.R. 506, 22 B.C.R. 596, 34 W.L.R. 317, 10 W.W.R. 470.

Section 8 (3) of the Mechanics' and Wage Earners' Lien Act, R.S.O. 1914, c. 140, gives a lien priority over mortgages upon the increase in selling value of land by reason of work or service done thereon or materials supplied. S. 14 gives priority to a lien which has been registered or of which written notice has been given to the mortgagee upon the land itself, including the buildings and erections thereon, over all subsequent advances under a mortgage. The priority of an unpaid vendor is not forfeited by the substitution of a mortgage for the unpaid amount. Actual notice not in writing is not sufficient to give a lien the priority over mortgages provided under s. 14.

Cook v. Koldoffsky, 28 D.L.R. 346, 35 O.L.R. 555. [Applied in Sterling Lumber v. Jones, 29 D.L.R. 288.]

PRIORITY OVER MORTGAGEE—WHEN.

In the absence of evidence that the selling value of the land incumbered by a mortgage has increased by the work or materials, no lien attaches under s. 8 of the Mechanics' Lien Act, R.S.O. 1914, c. 140, upon such increased value, in priority to the interest of a mortgagee; nor will it warrant a sale of the mortgage to satisfy the statutory lien, even though subject to a first charge in favour of the mortgagee for advances made prior to the registration of the lien.

Cut-Rate Plate Glass Co. v. Solodinski, 25 D.L.R. 533, 34 O.L.R. 604.

MORTGAGE—PRIORITY OF LIENS.

McSporran v. Miller, 9 W.W.R. 81, 32 W.L.R. 392.

STATEMENTS OF CLAIM.

It is not essential to the preservation of a lien against a prior mortgagee, under s. 8 (3) of the Mechanics' and Wage Earners' Lien Acts (R.S.O. 1914, c. 140), that it shall be stated in the registered claim that it is against the mortgagee, inclusively or otherwise.

Whaley v. Linnenbank, 29 D.L.R. 51, 36 O.L.R. 361.

OVER MORTGAGE—PRIORITIES OVER MORTGAGE—REFERENCE.

Rat Portage Lumber Co. v. Hewitt, 6 D. L.R. 871, 22 W.L.R. 249.

PRIORITY OVER MORTGAGE—INCREASE IN VALUE.

Northern Trusts Co. v. Battell, 29 D.L.R. 515, 9 S.L.R. 103, 33 W.L.R. 738, 9 W.W. R. 1265.

PRIORITY OVER MORTGAGEE—WORK OF TAKING OUT ORE—MECHANICS' LIEN ACT, R.S.B.C. 1911, c. 154, ss. 9 AND 10.

Section 9 of the Mechanics' Lien Act does not give relief to lien holders as against prior mortgagees, unless, from the proceedings at the trial, the increase in the value of the mortgaged premises can be ascertained. Lien holders for work consisting entirely of the taking out of ore from a mine, cannot, except when it is strictly development work, enforce their liens as against a prior mortgagee.

Anderson v. Kootenay Gold Mines, 18 B. C.R. 643.

MORTGAGE—VALUE OF LAND.

In determining the value of a parcel of land upon which stands a portion of a house which has been, by mistake, built partly upon the parcel in question and partly on an adjoining lot owned by another person, for the purpose of adjudicating upon the respective rights of a mortgagee and a lienholder under subs. 3 of s. 5 of "The Mechanics' and Wage Earners' Lien Act," R. S.M. 1913, c. 125, no regard can be had to the fact that such other person would, if applied to, have consented to the removal of the house off his lot, and the priority of a mortgage on the lot in question over the lien of a workman, subsequently arising under the Act, for the cost of removing the house so as to place it wholly on the parcel in question, is limited to the actual value of such parcel with the part of the house upon it at the time he began the work, which value must be ascertained without reference to the subsequent removal. Rule 603 of the King's Bench Act affords no relief to the mortgagee in such a case or any foundation for a contention that the value should be ascertained by deducting the cost of removal from the value after removal.

Jack v. McKissock, 27 Man. L.R. 548.

PRIORITY OF MORTGAGE OVER LIEN—MECHANICS' AND WAGE EARNERS' LIEN ACT, R. S.M. 1913, C. 125, SS. 5 (3), 27, 35, 37—PARTIES TO ACTION—AMENDMENT.

When the plaintiff in an action to realize upon a mechanics' lien intends to dispute the right of a prior mortgagee to priority for more than the actual value of the land at the time the improvements were commenced, being the limit of such priority imposed by subs. (3) of s. 5 of "the Mechanics' and Wage Earners' Lien Act," R.S.M c. 125, it is not necessary to make the mortgagee a party to the action in the first place, but the notice of trial may, under s. 35 of the Act, be served upon the mortgagee and the question of priority and for what amount may be determined at the trial under s. 37 of the Act. [Bank of Montreal v. Haffner, 10 A.R. (Ont.) 592, affirmed in the Supreme Court. Cassel's Digest, p. 526, sub nom.; Bank of Montreal v. Worswick, and Larkin v. Larkin, 32 O. R. 80, distinguished on account of differences between the Ontario and Manitoba statutes.] Quaere, whether the onus is not thrown by our statute upon the mortgagee of showing what was the value of the land at the time of the commencement of the improvements. In this case the plaintiff had joined the mortgagee as a defendant to the action and in his statement of claim had expressly conceded priority for the whole amount of the mortgage. Held, that, unless the mortgagee could show that it had been induced to alter its position to its prejudice in consequence of that concession, the plaintiff should be permitted to amend, on proper terms as to costs and otherwise to claim the limitation of the mortgagee's priority as above.

Dominion Lumber & Fuel Co. v. Paskov, 29 Man. L.R. 325, [1919] 1 W.W.R. 657.

CLAIM OF LIENHOLDER UNDER MECHANICS' AND WAGE EARNERS' LIEN ACT, R.S.O. 1914, C. 140, S. 8(3)—LIEN UPON INCREASED VALUE IN PRIORITY TO MORTGAGE — REALIZATION OF LIEN — LIENHOLDER FORECLOSED UNLESS HE PROCEEDS TO SALE—RIGHTS OF MORTGAGEE—COSTS OF SALE.

Henderson v. Morris, 10 O.W.N. 34.

EQUITABLE MORTGAGE—INCREASED VALUE OF PROPERTY — PRIORITY OF LIENHOLDER — ADVANCES MADE BY MORTGAGEE AFTER DELIVERY OF MATERIAL, BUT BEFORE REGISTRATION OF LIEN.

Independent Lumber Co. v. Bocz, 4 S.L.R. 103, 16 W.L.R. 316.

(§ III—14)—VENDOR'S LIEN.

A vendor of land to whom a portion of the purchase price is due is to be treated as if mortgagee, so far as the Mechanics and Wage Earners Lien Act, R.S.O. 1914, c. 140, is applicable, despite the fact that the land has been conveyed to the purchaser, and mortgaged by him; a duly registered reconveyance to the vendor in payment of the unpaid purchase money, the vendor assuming the existing mortgage, has priority to any unregistered lien under the Act of which the vendor had no actual notice.

Charters v. McCracken, 29 D.L.R. 756, 36 O.L.R. 260.

DIFFERENT LIENHOLDERS.

The priority acquired by notice under s. 32 of the Mechanics' Lien Act (Alta.), is a priority only over other lienholders of the same class as fixed by s. 30, and does not interfere with the priority fixed by that section as between the different classes of lienholders.

Rendall et al. v. Warren, 21 D.L.R. 801, 8 W.W.R. 113.

MATERIAL FURNISHED AFTER WORK WAS COMPLETED — NOT USED IN BUILDING — SCHEME TO PRESERVE PRIORITY.

Renny v. Dempster, 2 O.W.N. 1303, 19 O.W.R. 644.

MECHANICS' LIEN ACT—DAMAGES.

Damages suffered by a contractor by reason of his being improperly deprived of his contract cannot properly be claimed in a proceeding under the Mechanics' Lien Act nor could such damages be a lien on the lands.

Seaman v. Canadian Stewart Co., 18 O.W.R. 56, 2 O.W.N. 576.

LIEN OF SUBCONTRACTORS—ENFORCEMENT—ABANDONMENT OF WORK BY CONTRACTOR —COMPLETION BY OWNER.

Ringland v. Edwards, 19 W.L.R. 219.

WORK DONE AND MATERIAL SUPPLIED—OWNER OF LAND.

Desrochers v. Crump, 17 W.L.R. 47.

IV. For what work or materials.

(§ IV—15)—ALL MATERIALS—TIME FOR FILING.

A mechanics' lien will attach for all materials supplied in the erection of a building although the time for filing has expired as to certain classes of material, ordered at a different time, where it is shewn that there was a prior agreement to purchase all material required for the building from such vendor.

Whitlock v. Loney, 38 D.L.R. 52, 10 S.L.R. 377, [1917] 3 W.W.R. 971.

OWNER'S KNOWLEDGE OR REQUEST—NOTICE DISCLAIMING WORK—FAILURE OF—SUPERINTENDENCE AS WORK WITHIN MEANING OF ACT.

Scratch v. Anderson, 33 D.L.R. 620, 11 A.L.R. 55, [1917] 1 W.W.R. 1340.

DELIVERY OF MATERIALS—SUFFICIENCY.

Building materials are sufficiently delivered as regards a building in course of erection, so as to satisfy the Mechanics' Lien Act (Alta.), 1906, c. 21, where, because of lack of storage room on the land, they were delivered in its immediate vicinity.

Canadian Equipment & Supply Co. v. Bell, 11 D.L.R. 820, 24 W.L.R. 415.

FOR CONVEYING MATERIAL TO STRUCTURE—STREETS IN UNDEDICATED PLAT—HIRE OF TEAMS AND DRIVERS.

A lien for conveying building materials to the land where they are to be used cannot be acquired under s. 6 of the Mechanics' Lien Act, R.S.B.C. 1911, c. 154. [Webster v. Real Estate Imp. Co. (Mass.), 6 N.E.R. 71, followed.] Labour performed in making streets, which have not been dedicated as public highways, in a tract of land being subdivided for the owner's profit, is not work done on public highways for which a lien is denied by s. 3 of the Mechanics' Lien Act, R.S.B.C. 1911, c. 154, but is lienable under s. 6 of the Act. One who furnishes a contractor with horses, waggons and drivers for the use on premises he is improving, is, under s. 6 of the Mechanics' Lien Act, R.S.B.C. 1911, c. 154, entitled to a lien for their hire.

Vannatta v. Uplands, 12 D.L.R. 669, 18 B.C.R. 197, 25 W.L.R. 85, 4 W.W.R. 1265.

WORK ON SEWER BELOW SEA LEVEL—LIEN ON.

One performing labour on a sewer extending below low-water mark into the sea is nevertheless entitled, under s. 6 of the Mechanics' Lien Act, R.S.B.C. 1911, c. 154, to a lien for his services on that portion of the sewer on which he performed labour.

Boker v. Uplands, 12 D.L.R. 133, 18 B.C.R. 197, 24 W.L.R. 768.

EXCAVATING FOR FOUNDATION OF BUILDING.

One who makes an excavation for the foundation of a building is entitled to a lien for his services under s. 4 of the Mechanics' Lien Act (Alta.), 1906, c. 21. [For Annotation on parties having right to a mechanics' lien, see 9 D.L.R. 105.]

Farr v. Groat, 12 D.L.R. 575, 6 A.L.R. 259, 24 W.L.R. 860, 4 W.W.R. 1097.

LOADING MATERIAL FOR TRANSPORTATION TO BUILDING—CONVEYING MATERIAL.

Labourers employed by a subcontractor to dig earth and load it on waggons for transportation to the place where it was used in improving other property are not entitled to a lien on such other property for their services under s. 4 of the Mechanics' Lien Act (Alta.), 1906, c. 21. Teamsters employed by a subcontractor in conveying material to a building in the course

of erection are entitled, under s. 4 of the Mechanics' Lien Act (Alta.), 1906, c. 21, to a lien thereon for their services.

Mylnzyuk v. Northwestern Brass Co., 14 D.L.R. 486, 6 A.L.R. 413, 5 W.W.R. 483, 27 W.L.R. 508.

MATERIALS WORKED INTO BUILDING.

One who delivers materials for use in a building under course of construction by a contractor, is not, after the latter's default and the taking over of the work by the property owner, entitled to a mechanics' lien for such of the materials as were subsequently worked into the building by the latter; the right to a lien under such circumstances being denied by s. 5 of the Mechanics' Lien Act (Alta.), 1906, c. 21.

Canadian Equipment & Supply Co. v. Bell, 11 D.L.R. 820, 24 W.L.R. 415.

RIGHT TO LIEN—ASSISTANT ARCHITECT.

An assistant architect is entitled, under s. 6 of the Mechanics' and Wage Earners' Lien Act (R.S.O. 1914, c. 140), to a lien for his "work" and "service" in the drawing of plans and the supervision and the direction of the construction of the building.

Read v. Whitney, 48 D.L.R. 305, 45 O. L.R. 377.

FOR DRILLING OIL—PROMISE TO PAY—STATUTE OF FRAUDS—MECHANICS' LIEN ACT (ALTA.), 1906, C. 21, S. 4.

Henshaw v. Federal Oil & Gas Corp., 28 D.L.R. 750, 34 W.L.R. 208, 10 W.W.R. 329.

LIEN FOR WAGES—CONTINUOUS PERIOD.

The wages claims of labourers which are given a special privilege under the Mechanics' Lien Act (Alta.), if for "not more than 6 weeks' wages," are the wages earned within a continuous period of 6 weeks counting backward from the last day's work, and do not include that part of the wages prior to such period which may be included in the wages for services at different times, spread over a larger time, but aggregating 6 weeks' wages or less.

Rendall et al. v. Warren, 21 D.L.R. 801, 8 W.W.R. 113.

STATUTORY LIEN FUND—HOW AFFECTED BY CONTRACT.

The fact that a contract provides that 20 per cent of the amount of the progress certificates should be retained by the owner and should be paid within 30 days from the completion of the work does not in any way affect the statutory obligation on the owner to conduct 20 per cent from any payments to be made by him in respect of the contract, namely 20 per cent out of the 80 per cent of the progress certificates, under s. 11 (1) of the Mechanics' Lien Act, R.S.S. c. 150.

Peart Bros. v. Battell, 23 D.L.R. 193, 8 S. L.R. 305, 8 W.W.R. 1159, 31 W.L.R. 956.

AMOUNT OF LIEN—PAYMENT BY INSTALMENTS—RIGHT OF DEDUCTION.

Under ss. 6, 10 of the Mechanics' and Wage Earners' Lien Act, R.S.O. 1914, c. 140, the rights of lienholders are measured by the amount "justly owing" by the owner to the contractor, and where an agreement provides payment by instalments, with the right to retain an amount as a drawback on the completion of the work, the lien accrues for the full amount of any instalment payable, subject to the owner's right of deduction in the event of the noncompletion of the whole contract.

Deldo v. Gough Sellers Investments, 25 D.L.R. 602, 34 O.L.R. 274.

CLAIMS OF WAGE EARNERS AND MATERIAL MEN — BUILDING CONTRACT — AMOUNT DUE BY OWNER TO CONTRACTOR—CLAIM FOR EXTRAS—AMOUNT REQUIRED TO COMPLETE BUILDING AFTER DISMISSAL OF CONTRACTOR—REPORT OF REFEREE—VARIATION ON APPEAL—COSTS.

Powell Lumber Co. v. Gilday, 9 O.W.N. 180.

AMOUNT DUE BY OWNER TO CONTRACTOR—LIENS OF MATERIALMEN AND WAGE EARNERS—DISMISSAL OF CONTRACTOR—AMOUNT NECESSARY TO COMPLETE WORK—FINDINGS OF REFEREE—APPEAL.

Powell Lumber Co. v. Hartley, 9 O.W.N. 132.

MATERIALMAN—TIME FOR REGISTERING LIEN — MECHANICS' AND WAGE EARNERS' LIEN ACT, R.S.O. 1914, c. 140, s. 22 (2) —TIME WHEN "LAST MATERIAL" FURNISHED.

By s. 22 (2) of the Mechanics' and Wage Earners' Lien Act, R.S.O. 1914, c. 140, "a claim of lien for materials may be registered before or during the furnishing or placing thereof, or within 30 days after the furnishing or placing of the last material so furnished or placed." The plaintiff supplied lime to the contractor for the brickwork of a building being put up for the defendant. From the 5th November, 1913 till the 23rd December, 1913, there were items in the plaintiff's account for lime supplied on nearly every day; but after the last date there was no item until the 26th January, 1914, when two bags of lime were delivered, worth 85 cents. The plaintiff's claim for lien was not registered until the 25th February, 1914:—Held, upon the evidence, that the lime delivered on the 26th January, was for work done under the contract between the contractor and the defendant. That the validity of the claim for lien was not affected by the fact that the last item, by reference to which the registration was in time, was a small one, and that the material was furnished some time after the bulk. The amendment of the Act in 1896, by 59 Vict. c. 35, s. 21 (2), removed any difficulty in this respect. Review of the authorities before and since the amendment. That the plaintiff's lien was not confined to the 85 cents, but comprised all the items of his account. It is now immaterial whether the material is furnished under one contract or more; and the right is independent of the completion of the work.

Hurst v. Morris, 32 O.L.R. 346.

One who contracts, with an owner of land who intends building a house, to purchase the materials and pay the workmen and that he should receive $2 per day during the construction, is a builder within the meaning of art. 2013 et seq. C.C. (Que.), and, on observing the prescribed formalities, acquires for what is due him the privilege accorded by that article. If he contracts directly with the owner as if he were an independent contractor he is not obliged to give the notice required by art. 2013. A house, even when leased and occupied by the lessee, does not "become ready for the use to which it is destined" within the meaning of art. 2013 (b) so long as there is work to be finished, such as joining work and painting. The delay of 30 days for registering the builder's preference or privilege only begins to run from the completion of such work. The builder is not subject to art. 2013 (i), par. 2, nor bound to take legal proceedings within 3 months. Such condition is only required of the one who supplies the materials.

Letellier de St. Just v. Blanchette, 21 Que. K.B. 1.

PUBLIC ROADS.

A labourer who works on the macadamizing of a public road has not a lien on the road, it being a part of the public domain.

Desrosiers v. Leedham, 49 Que. S.C. 33.

MECHANICS' LIEN ACT—LABOURER'S LIENS—SECTION 10 — "NOT EXCEEDING THE WAGES OF SIX WEEKS"—SECTION 17—PAYMENTS BY OWNER WITHOUT DELIVERY OF RECEIPTED PAY ROLL—DEFEATING PROTECTION TO OWNER UNDER S. 32—HAULING MATERIAL—WHETHER WORK IN QUESTION GIVING RISE TO CLAIM FOR WAGES OR AS SUBCONTRACTOR.

The wages "not exceeding the wages of six weeks or a balance equal to his wages for six weeks" for which a labourer is given an absolute lien under s. 10 of the Mechanics' Lien Act (Alta.), means wages earned within a continuous period of six weeks counting backwards from the last day's work (interpretation of similar expression by Beck, J., in Rendall, Mackay v. Warren, 21 D.L.R. 801, accepted dubitante). The provision in s. 17 of the Act against payment by the owner without delivery by the contractor of receipted pay-roll as by that section required means that an owner who makes payments to the contractor without satisfying himself, by the method provided, that all wages have been paid, does so at his own risk and if, as a result of such payments, there is not enough in his hands to meet the wages over the six weeks' wages for which an absolute lien is given, he cannot avail himself of the protection given to him by s. 32 which limits his liability except for these six weeks' wages to the sum owing by him to the contractor at the time of the receipt by him of the written notice of the lien and the amount thereof. A claim for hauling materials to the building sites to be paid for in a lump sum and not done by the claimant himself but by others hired or sent by him, the price including the services of his horses and equipment, the claimant being his own boss as to the manner in which the work is to be done, is not a claim for wages, but a claim as a subcontractor. [Mylnzyuk v. Northwestern Brass Co., 14 D.L.R. 486, 6 A.L.R. 413, holding that teamsters employed by a subcontractor in conveying material to a building in the course of erection are entitled to a lien thereon for wages, approved and distinguished.] S. 13 of the Act applied to protect a labourer who had done his last work more than 35 days before his lien was filed.

Stafford v. McKay, [1919] 2 W.W.R. 280.

PLEADING—LIEN CLAIMED FOR PLOUGHING AND BREAKING—QUESTION AS TO ACT APPLYING TO SUCH WORK—DEFENCE RAISING POINT OF LAWS—ORDER STRIKING OUT PORTIONS OF STATEMENT OF CLAIM ON GROUND THAT ACT DOES NOT APPLY—APPEAL FROM ORDER ALLOWED.

Jordan v. Haugerud, [1919] 1 W.W.R. 506.

(§ IV—17)—ARCHITECTS' SERVICES.

Fripp v. Clark, 14 D.L.R. 918, 18 B.C.R. 216, 4 W.W.R. 912.

ARCHITECT—COMPLETION OF BUILDING.

An architect has a lien on the increased value given to an immovable property by the buildings thereon elected in accordance with his plans and specifications, provided he had his lien registered within 30 days from the date at which such buildings became fit for the use intended for them, although the architect is not mentioned in art. 2013 C.C. (Que.). A building has not become fit for the use intended for it, according to the terms of art. 2013b C.C. (Que.) as long as any work in it is to be done, even if it was inhabited by its owner, who had installed in it a bar for his hotel.

Brunswick Balke Collender Co. v. Racette, 49 Que. S.C. 50.

LIEN OF ARCHITECT—RIGHT OF ASSIGNEE TO ENFORCE—POSTING OF PAY ROLL.

Sickler v. Spencer, 19 W.L.R. 557.

(§ IV—24)—IN GETTING OUT LOGS.

The Woodman's Lien Act, 10 Edw. VII. (Ont.) c. 70, is not in force in any of the counties of Ontario, but only in the districts. Ss. 3, 6, 15, of the Woodmen's Wage Lien Act, 10 Edw. VII. (Ont.) c. 70, providing a lien for the performance of labour on "logs, cordwood, timber, cedar posts, telegraph poles, railroad ties, tanbark, pulpwood, shingle bolts and staves, or any of them . . . " is in derogation of the common law, and under strict construction, applies only to "railroad ties" manufactured or hewn in the woods, or for the work in getting the timber out of the forest about to be cut and before their arrival at the sawmill, but not when sawn into

lumber and made into railroad ties in the defendant's sawmill.

White v. Sandy Lake Lumber Co., 48 C. L.J. 25.

(§ IV—27)—MATERIAL FOR CONSTRUCTION OF BUILDING—CONTRACTOR INSOLVENT—MECHANICS' LIEN ACT (ALTA.)—MATERIAL ON ADJOINING PROPERTY—MATERIAL NOT USED—AFFIDAVIT IN SUPPORT.

Trussed Concrete Steel Co. v. Taylor Engineering Co., 46 D.L.R. 663, [1919] 2 W. W.R. 123.

(§ IV—28)—MATERIAL ON LAND.

The general lien under s. 6 of the Mechanics' and Wage Earners' Lien Act (Ont.) and the special one in the nature of a vendor's lien upon the material itself, depend upon the placing upon the land to be affected of the material in question. Proximity to the land is not enough; it must be on it, so that in fact or in contemplation of law the value of the land itself is enhanced by its presence. [Ed. Note:—By 8 Geo. V., c. 29, s. 1 (Ont.), assented to March 26th, 1918, s. 6 of the Mechanics' and Wage Earners' Lien Act, R.S.O. 1914, c. 140, is amended by adding after the word "upon" in the eighteenth line thereof the words "or adjacent to."]

Milton Pressed Brick Co. v. Whalley, 42 D.L.R. 395, 42 O.L.R. 369.

CONTRACTOR FURNISHING LABOUR AND MATERIALS FOR FIXED SUM—WORK DONE UNDER PROFIT-SHARING ARRANGEMENT.

Gidney v. Morgan, 16 B.C.R. 18.

V. To what property attaches.

(§ V—30)—"OWNER"—HOMESTEAD.

A homestead entrant is an "owner" within the meaning of s. 4 of the Mechanics' Lien Act (Sask.), and a materialman is entitled to file a lien against the homestead for material furnished.

Beaver Lumber Co. v. Miller (Sask.), 32 D.L.R. 428.

COAL MINING—OWNER'S REQUEST—LEASE.

No lien will attach under secs. 4, 11, of the Mechanics' Lien Act (Alta.) 1906, c. 21), to bind the owner of land, for work performed in mining coal under a lease, at the request of the lessee, not of the owner or for his benefit.

Wester v. Jago, 23 D.L.R. 617, 11 A.L.R. 52, [1917] 1 W.W.R. 1338.

OWNER—POSSESSION UNDER UNREGISTERED CROWN GRANT.

Actual possession under a grant from the Crown, coupled with a statutory right to register the grant, and thereupon to become the owner in fee, creates an estate or interest upon which a mechanics' lien may attach.

Dorrell v. Campbell, 32 D.L.R. 44, 23 B. C.R. 500, [1917] 1 W.W.R. 500.

INTEREST OF "OWNER"—WORK AT OTHER'S REQUEST—ASSUMPTION OF LIEN.

Under s. 2 (3) of the Mechanics' Lien Act, R.S.S. 1909, c. 150, a mechanics' lien can only attach upon the estate or interest of the person at whose request and upon whose behalf and for whose direct benefit the work is done; a lien which appears to be for work done at the instance of other persons, without indicating that the work was done for the "owner" of the property to be charged in incurably defective and the owner's subsequent undertaking to assume such lien is not binding on him.

Northern Plumbing & Heating Co. v. Greene, 27 D.L.R. 410, 34 W.L.R. 293, 10 W.W.R. 283.

MONEY OWING TO CONTRACTOR.

The effect of ss. 37 to 40 of the Mechanics' Lien Act (Alta.), 1906, c. 21, is to constitute the moneys owing to a contractor for getting out timber and logs, a specific fund, on which the workmen and labourers have a lien for wages, with an equitable as well as statutory legal remedy in regard thereto.

Pomerleau v. Thompson, 16 D.L.R. 142, 5 W.W.R. 1360, 27 W.L.R. 254.

INCREASED SELLING VALUE OF LAND—RIGHT OF VENDOR.

The "increased selling value," within the meaning of the Mechanics' Lien Act (Sask.), which results from the erection of a building, is the difference between the value of the land without the building and the amount for which both land and building may be sold. Where the property has a potential value, such as that which arises from its possibilities as a future industrial site, the "increased selling value" cannot be ascertained without a sale. A lien holder under the Act has a right to pay off the unpaid purchase money under an agreement for sale to the same extent as he would have had if the vendor's claim were that of a mortgagee. [Dure v. Roed, 34 D.L.R. 38, followed.] Where land has a potential value as a future business site, and is subject to a mechanics' lien for material used in erecting a building thereon, the proper method of determining the increased selling value occasioned by the building, is to ascertain the value of the property without the building, and then sell the whole property.

Whitlock v. Loney, 38 D.L.R. 52, 10 S.L. R. 377, [1917] 3 W.W.R. 971.

SQUATTER ON CROWN LAND—AFFIDAVITS—SUFFICIENCY.

Where a squatter on Crown land accepts work and materials applied to the erection of a building thereon, he holds himself out to be the owner of the land within the meaning of the Mechanics' Lien Act (B. C.) and in action under the Act to enforce a lien will not be permitted to escape liability on the ground that he has no interest in the land. Certain irregularities in affidavits of a mechanics' lien held not to render the affidavits insufficient.

Macdonald v. Hartley, [1918] 3 W.W.R. 910.

INSTALLATION OF WATER SYSTEM—PROPERTY AFFECTED BY LIENS—LAND ON WHICH HOUSE SITUATE.

A mechanics' lien under the Mechanics' Lien Act (Alta.), s. 4, is maintainable for installing a water system in a dwelling house as against the land occupied or enjoyed therewith and which was specified in the mechanics' lien which was registered, although the parcel of land upon which the house itself was situate was not included in the registered claim of lien its omission therefrom operated only as a relinquishment of part of the security, and did not have the effect of extinguishing the remainder of it.

Jackson Water Supply Co. v. Bardeck, 21 D.L.R. 761, 8 A.L.R. 305, 8 W.W.R. 468, 31 W.L.R. 151.

INTEREST OF REGISTERED OWNER—PURCHASE OF LAND FOR ERECTION OF CHURCH.

The interest of the registered owner of land upon which a church has been erected by a contractor pursuant to a contract with the trustees for an unincorporated church congregation, who held under an agreement for sale from the owner, is chargeable with a lien in the contractor's favour, where the owner has not given the notice required by s. 11 of the Mechanics' Lien Act (Alta.). The fact that the contractor was a member of the congregation and knew of the interest of the various parties in the land does not cut down his right of lien. Where the contractor is entitled to a quantum meruit a fair and reasonable sum to compensate him for the work undertaken and done and for the responsibility involved in the doing of it should be added to the actual cost of it to him.

Rohl v. Pfaffenroth, 31 W.L.R. 197.

Failure to complete a building in accordance with the specifications in a building contract precludes recovery of the contract price and the enforcement of a mechanics' lien thereon.

Simpson v. Rubeck, 3 O.W.N. 577, 21 O.W.R. 260.

BUILDING CONTRACT—PAYMENT OF BUILDERS BY PERCENTAGE ON TIME AND MATERIAL—APPLICATION TO MATERIAL FURNISHED BY BUILDING OWNER—REGISTRY OF LIEN VACATED ON PAYMENT OF AMOUNT CLAIMED INTO COURT—JUDGMENT IN ACTION TO ENFORCE LIEN—DECLARATION OF LIEN—PRINCIPAL AND AGENT SUED TOGETHER — PERSONAL JUDGMENT AGAINST BOTH—ELECTION TO HOLD ONE — COUNTERCLAIM — DAMAGES FOR BREACH OF CONTRACT TO FINISH IN A PARTICULAR TIME—CONTRADICTORY EVIDENCE — FINDING OF COUNTY COURT JUDGE — APPEAL — COSTS — MECHANICS' AND WAGE EARNERS' LIEN ACT, SS. 27 (4), 42.

Thomas v. Roelofson, 13 O.W.N. 201.

LIEN OF MATERIALMEN—OWNERS—STATUS OF ASSIGNEE.

The owners of certain land were putting up a building thereon. B. and T. were the contractors, and the plaintiffs supplied material to them, for which they claimed a lien upon the land, under the Mechanics' Lien Act, R.S.S. 1909, c. 50. The plaintiffs' registered claim of lien was (by mistake) "upon the estate" of B. and T. in the land, instead of upon the estate of the owners of the land. B. and T. made a general assignment to a trust company for the benefit of their creditors; and the plaintiffs brought this action (to enforce their lien) against the owners of the land and the trust company as assignee of B. and T.:—Held, that the trust company had a status to question the mechanics' lien claimed by the plaintiffs. That the plaintiffs had a valid lien, notwithstanding the mistake in naming the contractors as owners. Sections 4, 17, 19 of the Act considered. [Barrington v. Martin, 16 O.L.R. 635, followed.] The claim of lien substantially complied with s. 17; and no evidence was adduced of any prejudice resulting from the failure to name the actual owners of the land. Semble, that the lien was supportable upon the ground that B. and T. were the owners of an interest in the land (s. 2, subs. 3) by virtue of their lien for at least the same amount as that claimed by the plaintiffs.

Nobbs v. C.P.R. Co., 27 W.L.R. 664.

(§ V—32)—CONSOLIDATION OF LIENS.

The provisions of the Mechanics' Lien Act (C.S.N.B. 1903, c. 147) although allowing any number of lien holders to be joined in one suit do not enable a lien holder to consolidate liens against several different buildings. Each individual building must bear the burden of its own construction.

O'Brien v. Fraser, 41 D.L.R. 324, 45 N. B.R. 539.

SEMIDETACHED ERECTION—JOINT OR SEVERAL CONTRACT — OFFER AND ACCEPTANCE — "OWNER'S REQUEST AND BENEFIT."

A contractor's offer to build a pair of semidetached houses on two adjoining lots, owned by different persons, naming separate terms for each house but addressed to both owners together, implies a distinct acceptance by each of them, and the acceptance by one does not create a joint contract binding on both as subjecting both lots to a mechanics' lien for plumbing materials furnished for both houses nor can the interest of the accepting owner be charged for materials furnished on the adjoining lot not at "his request or for his direct benefit," within the meaning of s. 2 (c) of the Mechanics and Wage-Earners Lien Act, R.S.O. 1914, c. 140. [Deegan v. Kilpatrick, 54 App. Div. N.Y. 371, distinguished.]

Campaigne v. Carver, 27 D.L.R. 76, 35 O.L.R. 232.

The lien may also attach against several pieces of property as one individual claim; the fact that the houses are subsequently divided between different owners cannot impair the lien, which, under s. 4 (2) of

the Mechanics' Lien Act (R.S.M. 1913, c. 125), becomes effective from the time of the commencement of the work.

Polson v. Thomson, 29 D.L.R. 395, 26 Man. L.R. 410, 34 W.L.R. 745, 10 W.W.R. 865.

SEPARATE LOTS—"OWNER."

A materialman is not entitled under the Mechanics' Lien Act, R.S.S., 1909, c. 150, to register as one individual claim, a lien for the amount due for materials supplied by him to the contractor, against all the lands jointly of the owners of different parcels, who had made separate contracts with the contractor for the erection of houses on their respective parcels; nor do they have such interest in one another's land as "owners" within the meaning of s. 2 (3), so as to charge the other's land for materials furnished at the owner's request or benefit.

Security Lumber Co. v. Plested, 27 D.L.R. 441, 9 S.L.R. 183, 34 W.L.R. 352, 10 W.W.R. 280.

CLEARING OF TOWNSITE—EXTENT OF LIEN.

The lien for work done in clearing a townsite consisting of several tracts extends to the whole land benefited by the work within the meaning of s. 6 (c) of the Mechanics' Lien Act (B.C.), except whatever may be excluded from it by s. 3, as being "a public street or highway."

Beseloff v. White Rock Resort Dev. Co., 23 D.L.R. 676, 22 B.C.R. 33, 8 W.W.R. 1338, 32 W.L.R. 73.

SEPARATE LOTS—TO WHAT PROPERTY IT ATTACHES—SEPARATE LOTS — INDIVISIBLE CONTRACT.

Barr v. Percy, 7 D.L.R. 831, 21 W.L.R. 236.

PROOF OF LIEN MADE IN ACTION OF ANOTHER LIEN-HOLDER—CLAIM AGAINST AN ADDITIONAL PARCEL OF LAND — BUILDING PARTLY ON TWO PARCELS—VALIDITY OF LIEN—MULTIPLICITY OF ACTIONS—CONSOLIDATION — STATEMENT OF CLAIM — SERVICE—EXTENSION OF TIME.

Sheppard v. Davidovitch, 10 O.W.N. 159.

(§ V—34)—SCHOOL BUILDINGS.

Public school buildings and the lands upon which they are erected are subject to the provisions of the Mechanics and Wage-Earners Lien Act, R.S.O. 1914, c. 140, s. 2. [Hazel v. Lund, 25 D.L.R. 204; Connely v. Havelock School Trustees, 9 D.L.R. 875, followed.]

Benson v. Smith, 31 D.L.R. 416, 37 O.L.R. 257.

SCHOOL PROPERTY.

School trustees are within the meaning of the word "owner" in s. 8 of the Mechanics' Lien Act (B.C.), and the lien is enforceable against school property, notwithstanding the provisions in s. 3 of the Act making it inapplicable to any public work carried on by a municipal corporation or the express exemption of school property from sale under execution contained in the School Act.

Hazel v. Lund, 25 D.L.R. 204, 22 B.C.R. 264, 32 W.L.R. 818, 9 W.W.R. 749.

MUNICIPAL PROPERTY—INDUSTRIAL SITES—FAILURE TO GIVE NOTICE DISCLAIMING LIABILITY.

Lands agreed to be conveyed by a city to a purchaser buying same as an industrial site upon his building and equipping a factory and performing certain conditions as to the operation of the factory are not exempt from having a mechanics' lien enforced against the city's title for the cost of the building under the Mechanics' Lien Act (Alta.), if the city has failed to post up the notice repudiating responsibility under s. 11 of the Act. [Limoges v. Scratch, 44 Can. S.C.R. 86, applied.]

Revelstoke Saw Mill Co. v. Alberta Bottle Co., 21 D.L.R. 779, 7 W.W.R. 1002, 30 W.L.R. 312. [Affirmed in 9 A.L.R. 155.]

PUBLIC SCHOOL PROPERTY.

Connely v. Havelock School Trustees, 9 D.L.R. 875, 41 N.B.R. 374, 11 E.L.R. 473.

(§ V—38)—MECHANICS' AND WAGE-EARNERS LIEN ACT — R.S.O. 1914 c. 140 — NOT ENFORCEABLE AGAINST DOMINION RAILWAY.

A lien under the Mechanics' and Wage-earners' Lien Act, R.S.O. 1914, c. 140, cannot be enforced against a railway company incorporated under Dominion Act. [Crawford v. Tilden, 14 O.L.R. 572, followed.]

Johnson v. C.N.R. Co., 47 D.L.R. 75, 24 Can. Ry. Cas. 294, 44 O.L.R. 533, affirming 43 O.L.R. 10 on this point.

VI. Of subcontractors and materialmen.

(§ VI—45)—CLAIMS OF MATERIALMEN — STATUTORY FUND—APPLICABILITY.

The Mechanics and Wage-Earners Lien Act (R.S.O. 1914, c. 140, s. 12), requiring the owner to create a fund by deducting 20 per cent from any payment to be made by him in respect of a contract, for the protection of those who supplied materials to the contractor, does not apply to a contract under which nothing was payable by the owner to the contractor—as where during the progress of the work the owner had paid the contractor more than the value of the work done and the work as a whole was never completed: under such circumstances the claims of the material-men are not enforceable against the owner.

Burton v. Hookwith, 48 D.L.R. 339, 45 O.L.R. 348.

RIGHT OF SUBCONTRACTOR—TERMS OF PRINCIPAL CONTRACT — WAIVER — NONCOMPLETION OF WORK—HINDRANCE—VALUE OF WORK DONE.

Taylor Hardware Co. v. Hunt, (Cochrane Hardware Co.'s Claim), 36 D.L.R. 383, 39 O.L.R. 90. [See also 35 D.L.R. 504.]

Where the assignee of an architect superintended for the defendant the work of constructing a building, brought action to recover the money due for the architect's

services, and to enforce payment thereof by filing a lien for the sale and building, it was held, that the defendant should have raised in the pleadings the objection that the architect had not posted upon the building or delivered to the owner a receipted payroll pursuant to s. 15 of the Mechanics' Lien Act (B.C.), or led evidence upon that point. Therefore, that defence was not open. Held, also, that, the lien being assignable, every remedy for its enforcement went with it. Held, further, upon the facts, that there was a sufficient substantial performance of the contract to entitle the architect or his assignee to a lien, notwithstanding that some portion of the material contracted for had not been supplied by one of the contractors at the time he received his final certificate from the architect.

Sickler v. Spencer, 17 B.C.R. 41.

OF MATERIALMEN—QUEBEC LAW—REGISTRATION—PRACTICE.

By the statute of 1904, 4 Ed. VII., c. 43, the legislature of Quebec has explicitly given to the supplier of materials a right of privilege, by adding to arts. 2013 and 2013a, C.C. (Que.), the words "the supplier of materials," and consequently the latter has now a privilege on the increased value and not only an hypothec on the whole property. Since the passing of that statute, the supplier of materials is one of the privileged creditors by art. 2013, which declares a lien for the privilege as for the other privileges created by art. 2013. Under art. 2013, the creditors' privilege mentioned in art. 2013 (which includes the supplier of materials privilege) "dates only from the registration within the proper delay;" in order to fix that delay, one has to look for it by analogy in arts. 2013b and 2013c, and that delay must accordingly be the same one, namely, thirty days after the building is completed. The obligation imposed by law to the supplier of materials to preserve his right and privilege of notifying the owner, is sufficiently fulfilled when, before delivering the materials, the supplier obtains delivery receipts signed by the owner or by his authorized employees. Held, from the deeds filed, that the notices required by law have been properly given; such notices could be legally given by the defendant, the supplier of materials, to the plaintiffs' vendor during the whole course of the building as well before as after the plaintiffs' deed of acquisition; the defendant was not bound to register his privilege before the registering of plaintiffs' title; the defendant has notified the plaintiffs' vendors of the registering of his privilege and he has also notified the plaintiffs themselves; and finally, at the time of the institution of the present action, the defendant was still within the delays required by law to claim his said privilege.

Pacaud v. Limoges, 24 Rev. de Jur. 4. [Affirmed, 56 Que. S.C. 242.]

NOTICE—MUNICIPALITY—POWERS OF OFFICERS.

The secretary-treasurer of a municipality who, in order to give effect to a resolution passed by the council ordering him to "bear in mind a notice" of privilege received from a supplier of materials, writes a letter to that creditor that "the city will retain for you the sum of $1,500," and subsequently informs that creditor that he has been instructed by the council to see "that a remittance is sent you on the next estimate filed," exceeds his powers and does not bind the municipality. If such creditor's privilege subsequently becomes null for lack of formalities, he has no recourse against the municipality, as the letters from the secretary-treasurer have created no legal relation between them. In a case where a garnishment becomes void owing to the creditor failing to take action within the three months following the notice (art. 2013i, C.C. Que.), the owner is free from the obligation imposed on him by art. 2013h, of retaining, on the price of the building contract, an amount equal to that of the privileged claim.

Noiseux v. Lachine, 24 Rev. Leg. 491.

(§ VI—46)—MATERIAL-MEN—INTERVAL BEFORE SUPPLY OF EXTRAS—TIME FOR FILING LIEN.

Where the material-man has contracted to supply all of a certain class of supplies (e.g., the hardware) required in the construction of a particular building, as mentioned in the specifications, and the material-man supplies not only goods which were mentioned in the specifications, but further materials which were contemplated by his contract as extras or additions, for the amount of which the fixed price was subject to increase, the lien for the entire bill is not lost by the lapse of the statutory period for filing liens between the last delivery of that portions of the goods, the class and quantities of which were shewn in the specifications, and the later delivery of the extras; the lien in such case is in time if filed within the statutory period following the last delivery of extras.

Flett v. World Construction, 15 D.L.R. 628, 19 B.C.R. 73, 26 W.L.R. 612; 5 W.W.R. 1127.

CONTRACTOR'S DEFAULT.

A subcontractor supplying materials is not entitled to claim under the provisions of the Mechanics' Lien Act (R.S.M. 1913, c. 125, ss. 4, 7, 9), where, owing to the contractor's default, there is no "sum justly due or payable" to the contractor by the owner.

Wilks v. Leduc & Toronto General Trusts, 30 D.L.R. 792, 27 Man. L.R. 72, [1917] 1 W.W.R. 4.

EXTENT OF SUBCONTRACTOR'S LIEN.

Under the Mechanics' Lien Act, R.S.B.C. 1911, c. 154, the lien of a subcontractor will attach when he has completed his contract, or if the contract provides for prog-

ress payments on account, a lien would attach for the amount of each instalment as it became due; and in the absence of evidence that either the whole or some part of the contract price was due or payable to the subcontractor at the time of payment by the owner to the principal contractor of the only sum which accrued due to the latter before his abandonment of the contract, the subcontractor cannot rely upon such payment to establish his lien. [Turner v. Fuller, 12 D.L.R. 255, 18 B.C.R. 69, and Rosio v. Beech, 9 D.L.R. 416, 18 B.C.R. 73, applied.]

Nepage v. Pinner, 21 D.L.R. 315, 21 B. C.R. 81, 8 W.W.R. 322, 30 W.L.R. 720.

EXTENT OF SUBCONTRACTORS' LIENS—EXCAVATION AND CLEANING UP.

Where the contract work both with the principal contractor and the subcontractor for excavating expressly included the cleaning up of the debris on the completion of the building, and the owner called upon the principal contractor to do it before taking over the building and the latter replied that he would have the subcontractor do it, the subcontractor's lien for the excavation work will be kept alive by the cleaning up done by the latter in good faith in fulfilment of his subcontract although his last prior work (the excavating) was done more than five months before.

Foster v. Brocklebank, 22 D.L.R. 38, 8 W.W.R. 464.

LABOURER'S RIGHT TO LIEN.

A subcontractor is not a "labourer" under the Mechanics' Lien Act (Alta.), so as to acquire as to labour done as part of the contract, the special privileges given by that Act to labourers.

Rendall et al. v Warren, 21 D.L.R. 801, 8 W.W.R. 113.

SUBCONTRACTOR—TIME FOR FILING LIEN.

Under a mechanics' lien statute enabling claims for liens by contractors or subcontractors to be registered within 30 days after the completion of "the contract," a subcontractor is to register his lien within 30 days after the completion of his contract with the principal or superior contractor.

Merrick v. Campbell, 17 D.L.R. 415, 24 Man. L.R. 446, 27 W.L.R. 836, 6 W.W.R. 722.

WHEN ACCRUING.

The lien of a subcontractor does not attach under the Mechanics' Lien Act (B.C.) until he has completed his contract, or until, if the contract provides for interim payments on account, such a payment becomes due. [Nepage v. Pinner, 21 D.L.R. 315, followed.]

Braden v. Brown, 24 B.C.R. 374, [1917] 3 W.W.R. 906.

WORK INCLUDING MATERIALS AT LUMP SUM.

A subcontractor at a lump sum for painting work, including the supply of the necessary materials for that purpose, is not a "labourer" nor "person placing or furnishing materials" within s. 15 of the Mechanics' Lien Act, R.S.B.C. 1911, c. 154, so as to preserve to him a lien under that section, where the owner has made payment in full to the principal contractor before the lien was filed by the subcontractor.

Rosio v. Beech, 9 D.L.R. 416, 18 B.C.R. 73, 23 W.L.R. 174 & 406, 3 W.W.R. 952.

RIGHT TO LIEN BY MATERIALMAN.

Rat Portage Lumber Co. v. Watson, 10 D.L.R. 833, 17 B.C.R. 489.

SUBCONTRACTOR FURNISHING LABOUR AND MATERIALS—STATUTORY NOTICE OF LIEN CLAIM FOR MATERIALS.

A subcontractor who furnishes both labour and materials for the construction of a building for a lump sum is entitled to a lien therefor without giving the notice required of a mere material-man by s. 6 of the Mechanics' Lien Act, R.S.B.C. 1911, c. 154.

Irvin v. Victoria Home Construction & Investment Co., 12 D.L.R. 637, 18 B.C.R. 318, 25 W.L.R. 79, 4 W.W.R. 125.

SUBCONTRACTOR—RIGHT TO LIEN FOR LABOUR PERFORMED UNDER ENTIRE CONTRACT FOR BOTH LABOUR AND MATERIALS.

A subcontractor may, under s. 6 (1) of the Mechanics' Lien Act, R.S.B.C. 1911, c. 154, acquire a lien for labour, although performed under a contract to furnish both labour and materials for a lump sum, where the value of each can be easily ascertained.

Brown v. Allen, 13 D.L.R. 350, 18 B.C.R. 326, 25 W.L.R. 128, 4 W.W.R. 1306.

WORK COMPLETED BY OWNER—LIQUIDATED DAMAGES FOR DELAY — PENALTY — ACTUAL DAMAGES—MECHANICS AND WAGE-EARNERS LIEN ACT, SEC. 12—"CALCULATED ON BASIS OF CONTRACT PRICE"—ARCHITECT'S FINAL ESTIMATE OF VALUE OF WORK DONE BY CONTRACTORS—SUMS FOR WHICH SUBCONTRACTORS ENTITLED TO LIEN—PERCENTAGE BASED ON VALUE, NOT ON PAYMENTS.

Batts v. Poyntz, 11 O.W.N. 204.

DELIVERY OF MATERIALS IN INSTALMENTS—SEPARATE SALES—SEPARATE REGISTRATION.

Stephens Paint Co. v. Cottingham, 10 W.W.R. 627.

(§ VI—47) — MATERIALMAN — EXTENT OF LIEN.

The lien created by s. 5 of the Mechanics' Lien Act (Alta.), for the unpaid price of material "until it is put or worked into the building" is a continuation of the seller's lien for the unpaid purchase price notwithstanding delivery until the material is worked into the building; and the remedy of resuming possession must be taken before the materials are worked into the building.

Metals Ltd. v. Trusts & Guarantee Co., 22 D.L.R. 495.

SUBCONTRACTOR—OWNER ADVANCING STATUTORY PERCENTAGE TO CONTRACTOR.

The fact that the owner did not retain

from his contract any of the percentage of the value of the work as required by the Mechanics' Lien Act (Ont.) for the protection of subcontractors and wage-earners, does not make him liable for subcontractors' claims, as to which no lien was filed or notice of claim given the owner until after the expiry of thirty days following the abandonment of the work by the principal contractor, the statutory obligation to retain the percentage being limited to thirty days after completion or abandonment of the contract with the owner.

Brooks v. Mundy, 16 D.L.R. 119, 5 O.W.N. 795, 25 O.W.R. 687.

PERCENTAGE FUND—RETENTION OF 20 PER CENT FOR THIRTY DAYS.

The period of 30 days during which the owner is to retain 20 per cent of the value from his contractor for the protection of other lien holders is to be computed from the completion or abandonment of the contract by the principal contractor, but the expiry of such period does not relieve the owner from his obligation to protect the interests of a subcontractor of whose right to register a lien the owner has notice; and such obligation is enforceable by a subcontractor who was enabled to file his lien more than 30 days after the abandonment of the work by the principal contractor by having been permitted by the owner thereafter to go on and complete the subcontract and who had filed his lien within 30 days of completing his own work.

Merrick v. Campbell, 17 D.L.R. 415, 24 Man. L.R. 446, 27 W.L.R. 836, 6 W.W.R. 722.

SUBCONTRACTOR—CLAIM ON STATUTORY PERCENTAGE—TIME.

The obligation of the owner to retain a statutory percentage of the value of the work and materials is limited to the period of 30 days after the completion or abandonment of the contract by the contractor with whom the owner had contracted, and where such contractor had abandoned the work uncompleted and the owner had to pay more than the balance of the contract price to finish it, a subcontractor filing his claim more than 30 days after the principal contractor's abandonment although within 30 days of his own last work on the building has no lien, if nothing then remained due the principal contractor.

Brooks v. Mundy, 16 D.L.R. 119, 5 O.W.N. 795, 25 O.W.R. 687.

STATUTORY PERCENTAGE TO BE RETAINED TO PROTECT SUBCONTRACTOR—TRUSTEESHIP—CONTRACTOR'S FAILURE TO COMPLETE.

By the Mechanics' Lien Act, 10 Edw. VII. (Ont.) c. 69, the property owner is, as regards lien-holders holding claims against the principal contractor, a trustee of the 20 per cent of payments which become due to the latter under the contract during the progress of the work; and the owner will be liable for such percentage, so far as may be required to satisfy the unpaid lien claims, although by his contract he was to pay and did pay the contractor only 80 per cent of the value of the work as certified by progress certificates of the architect, where the contractor afterwards abandoned the work and the 20 per cent retained of the value so certified by the architect was insufficient to pay the cost of completing the contract. The property owner is entitled under the Mechanics' Lien Act, 10 Edw. VII. (Ont.) c. 69, to deduct from the sums for which he is liable to his contractor on progress certificates while the work is going on, 20 per cent thereof (or 15 per cent, where the contract price exceeds $15,000) for the protection of persons entitled to liens as subcontractors; and the owner is not entitled as against the subcontractor to apply such percentage to answer the cost of completing the work on the contractor's default. [Russell v. French, 28 O.R. 215, approved.]

Rice Lewis & Son Ltd. v. Harvey, 9 D.L.R. 114, 27 O.L.R. 630.

MATERIALMEN—JOINT ORDER BY CONTRACTOR AND OWNER.

Where the property owner joins with the contractor in giving the order for material to be supplied in the erection of the building and it is charged to their joint account, the owner may be held liable for the full price in a mechanics' lien action brought against them both to enforce payment, although only a lesser sum be due by him to the contractor.

Rogers Lumber Co. v. Gray 10 D.L.R. 698, 23 W.L.R. 920, 4 W.W.R. 294.

CREDITS—FICTITIOUS PAYMENT.

On trial of a mechanics' lien action involving materials supplied to a building contractor, a receipt of the materialman for a fictitious payment intended to assist the contractor in obtaining an advance from the owners will not necessarily be charged against the materialman.

Howlett v. Doran, 11 D.L.R. 372, 24 W.L.R. 401, 4 W.W.R. 674.

(§ VI—49)—BUILDING CONTRACT—SUBCONTRACTOR—VALUE OF WORK DONE—RECOVERY FROM MAIN CONTRACTOR—PROVISIONS OF SUBCONTRACT—WAIVER OF LIEN — BENEFIT OF OWNER — ARCHITECT'S CERTIFICATE.

Shipway Mfg Co. v. Loew's Theatres, 7 O.W.N. 292.

(§ VI—51)—EFFECT OF PAYING CONTRACTOR OR SUBCONTRACTOR.

If it appears that moneys were paid by the owner to the contractor or subcontractor for the very purpose of being applied in paying wage earners having a privileged and preferential lien under the Mechanics' Lien Act (Alta.), over other lien holders, and the moneys were in fact so applied, the owner is entitled to credit for such payments against the contract price.

Metals Ltd. v. Trusts & Guarantee Co., 22 D.L.R. 495.

PROGRESS PAYMENTS TO CONTRACTOR—ABANDONMENT OF WORK—PERCENTAGE FUND.

The value of the work upon which, to the extent of eighty per cent., the owner may pay the contractor under the Mechanics' Lien Act (Man.) prior to receiving written notice of a subcontractor's lien claim, is, in case of abandonment of the work while uncompleted by the principal contractor, the value of the work actually done and material furnished up to the date of abandonment, but such value is to be calculated on the basis of the price to be paid for the whole contract.

Merrick v. Campbell, 17 D.L.R. 415, 24 Man. L.R. 446, 27 W.L.R. 836, 6 W.W.R. 722.

EFFECT OF PAYING PRINCIPAL CONTRACTOR.

A subcontractor filing a mechanics' lien in that capacity in respect of his contract with the principal contractor for painting a house and furnishing both labour and materials, who admits payment for all material and that the balance owing to him was for work done only, has no lien as against the owner who has paid the principal contractor in full, even where the owner has made payment without receiving the receipted pay roll under s. 15 of the Mechanics' Lien Act, R.S.B.C. 1911, c. 154.

Rosio v. Beech, 9 D.L.R. 416, 18 B.C.R. 78, 23 W.L.R. 174, 406, 3 W.W.R. 952.

COMPLETION OF BUILDING BY OWNER.

A subcontractor's claim for lien on a building, the completion of which was taken over by the property owner, is defeated by s. 8 of the Mechanics' Lien Act, R.S.B.C. 1911, c. 154, where, at the time the claimant finished his work, the payments made the original contractor, together with the cost of completing the building, exceeded the original contract price.

Turner v. Fuller, 12 D.L.R. 255, 18 B.C.R. 69, 23 W.L.R. 170, 4 W.W.R. 161.

BUILDING CONTRACT TAKEN OVER BY PROPERTY OWNER—COST OF COMPLETION.

Under s. 32 of the Mechanics' Lien Act, (Alta.) as amended 8 Edw. VII. c. 20, no fund exists to which can attach a mechanic's lien for material furnished a contractor, where, on the construction of the building being taken over by the owner in accordance with the terms of a contract, the money already paid the contractor and that subsequently expended in completing the work, exceeded the contract price.

Canadian Equipment & Supply Co. v. Bell, 11 D.L.R. 820, 24 W.L.R. 415.

LIABILITY OF OWNER TO MATERIALMAN—BUILDING CONTRACT—CONTRACTOR FAILING TO COMPLETE WORK IN DUE TIME.

McManus v. Rothschild, 25 O.L.R. 138, 20 O.W.R. 469.

VII. How waived or defeated.

(§ VII—55)—ART. 2013b, C.C. QUE.—EXPRESS RENUNCIATION—SUBSEQUENT REGISTRATION—SALE—RIGHTS OF PARTIES.

The signing and delivery of a document by one entitled to a lien for material and labour, within the delay in which he had a lien on the property without registration under art. 2013b C.C. (Que.) by which he renounces all legal privilege, is an absolute renunciation which extinguishes such privilege.

Weiss v. Silverman, 47 D.L.R. 161, 58 Can. S.C.R. 363, reversing 24 Rev. Leg. 204.

LIS PENDENS IMPROPERLY ISSUED.

Under the Mechanics' Lien Act, R.S.M. 1913, c. 125, only the County Court for the judicial division in which the property affected is situated has jurisdiction to try an action under the Act; a lis pendens issued in any other jurisdiction has no effect on the property; unless a lis pendens is issued in the proper jurisdiction within the prescribed time, the lien wholly ceases to exist.

Meunier v. Hinman, 30 D.L.R. 114, 27 Man. L.R. 69, [1917] 1 W.W.R. 121.

ASSIGNMENT OF CONTRACT—COMPLETION BY OWNER.

A stipulation in a building contract, that upon default of the contractor the school trustees shall be entitled to take his place to complete the contract and deduct the cost of completion from the balance of the purchase price, is in effect an assignment of the unpaid balance of the contract price within the purview of s. 16 of the Mechanics' Lien Act (B.C.), and therefore invalid against the lien for the full balance of the contract of price acquired under the Act.

Hazel v. Lund, 25 D.L.R. 204, 22 B.C.R. 264, 9 W.W.R. 749, 32 W.L.R. 818.

ESTOPPEL IN PAIS.

Under s. 6 of the Mechanics' Lien Act, R.S.O. 1914, c. 140, an estoppel in pais from claiming such lien cannot arise, and such right can only be waived by a signed agreement.

Anderson v. Fort William Commercial Chambers, 25 D.L.R. 319, 34 O.L.R. 567.

ESTOPPEL—PRIORITIES—COSTS.

Held, on the facts in a mechanics' lien action, that the loan company was bound to advance the balance of a loan made on a property, the mortgage not being put in in evidence, and there being nothing in the application for loan providing that the mortgagee was not bound to advance the money. Held also, that there was no waiver of a lien upon a certain lot where a form of waiver as to that lot had been signed without consideration and by mistake, there being no intention to waive and the claimant not knowing at the time of signing that he was to do work on that particular lot. Held also, that the principle of estoppel did not apply in the particular case. A loan company forcing lien-holders to go to trial to establish their rights and priorities was ordered to pay the costs of the trial.

Palfrey v. Brown, 31 W.L.R. 535.

RELEASE—ACCORD AND SATISFACTION.

An owner's acceptance of the contractor's order given in return for the release of a materialman's lien operates as an accord and satisfaction of the materialman's claim, which cannot be reawakened by the subsequent delivery of additional material and the filing of a fresh lien within the statutory period therefor.

Wortman v. Frid Lewis Co., 9 W.W.R. 812, 33 W.L.R. 119.

FAILURE TO SERVE STATEMENT OF CLAIM.

Failure to serve a statement of claim in a mechanics' lien action within six months after issue does not destroy the lien.

Crown Lumber Co. v. Malcolm, 9 W.W.R. 481.

ASSIGNMENT OF MECHANIC'S LIEN IN PAYMENT—DESTRUCTION OF BUILDING COVERED BY LIEN—APPLICATION OF INSURANCE MONEYS—MECHANICS' AND WAGE EARNERS' LIEN ACT, R.S.O. 1914, CH. 140, S. 9.

Agnew v. East, 10 O.W.N. 428, 11 O.W.N. 78.

MECHANICS' LIEN ACT, R.S.S. 1909, C. 150, S. 24—"PERSON CLAIMING ANY RIGHT, TITLE OR INTEREST."

The right, title or interest which entitles a person to require the registrar to send out the notice provided for by s. 24 of the Mechanics' Lien Act, R.S.S. 1909, c. 150 is not necessarily a registered one, and so long as any one claiming a right, title or interest in the property in question requires him to serve the notice he must follow the provisions of s. 24.

Re Land Titles Act, [1919] 1 W.W.R. 47.

(§ VII—59)—WAIVER—TAKING SECURITY—GUARANTY OF PAYMENT.

One who furnishes a defaulting contractor with building materials under a guaranty of payment from the property owner, is not entitled to a mechanics' lien against the property, under the Mechanics' Lien Act, (Alta.), 6 Edw. VII. c. 21, unless there is a balance payable by the owner to the contractor; his remedy is by a personal judgment against the property owner.

Canadian Equipment & Supply Co. v. Bell, 11 D.L.R. 820, 24 W.L.R. 415.

VIII. Enforcement; procedure.

(§ VIII—60)—MATURITY — RIGHT OF ACTION—ALL CLAIMS.

When any part of a claim under the Mechanics' and Wage Earners Lien Act (R.S.O. 1914, c. 140) has matured, an action lies, and in that action all claims whether then payable or not are to be dealt with at the trial as provided for in s. 37.

Northern Lumber Mills v. Rice, 40 D.L.R. 128, 41 O.L.R. 201.

JOINDER OF "LIEN-HOLDERS."

"Lien-holder," in s. 2, c. 40, R.S.O. 1914, includes a person who files a claim but fails to establish it at the trial, and a lien duly registered but upon which no action has been brought, within the stipulated time, may be enforced in an action brought within that time by the plaintiff who failed.

Baines v. Curley, 33 D.L.R. 309, 38 O.L.R. 301.

NOTICE—POSTING BY OWNER—WHEN NECESSARY.

The Mechanics' Lien Act, 1906 (Alta.), c. 21, s. 11, does not make necessary the posting of a notice by the owner who does not learn until after the completion of the building by his tenant that construction work had begun, in order to escape the liability ensuing under the Act as upon the statutory presumption that in default of posting notice it shall be held to have been constructed "at the request of such owner;" s. 11 applies only where knowledge of the construction is acquired by the owner during the course of construction, and it is not sufficient to fix the owner with liability that he had given the tenant permission by the lease to erect a building at his own expense and to remove it at the end of the term.

Johnson v. Butler, 22 D.L.R. 347, 7 A. L.R. 427.

NECESSARY PARTIES.

Under s. 22 of the Mechanics' and Wage-Earners' Lien Act, R.S.M. 1902, c. 110, a claim of lien under the Act cannot be "realized" unless the person who is the registered owner of the land at the time of the commencement of the action is made a party to it, or unless there is some other action pending, to which such owner is a party, in which the claim may be "realized," and, in such case, although the lien has been duly registered within the time required by the Act, it absolutely ceases to exist unless some action to which the registered owner is a party has been commenced under the provisions of the Act, within the period of 90 days prescribed by the Act.

Abramovitch v. Vrondessi, 11 D.L.R. 352, 23 Man. L.R. 383, 24 W.L.R. 439.

ACTION OR COUNTERCLAIM.

The right to a mechanics' lien being entirely statutory, not only the right itself but the method of enforcing it must depend upon the statute, and must be pursued in strict compliance with the statute. If a particular court is designated to administer the remedy, resort must be had to that court and the jurisdiction of that court is exclusive. Accordingly in the Saskatchewan Supreme Court a mechanics' lien cannot be enforced either by action or by counterclaim.

Shuttleworth v. Seymour, 7 S.L.R. 74, 6 W.W.R. 1100.

Plaintiff brought action to enforce a mechanics' lien, and tendered in evidence in proof of the lien a certified copy which shewed no affidavit of execution, and did not shew any seal affixed. Further, the lien itself was irregularly drawn and improperly filled out. Without deciding whether the execution of the lien would be sufficient, had the corporate seal been omitted the lien would have been invalid in the absence of

such a seal, because no affidavit of execution was attached. 2. That the curative sections of the Mechanics' Lien Act (Sask.) do not affect the provisions of the Land Titles Act and cure invalidating defects in instruments under the latter Act. 3. But it appearing that the lien having in fact been sealed with the corporate seal of the plaintiff company, it should be given leave to prove that fact in proper form. 4. That where the particulars of the amount claimed in the lien were set out in a manner which substantially complied with the Act, the lien, notwithstanding defects, should be held valid under s. 19 of the Mechanics' Lien Act.

Monarch Lumber Co. v. Garrison, 4 S.L.R. 514.

ACCOUNT—CROSS-CLAIM.

Eadie-Douglas v. Hitch, 4 O.W.N. 1597, 24 O.W.R. 907.

The words of s. 17 of the Mechanics' Lien Act, "No assignment by the contractor . . . of any moneys due in respect of the contract shall be valid as against any lien given by this Act," were held, not to operate so as to prevent payments made by the owner to creditors of the contractor, under an arrangement between the owner and the contractor, from being effective as payments on account of the contract price, in the ascertainment of the amount due from the owner to the contractor, upon which alone the lien of materialmen attaches under s. 32 of the Act, as amended by s. 12 of the Statute Law Amendment Act, 1908. Secus, if arrangement had been one for payment in the future; but, once the arrangement was acted upon and payments were made in pursuance of it, the assignment (if the arrangement amounted to an assignment) ceased to be of importance, and the payments must be regarded as payments to the contractor—no notice in writing having been given by the plaintiffs—and the owner was protected to the amount of these payments. [False Creek Lumber Co. v. Sloan, 17 W.L.R. 525, applied and followed.]

Pioneer Lumber Co. v. Rooney, 19 W.L.R. 913.

PARTIES—CLAIM OF ENCUMBRANCEE CREATED PENDENTE LITE.

A plaintiff in an action to enforce a mechanics' lien is not obliged to add as a party an encumbrancee whose claim was created pendente lite.

Canada Foundry Co. v. Edmonton Portland Cement Co., [1919] 2 W.W.R. 310.

(§ VIII—61)—ASSIGNEE AS PARTY DEFENDANT.

A bank holding an assignment of the balance of the contract price owing by the owner to the principal contractor has a sufficient interest to be added a party defendant in a mechanics' lien action.

Dorrell v. Campbell, 27 D.L.R. 425, 22 B.C.R. 584, 10 W.W.R. 492, 34 W.L.R. 367. [See also 32 D.L.R. 44, 23 B.C.R. 500, [1917] 1 W.W.R. 500.

PARTIES—ERRONEOUS DESCRIPTION OF—AFFIDAVIT.

The error in the affidavit of a mechanics' lien under the Mechanics' Lien Act (Alta.), of misnaming the company for whom the work was done as equitable owner of the land as the Alberta Plate Glass Co., Ltd., instead of the Alberta Glass Bottle Co., Ltd., is cured by s. 14 of the Act where no prejudice has been shewn.

Revelstoke Saw Mill Co. v. Alberta Bottle Co., 21 D.L.R. 779, 7 W.W.R. 1002, 30 W.L.R. 312. [Affirmed in 9 A.L.R. 155 at 162.]

REGISTRATION OF CLAIM OF LIEN AFTER PROCEEDINGS TAKEN BY ANOTHER LIENOR—MECHANICS' LIEN ACT, 10 EDW. VII. c. 69, s. 24—MEANING OF "IN THE MEANTIME"—BENEFIT OF PROCEEDINGS TAKEN—PRESERVATION OF LIEN.

Eadie-Douglas v. Hitch & Co., 27 O.L.R. 257.

(§ VIII—62)—STATUTORY DECLARATION—ADVANCES.

Subsection 1 of s. 30 of the Mechanics' Lien Act, C.S.N.B. 1903, c. 147, does not apply to a claim of lien that is made after the contract has been completed, the section only applies where a contractor is getting advances during the progress of the work, that is where he is getting payment on progress estimates.

Brown v. Bathurst Lumber Co., 28 D.L.R. 294, 43 N.B.R. 527.

COSTS—RIGHT TO ALLOWANCE.

Where action has been brought to enforce a mechanics' lien under a building contract, other claimants against the same property should make ex parte application under Mechanics' Lien Ordinance, s. 18 (Alta.) to be added to the action, instead of bringing separate actions, and where they pursue the latter course they are entitled to such costs only as they would have properly incurred in making an ex parte application. The owner is ordinarily entitled to costs out of the fund in court before it is distributed under s. 30.

Howlett v. Doran, 11 D.L.R. 372, 24 W.L.R. 401, 4 W.W.R. 674.

NOTICE—NECESSITY—SUBCONTRACTOR FURNISHING LABOUR AND MATERIALS.

A subcontractor who furnishes both labour and materials for the construction of a building for a lump sum is entitled to a lien therefor without giving the notice required by s. 6 of the Mechanics' Lien Act, R.S.B.C. 1911, c. 154.

Fitzgerald v. Williamson, 12 D.L.R. 691, 18 B.C.R. 322, 25 W.L.R. 82.

ENFORCEMENT—STATEMENT OF CLAIM FILED WITHOUT AFFIDAVIT.

Bruce v. National Trust Co., 11 D.L.R. 842, 4 O.W.N. 1372, 24 O.W.R. 688.

AFFIDAVIT—OMISSION OF NAME AND RESIDENCE.

The saving clause (s. 14) of the Mechanics' Lien Act (Alta.), may operate to make

a lien effective although the affidavit of lien did not shew, as required by s. 13, the name and residence of the owner of the property or interest to be charged, e. g., on a lien which the affidavit shewed to be for work on a school identified by name and location although the board of school trustees was not named as owner.

Foster v. Brocklebank, 22 D.L.R. 38, 8 W.W.R. 464.

AFFIDAVIT AS TO PAYMENT OF WAGES.

The affidavit or statutory declaration of the contractor or his agent that all wages up to and inclusive of the fourteenth day preceding the declaration of persons employed on the work who are entitled to wages have been paid in full required by s. 30 (1) the Mechanics' Lien Act, C.S.N.B. 1903, c. 147, is not a condition precedent to a lien by a contractor on a completed contract, and an order of the judge of the Gloucester County Court dismissing a claim of lien because such an affidavit or declaration had not been given to the respondent company was set aside.

Brown v. Bathurst Lumber Co., 43 N.B.R. 527.

COSTS OF ACTION TO ENFORCE—QUANTUM—MECHANICS' AND WAGE EARNERS' LIEN ACT, R.S.O. 1914, c. 140, s. 42—"JUDGMENT"—TAXATION OF COSTS.

Powell Lumber Co. v. Hartley, 9 O.W.N. 249.

AFFIDAVIT—BEFORE SOLICITOR.

Rule 309, which provides that an affidavit shall not be sworn before the solicitor for the party on whose behalf it is to be used, applies to the affidavit required under s. 19 of the Mechanics' Lien Act. (B.C.), [Columbia Bitulithic v. Vancouver Lumber Co., 21 D.L.R. 91, followed.]

Braden v. Brown, 24 B.C.R. 374, [1917] 3 W.W.R. 906.

STATEMENT OF CLAIM—DEFECTIVE AFFIDAVIT—DISMISSAL OF ACTION—POWERS OF REFEREE AT TRIAL—MECHANICS AND WAGE EARNERS' LIEN ACT, R.S.O. 1914, CH. 140—FORM 5.

Lemon v. Young, 10 O.W.N. 82.

SCHEDULE OF REGISTRATION—DUPLICATE.

When a party complains that the schedule of registration of an architect's lien is not a duplicate but a copy, he must prove it; he cannot deduce this proof from the fact that the registrar, in his certificate upon the duplicate of the schedule sent to the creditor, made use of the word, "copy."

Brunswick Balke Collender Co. v. Racette, 49 Que. S.C. 50.

(§ VIII—63)—ALLEGATIONS—DESCRIPTION—AFFIDAVIT BEFORE SOLICITOR.

It is not necessary under s. 15 (a) of the Mechanics' Lien Act (R.S.M., 1913, c. 125) that the true ownership of the property be stated in the claim. The main object of the statute is to secure it on the buildings and land; it is immaterial that the claim describes more land than is required; nor is it void if sworn before a solicitor for the claimants.

Polson v. Thomson, 29 D.L.R. 395, 26 Man. L.R. 410, 34 W.L.R. 745.

SUFFICIENCY OF NOTICE—CERTIFICATE OF LIS PENDENS.

It is not essential that the certificate of lis pendens in a mechanics' lien action shall in terms state that the action was instituted "to realize the lien;" it is a sufficient compliance with s. 35 of the Mechanics' Lien Act (Alta.), that such purpose was indicated by the mention of the title or interest being called in question under that Act.

Revelstoke Saw Mill Co. v. Alberta Bottle Co., 21 D.L.R. 779, 7 W.W.R. 1002, 30 W.L.R. 312. [Affirmed in 9 A.L.R. 155 at 162.]

COMPLETION BY OWNER—NOTICE AND REGISTRATION.

When an owner resiliates his contract with his contractor, and continues the work of construction himself, employing the same workmen, he is considered as being substituted for the contractor and as working on his own account. In these circumstances one of the workmen can exercise the lien of workmen and furnishers of materials without giving the notice mentioned in articles 2013 (c) and 2013 (g), the registration and the notice required by art. 2013 being sufficient.

Temple Baptist Church v. Perras, 48 Que. S.C. 84.

SUFFICIENCY OF NOTICE OR STATEMENT OF LIEN—FILING AGAINST WRONG PROPERTY—RIGHT TO AMEND, HOW LIMITED.

The Mechanics' Lien Act (Alta.), does not enable the court to give leave to amend a lien where it has been registered entirely against the wrong property because of an error in the description of the lands to be charged, so as to substitute the description of the proper lands, if the time for filing a lien against the latter has already expired.

McDonald v. McKenzie, 19 D.L.R. 418, 7 A.L.R. 435, 29 W.L.R. 890, 7 W.W.R. 604.

SUBCONTRACTOR—NOTICE OF CLAIM TO OWNER—SUBSEQUENT PAYMENTS BY OWNER TO PRINCIPAL CONTRACTOR — PERCENTAGE.

Notice in writing to the owner by the subcontractor giving the particulars of the subcontract and stating that the owner will be held liable therefor is sufficient under the Mechanics' Lien Act (Man.), as a notice in writing of the lien and payments thereafter made by the owner the principal contractor even within the 80 per cent mentioned in R.S.M. 1902, c. 110, s. 8 (c), are not protected as against the subcontractor's lien.

Merrick v. Campbell, 17 D.L.R. 415, 24 Man. L.R. 446, 27 W.L.R. 836, 6 W.W.R. 722.

AS HYPOTHEC—REGISTRATION—NOTICE.

An action by a contractor against an owner for the price for which the defendant

executed a deed of obligation in favour of the plaintiff, is an action based upon a hypothec and not upon a lien; and if no document is produced shewing that a lien was registered against the immovable, and that notice of the lien was given to the owner, the judgment will be for dismissal only, reserving the rights of the plaintiff.

Choquette v. Couture, 17 Que. P.R. 480.

NOTICE OF LIEN—TIME.

The want of notice to the owner within 3 days after the registration of the architect's lien does not affect the validity of this registration because no provision in the law meets the case in which a notice is not given.

Brunswick Balke Collender Co. v. Racette, 49 Que. S.C. 50.

VERBAL NOTICE.

Inability of a contractor to pay his workmen, avowed before them and the owner, and the promise of the latter to pay them as soon as the works are finished, is a verbal notice sufficient to permit the workmen to register a lien upon the increased value given to the immovable by their labour.

Laflamme v. Laplante, 51 Que. S.C. 38.

NOTICE—VENDOR AND PURCHASER.

Builders and furnishers of material cannot acquire any lien upon an immovable possessed under an agreement for sale except by giving notice to the owner of the immovable in conformity with arts. 2013, 2013e, 2013g, C.C. (Que.); this notice is an essential condition of the lien, which can only be claimed by following strictly the formalities imposed by law.

Kalmanovitch v. Frank, 52 Que. S.C. 171.

NOTICE—RES JUDICATA.

When lumbermen take action for wages with conservatory seizure and at the same time claim a lien upon the timber cut, and this right is denied upon the ground that the notice given was irregular, there is a chose judgée in a subsequent action to compel a person formerly in possession of the timber cut, which had been disposed of, to bring into court an amount representing its value, in order to permit them to exercise their liens.

Marinier v. Riordon Paper Mills Co., 51 Que. S.C. 532.

NOTICE.

An architect not specially authorized has no power to receive from a materialman the written notice which should be given to the owner to create a lien especially if the architect is at the same time one of the contractors on the building. The notice required by art. 2013g, C.C. (Que.), is essential to the validity of the lien.

Duncan Co. v. Desjardins, 51 Que. S.C. 71.

(§ VIII—64) — AMENDMENT — DEFECTIVE STATEMENT OF CLAIM—IRREGULAR CERTIFICATE OF LIS PENDENS.

It is a ground for vacating the registration of a certificate of lis pendens issued pursuant to s. 35 of the Mechanics' Lien Act (Alta.), by the clerk of the court, certifying that an action had been commenced for the realization of a lien, that the statement of claim filed with the said clerk was defective and irregular in not containing the necessary statutory allegations, and not claiming to have the rights to a lien declared, or a sale of the land ordered, and that no other relief incidental to the rights of the lien holder was claimed thereby, notwithstanding that an amended statement of claim was afterwards delivered, without the requisite leave, in which a claim to realize on the lien was made.

Horne v. Jenkyn, 6 D.L.R. 54, 5 A.L.R. 359, 2 W.W.R. 929.

(§ VIII —65)—ACCOUNTING.

An interlocutory application to stay proceedings in an action under the Mechanics' Lien Act (Ont.), brought by workmen against both their employer and the property owner, should not be granted to enable the owner to complete the work on the contractor's default and so ascertain the balance, if any, owing by the owner under the contract; such a question should not be determined in Chambers but should be determined at the trial, or if the pleadings properly raise the question of law under Ont. Con. R. 259, it can be determined upon a motion in court.

Saltsman v. Berlin Robe & Clothing Co., 6 D.L.R. 350, 4 O.W.N. 88, 23 O.W.R. 61.

(§ VIII—66)—EXISTENCE OF LIEN—ACTION BROUGHT TOO LATE.

Where the question is whether an alleged lien under the Mechanics' Lien Act, C.S.N.B. 1903, c. 147, is in existence, an order made by the Trial Judge assuming to determine such question without taking the evidence thereon, will on appeal be vacated, if it appears that the lien was not prosecuted within the statutory period as prescribed by s. 22 of the Act.

Boucher v. Belle-Isle, 14 D.L.R. 146, 41 N.B.R. 509.

No lien attaches to the land under the Mechanics' and Wage Earners' Lien Act, R.S.O. 1014, c. 140, in the absence of evidence that any materials furnished for the building were supplied within the statutory period of the registration of the lien.

Campaigne v. Carver, 27 D.L.R. 76, 35 O.L.R. 232.

TIME OF REGISTRATION.

The time for registration limited by the Mechanics' and Wage Earners' Lien Act, R.S.O. 1914, c. 140, s. 22, does not begin to run until after the completion of additional work necessary for the full performance of the contract. [Anderson v. Fort William, 25 D.L.R. 319; Kalbfleisch v. Hurley, 25 D.L.R. 469, followed.]

Benson v. Smith, 31 D.L.R. 416, 37 O.L.R. 257.

TIME OF FILING—ABANDONMENT OF WORK—WHAT CONSTITUTES.

A cessation of work by a subcontractor under a mistaken belief that the contract

was completed, but which is later resumed by him and finished, constitutes no "abandonment" of the work within the meaning of s. 22 (1 of the Mechanics' Lien Act, R. S.O. 1914, c. 140, requiring the claim for a lien to be registered within 30 days after the completion or abandonment of the contract.

Anderson v. Fort William Commercial Chambers, 25 D.L.R. 319, 34 O.L.R. 567.

LAST DELIVERY OF MATERIALS.

A mechanics' lien is enforceable under s. 22 of the Mechanics, and Wage Earners' Lien Act, R.S.O. 1914, c. 140, if registered within the statutory period from the last delivery of materials, even though the materials last delivered may never have been used in the construction of the building, if they were furnished for the purpose of being used therein. [Brooks-Sanford Co. v. Theodore, etc., Co., 22 O.L.R. 176, distinguished; Bunting v. Bell, 23 Gr. 584, overruled; Larkin v. Larkin, 32 O.R. 80, approved.]

Kalbfleisch v. Hurley, 25 D.L.R. 469, 34 O.L.R. 268.

LAST DELIVERY OF MATERIAL.

A lien registered within the statutory period of the last delivery of material is a sufficient compliance with the Act as to the time of registration.

Deldo v. Gough-Sellers Investments, 25 D.L.R. 602, 34 O.L.R. 274.

TIME OF ENFORCEMENT—SUNDAY.

Where the nineteenth day after the filing of the affidavit of a mechanics' lien falls on a Sunday, an action to enforce the lien is in time if brought on the following day under the Interpretation Act (Alta.), s. 7, subs. 21.

Revelstoke Saw Mill Co. v. Alberta Bottle Co., 21 D.L.R. 779, 7 W.W.R. 1002, 30 W.L.R. 312. [Affirmed in 9 A.L.R. 155 at 162.]

CLAIM OF CONTRACTOR — ABANDONMENT OF WORK—TIME FOR REGISTRATION OF LIEN AND COMMENCEMENT OF ACTION—MECHANICS' AND WAGE EARNERS' LIEN ACT, R.S.O. 1914, c. 140, ss. 22, 23—AMOUNT DUE TO CONTRACTOR AFTER ALLOWANCE FOR DEFECTS AND NONCOMPLETION.

Corby v. Perkus, 9 O.W.N. 318.

MATERIALS — SUPPLYING — LIEN — TIME FOR FILING—MECHANICS' LIEN ACT (B. C.)

A person supplying materials only for the building under a contract therefor with the principal contractor must file his lien under the Mechanics' Lien Act, R.S.B.C. 1911, c. 154, s. 19 (2), within 31 days after the last delivery of materials made by him. [Irvin v. Victoria Home, 12 D.L.R. 637, 13 B.C.R. 318, distinguished.]

Coughlan v. Carver, 20 D.L.R. 533, 20 B. C.R. 497, 29 W.L.R. 791, 7 W.W.R. 459.

JUDGMENT IN ACTION OF OTHER LIENHOLDER.

Where a lienholder had registered a claim of lien under the Mechanics' and Wage Earners' Lien Act, 10 Edw. VII. (Ont.) c. 69, and judgment in the action had been delivered, but not signed, a lienholder who registered his lien after the judgment was delivered may be let in to prove his claim on payment of his own costs of the application. Any proceeding taken during the existence of a lien is within the meaning of the words "unless in the meantime an action is commenced" in s. 24 (1) of the Mechanics' and Wage Earners' Lien Act, 10 Edw. VII. (Ont.) c. 69, the words "in the meantime" being held to mean any time before the lien ceases to exist.

Eadie-Douglas v. Hitch & Co., 9 D.L.R. 239, 27 O.L.R. 257.

COMPLETION OF CONTRACT—FURNACE SUPPLY.

A plumbing contract to furnish and install a hot air furnace for heating a house, including the necessary pipes, registers and fittings, comprises the furnishing and installation of the incidental cold air registers as a material part thereof; and the time within which a mechanics' lien may be filed for such work under the Mechanics' Lien Act (Alta.), 6 Edw. VII. c. 21, s. 13, is to be computed with reference to the installation of the cold air registers where that is the last work done under the contract, notwithstanding a delay of two months after the installation of the furnace itself and of the other incidental fittings.

Colling v. Stimson, Wainwright Lumber Co. v. Logan, 10 D.L.R. 597, 6 A.L.R. 71, 23 W.L.R. 789, 4 W.W.R. 597.

TIME OF FILING LIEN OR GIVING NOTICE—CERTIFICATE OF COURT.

The certificate which may be granted by the judge under the saving provisions of s. 41, read with ss. 22, 38, 39, 40 of the Mechanics' Lien Act, C.S.N.B. 1903, c. 147, is the commencement of the lien proceedings against an owner.

Boucher v. Belle-Isle, 14 D.L.R. 146, 41 N.B.R. 509.

TIME FOR FILING LIEN OR GIVING NOTICE—PROCEDURE — TIME FOR REGISTERING LIEN — WRONGFUL TERMINATION OF BUILDING CONTRACT—LIABILITY OF CONTRACTOR — ARCHITECT'S CERTIFICATE — LIEN OF SUBCONTRACTOR.

Fuller v. Beach, 7 D.L.R. 822, 21 W.L. R. 391.

TIME FOR FILING—PERFORMANCE OF WORK.

Work performed by a contractor on buildings in pursuance of and to complete his contract, after the date fixed for completion, entitles him to file his mechanics' lien within the statutory limit of time as from the performance of such work. The triviality of the work done or the amount involved cannot affect the plaintiff's rights.

Brynjolfson v. Oddson, 32 D.L.R. 270, 27 Man. L.R. 390, [1917] 1 W.W.R. 1000.

REGISTRATION—TIME.

The omission to register a mechanics' lien

within the specified time in the Land Registry Office is not cured by s. 20 of the Mechanics' Lien Act, R.S.B.C. 1911, c. 154 (which provides that "no lien shall be invalidated by reason of failure to comply with any of the requisites thereof . . . unless the owner is prejudices thereby . . . ") and is fatal to the validity of the lien, even where it has been registered within the prescribed time in the County Court Registry.

Dale v. International Mining Syndicate, 25 B.C.R. 1, [1917] 2 W.W.R. 1031.

Under s. 9 of the Mechanics' and Wage earners' Lien Act, R.S.M. 1913, c. 125, a person who has delivered materials to the contractor loses his lien therefor, as against the 20 per cent of the contract price to be held back by the owner from the contractor, unless he registers his lien within 30 days after the abandonment of the contract, if he has not supplied any materials to the contractor after such abandonment, though he was not notified of it, and a delivery of some materials for use in the building to the owner after such abandonment, in exchange for some of the materials formerly supplied to the contractor, will not have the effect of extending the time for registering the lien for the materials supplied to the contractor.

Brown v. Dunhill, 25 Man. L.R. 546.

REGISTRATION — TIME — AMENDMENT OF STATUTE.

Where a lien, both by the previous law and by the statute amending it, is made to depend upon and to date from its registration, the effects of the registration of such lien effected after the coming into force of the amending Act are governed by the provisions of this Act. A lien of a materialman registered after the coming into force of the amending Act (7 Geo. V. c. 52) is governed by the latter Act, although the materials for which the lien is sought were delivered before the Act came into force.

Cantin v. Chevalier, 52 Que. S.C. 97.

REGISTRATION—ACTION.

The words, in art. 2013b C.C. (Que.), concerning the privilege on immovable with registration, "unless a suit be taken in the interval, or unless a longer delay for payment has been stipulated in the contract," refer to an action by the creditor to recover his claim during the year and not to anything relating to the validity of the privilege.

Waxman v. Girouard, 24 Rev. Leg. 429.

REGISTRATION OF LIEN — PARTNERSHIP — COMPANY—PROOF OF EXECUTION.

Where a mechanics' lien has been filed by a partnership, even though it be trading under the name of what purports to be an incorporated company, the Registrar is justified in insisting that a discharge of the lien be executed by all the partners, or someone duly authorized on their behalf, and that proof be given him of the composition of the partnership.

Re Land Titles Act; Re Mechanics' Lien Act, [1918] 1 W.W.R. 411.

(§ VIII—67)—PLACE OF FILING.

Where the official with whom the affidavit of a mechanics' lien is to be filed under the Mechanics' Lien Act (Alta.), is not only a deputy clerk of the Supreme Court (in which capacity he was entitled to receive the filing), but also a deputy clerk of the District Court (in which capacity alone the filing would not be authorized), the stamping of the filing as in the District Court will not invalidate the lien where it was duly forwarded to the Land Titles office in like manner as it would have been had it been stamped as a Supreme Court filing if no prejudice resulted, the curative clause, s. 14 of the Act, being operative in respect of the error.

Revelstoke Saw Mill Co. v. Alberta Bottle Co., 21 D.L.R. 779, 7 W.W.R. 1002, 30 W.L.R. 312. [Affirmed in 9 A.L.R. 155 at 162.]

(§ VIII — 68) — SUBCONTRACTOR — MORTGAGEE—PROGRESSIVE PAYMENTS — DISCHARGE OF LIEN.

Where progressive payments under the contract of the principal contractor are made contingent upon advances being made to the owner by the mortgagee, the court may, on the trial of a mechanics' lien action brought by a subcontractor who had completed his subcontract, direct that his lien remain in force, so that it may attach in respect of any such further advances which may in future be made by the mortgagee, reserving leave to the owner and the mortgagee to apply for the discharge of the lien. A mechanics' lien filed by a subcontractor is not to attach so as to make the owner liable for a greater sum than the sum owing by the owner to the contractor under the Mechanics' Lien Act (Alta); consequently if the latter's contract with the owner does not entitle him to a further payment until completion, the lien of the subcontractor who has completed his subcontract cannot be made effective until completion of the entire work of the principal contractor, but the court may, on the trial of the lien action, direct that such lien shall remain in force, so that it may attach in respect of further sums that may thereafter become due by the owner to the principal contractor, reserving leave to the owner to apply to discharge the lien.

Colling v. Stimson, Wainwright Lumber Co. v. Logan, 10 D.L.R. 597, 6 A.L.R. 71, 23 W.L.R. 789, 4 W.W.R. 597.

DISCHARGE OF LIEN—DISMISSAL OF PROCEEDINGS TO ENFORCE LIEN—DEFAULT OF PLAINTIFF IN MAKING DISCOVERY — RIGHTS OF OTHER LIEN HOLDERS—ABSENCE OF PLAINTIFF—OPPORTUNITY TO PROCEED.

Ramsay v. Graham, 2 D.L.R. 889, 3 O.W.N. 972.

(§ VIII—69)—PERSONAL JUDGMENT.

If under the Mechanics' and Wage Earners Lien Act, R.S.O. 1914, c. 140, a contractor fails to enforce his lien against the owner because of his failure to commence the action within the statutory period, the contractor may be awarded in the same hearing a personal judgment against the owner to the extent of the amount of the lien claimed.

Kendler v. Bernstock, 22 D.L.R. 475, 33 O.L.R. 351.

PERSONAL JUDGMENT AGAINST CONTRACTOR —LABORERS' LIEN — LOGGING OPERATIONS.

An employee of the contractor for getting out logs who has obtained personal judgment against the contractor does not thereby forfeit his equitable right to be paid out of the fund which by the Mechanics' Lien Act (Alta.), 1906, c. 21, ss. 37 and 38, is created for the protection of the workmen and labourers engaged in the work, and such right may be enforced in garnishment proceedings against the money due by the owner of the logs to the contractor by declaring the lien of the workmen to have priority over the claim of other execution creditors.

Pomerleau v. Thompson, 16 D.L.R. 142, 5 W.W.R. 1360, 27 W.L.R. 254.

MATERIALS FURNISHED DECEASED CONTRACTOR—DECLARTORY JUDGMENT AGAINST ADMINISTRATOR.

Where, in an action to enforce a mechanic's lien against a building, by reason of the owner of the property not being indebted to the contractor, the claimant cannot have a lien under the Mechanics' Lien Act, (Alta.) he is entitled to a declaratory judgment that the administrator of the contractor's estate is, in the due course of administration, liable therefor. [Case Threshing Co. v. Bolton, 2 A.L.R. 174, followed.]

Canadian Equipment & Supply Co. v. Bell, 11 D.L.R. 821, 24 W.L.R. 415.

(§ VIII—70)—UNENFORCEABLE LIEN — VALID LIEN—JUSTIFICATION OF PROCEEDING TO JUDGMENT.

Where the lien cannot be enforced against the property of the company no valid lien, which justifies the plaintiff in proceeding to judgment under s. 49 of the Mechanics' Lien Act, can be established.

Johnson Co v. C.N.R. Co., 47 D.L.R. 75, 44 O.L.R. 533, reversing 43 O.L.R. 10 on this point, 24 Can. Ry. Cas. 294.

DEFENCES—PLEADING.

A defence under s. 8 of the Mechanics' Lien Act, R.S.B.C. 1911, c. 154, that no money is payable by the owner to the principal contractor, must under B.C. County Court 175, order 11, r. 18, be pleaded in the dispute note filed in an action brought by a subcontractor to enforce a lien for the balance due to him by the principal contractor.

Fitzgerald v. Williamson, 12 D.L.R. 691, 18 B.C.R. 322, 25 W.L.R. 82, 4 W.W.R. 1251.

SUBCONTRACTOR — DEFENSES — NONINDEBTEDNESS TO PRINCIPAL CONTRACTOR.

In an action by a subcontractor to enforce a mechanics' lien, the defence that nothing is due the principal contractor must be set up in the notice of defence. [Fitzgerald v. Williamson, 12 D.L.R. 691, followed.]

Brown v. Allen, 13 D.L.R. 350, 18 B.C.R. 326, 25 W.L.R. 128, 4 W.W.R. 1306.

(§ VIII—73)—STATUTORY DIRECTIONS AS TO TRIAL.

In a mechanics' lien proceeding, where, under s. 45 of the Mechanics' Lien Act, C.S. N.B. 1903, c. 147, a notice disputing the plaintiff's lien is filed, the existence of the lien must, as a distinct preliminary proceeding under ss. 45, 46, be first and separately determined by the court.

Boucher v. Belle-Isle, 14 D.L.R. 146, 41 N.B.R. 509.

Under the statutory direction contained in the Mechanics' Lien Act, R.S.N.S. 1900, c. 171, s. 30, which specifies that in a mechanics' lien action the Trial Judge shall "do all things necessary to try and otherwise finally dispose of the action and of all matters, questions and accounts arising in the action," it is sufficient if the Trial Judge disposes of all questions which are necessary to be tried to enable him to dispose of the action.

Dixon v. Ross, 1 D.L.R. 17, 46 N.S.R. 143.

PRACTICE UNDER MECHANICS' AND WAGE EARNERS' LIEN ACT, R.S.O. 1914, c. 140, s. 37 (2)—NOTICE OF TRIAL—NECESSITY FOR SERVICE UPON DEFENDANTS WHO DO NOT DEFEND—"APPEAR"—RULES 121, 354.

Elliott v. Rowell, 11 O.W.N. 203.

(§ VIII—74)—CLASS OF ACTION TO ENFORCE.

Where art. 2013 (b) C.C. (Que.) provides that a builders' and workmen's privilege exists only for one year from the date of registration unless a suit be taken in the interval, the suit required is a hypothecary action to enfroce the privilege and a personal action against the debtor does not suffice. The action to enforce a mechanics' lien (builders' privilege) under art. 2013 (b) is a personal hypothecary action if the property is still in the debtor's hands or an action in declaration of hypothec if it has passed into the hands of a third party.

Demers v. Byrd, 6 D.L.R. 807, 41 Que. K.B. 330.

(§ VIII—75)—VACATING OR CANCELLING.

Sections 25, 26 of the Mechanics' Lien Act, R.S.B.C. 1911, c. 154, do not permit the cancellation of a mechanics' lien by a judge's order unless security be given to take the place of the lien.

Walsh v. Mason; Stevens v. Mason, 15 D.L.R. 895, 19 B.C.R. 48, 26 W.L.R. 942, 5 W.W.R. 1318.

PROCEEDINGS TO VACATE—LIEN FILED ON LANDS OF STRANGER—ACTION TO VACATE.

Boggs v. Hill, 13 D.L.R. 941, 4 W.W.R. 1117.

MEDICAL PRACTICE.

See Physicians and Surgeons.

MERCHANT SHIPPING.

See Shipping.

MERGER.

NOTE—MORTGAGE.

A mortgage given by way of additional security for a note does not operate as a merger of the note in the mortgage where there is a plain intention of the parties that it should not have that effect.

Northern Crown Bank v. Elford, 34 D.L.R. 280, 10 S.L.R. 96, [1917] 2 W.W.R. 109.

The taking of a mortgage as collateral security does not operate as a merger of the simple contract debt (lien note) nor affect the remedy thereunder.

Wenbourne v. Case Threshing Machine Co., 34 D.L.R. 363, [1917] 2 W.W.R. 150. [Affirmed in 35 D.L.R. 577, 12 A.L.R. 1, [1917] 2 W.W.R. 1262.]

CHARGES AND INCUMBRANCES.

An absolute assignment of a timber berth which was intended as a mortgage, was superseded by a mortgage given for a greater amount, which included the indebtedness covered by such assignment, without mentioning the assignment.

Manitoba Lumber Co. v. Emmerson, 5 D.L.R. 337, 18 B.C.R. 96, 21 W.L.R. 503, 2 W.W.R. 419.

MILITARY LAW.

See also Militia.

MILITARY SERVICE ACT, 7-8 GEO V. 1917, CAN., C. 19—CONSENT OF ATTORNEY-GENERAL OF CANADA TO PROSECUTION—NOTICE TO REPORT FOR DUTY—ABSENCE WITHOUT LEAVE — TAKEN ON THE STRENGTH.

The written consent of the Deputy Minister of Justice, is sufficient to authorize a prosecution under the Military Service Act, 1917. A limitation is made by s. 13 of Order-in-Council, P.C. (Can.), 3168, that no conviction shall be made for being absent without leave under s. 102 of the Military Service Regulations (Can.), unless the man charged has, before he became absent without leave, been taken on the strength of the Canadian Expeditionary Force. Because of this it is not sufficient for prosecution to shew merely that because of the notice to report for military duty as a member of class 1 under the Military Service Act 1917, he became a man "on active service" and that he failed to report; there must be evidence to shew that before he became absent without leave he was taken on the strength of the C.E.F. A notice to report for military duty under the Military Service Regulations, and the Military Service Act, 7-8 Geo. V. 1917 (Can.), c. 19, is sufficient if received by mail at the correct street address for the defendant by his sister, although the initials of his name were incorrectly given.

R. v. Ba[illegible], 31 Can. Cr. Cas. 263.

WAR MEASURES ACT AND REGULATIONS—TRIBUNAL FOR TRIAL—OPTION OF PROSECUTION.

The general powers conferred on the Governor-in-Council under the War Measures Act, 5 Geo. V., 1914 (Can.), c. 2, s. 6, to pass regulations, inter alia, as to censorship of publications is not limited by s. 10 of the same Act so as to make it necessary that the regulations should prescribe only one of the two methods of prosecution therein referred to, i.e., summary conviction proceedings or indictment, to the exclusion of the other. The power under s. 10 to prescribe which of these two should be followed is permissive only, and under s. 6 the regulation may leave it to the prosecution to choose under which of the authorized modes he will institute the proceedings. The accused being properly before the magistrate, the latter's decision in favor of summary proceedings will not be reviewed on prohibition instituted before the actual trial.

R. v. Spence, 31 Can. Cr. Cas. 365.

(§ I—1)—PROCLAMATION—ENROLLMENT — EFFECT—C.C.P. ART. (QUE.) 332—7-8 GEO. V. (C.) [1917], C. 19.

The calling, by proclamation, of men subject to the Military Service Act, has the effect of immediately enrolling in the military forces of Canada all those who fall within the class named. The draftees thus enrolled do not form part of the Canadian Expeditionary Force except by being placed on active service. We cannot consider as part of the reinforcements the draftees who are exempted or who are on the exemption list, nor those whom the Act considers as deserters.

Rheault v. Landry, 55 Que. S.C. 1, 20 Que. P.R. 187.

MILITARY SERVICE ACT—SON OF NATURALIZED ALIEN — DISFRANCHISEMENT — HABEAS CORPUS—CONSTITUTIONAL LAW.

Naturalization of the father of the applicant, in 1913, under the Naturalization Act (Can.), had the effect of giving the applicant, then a minor, the capacity of a British subject and the enjoyment of the rights appertaining thereto. The Wartime Elections Act, of 1917, took away the applicant's right to vote, and as he could only be conscripted by reason of the enjoyment of such right, he thenceforth ceased to be subject to conscription, and consequently the applicant is not bound by the Military Service Act of 1917. The fact that the applicant had asked exemption before the local tribunals should not, under the circumstances, deprive him of the

right to ask for the annulling, as applicable to him, of the order-in-council of April 20, 1918, which cancelled the exemptions granted to conscripts of 20, 21 and 22 years since the applicant was never subject to the Military Service Act of 1917. Section 6 of the War Measures Act of 1917 did not confer on the Governor-General-in-council the right to abolish or suspend the Habeas Corpus Act in this country; even if such right might be inferred from that section, the parliament which passed it had no constitutional right to do so, as the Parliament of Canada has not the right to abolish the Habeas Corpus Act in this country, this right being restricted to the Imperial Parliament which has not deemed it proper to do. The order-in-council of April 20, 1918, is in conflict with the Imperial Acts, and therefore void.

Blanshay v. Piche, 24 Rev. de Jur. 578, 32 Can. Cr. Cas. 151. [See 41 D.L.R. 147, 54 Que. S.C. 170, 24 Rev. de Jur. 438.]

ENLISTMENT—DISCHARGE—ILLEGAL ARREST—HABEAS CORPUS—ARMY ACT.

One who voluntarily enlists in an expeditionary force for overseas, to serve in a war, and who, having left the service, following his discharge by a military medical board, as being permanently incapacitated, is arrested and arraigned before a police magistrate, who frees him, cannot be again placed under arrest by the military authorities and if he is, he can demand his liberation by a writ of habeas corpus. The Army Transfer Act, 1915, does not apply to voluntary enlistment in this country, and only relates to the regular army.

Therrien v. Schneider, 53 Que. S.C. 246, 32 Can. Cr. Cas. 121.

CONSCRIPTION — EXEMPTION — HABEAS CORPUS.

One taken under the conscription law, who is temporarily exempted by a local tribunal from whose judgment no appeal has been taken, is not a deserter, and if he is arrested as such he can obtain his liberty by a writ of habeas corpus. If such conscript signs, by error, documents in which he agrees to enroll, believing that such documents were necessary to set him at liberty, he is not bound by the documents he signed.

St. Denis **v.** Gingras, 54 Que. S.C. 515.

DISOBEDIENCE OF LAWFUL MILITARY COMMANDS—REFUSAL TO DON UNIFORM—SENTENCE OF COURT MARTIAL—IMPRISONMENT WITH HARD LABOUR—APPLICATION FOR HABEAS CORPUS—ORDER-IN-COUNCIL SUSPENDING HABEAS CORPUS ACT IN RESPECT OF PERSONS IN MILITARY CUSTODY — VALIDITY — PENALTY FOR DISOBEDIENCE—CANADIAN MILITIA ACT, R.S.C. 1906, c. 41, s. 122.

Re MacSwiney; Re Roche, 15 O.W.N. 226.

MILITIA.

See also Military Law; Soldiers; Army and Navy; Desertion.

QUELLING RIOTS—LIABILITY OF A MUNICIPALITY FOR EXPENSE.

The "senior officer present at any locality" who may, under the Militia Act, R.S.C. 1886, c. 41, s. 34, on requisition from three justices of the peace, call out the troops in aid of the civil power, wherever a riot or disturbance of the peace has occurred or is anticipated, is not necessarily the senior officer of a corps stationed at the place where the riot occurs or is likely to occur; the justices, in their discretion, may requisition the senior officer of any available force.

Att'y-Gen'l of Canada v. Sydney, 16 D.L.R. 726, 49 Can. S.C.R. 148, 50 C.L.J. 233, reversing 9 D.L.R. 282, 46 N.S.R. 527, 12 E.L.R. 427.

LIABILITY OF MEMBERS.

The members of a civilian rifle association, purporting to be constituted in pursuance of powers conferred by the Militia Act, R.S.C. 1906, c. 41, and of regulations made under ss. 63 and 64 of that Act, having its range selected, approved and inspected by military officers and financially aided by the federal government and having its ammunition supplied by the military authorities, are, while engaged in a shooting competition, approved by the district officer and under the command of a deputy captain, acting in pursuance of the Militia Act, and are entitled to the benefit of its provisions, in an action to recover damages for alleged injuries due to their negligence while engaged in such competition.

Webster **v.** Leard, 7 D.L.R. 429, 11 E.L.R. 203.

ENLISTMENT OF MINORS—HABEAS CORPUS.

Under art. 243 C.C. (Que.) a son remains subject to the parents' authority until majority or emancipation, and though under the Militia Act (R.S.C. 1906, c. 41) all male inhabitants of Canada between 18 and 60 years of age are liable to serve in the militia, the minor son of a person domiciled in Quebec cannot enlist voluntarily in the active militia without the consent of his father; and upon the application of the father will be discharged upon habeas corpus proceedings if he has so enlisted. [Rolbrow **v.** Cotton, 9 Q.L.R. 105, distinguished.]

Arsenault **v.** Piuse, 32 D.L.R. 604, 50 Que. S.C. 373.

A minor under 18 years, who understands the nature and consequences of enlistment and who is certified by the proper authorities to be qualified, may waive the exemption in favour of youths under 18 contained in the Dominion order-in-council of August 20, 1915, and his enlistment for overseas service will be valid without his father's consent.

Re Fournier, 32 D.L.R. 720, 26 Can. Cr. Cas. 405.

DESERTION—ABSENT WITHOUT LEAVE.

The defendant was charged before the county stipendiary for that "he did on or about the 14th day of May, 1916, desert" (from the active militia of Canada) "and was absent from the same as a deserter until apprehended on the 31st day of August, 1918." The court held that the gist of the charge that the accused was absent as a deserter involved being absent without leave and he was properly convicted under par. 13 of the Dominion order-in-council passed 9th November, 1917.

The King v. Graves, 43 D.L.R. 696, 52 N.S.R. 365.

MILITARY LAW — MILITARY SERVICE ACT, 1917—APPLICATION—MEMBER OF MILITIA—ARMY ACT—KING'S REGULATIONS.

The definition "His Majesty's auxiliary forces," in the Army Act, applies only to military forces under the control of the Parliament of the United Kingdom, including therein the Channel Islands and the Isle of Man, and does not include volunteer troops or colonial militia. Paragraph 2 of the Schedule to the Military Service Act, 1917, exempts from its operation only members of His Majesty's forces as defined by the Army Act, and not members of the Canadian Militia. The fact that a soldier is transferred from one corps to another without his consent, contrary to par. 306 of the King's Regulations does not constitute a complaint sufficient to base thereon an application for habeas corpus. It is for the military tribunals organized under the authority of these regulations, to take cognizance of breaches of the regulations.

Bouffard v. Piuze, 28 Que. K.B. 123, 32 Can. Cr. Cas. —.

MINES AND MINERLAS.

I. ON PUBLIC LANDS.
- A. Claims; location; relocation.
- B. Work; abandonment; forfeiture.
- C. Conflicting claims; contests.

II. ON PRIVATE LANDS.
- A. In general, coal mines; quarries.
- B. Oil and gas.

III. MINER'S LIENS.

I. On public lands.

A. CLAIMS; LOCATION; RELOCATION.

(§ I A—1)—EXCEPTION OF "MINES"—RESERVATION OF "RIGHT TO GET MINERALS"—INTERPRETATION OF.

An exception of "mines" or of any mineral occupying a continuous space is an exception also of the space occupied; but a reservation of a right to get minerals does not operate as an exception of the minerals themselves unless the intention to that effect is clearly shewn.

Yukon Gold Co. v. Boyle Concessions, 19 D.L.R. 336. [Affirmed 27 D.L.R. 672; 50 D.L.R. 742.]

ON SURVEYED LANDS—WHAT ARE.

Land in the Gillies timber limit (Coleman Mining Division, Ont.) that has been divided into blocks one mile square without further subdivision is "unsurveyed land" which is not within s. 51 (c) and (d) of the Ontario Mining Act, 8 Edw. VII. c. 21, R.S.O. 1914, c. 32, relating to the size of mining claims on surveyed lands.

Re McLeod and Armstrong; Re Johnson and Armstrong, 15 D.L.R. 57, 29 O.L.R. 398.

GOLD COMMISSIONER — MINING RECORDER—POWERS.

The Governor-in-Council having appointed only one Gold Commissioner for the Yukon Territory, such Gold Commissioner has all the powers and authority of a mining recorder throughout the whole territory under the Yukon Placer Mining Act, R.S.C. 1906, c. 64, ss. 3, 4, 5 and 6, as amended by 7 & 8 Edw. VII. c. 77, s. 25, without any direction to that effect by the Commissioner of the Yukon Territory.

Murphy and Gould v. The King, 39 D.L.R. 370, 55 Can. S.C.R. 550, reversing 27 D. L.R. 405, 16 Can. Ex. 81.

MINING CLAIM—DISCOVERY OF MINERALS—LANDS WITHDRAWN FROM EXPLORATION—ORDER-IN-COUNCIL.

The lands under the waters of Cobalt Lake having been, by order-in-council of the 14th August, 1905, withdrawn from exproration for mines and minerals and from sale, lease, or location, it was held, that the plaintiffs had failed to establish their title to a mining claim based upon a discovery of minerals said to have been made upon those lands on the 7th March, 1906.

Florence Mining Co. v. Cobalt Lake Mining Co., 43 O.L.R. 474, affirming 18 O.L.R. 275.

SCOPE OF LEASE—POLLUTION OF STREAM BY LESSEE.

Leases granted under the Mining Act, C. S.N.B. 1903, c. 30, do not empower the lessee to discharge polluted water into a stream; the Lieut.-Gov.-in-Council has no power to make a lease or grant that affects the rights of private individuals.

Nepisiquit, etc., Co. v. Can. Iron Corp., 42 N.B.R. 387.

ORDER VESTING MINING LOCATIONS IN APPLICANT—MINING ACT OF ONTARIO, R.S.O. 1914 C. 32—APPLICATION TO SET ASIDE ORDER AFTER EXPIRY OF 3 YEARS—ORDER MADE ON NOTICE—DELAY NOT SATISFACTORILY ACCOUNTED FOR — REFUSAL OF APPLICATION—APPEAL.

Re Hay & Engledue, 15 O.W.N. 391. [See 16 O.W.N. 223.]

MINING CONCESSION—CONSENT OF MINISTER—RIGHTS OF APPLICANT.

A mining concession under art. 2110 of the Quebec Mining Law (R.S.Q. 1909, arts. 2098 et seq.) which is a purchase of Crown property, can only be acquired with the consent of the Minister of Colonization, Mines and Fisheries. This consent cannot be presumed, or inferred from correspondence or circumstances; it must be formal,

and any person who alleges that he has obtained it must furnish the proof. An application for a concession, accompanied by a deposit of the price and followed by the determining of the location under art. 2109, does not confer on the applicant any right of possession or of working as long as the application has not been accepted by the Minister and he has not formally granted the concession.

Pelletier v. Roy, 46 Que. S.C. 9, reversing 44 Que. S.C. 147.

(§ I A—5)—STAKING OUT—BOUNDARIES.

That which a discoverer is entitled to under the Mining Act (R.S.O. 1914, c. 32) is 20 acres laid out in the manner imperatively and minutely prescribed, with diagrams, by the Act; if a claim has been inaccurately laid out, it is not thereby invalidated, but the claim may be laid out as the Act prescribes.

Re Neilly and Lessard, 33 D.L.R. 634, 38 O.L.R. 440.

The legislative intent of the Railway Aid Act (B.C.) 1890 c. 110, was, that the interest of the Crown in lands (already located as mineral claims), which are comprised in a greater block of lands granted as a subsidy to a railway company under the Act, may pass to the railway company, subject to existing and future rights of the persons who prior to the subsidy had made such locations. [Railway Aid Act, construed.]

Farrell v. Fitch, 7 D.L.R. 657, 17 B.C.R. 507, 22 W.L.R. 517, 3 W.W.R. 84.

CLAIMS — AFFIDAVIT ACCOMPANYING — SUFFICIENCY — INFORMATION AND BELIEF.

Although a licensee need not personally do all the things necessary under s. 22 (2) and 35 of the Mining Act, 8 Edw. VII. (Ont.) c. 21, R.S.O. 1914, c. 32, in order to obtain a mining claim, yet all of the facts pertaining thereto must be sworn to in the affidavit of discovery for the purpose of recording a mining claim, in the personal knowledge of the applicant as of the time of making the affidavit; a claim made by an affidavit of an applicant as to facts which he did not at the time know to be true is not validated by the circumstance that the allegations as to which the deponent wrongfully purported to have knowledge were in fact true.

Re McLeod and Armstrong; Re Johnson and Armstrong, 15 D.L.R. 57, 29 O.L.R. 398.

MINERAL CLAIMS — LAW OF DOMICILE — CHATTEL OR IMMOVABLE — TRANSFER PROCEEDINGS — TIME LIMIT — FOREIGN BANKRUPTCY PROCEEDINGS.

Barinds v. Green, 16 B.C.R. 433, 16 W.L.R. 422.

GROUPING CLAIMS—MINERS' LIEN ORDINANCE.

Gustafson v. Ennis; Burr v. Ennis, 18 W.L.R. 6.

COAL MINING AREAS—ASSIGNMENT OF APPLICATIONS FOR LICENSE—DECLARATION OF RIGHTS.

Shaw v. Robinson, 10 E.L.R. 103, affirming 8 E.L.R. 557.

WITHDRAWAL OF LANDS FROM ENTRY — POWERS OF COMMISSIONER — HYDRAULIC LEASE.

Smith v. Canadian Klondike Mining Co., 16 W.L.R. 196. [Affirmed 19 W.L.R. 1.]

PRE-EMPTION RECORD—HOUSE AS CHATTEL UNDER MINING LAW.

Taylor v. Palmer, 16 B.C.R. 24.

(§ I A—6)—DISCOVERY.

Where the holder of a miner's license under the Mining Act 8 Edw. VII. (Ont.) c. 21, stakes out a mining claim after the expiration thereof, a subsequent special renewal license obtained by him under s. 85 (1) (a) of the Act gives no validity to the previous staking and he acquires no rights thereunder. To stake out a mining claim without a miner's license is a crime under the Act, and the discoverer acquires by such staking no rights which will be allowed by the court or enforced against the claim of any other.

Re Sanderson and Saville, 6 D.L.R. 319, 26 O.L.R. 616, 22 O.W.R. 672.

(§ I A—7)—NOTICE AND RECORD OF CLAIM.

An application under the Mining Act, 8 Edw. VII. (Ont.) c. 21, s. 62, for a mining claim is deemed to be recorded in the mining recorder's office as soon as the application is received in the recorder's office after all requirements for recording have been complied with by the applicant.

Re Campsall and Allen, 7 D.L.R. 18, 4 O.W.N. 130, 23 O.W.R. 140.

PLACER MINING (B.C.)— LEGAL POSTS ON STAKING.

Strict compliance with statutory requirements is essential on staking a claim under the "placer mining" law of British Columbia, R.S.B.C. 1911, c. 165, and, if legal posts were not used in locating the claim it is invalid.

Deisler v. Spruce Creek Power Co., 17 D.L.R. 506, 28 W.L.R. 329. [Affirmed 22 D.L.R. 550, 21 B.C.R. 441, 31 W.L.R. 289.]

MINING ACT (ONT)—CLAIMANT'S INTEREST —"LANDS."

While the issue of a certificate of record to a claimant in an unpatented mining claim is declared by s. 68 of the Mining Act, 8 Edw. VII. (Ont.) c. R.S.O. 1914, c. 32, to create a tenancy at will as between the claimant and the Crown, such reference must be taken in conjunction with the other provisions of the Act in determining what is exigible under execution at the instance of a judgment creditor of the claimant, and the effect is that, notwithstanding such declaration, substantial rights are vested in the claimant which come within the word "lands" as used in the Execution

Act. (Ont.), 9 Edw. VII. c. 47, R.S.O. 1914, c. 80.

Clarkson v. Wishart, 13 D.L.R. 730, [1913] A.C. 828, 24 O.W.R. 937.

CLAIMS—LOCATION—NOTICE AND RECORD OF CLAIM — APPLICATION AND SKETCH, FORCE OF.

Under ss. 59 to 65 of the Mining Act, 8 Edw. VII. (Ont.) c. 21, R.S.O. 1914, 3. 32, the foundation of the right which a staker acquires or may acquire, is the claim and sketch filed with the recorder after compliance with the requirements as to discovery and staking; and, in determining the area of the location, such application and sketch will control as against the marking of the supposed limits on the recorder's map and the granting of a certificate of record without specific description other than the number of the claim.

Re Olmstead and Exploration Syndicate of Ontario, 13 D.L.R. 750, 5 O.W.N. 8, 49 C.L.J. 670, 24 O.W.R. 974.

CROWN PATENT—CONSTRUCTION — DESCRIPTION OF LAND — REFERENCE TO RECORDED PLAN.

A tract of land granted to the respondents by letters patent from the Crown was described therein as being in a certain township, containing a certain number of acres, and being composed of mining location S.V. 476, being land covered with the water of Peterson Lake, in front of certain other mining locations named, as shewn on a plan of survey by W., of record in the Department of lands, forests and mines. W.'s plan shewed that the whole of Peterson Lake was included in mining location S.V. 476:—Held, that the controlling words of the description were those referring to the mining location by its number as shewn on W.'s plan; and the other part of the description, if it was not an accurate description of the mining location as so shewn, must be rejected, as falsa demonstratio. Decision of the Mining Commissioner affirmed.

Re Finucane and Peterson Lake Min. Co., 32 O.L.R. 128, 7 O.W.N. 194.

BOUNDARIES OF MINING LOCATION — EVIDENCE — SURVEY — MINES ACT, R.S.O 1897, c. 36, ss. 26, 27—SURVEYS ACT, R.S.O. 1897, c. 181, ss. 17, 18, 19—FINDING OF FACT OF TRIAL JUDGE.

O'Brien v. La Rose Mines, 17 O.W.N. 230.

(§ I A—8)—PLACER CLAIM—LOCATION—RECTIFICATION OF LEASE.

A free miner locating a placer claim in the vicinity of lands under lease from the gold commissioner, and who locates his claim outside of the boundaries described in such lease, is not deprived of his claim legally obtained by his location and record when a rectification is afterwards made of the boundaries described in the lease under the authority of an order-in-council, particularly where such order-in-council contained a clause saving the rights of free miners.

Deisler v. Spruce Creek, 22 D.L.R. 550, 21 B.C.R. 441, 31 W.L.R. 289, affirming 17 D.L.R. 506, 28 W.L.R. 329.

(§ I A—9)—RESERVATION OF MINERALS IN TRANSFER—MINERALS EXCEPTED FROM CROWN GRANT.

A registrar should refuse to register a transfer containing a reservation of mines and minerals, where the right to the minerals was reserved in the grant of the land from the Crown.

Re C.P.R. and Reid, 6 W.W.R. 1160.

PUBLIC LANDS—RIGHTS TO MINERALS—COAL—RESERVATION OF GOLD AND SILVER TO CROWN.

In cases where patents to land have been issued by the Crown and no specific reservation appears on the patent with regard to coal under such land, the common-law rule applies, and all minerals, except gold and silver, lying in a direct line between the surface and the centre of the earth belong to the owner of the land.

Re Registration of a Transfer of Coal Rights, 7 W.W.R. 769.

B. WORK; ABANDONMENT; FORFEITURE.

(§ I B—10)—FORFEITURE.

A mineral claim of a free miner under location at the date of the grant of a land subsidy in British Columbia to a railway company pursuant to the Railway Aid Act, 1890, is not excepted under that Act from the grant to the railway company, as lands "alienated by the Crown," where the locator by his default (in not performing certain conditions) loses his right to a grant of the land as well as its minerals.

Farrell v. Fitch, 7 D.L.R. 657, 17 B.C.R. 507, 22 W.L.R. 517, 3 W.W.R. 84.

NOTICE OF CANCELLATION — CONTENTS — SERVICE—SOLICITORS.

In order for the Crown to effectively terminate a coal mining lease granted under the regulations in pursuance of s. 47 of the Dominion Lands Act, the conditions of the lease empowering the Minister of the Interior to cancel the lease by written notice upon default by the lessee to perform the conditions therein, it is essential that the cancellation should be effected by a notice which actually reaches and is served on the lessee, and in the absence of special authority, solicitors employed by the lessee in respect of his business with the department are not deemed agents to whom such notice of cancellation could be given; such notice should first convey a proposal or intention to cancel and thus give the lessee an opportunity to remedy the breach or at least to be heard before forfeiture. [Davenport v. The Queen, 3 App. Cas. 115, applied.]

Paulson v. The King, 27 D.L.R. 145, 52 Can. S.C.R. 317, 9 W.W.R. 1099, reversing 20 D.L.R. 787, 15 Can. Ex. 252.

RELIEF AGAINST FORFEITURE—GOOD CAUSE.

Under the Ontario Mining Act (R.S.O. 1914, c. 32, s. 85), the Mining Commissioner has no power to relieve against the forfeiture of a mining claim for noncompliance with the requirements of the Act, unless some good cause is shewn for the omission.

Re Watson and Monahan, 37 D.L.R. 333, 29 O.L.R. 358.

REPRESENTATION WORK—SCOPE OF AUTHORITY.

An authority given one to do representation work on a mining claim for gold in order to obtain a renewal of the grant does not authorize the donee of such power to give a lay to work the claim without the previous authority or subsequent ratification of the owner, and constitutes an act of trespass on the part of anyone to work the claims in excess of such right. [Olsen v. Desjarlais, 15 W.L.R. 72, followed.]

Mills v. Porter, 24 D.L.R. 638, 32 W.L.R. 491.

LAND STAKED OUT AND RECORDED AS MINING CLAIM—RIGHT TO STAKE OUT AND RECORD AS QUARRY CLAIM — ABANDONMENT OR FORFEITURE — DISCOVERY OF MINERAL IN PLACE — MINING ACT OF ONTARIO, R.S.O. 1914, c. 32, ss. 34, 118.

Re Franker and Bartleman, 8 O.W.N. 360.

TIME FOR PERFORMANCE OF WORK ON MINING CLAIM—COMMENCEMENT AND EXPIRY OF PERIODS.

Re Burns and Hall, 25 O.L.R. 168, 20 O. W.R. 526.

(§ I B—11)—JOINT OWNERS—DEFAULT OF ONE.

The provisions of s. 81 of the Mining Act, 8 Edw. VII. c. 21 (Ont.), that each of two or more persons holding an unpatented mining claim shall contribute proportionately to his interest, or as they may otherwise agree between themselves, in the work required to be done thereon by s. 78 of the Act in order to hold the claim, and that in case of default by any holder the mining commissioner upon the application of any other holder may make an order vesting the interest of the defaulters in the co-owners, do not apply where two owners of a mining claim instead of doing the work required or expending their own money to have it done, agreed to obtain subscriptions for stock in a company to be incorporated and with the money so obtained to develop the property, which was done, and the co-owner who secured all the subscriptions, the other doing nothing, is not entitled to an order of the mining commissioner vesting the interest of the other owner in him.

Irish v. Smith, 2 D.L.R. 230, 3 O.W.N. 711, 21 O.W.R. 297.

INTEREST IN MINING CLAIMS—HUSBAND AND WIFE—EVIDENCE—DECISION OF MINING COMMISSIONER—APPEAL.

Re Jessop and Jessop, 7 O.W.N. 405.

C. CONFLICTING CLAIMS; CONTESTS.

(§ I C—15)—YUKON PLACER REGULATIONS —EXTENSION OF "CREEK CLAIM" ACROSS RIVER—RIVER CLAIM—SUBMERSION OF RIVER BANK — TRESPASS — DAMAGES — "HARSHER RULE."

What is known as a "creek claim" in the Yukon Placer Mining Regulations of 1901 does not extend across a river. A river claim which includes parts of a river bank extends also to those parts within the boundaries of the claim which may have become eroded or submerged imperceptibly, and the existing dredging lease of the river bed does not extend to this accretion.

The "harsher rule" of fixing damages for trespass to a mining claim is applied. [Lamb v. Kincaid, 38 Can. S.C.R. 516, applied.]

Boyle Concessions v. Yukon Gold Co., 50 D.L.R. 742, affirming 27 D.L.R. 672, 23 B.C.R. 103, which affirmed 19 D.L.R. 336.

MINING LEASE WITH INSUFFICIENT DESCRIPTION—SUBSEQUENT LOCATOR OF PLACER CLAIM WITHIN INDICATED AREA — AMENDMENT OF CROWN LEASE—RESERVATION OF RIGHTS OF FREE MINERS.

If, through a faulty description in a lease from the Crown, of a mining claim in British Columbia, the lessee did not get the land intended, a subsequent bona fide locator of a placer claim is not affected by the fact that the greater portion of his claim may be within the boundaries of an area created by four corner posts but for which no lease has been granted; nor is the validity of the placer claim destroyed by any subsequent amendment in the description authorized by the Crown subject only to free miners' rights.

Deisler v. Spruce Creek Power Co., 17 D.L.R. 506, 28 W.L.R. 329. [Affirmed, 22 D.L.R. 550, 21 B.C.R. 441, 31 W.L.R. 289.]

PROTECTION FROM OPERATIONS OF ADJOINING CLAIM OWNER—OBSTRUCTION OF RIVER —INJUNCTION—RIGHTS OF RESPECTIVE LESSEES.

Canadian Klondyke Mining Co. v. Yukon Gold Co., 29 D.L.R. 118, 34 W.L.R. 1182.

MINING LAW—COAL AND PETROLEUM ACT—LICENSES—MINISTER OF LANDS—RIGHT TO REFUSE LICENSE—FORMER HOLDER'S RIGHT TO REVIVE LAPSED LICENSES—B. C. 1915, C.C. 48—R.S.B.C. 1911, c. 159.

The petitioners applied to the Minister of Lands for licenses under the Coal and Petroleum Act to prospect for coal and petroleum over an area upon which others had previously held licenses. The petitioners had fulfilled the statutory requirements to entitle them to licenses after the former licenses had expired and before the holders thereof attempted to revive them under B.C. 1915, c. 48 being an Act to enable

the Lieut.-Gov.-in-Council to grant relief from penalties and forfeitures in relation to moneys payable to the Crown. The Minister refused the licenses on the ground that the Lieut.-Gov.-in-Council had, under the Act, purported to revive, or was bound by law to revive, the lapsed licenses:—Held, on appeal, that the petitioners having fulfilled the statutory requirements after the former licenses had lapsed and before the attempt was made to revive them they had a legal right to obtain their licenses. Held, further, that c. 48 does not confer any power on the Lieut.-Gov. in Council to revive lapsed licenses in face of the petitioner's legal rights. [Woodbury Mines v. Poyntz, 10 B.C.R. 181, followed.] The Minister of Lands has no discretionary powers in the performance of his functions under the Coal and Petroleum Act; he acts as a mandatory of the statute.

Re Coal and Petroleum Act & Johnson, 26 B.C.R. 19.

WRITTEN ACKNOWLEDGMENT—PARTNERSHIP.

Appeal allowed from judgment awarding a share in a mine to the plaintiff, the person in whose name the claim was staked never having given a written acknowledgment as provided by s. 19 of the Mineral Act, R.S.B.C. 1911, and the statutory rules as to partnership not having been observed. Appeal dismissed in so far as repayments to plaintiff of moneys for keeping alive the mining properties were concerned.

Moore v. Deal, 24 B.C.R. 181, [1917] 2 W.W.R. 955.

QUARTZ MINERAL CLAIM—PREVIOUSLY LOCATED PLACER MINING CLAIMS—"OCCUPIED GROUND."

Smith v. Yukon Gold Co., 19 W.L.R. 8. [Affirmed 19 W.L.R. 68.]

(§ I C—16)—PLACER MINING—LEASE FOR —OCCUPATION UNDER.

The marking out of the ground by the applicant for a mining lease under the Placer Mining Act, R.S.B.C., c. 136, is merely a preliminary to the application for a lease; it does not constitute occupation and is subject to the modifications which the gold commissioner may make and to the boundaries which he may fix.

Deisler v. Spruce Creek, 22 D.L.R. 550, 21 B.C.R. 441, 31 W.L.R. 289, affirming 17 D.L.R. 506, 28 W.L.R. 329.

(§ I C—21)—MINERAL CLAIM — APPLICATION FOR CERTIFICATE OF IMPROVEMENTS —MINERAL ACT, R.S.B.C. 1911, c. 157— ADVERSE CLAIM—EXPIRATION OF WRIT ISSUED — ABANDONMENT OF CLAIM — TRESPASS.

The owner of a mineral claim who has complied with specified conditions precedent, and has applied for a certificate of improvements under the Mineral Act (R.S. B.C. 1911, c. 157), except that he was deterred from filing the affidavit required by subs. (g) of s. 57 by the statement of the Mining Recorder that an adverse action had been begun, who does nothing further before the expiry of the writ, than to inquire of the Mining Recorder from time to time whether or not the obstacle has been removed, cannot be said to have intended to abandon the interest which he claims and is entitled to judgment in an action for trespass against the adverse claimant, who has located mineral claims on the same ground after the expiry of the writ.

Reid v. Collister, 50 D.L.R. 289, 59 Can. S.C.R. 275, [1919] 3 W.W.R. 1083, affirming 47 D.L.R. 509, [1919] 3 W.W.R. 229.

CONTEST.

A tenant at will under the Crown holding an unpatented mining claim under the Mining Act, 8 Edw. VII. c. 21 (Ont.), has no status to attack an express adverse grant of the Crown, nor to set up a claim for damages against the adverse grantee.

Bucknall v. British Canadian Power Co., 7 D.L.R. 62, 4 O.W.N. 164, 23 O.W.R. 155.

Under the Mining Act, 8 Edw. VII. (Ont.) c. 21, s. 62, where an application for a mining claim is refused by the mining recorder, and the refusal is contested, the applicant's proper and competent procedure for a hearing is that provided under ss. 63, 65, 66, 130 (2), where the recorder's formal decision is to be obtained in the first instance before the right to appeal to the mining commissioner arises. Under the Act, where a disputant, ignoring ss. 63, 65, 66 and 130 (2), fails to submit the dispute in the first instance to the recorder and instead initiates his proceeding before the mining commissioner, the commissioner will rightly refuse to go into the merits because the dispute is not properly before him under s. 130 (2).

Re Campbell and Allen, 7 D.L.R. 18, 4 O.W.N. 130, 23 O.W.R. 140.

II. On private lands.

A. IN GENERAL; COAL MINES; QUARRIES.

Coal Mines Act, lease, see Public Lands, II—20.

Value of mineral rights, see Taxes, III D—135; Evidence, XI F—790.

Compensation for mining rights in expropriation under Railway Act, Arbitration, III—17.

(§ II A—25)—MINING CONTRACT—"DIRT MINED."

In the absence of an express stipulation to that effect, a second handling of tailings cannot be treated as "dirt mined" under an agreement allowing out of the gold recovered a certain sum for every cubic yard of dirt mined.

Olsen v. Can. Klondyke Mining Co., 34 D.L.R. 529, 24 B.C.R. 114, [1917] 2 W.W.R. 640, affirming 34 W.L.R. 953.

EXISTENCE OF MINERALS AS DETERMINING RIGHT.

The potentiality of the nonexistence of minerals in or upon land may affect the

nature of the interest of the owner of a right to dig for minerals.

Coleman v. Head Syndicate, 11 A.L.R. 314, [1917] 1 W.W.R. 1070.

MINING OPTION—HOW DISTINGUISHED FROM AGREEMENT OF SALE.

An option (mining) or working bond can be distinguished from an agreement of sale, in that in the former the vendor looks to payment from whatever ore may be extracted from the mine and not to the vendor's covenant for payment.

Venness v. Stoddard, 9 W.W.R. 832.

MINING PROPERTIES—CONTRACTS—EVIDENCE—FAILURE TO ESTABLISH AGREEMENT.

Browne v. Timmins, 8 O.W.N. 482.

(§ II A—28)—FORFEITURE OF COAL LEASE—INVALID NOTICE—INACCURATE DATE.

Forfeitures are regarded with disfavour by the courts, and their upholding will be avoided even for trifling reasons; therefore an inaccuracy in the reference to the date of a lease is sufficient to invalidate the notice of forfeiture.

Big Valley Collieries v. MacKinnon, 23 D.L.R. 62, 9 W.W.R. 4, 32 W.L.R. 158.

ASSIGNMENT OF APPLICATIONS FOR LICENSE TO WORK — HOLDING COMPANY — JOINT BENEFIT—ABSOLUTE SALE.

Shaw v. Robinson, 4 N.B. Eq. 286.

MINING LEASE—PROVISIONS AS TO FORFEITURE—RIGHTS OF LESSOR—EXERCISE OF SUCH RIGHTS—FAILURE OF LESSEE TO COMPLY WITH PROVISIONS.

A mining lease embodying provisions as to forfeiture on the failure of the lessee to fulfil certain obligations is not void when such failure occurs, but voidable at the option of the lessor. A lease which is part of an undertaking authorized by a special statute must be construed with and governed by such statute.

Quesnel Forks Gold Mining Co. v. Ward, 50 D.L.R. 1, [1919] 3 W.W.R. 946, affirming 42 D.L.R. 476, 25 B.C.R. 476, [1918] 3 W.W.R. 230.

(§ II A—30)—SALE OF RIGHT TO TAKE AWAY AND REMOVE MINERAL.

The sale of the right to take away and remove from now and for ever all the natural paint mineral or other minerals which may be found in a certain immoveable constitutes a sale of the mine carrying with it the concessions of the surface, and is not merely the sale of the right to work the mine; such a sale is the sale of an immoveable right with all the effects thereof, whereas the sale of the right to mine is the sale of a moveable right. There are three elements which must be taken into consideration to ascertain whether a sale is that of a mine itself or that of the right to mine; the mine itself, the ground and the rent.

Houle v. Quebec Bank, 4 D.L.R. 614, 41 Que. S.C. 521.

MISREPRESENTATION—PURCHASE OF MINING CLAIMS—UNDERTAKING TO RETURN PURCHASE MONEY.

Lake View Consols v. Flynn, 7 O.W.N. 322.

(§ II A—32)—RIGHTS OF DEVISEE OR GRANTEE.

Where a deed granting all the sewer pipe clay on a part of the grantor's farm made no limit as to the depth the grantees were to go in removing the clay and there was no other agreement as to that subject, the grantor is not entitled to have the deed rectified so as to conform to what both parties at the time of its execution contemplated would be the depth to which the grantees would go in getting the clay as the result of tests then made. [Okill v. Whittaker, 1 De G. & Sm. 83, and Howkins v. Jackson, 2 Macn. & G. 372, applied.]

Gallagher v. Ontario Pipe Clay Co., 3 D.L.R. 594, 3 O.W.N. 732, 1240, 21 O.W.R. 550, 1002.

SALE OF LANDS—RESERVATION—RIGHT TO MINES AND MINERALS—IMPLIED RIGHT TO ENTER.

A sale of land with a reservation of mining and mineral rights, implies a right to enter on such land in order to exercise these rights.

Fuller v. Garneau, 50 D.L.R. 405, [1920] 1 W.W.R. 154. [Affirmed 51 D.L.R. 307.]

(§ II A—34)—DEPOSIT OF "TAILINGS" ON PRIVATE LANDS—PERMISSION OF OWNER—PROPERTY IN "TAILINGS."

"Tailings" from ore reduction deposited on the private lands of a company by another company, with the permission of the former, but with no agreement as to removal, become the property of the first-mentioned company.

Dominion Reduction Co. v. Peterson Lake Silver Cobalt Mining Co., 50 D.L.R. 52, 59 Can. S.C.R. 646, affirming 46 D.L.R. 724, 44 O.L.R. 177, which affirmed 41 O.L.R. 182.

ILLEGAL DISPOSAL OF ORE.

R. v. Barber, 17 Can. Cr. Cas. 237.

PLACER MINERS—HYDRAULIC MINERS—USE OF IMPORTED WATER—INJURY TO ADJACENT MINES BY FLOODING.

Barnes v. Yukon Gold Co., 18 W.L.R. 542.

B. OIL AND GAS.

(§ II B—41)—DEED OR RESERVATION OF OIL OR GAS.

The words "mines" and "minerals" are not definite terms but are susceptible of limitation or expansion according to the intention with which they are used. [Glasgow v. Farie, 13 App. Cas. 657, applied.]

Barnard-Argue, etc., Oil & Gas Co. et al. v. Farquharson, 5 D.L.R. 207, 23 O.W.R. 90, [1912] A.C. 864.

(§ II B—52)—CONDITIONS AS TO DEVELOPING.

An agreement by two separate landowners, neither of whom had any title or right to or interest in the farm of the other,

that they are to give "the usual gas and oil leases of their respective farms," where the agreement throughout uses the word "leases" in the plural and never in the singular, is an agreement for separate leases of their respective farms and not for one joint lease of the two farms, notwithstanding a provision that the lessee was to supply gas free of charge to the landowners.

Welland County Lime Works Co. v. Shurr, 8 D.L.R. 720, 4 O.W.N. 336, 23 O.W.R. 397, reversing 1 D.L.R. 913, 3 O.W.N. 775, and restoring 3 O.W.N. 398.

(§ II B—53)—RIGHT AND TITLE ACQUIRED UNDER LEASE.

Subsequent lessees of an "oil lease" where there is already on record an outstanding valid "oil lease" on the same property will be restrained from entering upon or prospecting for oil or gas on the lands in question during the period that the prior lessees are so entitled.

Maple City Oil & Gas Co. v. Charlton, 7 D.L.R. 345, 3 O.W.N. 1629.

OIL AND GAS LEASE—"SO LONG AS OIL AND GAS IS PRODUCED IN PAYING QUANTITIES" — OPTION FOR UNLIMITED AS TO TIME—RULE AGAINST PERPETUITIES.

United Fuel Supply Co. v. Volcanic Oil & Gas Co., 3 O.W.N. 93, 20 O.W.R. 78.

(§ II B—55)—"OIL LEASES"—LEASE MADE BY WIFE—NONACQUIESCENCE OF HUSBAND—FAILURE OF LESSEES TO COMPLY WITH PROVISIONS OF LEASE—FORFEITURE—RECOVERY OF POSSESSION OF LAND—DAMAGES BY OIL OPERATIONS—REMOVAL OF MACHINERY—SALE ON DEFAULT.

Smith v. Miller, 10 O.W.N. 344.

(§ II B—56)—CONTRACTS.

Where, in an agreement between the parties, the first clause contained a declaration of title, and subsequent clauses gave a right of mining with a power of cancellation under certain contingencies, the agreement was severable, and the exercise of such power related to the operative clauses only and did not affect the clause containing the declaration of title.

Dunsmuir v. Last Chance Mining Co., 16 B.C.R. 499.

III. Miner's liens.

See Mechanics' Lien, V. 30.

(§ III—75)—CONSTRUCTION OF ORDINANCE.

The Miners' Lien Ordinance, 1906 (Y.T.) must be read and construed in the light of the history of the lien laws in the several provinces and their progenitors, the lien laws of the United States. The underlying principle of the mechanics' lien laws in the several provinces is that the lien attaches by reason of a contract with the owner of the premises, qualified by the provision that the statute does not give a lien, but only a potential right of creating it.

Bradshaw v. Saucerman, 9 D.L.R. 439, 18 B.C.R. 41, 23 W.L.R. 33, 3 W.W.R. 761.

(§ III—85)—PRIOR MORTGAGEE—PRIORITIES—NOTICE.

Under s. 7 of the Miners' Lien Ordinance, 1906 (Y.T.), requiring that a claim of lien shall state the name and address of the owner of the property to be charged, and also of the person for whom and upon whose credit the work was done, a mortgagee of the property, whose mortgage was registered prior to the work done and material supplied and who was not in possession when the work was done and material supplied and who had not contracted for or been in any way privy to the hiring of the workmen, need not be named in the claim of lien.

Bradshaw v. Saucerman, 9 D.L.R. 439, 18 B.C.R. 41, 23 W.L.R. 33, 3 W.W.R. 761, affirming 4 D.L.R. 476, 21 W.L.R. 65.

FOR WHAT WORK OR MATERIALS—WOOD CUT FOR MINE, DIVERTED.

A claim of lien by workmen for wood cut for a mine properly includes all the wood cut by the workmen which was intended for use in the mine, though part of the wood was diverted to other purposes by the owner, such diversion not being under the control of the workmen.

Bradshaw v. Saucerman, 9 D.L.R. 439, 18 B.C.R. 41, 23 W.L.R. 33, 3 W.W.R. 761.

(§ III—100)—EXCESSIVE CLAIM.

A claim for a miner's lien should not be rejected merely because the sum claimed is more than the claimant is entitled to, but the claimant should be allowed to establish that he is entitled to a lien for some part of the claim.

Bradshaw v. Saucerman, 9 D.L.R. 439, 18 B.C.R. 41, 23 W.L.R. 33, 3 W.W.R. 761, affirming 4 D.L.R. 476, 21 W.L.R. 65.

(§ III—105)—PARTICULARS OF WORK DONE, REQUIREMENTS.

A statement in the claim for a lien under the Miners' Lien Ordinance, 1906 (Y.T.), that it is "for wages for work and labour done and performed on and in respect to certain mining claims," followed by the amounts set out in their respective time checks for wages and giving the dates of employment, is a sufficient statement of the work done within the meaning of subs. (b) of s. 7 of that Act. [Barrington v. Martin, 16 O.L.R. 635, distinguished.]

Bradshaw v. Saucerman, 9 D.L.R. 439, 18 B.C.R. 41, 23 W.L.R. 33, 3 W.W.R. 761, affirming 4 D.L.R. 476, 21 W.L.R. 65.

MINORS.

See Infants; Parent and Child.

MISCHIEF.

WILFUL DAMAGE—HIGHWAY.

Where rural municipalities had a statutory right to open temporary roads across private property and the municipal council had passed a resolution purporting to give the defendant and her agents the right to cross the informant's land in pursuance of

which defendant instructed her agent to cross the land with a load of hay, believing that she had the right to do so, an inference is raised that the defendant acted under a fair and reasonable supposition of right (Cr. Code, s. 540), displacing the liability to summary proceedings under s. 539 for wilful injury to property; and where there was no evidence to the contrary, the justices were without jurisdiction and their summary conviction of defendant was quashed on certiorari.

R. v. Adamson, 25 Can. Cr. Cas. 440, 9 S.L.R. 91, 33 W.L.R. 566.

SETTING FIRE TO THRESHING SEPARATOR—"MACHINES," "STRUCTURE," MEANING OF.

A "threshing separator" is not a "structure" within the meaning of s. 511 Cr. Code, but is covered by the term "agricultural or manufacturing machines" under s. 510.

Mortimer v. Fisher, 11 D.L.R. 77, 6 S.L.R. 200, 23 W.L.R. 905, 4 W.W.R. 454.

WILFULLY KILLING HORSE—AGREEMENT NOT TO PROSECUTE.

If the offence is of a public nature no agreement can be valid that is founded on the consideration of stifling a prosecution for it; consequently a promissory note, unless held by a transferee in due course and for value, is not enforceable if given in consideration of stifling a criminal prosecution for the indictable offence of wilfully killing a horse, the property of another (Cr. Code, s. 510).

Johnson v. Musselman (Alta.), 37 D.L.R. 162, 28 Can. Cr. Cas. 165, [1917] 2 W.W.R. 444.

MISCHIEF TO MINES—CUTTING DAM IN COURSE OF CONSTRUCTION.

The King v. Watier, 17 Can. Cr. Cas. 9.

MISDEMEANOURS.

See Summary Conviction; Criminal Law.

MISDIRECTION.

See Trial; New Trial; Appeal.

MISFEASANCE.

Of directors, see Companies.

MISJOINDER.

See Pleading; Parties; Action.

MISREPRESENTATION.

See Fraud and Deceit; Contracts; Vendor and Purchaser; Insurance; Companies.

MISTAKE.

I. MISTAKE OF FACT.
II. MISTAKE AS TO TITLE.
III. WHEN RELIEF MAY BE GRANTED.
IV. RECOVERY OF MONEY.

Payment under mistake of fact, see Taxes, III J—165.

Lien for taxes mistakingly paid on another's land, see Liens, I—1.

Lien for improvements upon land under mistake of title see, Liens, I—1.

Mistake in description of land correction of error in judgment, see Judgment, I G—55.

Mistake in description not misleading as of no invalidating effect, see Municipal Corporations, II G—260.

I. Mistake of Fact.

PAYMENT UNDER MISTAKE OF FACT.

Money paid by a surety under a mistake as to the identity of the person covered by the bond is payment under mistake of fact and may be recovered back.

U.S. Fidelity & Guaranty Co. v. Union Bank, 36 D.L.R. 724, 39 O.L.R. 338.

OF FACT—PILOTAGE LIMITS.

Money paid for a pilotage license which the pilotage authorities had no power to grant, for lack of territorial jurisdiction, is payment under a mistake of fact, and may be recovered back.

Smith v. Halifax Pilot Commissioners, 35 D.L.R. 765, 51 N.S.R. 241.

SALE OF BUSINESS—FORMER OWNER AS AGENT IN CARRYING ON NEW BUSINESS—SALE TO CREDITOR OF FORMER FIRM WHO DOES NOT KNOW OF CHANGE OF OWNERSHIP—RECOVERY OF PRICE OF GOODS SOLD.

The purchaser of a business, who engages the former owner to act as his agent in carrying on the business, cannot recover the price of goods sold to a creditor of the former firm, who thinks he is still dealing with the old firm, and that the amount of the purchase will be credited on the account, before he has given such purchaser notice of the change of ownership and that the goods are being supplied by him. [Boulton v. Jones, 2 H. & N. 564, 157 E.R. 232, followed.]

Maritime Manufacturers & Contractors v. Berringer, 46 D.L.R. 247.

MUTUAL—VENDOR AND PURCHASER—HOUSE AND LOT DESCRIBED BY STREET NUMBER—HOUSE ON OTHER LOT—REMOVAL BY PURCHASER TO PROPER LOT—DAMAGES.

Where a vendor agrees to sell and a purchaser to buy a house and lot described by the street and street number where it is situated, both parties believing at the time of sale that the house stood on the west half of a certain lot according to a registered plan, and after the sale it is found that the house in fact encroaches 4 feet on the east half of the lot, which has been conveyed to a third party; it being impossible to rectify the deed to conform with the agreement the purchaser is entitled to damages. The damages were assessed at what it cost the purchaser to move the house on to the west half.

Hickman v. Warman, 46 D.L.R. 66, 44 O.L.R. 257.

TIMBER LIMIT—MISDESCRIPTION.

Where an agent locator makes a mistake in the description of a timber limit, so that

it is not recognized by subsequent locators or in the office of the Surveyor-General, the principal has no right of action against subsequent locators who state the same claim and describe and register it properly.

Orde v. Rutter, 39 D.L.R. 456, 25 B.C.R. 45, [1918] 1 W.W.R. 735. [Affirmed, 49 D. L.R. 691.]

QUANTITY OF SUBJECT-MATTER — LANDS — RECTIFICATION BETWEEN VENDOR AND PURCHASER.

Where by mutual mistake of both vendor and purchaser land sold at an acreage price was dealt with on the sale as being of a much larger area as erroneously described in one of the documents of title (e.g. 87 acres, instead of 25 acres), rectification will not be ordered on the purchaser discovering the mistake subsequent to conveyance, if the parties cannot be replaced in their original position because of subsequent dealings with the property by the purchaser before discovering the mistake and of alterations made thereto.

Jackson v. Irwin, 12 D.L.R. 573, 18 B. C.R. 225, 24 W.L.R. 947, 4 W.W.R. 1301, reversing 11 D.L.R. 188, 18 B.C.R. 225, 4 W.W.R. 511.

II. Mistake as to Title.

IMPROVEMENTS UNDER MISTAKE OF TITLE.

Whatever claim the parties in possession of Dominion Crown lands may have to the grace and bounty of the Crown, in respect of improvements or otherwise on the setting aside of a Crown patent improvidently issued in the name of a person already deceased at the date of the grant and through whom the parties in possession claim, it is a matter to be dealt with by the law officers of the Crown rather than by the Exchequer Court hearing the information brought at the instance of the Crown to cancel such patent.

The King v. Larence, 10 D.L.R. 195, 15 Can. Ex. 145.

IMPROVEMENTS—OPTION TO PURCHASE LAND TAKEN FROM LIFE TENANT—INTENTION TO EXERCISE OPTION—BONA FIDE MISTAKE AS TO NATURE OF ESTATE OF VENDOR—RETENTION OF POSSESSION UPON MAKING COMPENSATION TO REMAINDERMEN — CONVEYANCING AND LAW OF PROPERTY ACT, R.S.O. 1914, C. 109, S. 37.

To entitle a person to relief under s. 37 of the Conveyancing and Law of Property Act, R.S.O. 1914, c. 109, it is not necessary that he should believe or have reasonable grounds for believing that he has the legal estate in the lands upon which he makes "lasting improvements" — all that is required is that he shall in good faith believe that he is in a position to make himself the owner. [Young v. Denike, 2 O.L.R. 723, applied and followed.]

Montreuil v. Ontario Asphalt Block Co., 46 O.L.R. 136.

III. When relief may be granted.

Where, by reason of mutual mistake between the parties, in a supposed parol agreement for the sale of land, the plaintiff has, with the other's acquiescence, erected a barn and planted fruit trees on the premises, a court of equity will grant reasonable compensation therefor.

Kerr v. Cunard, 16 D.L.R. 662, 42 N. B.R. 454.

CHATTEL MORTGAGE BY COMPANY—REGISTRATION OF IN COUNTY COURT INSTEAD OF WITH REGISTRAR OF JOINT STOCK COMPANIES—RECTIFICATION OF ERROR.

Morrison, Thompson Hardware Co. v. Westbank Trading Co., 16 B.C.R. 33. [Affirmed 19 W.L.R. 294.]

CORRECTION.

When there is an error in calculation in a document it is the duty of the party who discovers it to notify his adversary and the court of first instance, and if he does not, the Court of Review should correct this error without modifying the costs.

Marinier v. Riordon Paper Mills, 51 Que. S.C. 532.

IV. Recovery of money paid voluntarily under a mistake of fact.

VOLUNTARY PAYMENT MADE TWICE OF SAME DEBT—ABSENCE OF FRAUD.

In the absence of fraud or misrepresentation on the part of the payee, he is not under an obligation to pay back upon the ground of mistake, the amount of promissory notes which the payer has paid the second time under protest and with the knowledge that he was not liable. [Kelly v. Solari, 9 M. & W. 54, and Imperial Bank v. Bank of Hamilton, [1903] A.C. 49, applied.]

Court v. Glenn, 14 D.L.R. 612, 6 S.L.R. 140, 26 W.L.R. 71, 5 W.W.R. 619.

CHEQUE ERRONEOUSLY DRAWN TO HUSBAND FOR DEBT DUE WIFE.

A husband having conveyed his business to his wife and, after working for her for a certain time as an employee, the husband and wife have separated and are living apart, and the husband has ceased to have anything to do with the business, and the defendant knew of this change and intended to deal with the wife, but through error a cheque was made payable to the husband, who appropriated the money to his own use, the payment to the husband cannot be considered a valid payment of the debt, as the wife was in no way to blame for the error.

Ross v. New Brunswick Construction Co., 24 D.L.R. 234, 48 N.B.R. 291.

RECOVERY OF MONEY VOLUNTARILY PAID — MISTAKE OF FACT.

The future happening of an unforseen event which affects the right of one to whom money had been voluntarily paid does not amount to a mistake of fact that will permit the payor to recover such payment. Where the executor of an estate from which an annuity was payable, in order to

facilitate the settlement thereof, paid all of the succession duty on the annuity in one payment, instead of in 4 annual instalments, as he might have done under s. 11 (1) of the Succession Duty Act, (Ont.) 7 Edw. VII. c. 10, he cannot recover from the Crown upon the death of the annuitant immediately after such payment was made, on the theory that it was paid under a mistake of fact, the amount of the 3 annual instalments of succession duty that would have subsequently accrued had it not all been paid at one time, notwithstanding such Act provides that in the death of the annuitant before the expiration of the 4 years, payment should be required only of the instalments which fell due before the death of the annuitant.

Bethune v. The King, 4 D.L.R. 229, 26 O. L.R. 117.

MONEY PAID UNDER MISTAKE OF LAW—COSTS PAID BY SOLICITORS.

The rule of law that moneys paid under a mistake of law cannot be recovered does not apply where the mistakes are made by officers of the court therefore costs paid by a solicitor under a mistake of rules of practice as to an examination for discovery may be recovered by him. [Ex parte James, L. R. 9 Ch. 609, followed.]

London Guarantee & Accident Co. v. Henderson, 23 D.L.R. 38, 25 Man. L.R. 617, 32 W.L.R. 61, 8 W.W.R. 1260.

MISTAKE.

Money paid in satisfaction of a succession duty under a mistake of law to the effect that a bequest created an annuity, cannot be recovered from the Crown.

Bethune v. The King, 4 D.L.R. 229, 26 O. L.R. 117, 21 O.W.R. 559.

MONEY PAID BY MISTAKE—REPETITION.

The hirer of services may maintain an action en répétition de l'indu to recover a sum in excess of their value paid by his agent to the employee through error, and on a representation that the amount had been fixed by agreement.

Menier v. Viau, 41 Que. S.C. 298.

MONEY PAID VOLUNTARILY UNDER MISTAKE OF FACT.

The words "without prejudice to the rights of (third parties)," appended to a release from a debt, do not make the latter conditional, and the representatives of the debtor, who pay it, in ignorance of the release, have an action to recover it from the creditor or his representatives.

Harbec v. Menard, 22 Que. K.B. 320.

ALLEGATIONS OF PLAINTIFF—ACTION DE IN REM VERSO—MANAGEMENT OF AFFAIRS — MISTAKE — C.C. (QUE.) ARTS. 1043, 1046, 1141.

In an action to recover money paid by mistake, claiming an amount paid to another than the real debtor, the plaintiff must allege that the payment had benefited such debtor, and not only that the plaintiff paid it by mistake. Where the plaintiff based his action on mistake, he cannot invoke the principle of action "de in rem verso."

St. Gabriel-de-Brandon (Parish) v. St. Gabriel-de-Brandon (Village), 25 Rev. Leg. 118.

OBLIGATION TO RESTORE PROPERTY OF ANOTHER.

Greece v. Greece, 39 Que. S.C. 233.

MODERN DESCRIPTION.

See Vendor and Purchaser, I C—10.

MONEY.

Annotation.

Right to recover—Illegality of contract—Repudiation: 11 D.L.R. 195.

MONEY IN COURT.

Right to recover, see Contracts, VI.

DEPOSIT TO OBTAIN NEW TRIAL.

On an appeal from a judgment in favour of the plaintiffs a new trial was ordered upon the defendant paying into court $4,000 to abide the result of the new trial. On the new trial judgment was again given in favour of the plaintiff, the judge adding that the payment out of moneys must be spoken to. Subsequently the defendants assigned for the benefit of creditors. On application for payment out:—Held, that as the money was paid in as against the happening of a contingency which eventuated before the assignment, namely, the securing of a judgment, the plaintiff was entitled to payment out. Neither the Fraudulent Preferences Act nor the Creditors' Trust Deeds Act applies in this case.

Doctor v. People's Trust Co., 14 D.L.R. 451, 18 B.C.R. 111, 3 W.W.R. 929.

LACOMBE ACT (QUE.)

When the debtor has deposited in the Circuit Court a part of his sale as provided by the Lacombe Act, a creditor holding a judgment in the Superior Court cannot demand that the debtor or the tiers-saisi shall make a fresh deposit in the Superior Court on the ground that the Lacombe Act does not apply to Superior Court judgments, but the hearing on the plaintiff's motion will be postponed until the contestation of the saisie-arrêt is determined.

Ouimet v. Fleur, 14 Que. P.R. 162.

PAYING OUT.

A party making a deposit on any preliminary plea has the right to withdraw it so soon as adjudication is made thereon, without waiting for the final decision on the merits of the case.

Miller v. Demers, 13 Que. P.R. 420.

MONEY LENDERS ACT.

See Usury; Interest.

MONOPOLY AND COMBINATIONS.

I. What constitutes; In general.
II. Combinations in restraint of trade, commerce or competition.
A. In general.
B. Of manufacturers of or dealers in, various products.
III. Government control.

Restraint of trade, Cr. Code, s. 498, see Contracts, III E—275.

I. What constitutes; in general.

(§ I—2)—Combine defined.

A "combine" within the meaning of the Combines Investigation Act is any compact about the making or selling of one article which would fix the price not only of that one article, but of any other article, to the detriment of consumers or producers of the last-mentioned article.

United Shoe Machinery Co. v. Laurendeau and Drouin, 2 D.L.R. 77.

II. Combinations in restrain of trade, commerce or competition.

B. Of manufacturers of, or dealers in, various products.

(§ II B—16)—Other products.

An agreement between two dealers in junk aimed to destroy all competition in that business in the territory in which they were operating and to lower prices paid by them for the stuff and indirectly to raise prices paid to them by their customers, the profits resulting to be divided between them, is void and unenforceable under Cr. Code, s. 498.

Weidman v. Shragge, 2 D.L.R. 734, 46 Can. S.C.R. 1, 2 W.W.R. 330.

Undue restraint of trade.

The mere fact that for a consideration which was reasonable, the owner of a salt works and plant should agree to give the sole and exclusive control for a limited period to another person of those works and plant, retaining only a right to manufacture for the local trade and sell to that trade at prices to be fixed by the purchaser of the control of the salt works, does not make such an agreement illegal ex facie under s. 498 Cr. Code. [Att'y-Gen'l of Australia v. Adelaide S.S. Co., [1913] A.C. 781, applied.]

MacEwan v. Toronto General Trusts Co., 35 D.L.R. 435, 28 Can. Cr. Cas. 387, 54 Can. S.C.R. 381, reversing 29 D.L.R. 711, 36 O. L.R. 244.

Buying out competition.

An arrangement between coal companies for the purpose of buying out a competitor is not illegal under s. 498 (d) Cr. Code, as tending to unduly prevent or lessen competition. That subsection applies to arrangements among persons who remain in the business as to the method by which they will carry it on and to regulations among themselves so as to lessen competition, and not to an arrangement to buy out the property of a competitor who is left free to acquire other properties and so to continue in competition with his vendees.

*Stewart v. Thorpe, 36 D.L.R. 752, 28 Can. Cr. Cas. 218, 11 A.L.R. 473, [1917] 2 W. W.R. 700, varying [1917] 1 W.W.R. 896, 27 Can. Cr. Cas. 409, [Affirmed 49 D.L.R. 694.]

Price restriction agreement.

A price restriction agreement between the wholesaler and the retail dealer whereby the latter was to sell certain goods bought from the wholesaler only at prices therein stated, will not be enforced because of its illegality under Cr. Code, s. 498, if its stipulations are such as unreasonably to enhance the price of the goods to the purchasing public. [Wampole v. Karn, 11 O. L.R. 619; Weidman v. Shragge, 20 Can. Cr. Cas. 117, 46 Can. S.C.R. 1, followed.]

Stearns v. Avery, 24 Can. Cr. Cas. 339, 33 O.L.R. 251.

Agreement fixing passenger and freight tariffs—Public policy.

St. John River S. Co. v. Star Line S.S. Co., 10 E.L.R. 97.

III. Government control.

(§ III — 51) — Combines Investigation Act.

It is for the judge to whom application is made for an order under the Combines Investigation Act (Can.) to decide whether the applicants have shewn prima facie cause, and his discretion as to whether there is "reasonable ground" for considering the applicants as "consumers" or "producers" cannot be revised by prohibition, especially after the board itself has been constituted.

United Shoe Machinery Co. v. Laurendeau and Drouin, 2 D.L.R. 77.

Procedure under the Combines Investigation Act.

United Shoe Machinery Co. v. Drouin, 12 Que. P.R. 289.

MORATORIUM.

I. Application of Acts generally.
II. Vendors and purchasers.
III. Mortgages.
IV. Tax sales; judicial sales.
V. Procedure.

Annotations.

Postponement of Payment Acts, construction and application: 22 D.L.R. 865.

See War Relief Act; Volunteers and Reservists Relief Act; Vendor and Purchaser, I B—5; Mortgage, VI E—90.

I. Application of acts generally.

(§ I—2)—Agreement of sale—Lands in other province.

The Moratorium Act (Man.), does not apply to the enforcement in Manitoba of an agreement for sale of lands situate in another province.

Stanley v. Struthers, 22 D.L.R. 60, 7 W. W.R. 1060.

CROP AGREEMENTS.

An agreement for sale of lands whereby the purchaser is to pay the proceeds of one-half of the wheat crop yearly until the purchase money and interest is fully paid, is within the exception of s. 4 (b) of the Moratorium Act (Man.), although the agreement is not for delivery of part of the crop itself; but s. 3 of the Act applies to extend for one year the time fixed for redemption under the Master's report made before the Act came into force.

Haight v. Davis 22 D.L.R. 507, 25 Man. L.R. 187, 30 W.L.R. 565, 7 W.W.R. 1154.

"RESIDENT."

A resident of another province or country who comes into this province with the intention of enlisting in the forces raised by the Government of Canada in aid of His Majesty during the present war, and does so enlist within a short time after his arrival here, cannot be deemed to have become a "resident" of Manitoba within the meaning of that expression as used in the War Relief Act (Man.), 1915, c. 88, and is not entitled to the benefits of that Act. [Wanzer v. Woods, 13 P.R. (Ont.) 511, at p. 513; Bempde v. Johnstone, 3 Ves. 201, followed.]

Douglas v. O'Brien, 27 Man. L.R. 46.

MUNITION WORKER—MEMBER OF ARMY RESERVE.

An applicant for relief under the War Relief Act (B.C.), 1916, c. 74 went to England in June, 1915, as a volunteer and applied for a commission in the Engineers, but owing to his doing special building construction work on a munition factory at the time his application was suspended. In August, 1915, he became manager of a munition factory, at which work he is still engaged. In July, 1916, he was placed in Army Reserve, Section B, exempting him from service while employed in a munition factory. An action was brought against him for foreclosure of a mortgage. Held, that he was entitled to relief under the War Relief Act.

Walker v. British Canadian Securities, 24 B.C.R. 119.

INCORPORATED CLUB.

A club incorporated under the Benevolent Societies Act, R.S.B.C. 1897, is a statutory trustee of property held in its name and comes therefore within s. 2 (c) of the War Relief Act (B.C.), 1916, c. 74 as amended by Act 1917, which provides that during the continuance of the war, and for a period of 6 months thereafter, it shall not be lawful for any person to bring any action or take any proceedings, either in any of the civil courts of this province, or outside of such courts, against any member of the family of any such person if dependent on such person.

Inman v. Western Club, [1917] 3 W.W.R. 541.

LIBEL ACTION.

A plaintiff in a libel action need not comply with the provisions of the War Relief Act (B.C.), 1916, c. 74.

Nelson v. Balderson, [1917] 3 W.W.R. 448.

MORTGAGE—CODEFENDANT.

Defendants in an action based upon a covenant for payment in a mortgage cannot rely upon the fact that a codefendant is a volunteer as defence to the action.

Northern Trusts Co. v. Peart, 10 S.L.R. 67, [1917] 1 W.W.R. 1415.

ANTECEDENT DEBT—RENEWAL OF NOTE.

No action lies against a volunteer or reservist upon a promissory note which, although made after the date of the passing of the Volunteers and Reservists Relief Act (Alta.), c. 6, 1916, is shewn to be a renewal of a note before the passing of the Act and not intended to discharge the original note.

Merchants Bank v. Arnold, 11 A.L.R. 24, [1917] 2 W.W.R. 39.

WAR RELIEF ACT — MORTGAGEE — HUSBAND ENLISTED FOR ACTIVE SERVICE —LATER DISCHARGED—WIFE NOT SUPPORTED BY HUSBAND—EFFECT OF—NEW EVIDENCE AFTER TRIAL — COSTS — B.C. STATS. 1916, C. 74—1917, C. 74.

In the case of a husband enlisting for active service, although his wife may not be actually dependent upon him for support she is nevertheless entitled to the benefit of the War Relief Act. [Parsons v. Norris, 24 B.C.R. 41 followed.]

Mortgage Co. of Canada v. Hall, 25 B.C. R. 280.

WAR RELIEF ACT — DIVORCE — JUDGMENT—DAMAGES—"LIABILITIES"—B.C. STATS. 1917, C. 74, S. 2.

The term "liabilities" in s. 2 of the War Relief Amendment Act, 1917, does not include damages recovered in an action arising in tort.

Bouch v. Rath, 25 B.C.R. 445.

THE VOLUNTEERS AND RESERVISTS RELIEF ACT, C. 7, 1916—VENDOR SEIZING SHARE OF CROP UNDER AGREEMENT OF SALE OF LAND—NOT A PROCEEDING UPON A PERSONAL COVENANT UNDER S. 3—SPECIFIC PERFORMANCE—INTEREST OF PURCHASER MERELY NOMINAL, S. 8—PROCEEDINGS CONFIRMED UNDER S. 17.

In the case above mentioned the purchaser, who had enlisted was not protected under the Volunteer and Reservists Relief Act, c. 7 of 1916, as against the vendor's right to seize her share of the crop, the proceedings not being a proceeding upon a personal covenant within the meaning of s. 3 (following Riach v. Elliott, [1917] 1 W.W.R. 591). Proceedings by way of counterclaim for specific performance of the agreement of sale on cancellation, were allowed as if the volunteers and Reservists Relief Act had not been passed, the court being satisfied under s. 8 that the interest of the purchaser was merely nominal as he had never paid more than interest on the

agreement, and under s. 17 of the court confirmed and validated the proceedings.

Rose v. Edmonds, [1919] 3 W.W.R. 47.

MORATORIUM ACT (MAN.), 5 GEO. V., c. 10—COVENANT BY VENDOR ASSIGNOR TO PAY ASSIGNEE UPON PURCHASER'S DEFAULT NOT WITHIN THE ACT.

Baron Vivian v. Strain, 9 W.W.R. 1174.

(§ I—5)—VOLUNTEERS AND RESERVISTS—DISCHARGED VOLUNTEER.

Section 3 of the Volunteers and Reservists Relief Act (Sask.), 1916, c. 7, continues the protection afforded by the Act, until 6 months after the conclusion of the war; this protection applies to all who have once joined the Canadian forces as volunteers although subsequently discharged.

Colonial Investment & Loan Co. v. Smyth, 40 D.L.R. 586, 11 S.L.R. 186, [1918] 2 W.W.R. 482.

WAR RELIEF ACT—MORTGAGE—ARREARS OF INTEREST.

The War Relief Act (Alta.), 1918, s. 3, does not apply to proceedings pending at the time the Act came into operation, but after proceedings have been commenced a mortgagor may pay all arrears of interest and other charges leaving nothing but the principal in arrear, and proceedings, although properly commenced, could then only be continued in contravention of the section.

Re War Relief Act; Re Credit Foncier Franco-Canadien Co., 40 D.L.R. 542, 13 A.L.R. 303, [1918] 2 W.W.R. 475.

WAR RELIEF AMENDMENT ACT—CONFLICT OF LAWS—ACTION IN ENGLAND.

The War Relief Amendment Act (B.C.), 1917, c. 74, relates to procedure only and therefore is no defence to an action in the English courts against a volunteer who enlisted in that province but upon whom service of process is made in England.

Merchants Bank v. Eliot, [1918] 1 W.W.R. 698.

WAR RELIEF ACT—COMMISSIONED OFFICERS—"PROCEEDINGS."

Commissioned officers, though not in a sense "enlisted" soldiers, are "volunteers" within the protective provisions of the War Relief Act, 1916, c. 74, and an application for the registration of a final foreclosure order is a "proceeding outside the court" suspended by the Act.

Re Smith and the Land Registry Act, 31 D.L.R. 702, 23 B.C.R. 547, [1917] 1 W.W.R. 332.

(§ I—10)—HUSBAND AND WIFE.

An action against a married woman for her personal debt, her husband not being a defendant, will not be stayed under the Volunteers and Reservists Relief Act (Alta.), 1916, c. 6, on the ground that since the action was begun her husband has come within the protection of that Act. [Shipman v. Imperial Canadian Trust Co., 31 D.L.R. 137, 27 Man. L.R. 238, followed.]

British Columbia Life v. Davis, [1917] 3 W.W.R. 661.

(§ I—15)—EFFECT OF DEATH.

The protection given the wife of a volunteer by s. 15 of the Volunteers and Reservists Relief Act (Sask.), 1916, c. 7, is not removed upon his death, but continues during the period covered by the Act, if she does not remarry. [McCausland v. Griffiths, [1917] 3 W.W.R. 52, distinguished.]

Re Canada Life Assurance Co., [1917] 3 W.W.R. 349.

The protection afforded by the Volunteers and Reservists Relief Act (Sask.), 1916, c. 7, does not cease with the death of the volunteer or reservist, but extends to protect his property and interests during the continuance of the war and for one year thereafter.

Re Land Titles Act; Re Netherlands Transatlantic Mortgage Co., [1917] 2 W.W.R. 1089.

EFFECT OF DEATH—MORTGAGE.

A volunteer who died before the Volunteers and Reservists Relief Act (Alta.), 1916, c. 7 came into force (April 19, 1916) never had the protection of the Act and therefore his estate is not entitled to its protection. An action to foreclose a mortgage upon property, on which a volunteer has a vendor's lien, is a proceeding against such volunteer, and is therefore prohibited by s. 3 of the Act.

Royal Trust Co. v. Fraser, 12 A.L.R. 109, [1917] 3 W.W.R. 48.

VOLUNTEERS AND RESERVISTS RELIEF ACT—(SASK.)—DEATH OF VOLUNTEER—RIGHT TO MAINTAIN FORECLOSURE ACTION AGAINST PERSONAL REPRESENTATIVES.

McCausland v. Griffiths, [1917] 3 W.W.R. 52.

(§ I—16)—WAR RELIEF ACT—VOLUNTEERS AND THEIR DEPENDANTS.

The immunity from actions or proceedings conferred by the War Relief Act (B.C.), 1916, c. 74 upon the wife or dependants of a volunteer extends to and includes debts and obligations of the wife or dependants and is not confined to claims against the volunteer. [Shipman v. Imperial Can. Trust Co., 31 D.L.R. 137, reversing 29 D.L.R. 236, disapproved.]

Parsons v. Norris, 33 D.L.R. 593, 24 B.C.R. 41, [1917] 2 W.W.R. 606.

The parents of a soldier in receipt from him of $15 per month for their support and who depend upon that sum and the father's salary of $79 per month to supply them with the necessaries of life, held to be "dependants" within the meaning of the War Relief Act (B.C.), 1916, c. 74.

Barker v. Eadie, [1917] 2 W.W.R. 1013.

WAR RELIEF ACT—SOLDIERS AND THEIR DEPENDANTS—RETROACTIVE PROVISIONS—CONSTRUCTION.

Copethorne v. Elliott, 28 D.L.R. 773, 34 W.L.R. 943.

WAR RELIEF ACT (B.C.)—VOLUNTEERS AND THEIR DEPENDANTS—MOTHER.

North American Life v. Gold, 34 D.L.R. 735, 24 B.C.R. 50, [1917] 2 W.W.R. 615.

II. Vendors and purchasers.

(§ II—20)—WAR RELIEF ACT—VENDOR AND PURCHASER — REMEDIES — PARTIES — JOINT DEBTORS.

Harris v. Dalgleish, 37 D.L.R. 194, [1917] 3 W.W.R. 439.

VENDOR AND PURCHASER—RESALE.

In an action by a vendor against a purchaser upon an agreement to buy land the fact that there has been nothing of record in the Land Titles Office to disclose a resale by the purchaser to a man now on active service, such resale not being discovered until after the action was begun, is not a ground for suspending the operation of the Volunteers and Reservists Relief Act (Sask.), 1916, c. 7.

Sutherland v. Jackson, [1917] 3 W.W.R. 656.

(§ II—25)—VENDOR'S LIEN—ENFORCEMENT OF.

The Moratorium Act (Man.), does not prevent the enforcement of a vendor's lien for unpaid purchase money where nothing whatever had been paid and the lien was claimed for the whole purchase price.

Ronald v. Lillard, 23 D.L.R. 392, 25 Man. L.R. 393, 30 W.L.R. 382, 7 W.W.R. 1128.

(§ II—30) — ACTION FOR POSSESSION OF LAND.

An action by the vendors for possession of lands upon a default by the purchaser under an agreement of sale is not prohibited by the Volunteers and Reservists Act (Sask.), 1916, c. 7.

Riach v. Elliott, 31 D.L.R. 681, 9 S.L.R. 408, [1917] 1 W.W.R. 591.

(§ II—36)—WAR RELIEF ACT—EFFECT ON LAND REGISTRY ACT—ABSOLUTE ORDER OF FORECLOSURE.

Re War Relief Act and Land Registry Act, 30 D.L.R. 278, 23 B.C.R. 255, 10 W.W.R. 1329.

III. Mortgages.

(§ III—40)—MORTGAGE—MORTGAGORS AND PURCHASERS RELIEF ACT—EXCEPTION AS TO INTEREST—ONUS.

George v. Lang, 30 D.L.R. 502, 36 O.L.R. 180.

MORTGAGE — MORTGAGORS AND PURCHASERS RELIEF ACT—MORTGAGE MADE BEFORE THE WAR—DEFAULT—APPLICATION BY MORTGAGEE FOR LEAVE TO PROCEED—TRANSFER OF EQUITY OF REDEMPTION—VOLUNTARY ASSUMPTION OF LIABILITY BY TRANSFEREE—INABILITY TO MEET PAYMENTS NOT ATTRIBUTABLE TO WAR—ATTEMPT TO COMPEL MORTGAGEE TO REDUCE AMOUNT OF MORTGAGE — ACTION AGAINST MORTGAGOR UPON COVENANT—COSTS.

Re Sharp and Mandel, 17 O.W.N. 110.

(§ III—45)—FORECLOSURE OF LAND AGREEMENTS AND MORTGAGES—PERIOD OF EXTENSION.

The period of one-year extension prescribed by ss. 3, 7 of the amending Act (Man.), 5 Geo. V., c. 10, known as the Moratorium Act, to enable purchasers and mortgagors of land to meet defaults, cannot be invoked after the period had once run without the default being made good; consequently payment by a purchaser of a tax arrear, the default of which had run a year will not revive the operation of the statute as against a vendor seeking enforcement of the contract by reason of such default.

Campbell v. Roubert, 25 D.L.R. 652, 26 Man. L.R. 38, 9 W.W.R. 855, affirming 26 Man. L.R. 38, 32 W.L.R. 444, 9 W.W.R. 175.

SALE UNDER MORTGAGE — FAILURE TO GIVE NOTICE—INJUNCTION.

In an application by a mortgagor in respect of sale proceedings no relief or stay of extra judicial proceedings can be granted under the Moratorium Act (B.C.), 1915, c. 35, where the moneys owing are in respect of interest or principal and interest. The failure of the mortgagee to give the notice required by s. 2, subs. 1, para. c. gives no jurisdiction to relief on an application under the Act, but an injunction might be applied for to restrain the mortgagee from proceeding with the sale.

Re Canada Permanent Mortgage Corp., 9 W.W.R. 180.

EXTENSION AS VESTED RIGHT—MEANING OF FORECLOSURE — LAND PURCHASE AGREEMENTS—SEVERAL WRITINGS.

Re Real Property Act, 22 D.L.R. 921, 31 W.L.R. 966.

JUDGMENT—SUSPENSION OF.

A registered judgment is an instrument charging land within the meaning of the Moratorium Act, 1914 (Man.), but where registered after July 31, 1914, it is a "contract" within the exception of s. 6, and by virtue of the County Courts Act, so that the restrictions of the Moratorium Act do not apply to prevent an order for sale being made thereunder within the six months' period.

Slobodian v. Harris, 21 D.L.R. 75, 25 Man. L.R. 74, 30 W.L.R. 381, 7 W.W.R. 1017.

VOLUNTEERS AND RESERVISTS RELIEF ACT (MAN.)—MORTGAGE—FORECLOSURE.

In an action upon a mortgage a mortgagee out of possession is not entitled between the time of the order nisi and the application for the final order to apply for possession.

Colonial Investment & Loan Co. v. Richardson, [1918] 2 W.W.R. 389.

WAR RELIEF ACT (B.C.), S. 2 (A & B), C. 74, 1916—SECTIONS 2, 6, C. 97, 1918—FORECLOSURE OF MORTGAGE — DEFENDANT WIDOW OF SOLDIER WHO DIED AT THE FRONT.

Anderson v. Stollery, [1918] 3 W.W.R. 580.

FORECLOSURE—MAN. ACT, 1916, c. 23.

An action has been stayed until "some interest, taxes, or premiums of insurance are again in arrear and unpaid for one year."

Patterson v. Wickson, 10 W.W.R. 875.

(§ III—50)—MORATORIUM PROCLAMATION —TRANSFER OF LAND AFTER SALE UNDER FORECLOSURE PROCEEDINGS.

The registration of a transfer subsequent to the issue of the Moratorium Proclamation is not forbidden thereby. Accordingly where the property in land has passed in default of payment within the time specified in an order nisi for private sale to a specific purchaser prior to the proclamation taking effect, the transfer to such purchaser may be registered.

Re Moratorium Proclamation, 7 W.W.R. 795.

(§ III — 55) — MORATORIUM ACT, 1914 (MAN.), EFFECT OF IN FORECLOSURE ACTIONS—RIGHT TO PERSONAL JUDGMENT.

Section 5 of the Moratorium Act, 1914, (Man.), which stays actions "for the recovery of possession of the land charged" until after the lapse of a 6 months' period does not limit the recovery of a personal judgment for the amount due under a sale agreement for principal and interest, and where an action which was pending when the Act was passed had not proceeded to the entry of final judgment before August 1st, 1914, the limitation of s. 4 as to actions to enforce a covenant or agreement in respect of lands does not prevent the subsequent entering up of judgment, although it stays proceedings to enforce payment by writ of execution or by registration of the judgment.

Fisher v. Ross, 19 D.L.R. 69, 24 Man. L.R. 773, 7 W.W.R. 359.

FORECLOSURE—WIFE'S SEPARATE ESTATE.

The War Relief Act, 1915 (Man.), 5 Geo. V., c. 88, s. 2, does not protect the wife of an enlisted volunteer against proceedings to enforce payment of a mortgage upon her separate estate.

Shipman v. Imperial Canadian Trust Co., 31 D.L.R. 137, [1917] 1 W.W.R. 297, reversing 29 D.L.R. 236, 27 Man. L.R. 238, 33 W.L.R. 247, 9 W.W.R. 880.

FORECLOSURE DECREE—ITS FORM UNDER ACT.

A foreclosure decree as to the purchaser's interest under a land purchase agreement will, since the Moratorium Act, 1914 (Man.), be conditional upon the nonpayment of the principal, interest and costs within 1 year from the taxing officer's certificate, together with subsequent interest to the date of payment.

Maxwell v. Cameron, 20 D.L.R. 71, 7 W. W.R. 365.

VOLUNTEERS AND RESERVISTS RELIEF ACT—RIGHT OF MORTGAGEE TO RENT.

The fact that a mortgagor is a volunteer or reservist within the meaning of the Volunteers and Reservists Relief Act (Alta.), 1916, c. 6, is not a defence to an action to recover the rent or rental value of the mortgaged premises, provided the mortgage gives the mortgagee the right to collect the rent or rental value. In such a case the mortgagee is entitled to judgment for the payment of the rent or rental value and for the appointment of a receiver therefor and to an order for possession in default of payment until such default is remedied.

Mutual Life Ass'ce Co. v. Blackett, [1918] 2 W.W.R. 521.

Where a mortgage is in arrears, the mortgagee, is entitled to the rents or, in default of rent, to possession, although the wife of a volunteer claims an interest in the premises under an agreement of sale and has rented them to the wife of another volunteer.

General Financial Corp. v. Wood and McGregor, [1918] 1 W.W.R. 780.

WAR RELIEF ACT—RIGHT OF MORTGAGEE TO POSSESSION OR RENTABLE VALUE.

On an application under s. 9, War Relief Act (B.C.), 1916, c. 74, for leave to a mortgagee to enter into possession unless paid the rentable value of the mortgaged premises, the court will have regard, not to the ability of the mortgagor to pay, but to the question whether there exists at the time of the application a sufficient equity in the mortgagor to make it reasonably certain, in the opinion of the court, that the mortgagee will ultimately recover his principal and interest. If there is, leave will be refused; if not, it will be granted. In deciding what is the rentable value the court has no discretion to fix an arbitrary rent, but must on evidence adduced decide what is the rentable value as fixed by the market at the time of the application.

Re War Relief Act, [1918] 3 W.W.R. 475.

WAR RELIEF ACT, 1918—VENDOR'S RIGHT TO RECOVER RENTAL VALUE—SECTION 10.

Under s. 10 of the War Relief Act, 1918, if the property sold to or mortgaged by a defendant claiming protection under said Act has an actual rental value as shown by leases made by defendant of the property and rentals received by him, the amount of such rental value, if it does not exceed the interest due, is recoverable from him by his vendor or mortgagee.

Jameson v. Moore, [1919] 2 W.W.R. 49.

WAR RELIEF ACT, C. 4, 1918, SS. 4, 6—MEANING OF PROVISO TO S. 6—MORTGAGEE'S RIGHT TO RENT OF MORTGAGED PREMISES—NOTICE TO TENANT—NECESSITY OF LEAVE FOR.

The proviso to s. 6 of the War Relief Act, c. 24, 1918, means that no matter what may happen to a mortgagee's application for leave to pursue any of his other remedies, his right to payment of the full amount of the net income of the mortgaged property to the extent of the mortgagor's default is absolute. It is, therefore, not necessary for a mortgagee to obtain leave to serve

notice on a tenant to pay him the rents of the mortgaged premises.

Re Mortgage Co. of Canada and Stennett, [1919] 1 W.W.R. 8.

(§ III—60)—MORTGAGE—VALUE OF PROPERTY.

Where the rental value of mortgaged property, without deducting anything for payments made to a prior mortgagee, is greater than the amount proceeded for, a stay of proceedings will not be granted under s. 4 (a) of the Moratorium Act (Man.).

McIvor v. Parker, [1917] 1 W.W.R. 1399.

PURCHASERS AND MORTGAGORS—"RENTABLE VALUE."

Section 1 of c. 21 of 6 Geo. V. was plainly intended only to abridge the rights of a vendor or mortgagee and to extend relief to the purchaser or mortgagor, in cases where interest could not be sued for under the Moratorium Act (Man.) its amendments made by c. 10 of 5 Geo. V., till it was more than a year overdue, so as to enable the debtor to prevent an action not yet brought, or to get a stay of proceedings after action brought, by paying such a sum as would leave no interest more than a year in arrear, which it had been held in Campbell v. Roubert, 25 D.L.R. 652, 26 Man. L.R. 38, he could not previously have done. That section does not expressly repeal subs. (a) of s. 4 of the Moratorium Act as enacted by s. 5 of c. 10 of 5 Geo. V., which enables a vendor or mortgagee to sue at once for interest in arrear subject to the right of the debtor to shew that the "rentable value" of the property is less than the amount of the interest sued for and to get a stay of proceedings for more than such rentable value; and, is full effect can be given to it without holding that such repeal was intended, it should not be construed as effecting such repeal by implication. The provisions of subs. (a) of s. 5 of the Moratorium Act as enacted by s. 6 of 5 Geo. V. which admittedly have not been either expressly or impliedly repealed, tend further to shew that subs. (a) of s. 4 was not intended to be repealed.

Holmes v. Barnett, 27 Man. L.R. 558, [1917] 2 W.W.R. 881.

IV. Tax sales; judicial sales.

(§ IV—65)—WORD "INSTRUMENT"—REGISTERED JUDGMENT — SUSPENSION OF LIEN.

The word "instrument" as used in s. 2 of the Moratorium Act (Man.), does not include a registered judgment for the payment of money so as to suspend or take away the judgment creditor's right of action for a declaration of lien in respect of the certificate of judgment registered in the Land Titles office and its enforcement by a judicial sale.

Chapman v. Purtell, 22 D.L.R. 860, 25 Man. L.R. 76, 30 W.L.R. 122, 7 W.W.R. 1155.

TAX SALE—REFUND.

The War Relief Act (B.C.), 1916, c. 74, operates to prevent the issue of a tax sale deed of the land of a soldier upon active service, and the collector of the municipality is not bound to refund the amount paid at the tax sale of the land in question.

Hunter v. Point Grey, [1917] 1 W.W.R. 1244.

V. Procedure.

(§ V—70)—REGISTERED JUDGMENT—"INSTRUMENT CHARGING LAND WITH THE PAYMENT OF MONEY"—COUNTY COURTS ACT, R.S.M. 1913, c. 44, ss. 215, 216—STAYING PROCEEDINGS.

Ledoux v. Cameron, 21 D.L.R. 864, 25 Man. L.R. 71, 30 W.L.R. 774, 7 W.W.R. 687.

MORATORIUM ACT — EFFECT OF — STAYING PROCEEDINGS FOR SALE OF LAND—SPECIFIC PERFORMANCE OF AN AGREEMENT OF SALE OF LAND—RESCISSION.

In an action, commenced before the coming into force of the Moratorium Act and not defended, the plaintiffs, as vendors, claimed specified performance of an agreement of sale of land and, in default, rescission and immediate possession, also that, in default of payment, the lands might be sold to realize the unpaid purchase money, interest and costs:—Held, that, so far as regards the relief by sale, the plaintiffs were entitled to a sale at the expiration of a year from the fixing of the time for payment.

United Investors v. Gaynor, 24 Man. L.R. 781.

VOLUNTEERS AND RESERVISTS—STAY OF PROCEEDINGS.

Any person who joins one of the ordinary Canadian Militia regiments organized under the provisions of the Militia Act (R.S.C. 1906, c. 41), whether in the active militia or in the reserve militia, comes within the purview of the Volunteers and Reservists Relief Act (Alta.), 1916, c. 6, and is entitled to the benefit of the provisions of s. 3, subs. 2, of the Act, entitling him to a "stay of any action or proceeding begun . . . after the passing of this Act . . . until the expiration of a period of one year after the termination of the said state of war."

Calgary Brewing & Malting Co. v. McManus, 29 D.L.R. 455, 10 A.L.R. 1, 34 W.L.R. 1027, 10 W.W.R. 969.

(§ V—75)—LEAVE TO ISSUE WRIT — CODEFENDANT.

Leave to issue a writ against a protected volunteer must be obtained prior to the issue, even when the interest of such volunteer in the subject-matter of the dispute is a merely nominal one. The issue of a writ and service upon a defendant is not bad by reason of his codefendant being a protected volunteer.

Alton v. Skelton, 10 S.L.R. 57, [1917] 1 W.W.R. 1389.

"FURTHER STEP."

The delivery of a statement of claim with the writ of summons is the taking of a "further step" within the meaning of s. 10 of the War Relief Act (B.C.), 1916, c. 74, as amended by the Act, 1917.

Blackett v. Westcott, [1917] 3 W.W.R. 469.

PLEADING — AMENDMENT — "MORTGAGE OR OTHER INSTRUMENT CHARGING LAND"— BOND.

If a litigant intends to rely upon the Moratorium Act (Man.), he must, as a general rule, set it up in his pleading; but some of its provisions, which introduce specific changes in the status of all litigants, will be recognized and applied whether they have been pleaded or not; and leave to amend should be given or refused in accordance with the principles applied to the Statute of Limitations. A bond as collateral security for a mortgage is not a "mortgage or any other instrument charging land with the payment of money," within the meaning of the Moratorium Act.

Great West Life Ass'ce Co. v. Howden, 35 D.L.R. 617, [1917] 1 W.W.R. 1531.

MORATORIUM ACT, S. 7—ABANDONMENT— PLEADING.

On motion for judgment in an undefended action for foreclosure of an agreement of sale, the plaintiff is not entitled to claim that the Moratorium Act (Man.), does not apply because of an abandonment of the land by the defendant, as provided in s. 7, unless there is in the statement of claim an appropriate allegation to that effect.

Armstrong v. Siebels, 24 Man. L.R. 782.

WAR RELIEF ACT AMENDED—PROCEDURE.

Any application dealing with an order made under the War Relief Act (B.C.), 1916, c. 74, and amendments must be made to the court.

Pilkington v. Kent (B.C.), 25 B.C.R. 432, [1918] 3 W.W.R. 584.

LEAVE TO TAKE STEP IN ACTION—NOTICE OF APPEAL.

Section 8 of the War Relief Act Amendment Act (B.C.), 1917, which came into force on the 19th May, 1917, provides that "every plaintiff or party commencing, instituting or taking any proceedings in or out of court shall after service of the writ, notice, or other process whereby any proceedings in or out of court are instituted, and before taking any further step, furnish evidence to the satisfaction of such court or of the officer or tribunal in whose office or before which any proceedings out of court are being taken, that the defendant was not at the time of such service entitled to the benefit of this Act," etc. The writ was issued in this action on May 10th, 1917, and without the plaintiff complying with the above section the action was tried and judgment given in his favor on June 20th following. The defendant first raised the point that the plaintiff had not complied with the provisions of the War Relief Act in his notice of appeal. Held, that it is only when the plaintiff proposes to take a step in the action that he is required to obtain leave. In the present instance it is the defendant who is taking the step (i.e. giving notice of and bringing on the appeal), in which case the provisions of the Act do not apply.

Bell v. Johnston, 25 B.C.R. 82, [1918] 2 W.W.R. 549.

COMPANY—WINDING-UP — APPLICATION FOR UNDER DOMINION ACT — WAR RELIEF ACT, C. 74, 1916 (B.C.) — APPLICABILITY.

Re Winding-up Act and Robson Investment Co., [1918] 1 W.W.R. 779.

INSTRUMENT CHARGING LANDS — ASSIGNMENT OF AGREEMENT FOR SALE AS.

Mortgage & Agreement Purchase Co. v. Bell, [1918] 3 W.W.R. 844.

MORTGAGE.

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Land titles (Torrens system); foreclosing mortgage made under Torrens system; jurisdiction: 14 D.L.R. 301.

Equitable rights on sale subject to mortgage: 14 D.L.R. 652.

Foreclosure; reopening foreclosures: 17 D.L.R. 89.

Mortgages and land purchase agreements affected by moratorium: 22 D.L.R. 865.

Assumption of debt upon a transfer of the mortgaged premises: 25 D.L.R. 435.

Parol evidence that deed absolute intended as mortgage: 29 D.L.R. 125.

Power of sale in statutory form of mortgage: 31 D.L.R. 300.

Discharge of mortgage as reconveyance: 31 D.L.R. 225.

Mortgage or charge signed in blank; assignment; consideration: 32 D.L.R. 26.

Statement of rate of interest in land mortgage: 32 D.L.R. 60.

Limitation of actions for redemption of mortgage: 36 D.L.R. 15.

Insurance on mortgaged property: 44 D.L.R. 24.

Without consideration; receipt for mortgage money signed in blank: 32 D.L.R. 26.

I. Nature; validity and effect.

See Land Titles.

As merger of simple debt, see Merger.

Equitable mortgage, enforcement, appointment of receiver, see Receivers, I B —12.

Statement of rate of interest, see Interest, II B—65.

A. In general; delivery.

(§ I A—2)—Execution — Proof — Sufficiency.

Shepard Co. v. Skedanuk, 13 D.L.R. 892, 6 A.L.R. 368, reversing 11 D.L.R. 199.

(§ I A—3)—Action by administrator of estate of deceased mortgagee—Defence of mortgagor — Instrument not intended to be operative or intended as security for interest only —Evidence—Gift—Delivery of instrument — Registration — Registry Act, s. 50—Possession of instrument by mortgagor.

Holmes v. Husband, 14 O.W.N. 267.

B. What constitutes.

(§ I B—5)—Form — Substance — Mortgagee's rights—How determined.

A mortgage, no matter what its form, is but a security for the payment of the money covered by it, and this principle governs in determining the mortgagee's rights.

Bernard v. Faulkner, 18 D.L.R. 174, 7 A.L.R. 439, 7 W.W.R. 162.

(§ I B—6)—Equitable mortgage.

Where an instrument covering certain lands purports to be an absolute assignment and power of attorney but is really given only to secure a loan for which the borrower gives his promissory note, such instrument is merely an equitable mortgage, and under the maxim "once a mortgage always a mortgage" the grantee will be limited strictly to his rights as a mortgagee. [London & Globe Finance Corp. v. Montgomery, 18 T.L.R. 661, distinguished; Samuel v. Jarrah, [1904] A.C. 324, followed.]

Arnold v. National Trust Co., 7 D.L.R. 734, 5 A.L.R. 214, 3 W.W.R. 183.

A good equitable mortgage by deposit of documents of title may be created, although the legal estate is outstanding in another than the depositor. The law of Ontario in respect of equitable mortgages by deposit of documents of title is the same as the law of England.

Zimmerman v. Sproat, 5 D.L.R. 452, 26 O.L.R. 448.

(§ I B—7)—Deed with agreement to reconvey.

An agreement by a mortgagor after default whereby the mortgagee gets a new security for advances not included in the original mortgage and expenditures not in contemplation when the original mortgage was made, is to be treated as in effect a new mortgage as regards any attempted restriction of the mortgagor's right to redeem.

Manitoba Lumber Co. v. Emmerson, 14 D.L.R. 390, 18 B.C.R. 96, affirming with a variation 5 D.L.R. 337, 21 W.L.R. 503, 2 W.W.R. 419.

Quitclaim deed—Discharge—Tender.

A quitclaim deed given as security for a debt, together with a written memorandum providing for the surrender of the deed when the indebtedness is satisfied, must be read together, and operate as a mortgage, which is discharged by subsequent tender of the amount of the indebtedness. The tender of such amount according to statement furnished by the creditor is sufficient notwithstanding it subsequently turns out that the statement was for less than the amount actually due.

McLaughlin v. Tompkins, 31 D.L.R. 320, 44 N.B.R. 249.

Sale with power of repurchase—Expenses and ameliorations — Renunciation—Reimbursement—C.C. art. 1548.

He who, after consenting to a sale with power of repurchase, makes improvements to the sold estate, thereby incurring expense, has a right to be reimbursed if he renounces his right to repurchase the property and the buyer accepts this renunciation.

Malo v. Lebrun, 25 Rev. Leg. 458.

Sale with power of redemption—Simulation — Fraud — Loan — Written evidence — Commencing evidence by writing—C.C. (Que.) arts. 984, 989, 1032, 1233.

Even where the parties had in view a loan of money, if they give to it the form of a sale with power of redemption, the latter must take effect as such, and cannot be considered as a pretended sale. In the absence of fraud and simulation proof by witnesses will not be allowed of an agreement extending the time for redeeming land valued at more than $50 agreed upon in a deed of sale. The refusal of a person to carry out his written or verbal agreements, does not in itself constitute fraud.

St. Aubin v. Crevier, 56 Que. S.C. 143.

(§ I B—8)—CONVEYANCE ABSOLUTE IN FORM.

Stuart v. Bank of Montreal, 10 D.L.R. 841, 4 O.W.N. 1280, 24 O.W.R. 714.

CONVEYANCE ABSOLUTE IN FORM—CONTEMPORANEOUS AGREEMENT — DEFEASIBLE PURCHASE OR MORTGAGE.

In determining whether a deed absolute in form was in fact a mortgage under the form of a sale or represented a bona fide sale with a contract to repurchase, it is a fair test to ascertain if the remedies are mutual and reciprocal; and a collateral agreement which refers to the debt and interest for which the property is held and which stipulates for the transferee having full power to dispose of same, is evidence of the transaction being a mortgage rather than a defeasible sale with right of repurchase.

Cleary v. Aitken, 17 D.L.R. 548, 19 B.C.R. 369, 28 W.L.R. 1, 8 W.W.R. 871.

DEED ABSOLUTE IN FORM—SECURITY FOR DEBT.

A deed, although absolute in form, will be construed as a mortgage when given by the grantor as security for past and future advances from the grantee.

Buchanan v. Oakes, 15 D.L.R. 582, 26 W. L.R. 549.

CONVEYANCE ABSOLUTE IN FORM—POWER OF SALE.

A conveyance of land by a deed absolute in form, but which had been intended as security for a debt, does not import a power of sale by which the grantee may sell the property without the concurrence of the grantor. [Pearson v. Benson, 28 Beav. 598, followed; Oland v. McNeil, 32 Can. S.C.R. 25, distinguished.]

Hetherington v. Sinclair, 23 D.L.R. 630, 34 O.L.R. 61.

ABSOLUTE CONVEYANCE—EQUITY OF REDEMPTION—INTENTION.

A conveyance absolute in form may be intended to operate as a mortgage or pledge only, but the mortgagor may, by subsequent independent agreement, extinguish his equity of redemption in favour of his mortgagee or surety, at the same time acquiring an option to repurchase, and if such is the real intention of the parties the equity of redemption ceases to exist, and the former mortgagor has only his option or privilege of repurchasing on the terms set out in the agreement.

Roscoe v. McConnell, 29 D.L.R. 121 5 O. W.N. 172.

(§ I B—9)—ORDER OF DISTRIBUTION—REGISTRATION OF JUDGMENT AS A MORTGAGE —APPEAL—QUE. C.P. 801.

A judgment rendered by a Trial Court may be registered as a mortgage on a property; but such a mortgage follows the issue of the appeal; if the appeal is maintained, the mortgage remains but if the appeal is dismissed, the mortgage becomes void. Art. 801, C.C.P. as a rule refers only to mortgages in warranty respecting the fulfilment of the sale against the foreseen or unforeseen dangers of eviction.

Joyal v. Vigneault, 16 Que. P.R. 8.

C. WHAT PROPERTY COVERED; DESCRIPTION OF PROPERTY.

(§ I C—10)—FIXTURES — LIABILITY OF STRANGER FOR CONVERTING.

A person who, with knowledge of the land mortgage, purchased and removed from the lands an engine and boiler so placed as to become a fixture, may be joined as a defendant in the mortgagee's action for foreclosure and sale, so that he may be held liable for any deficiency in the mortgage security to the extent of the value of the engine and boiler.

Dyas v. Henderson, 19 D.L.R. 560.

FIXTURES IN STORE—ATTORNMENT CLAUSE—LANDLORD AND TENANT.

The plaintiff was the mortgagee of land upon which was a store containing articles usually regarded as trade-fixtures. The mortgagor sold and conveyed the land to W.; he also sold his stock of merchandise, chattels, and fixtures to W., and executed a bill of sale thereof. W. made a bill of the same property to B., and B. to the defendant F. In this action the plaintiff sought to restrain the defendants from removing such of the articles as he considered to form part of the freehold. The plaintiff's mortgage contained a clause by which the mortgagor attorned to the mortgagee and became tenant of the land at a rent equivalent to and payable at the same time as the interest:—Held, that by the mortgage all fixtures passed to the mortgagee, subject to the right to redeem; and, if the clause created the relationship of landlord and tenant, the fixtures were the landlord's and could not be removed by the tenant. But the true relationship was that of mortgagee and mortgagor; and the mortgagor by the mortgage of the land pledged all that could be regarded as fixtures in the widest sense of the term—all things actually fixed, and such things not actually fixed, and such things not actually fixed as were intended to form part of the inheritance. [Monti v. Barnes, [1901] 1 Q.B. 205, Southport & West Lancashire Banking Co. v. Thompson, 37 Ch. D. 64, 70 Stack v. T. Eaton Co., 4 O.L.R. 335; Bing Kee v. Yick Chong, 43 Can. S.C.R. 334, followed.]

Gordon v. Fraser, 43 O.L.R. 31.

(§I C—13)—TO SECURE BONDS.

Where a mortgage to secure bonds excepts from its operations logs on the way to the mill, logs which have once been started on the way to the mill do not cease to fall within the exception because they are delayed through lack of water to float them or from any other cause. Where a mortgage is made to secure bonds upon the whole property, assets etc., of a company, present and future, except logs on the way to the mill, such exception applies to

such logs as may be on the way to the mill, not only at the date of the mortgage, but also at any future time.

Imperial Paper Mills v. Quebec Bank, 6 D.L.R. 475, 26 O.L.R. 637, 22 O.W.R. 703. [Affirmed 13 D.L.R. 702, 24 O.W.R. 930.]

D. VALIDITY.

Security to bank, undue influence, see Banks, VIII A—160; Husband and Wife, II A—60.

Registration of company mortgages or charges, see Companies, 10 C—55.

(§ I D—15)—MORTGAGE BY MARRIED WOMAN PROCURED BY FRAUD—PLEA OF "NON EST FACTUM."

A married woman who by the fraud of the company's agent is innocently induced to sign mortgage papers in favour of the company and a direction to pay the proceeds of the loan to such agent in respect of property which she did not own but which was transferred into her name without her knowledge by such agent in pursuance of his fraudulent scheme to obtain money from the company in excess of its value through a false valuation and an application in the name of another, is not estopped from repudiating liability under the mortgage under a plea of non est factum and of claiming that she was led to believe that the documents she was signing were of an entirely different character, by her failure to personally inspect and read over what she was signing under such circumstances she was under no duty to protect the company from possible frauds by its own agent.

Morgan v. Dominion Permanent Loan Co., 22 D.L.R. 163, 50 Can. S.C.R. 485, reversing 4 D.L.R. 333, 17 B.C.R. 366, 21 W.L.R. 748.

MORTGAGE CONTEMPORANEOUS WITH BUT NOT PART OF CONTRACT FOR SALE OF MACHINERY.

A mortgage executed contemporaneously with but not contained in, endorsed on or annexed to an order for machinery, although given to secure the payment therefor, is not within c. 5 of Alberta Acts of 1910, (2nd sess.) prohibiting charges on lands contained in certain instruments. [Nichols v. Skedanuk, 11 D.L.R. 199, distinguished.]

Perrault v. Rumely Products Co., 12 D.L.R. 772, 25 W.L.R.180, 4 W.W.R. 1291.

SON INDUCING AGED AND ILLITERATE MOTHER TO JOIN IN MORTGAGE OF LAND—UNDUE INFLUENCE—ABSENCE OF INDEPENDENT ADVICE—IMPROVIDENCE—KNOWLEDGE OF MORTGAGEE—MORTGAGE SET ASIDE AS TO MOTHER'S INTEREST IN LAND.

Patterson v. Canadian Bank of Commerce, 12 O.W.N. 135.

SECURITY FOR ADVANCES—PROMISSORY NOTES—MORTGAGE ASSIGNED AS COLLATERAL SECURITY — ACTION ON MORTGAGE — COUNTERCLAIM—DECLARATION OF INVALIDITY OF MORTGAGE AND ASSIGNMENT—EVIDENCE—FINDINGS OF TRIAL JUDGE—APPEAL—COSTS.

Cunningham v. Kelly, 14 O.W.N. 183, reversing 13 O.W.N. 342.

FRAUD OF MORTGAGEE—LAND CONVEYED BY MORTGAGOR TO ANOTHER—RIGHT OF ACTION OF MORTGAGOR FOR CANCELLATION OF MORTGAGE—PARTIES—MORTGAGE SET ASIDE AND REGISTRY VACATED.

Bennett v. Bennett, 14 O.W.N. 235.

(§ I D—17)—AMOUNT OF DEBT.

The "true value" of a mortgage under s. 176 of the Land Registry Act, R.S.B.C. 1911, c. 127, does not necessarily mean the nominal amount secured by the mortgage, and, if the registrar is not satisfied with the value as affirmed, he must proceed as directed by s. 176 to ascertain the true value.

Re Land Registry Act; Re Royal Trust Co., 5 D.L.R. 628, 22 W.L.R. 5, 17 B.C.R. 329, 2 W.W.R. 867.

VALIDITY—AMOUNT OF DEBT—PAROL AGREEMENT FOR EXTRA INTEREST—AFTER DEFAULT—INTEREST ACT.

Although a parol agreement by the mortgagor after default to pay an increased rate of interest on a mortgage in consideration of an extension of time is under the Statute of Frauds insufficient to charge the extra interest upon the land, such an agreement is enforceable against the mortgagor personally. Section 8 of the Interest Act, R.S.C. 1906, c. 120, inhibiting any stipulation by way of fine or penalty or rate of interest raising the rate on arrears of mortgage principal above that on principal not in arrear, is construed as having reference to covert or burdensome provisions of the mortgage as originally drawn and does not preclude a new contract by which a mortgagor in arrear agrees to pay an increased rate in consideration of an extension.

Standard Trusts Co. v. Hurst, 16 D.L.R. 473, 24 Man. L.R. 185, 27 W.L.R. 775, 6 W.W.R. 493.

(§ I D—18)—CHARGE WITHOUT INTEREST—REGISTRATION — ABSENCE OF INTEREST IN CREATOR OF CHARGE—CLOUD ON TITLE—DAMAGES.

Fee v. MacDonald Mfg. Co., 6 D.L.R. 852, 4 O.W.N. 63, 23 O.W.R. 189, varying 3 D.L.R. 884, 3 O.W.N. 1378.

E. RIGHTS AND LIABILITIES OF PARTIES GENERALLY.

"Mortgagee," "Owner," see Mechanics' Liens, II—8.

As to fixtures subject to conditional sale, see Sale, I C—15.

Assignment of policy to mortgagee, right to sue, see Insurance, IV A—160.

Contribution between joint obligors on mortgage, see Contribution.

(§ I E—20)—TRUSTEES—PERSONAL LIABILITY—MISTAKE IN DRAUGHTSMANSHIP—REFORMATION OF INSTRUMENT.

A covenant in a mortgage by trustees expressed to be made by them "as trustees but not otherwise" will in the absence of other controlling words be held to limit their liability to the payment of the money out of trust estate and will not render them

personally liable. If, therefore, it appears from the evidence that the parties agreed that the mortgagors were to pay as trustees and not otherwise and failed through a mistake in draughtsmanship to express that intention in the instrument, it should be reformed so as to limit the liability as intended. [Watling v. Lewis, [1911] 1 Ch. 414, distinguished; Wilding v. Sanderson, [1897] 2 Ch. 534, applied.]

O'Brien v. Knudson, 48 D.L.R. 447, [1919] 3 W.W.R. 480, reversing 45 D.L.R. 187, [1919] 1 W.W.R. 327.

COVENANT—JOINT OR SEVERAL—DEATH OF MORTGAGOR.

A covenant by three mortgagors that "the said mortgagors covenant with the said mortgagee that the mortgagors will pay the mortgage money and interest and observe the above proviso, and will pay all present and future taxes" . . . is a joint covenant only, and, therefore, if default in performance occurs after the death of one of the mortgagors his estate is not liable.

Lindley v. Vassar, 25 B.C.R. 219, [1918] 1 W.W.R. 879.

COVENANT FOR FURTHER ASSURANCES—LAND TITLES ACT—TRANSFER OR VESTING ORDER.

Under a covenant in a mortgage under the Land Titles Act (Alta.), that the mortgagor, upon default, "will execute such further assurances of the land as may be requisite," the mortgagee is not entitled upon default by the mortgagor, to an order directing the mortgagor to execute a transfer of the mortgaged land or to a vesting order. The extended covenant for further assurances (s. 70), if applicable to a mortgage under the Act, can be so by analogy only, and the meaning thereof would seem to be that after default the mortgagor will do any act or execute any instrument necessary to perfect the security and support the mortgage.

Ritchie v. Edmonton Milling Co., [1918] 1 W.W.R. 537.

(§ I E—22)—MORTGAGEE IN POSSESSION.

Only ordinary and necessary repairs to encumbered property are within the purview of an agreement by which a mortgagee was placed in possession of a sawmill property, as a mortgagee in possession, the mortgagor reserving the right to redeem upon paying the costs of improvements made by the mortgagee while in possession, and the mortgagor cannot be required to pay, either under the terms of such agreement, nor as appurtenant to the rights of a mortgagee in possession, $106,000 for improvements consisting of the erection of a new and different mill in place of a practically new one that was torn down, a large portion of such expense being incurred after the expiration of the time for redemption and notification by the mortgagor of his intention to redeem, and his repudiation of liability for such extensive improvements, and after the launching by him of an action for redemption. [Carrol v. Robertson, 15 Gr. Ch. (Ont.) 173; Brotherton v. Hetherington, 23 Gr. Ch. (Ont.) 187; Shepard v. Jones, 21 Ch. D. 469; Henderson v. Astwood, [1894] A.C. 150, distinguished.]

Manitoba Lumber Co. v. Emmerson, 5 D.L.R. 337, 18 B.C.R. 96, 21 W.L.R. 503, 2 W.W.R. 419. [Affirmed 14 D.L.R. 390.]

LOSS OF RENTS FROM NONREPAIR—SUBSEQUENT REDEMPTION DECREE.

While acting as owner following a final order of foreclosure in his favour regularly obtained, and up to the time when the court, exercising its equitable powers and not for any irregularity in the final order, opened the foreclosure and gave the mortgagor liberty to redeem, the mortgagee was under no obligation to repair or to keep up the buildings on the mortgaged lands, or to try to obtain tenants, and, therefore, his mortgage account is not subject to surcharge as for rents which might have been, but were not, obtained by him.

Williams v. Box, 15 D.L.R. 261, 26 W.L.R. 461, 24 Man. L.R. 31, 5 W.W.R. 912, reversing 12 D.L.R. 90, 24 W.L.R. 93, 4 W.W.R. 244.

COLLATERAL AGREEMENTS AS TO RATE OF INTEREST—CLAIM IN MORTGAGE ACTION—RES JUDICATA—CHATTEL MORTGAGE—SALE—ACCOUNTING.

The plaintiff, with two others, in 1905 purchased from C. farm machinery, giving notes therefor bearing interest at 7 per cent before maturity and 10 per cent thereafter until paid, and as further security gave a lien on the machinery and certain land mortgages, the mortgages bearing interest at the rates specified in the notes. C. subsequently took proceedings in the court leading to the sale of the lands under the mortgages, and on the taking of the mortgage accounts before the local registrar, interest was allowed at 7 per cent only, it being held that the increased rate of 10 per cent on the arrears was not recoverable. The amount thus found to be due was fully satisfied out of the sale of the lands. In 1913, the plaintiff gave a chattel mortgage to the defendant on an engine, part of the machinery in question. This engine the chattel mortgagee subsequently sold and out of the surplus proceeds remaining after payment of its claim paid to C. in satisfaction of an alleged lien of C. $392, this sum representing the amount claimed by C. in respect of the increased rate of interest specified in its collateral agreement and disallowed on the taking of the accounts in the mortgage proceedings. In an action for an accounting of the moneys received on the sale of the engine under the chattel mortgage, held, that the chattel mortgagee was a trustee of the surplus and as such had the right to pay and discharge out of the sale price any encumbrances prior to it. That the claim of C. was, however, one that could have been and should have been raised by C. in its mortgage action, and not having been there

raised was res judicata and could not be asserted, and that therefore the payment in question to C. was not warranted.

Calder v. International Harvester Co., 11 S.L.R. 244, [1918] 2 W.W.R. 905.

BONUS FOR DELAY—CREDIT ON MORTGAGE DEBT—MORTGAGE GIVEN FOR BALANCE OF PURCHASE MONEY — MONEY-LENDERS ACT, ss. 4, 5 — APPLICATION OF — "MONEY LENT"—"COST OF LOAN"—INTEREST IN ARREAR—MORTGAGORS AND PURCHASERS RELIEF ACT—APPROPRIATION OF PAYMENTS—COSTS—PARTIES—ADDITION OF, IN MASTER'S OFFICE.

Walshaw v. Securities Ltd., 15 O.W.N. 92.

FIXTURES—EFFECT OF POSSESSION—REMOVAL—INJUNCTION.

A mortgagee by leaving his mortgagor in possession of the mortgaged premises impliedly authorizes him to hire and bring and fix other fixtures necessary for his business and to agree with their owner that he shall be at liberty to remove them at the end of the time for which they are hired. The right in the owner to unfix or remove things so affixed ceases, however, when the mortgagee takes possession. But if such an implied permission is at variance with the express language of the contract between the mortgagee and the mortgagor, no implied permission can as between them be supported. [Ellis v. Glover [1908] 1 K.B. 388, followed.] A mortgagee not in possession is not entitled to obtain an injunction to restrain the removal of such fixtures, unless he also proves that his security is insufficient or will become so by such removal.

D'Angigney v. Brunswick-Balke Collender Co., [1917] 1 W.W.R. 1331.

RIGHT OF FIRST MORTGAGEE TO POSSESSION OF TITLE DEEDS—LIEN—AGREEMENT TO POSTPONE.

Storey v. Gallagher, 16 W.L.R. 220.

(§ I E—23)—RENTS—RECEIVER.

A mortgagee is not entitled, as against the mortgagor, to a refund of rents paid, before the mortgagee takes possession, by a tenant of a purchaser under an agreement for sale. Where such rents have been paid over by the purchaser's solicitors to a receiver appointed on the application of the mortgagee, the fact that the purchaser is indebted to the mortgagor and is out of the jurisdiction does not entitle the receiver to retain the rents.

Sellick v. Hayward, 24 B.C.R. 125, [1917] 2 W.W.R. 803.

ATTORNMENT CLAUSE—TENANCY.

A mortgagor who has given a statutory mortgage cannot attorn tenant to the mortgagee.

Traders Bank v. Rutherford (Sask.), 10 W.W.R. 796.

ATTORNMENT CLAUSE—SEIZURE OF GOODS OF TENANT.

Vousden v. Hopper, 4 S.L.R. 1, 16 W.L.R. 294.

(§ I E—24)—FORM OF MORTGAGE.

A mortgagee cannot lawfully provide, at the same time as the loan is made, for any event or condition on which the equity of redemption shall be discharged and the conveyance become absolute, nor for an option to purchase, although the option price is far in excess of the loan; and this, although it appears that the lender was not willing to lend unless he had both the security and the option and that the lender and borrower were dealing at arm's length. [Vernon v. Bethel, 2 Eden 110, 113; Noakes v. Rice, [1902] A.C. 24; Salt v. Northampton, [1892] A.C. 1, followed.]

Arnold v. National Trust Co., 7 D.L.R. 754, 5 A.L.R. 214, 22 W.L.R. 693, 3 W.W.R. 183.

AGREEMENT FOR MORTGAGE—MATURITY DATE NOT SPECIFIED.

A written agreement to give a mortgage back to the vendor on the purchase of real estate is too indefinite to be binding where only the amount of the mortgage money and the rate of interest are specified and it does not appear for how long the mortgage is intended to run; under such circumstances the court will not oblige the proposed mortgagee to accept a mortgage which might be paid off whenever the purchaser chose in his lifetime.

Reynolds v. Foster, 9 D.L.R. 836, 4 O.W.N. 694, 23 O.W.R. 933, affirming 3 D.L.R. 506, 3 O.W.N. 983.

F. TRUSTEES AND BONDHOLDER,

(§ I F—25)—MORTGAGE OF CHURCH—GUARANTY OF DEBT BY TRUSTEES—SCOPE.

A covenant by the trustees of a church guaranteeing the payment of the mortgage debt creates a general guaranty as against all the guarantors, notwithstanding a clause that the covenants of the mortgage shall affect and bind only the specific property of the church.

Colonial Investment & Loan Co. v. Grady, 24 D.L.R. 176, 8 A.L.R. 496, 31 W.L.R. 575, 8 W.W.R. 995.

TRUST DEED SECURING DEBENTURES—FORECLOSURE — COMPANY — WINDING-UP ACT.

The contention that when a company is being wound up under the Winding-up Act, R.S.C. 1906, c. 144, an action for foreclosure of a mortgage given by the company does not lie, but the mortgagee is restricted to the remedy given by s. 133 of the Act, can only prevail, if at all, when the case falls strictly within the class of cases mentioned in the section, and the case is not within such class if the mortgaged premises were never "in the hands, possession or custody of the liquidator." Stewart v. LePage, 29 D.L.R. 607, should not be interpreted as holding that, even where leave has been granted (as was the fact in the present case) such an action is not maintainable.

Michigan Trust Co. v. Canadian Puget

Sound Lumber Co., 25 B.C.R. 560, [1918] 3 W.W.R. 273.

II. Priority.

A. As to other mortgages.

(§ II A—30)—Equitable mortgage—Executions.

An assignment of the proceeds of a mortgage to cover an indebtedness to a bank in pursuance of a prior agreement by the debtor to place a mortgage on his lands whenever required by the bank, the mortgage being executed prior to but not registered after the filing of an execution, disentitles the bank, under ss. 70, 118 (2) of the Land Titles Act (Sask.), as amended by s. 17 of c. 16 of 1912-13, to claim priority by way of equitable mortgage over the execution creditor.

Union Bank v. Lumsden Milling Co., 23 D.L.R. 460, 8 S.L.R. 263, 31 W.L.R. 800, 8 W.W.R. 1167.

Assignee of first mortgage—Mechanics' liens against property — Second mortgage—Assignee paying off liens—Rights and liabilities of parties.

Great West Permanent Loan Co. v. National Mortgage Co., 45 D.L.R. 751, [1919] 1 W.W.R. 788.

Covenant—Construction—Claim for reformation—Principal and interest—Redemption—Foreclosure—Sale.

McKey v. Conway, 7 O.W.N. 62.

(§ II A—35)—First mortgage—Vendor's lien—Costs.

Upon the foreclosure of a mortgage on land subject to a prior mortgage and vendor's liens, the property will be ordered sold subject to the rights of the first mortgagee, with a priority, as to the costs, in favour of the second mortgagee over the vendor's liens.

Empire Cream Separator Co. v. Frier, 36 D.L.R. 356, 45 N.B.R. 1.

As to other claims.

Notwithstanding that the title acquired by the holder of a mortgage under a foreclosure proceeding may be void against a purchaser of the encumbered land whom the former led to believe that the mortgage was satisfied, yet a person whom, in good faith, lends money to the holder of the title so acquired, and who registers his mortgage without notice of such purchaser's rights, will be protected although warned of impending litigation regarding the land before taking such mortgage.

Robinson v. Ford, 14 D.L.R. 360, 25 W.L.R. 669, 5 W.W.R. 542. [Varied 19 D.L.R. 572, 7 S.L.R. 443, 31 W.L.R. 13, 7 W.W.R. 747.]

Payment — Second mortgage — Priority—Master's report.

Stothers v. Borrowman, 11 O.W.N. 77.

Subsequent mortgage — Mistake — Equitable relief.

Where the defendant in a mortgage action had been a first mortgagee and had taken a conveyance of the property he was not entitled to equitable relief on the ground of ignorance of the plaintiff's mortgage, there being no evidence of either a joint intention or an express agreement to take the land free from encumbrances, as was the case in Dean and Chapter v. McArthur, 9 Man. L. R. 391.

James v. Smyth, [1918] 3 W.W.R. 318.

B. As to judgment; other liens and equities.

Mechanics' liens, increase in value, see Mechanics' Liens, III—10.

As to rent under attornment clause, see Levy and Seizure, III C—50.

Of judgment lien, see Execution, I—8.

(§ II B—40)—Conditional sale agreement—Failure to register renewal under Conditional Sales Act—Subsequent debenture.

A publishing company purchased from the defendant in 1913 certain machinery under a conditional sale agreement—only a small portion of the purchase price being paid at the time of purchase. In 1915 the same company received an advance from the plaintiffs, as security for which they gave them what is described as a "first mortgage debenture" which specifically charged the assets of the company with payment of the amount and contained the words "but so that the company is not to be at liberty to create any mortgage or charge on its property ranking in priority to or pari passu with this debenture." The defendant failed to register the renewal statement within the two years as required by the ordinance respecting Hire Receipts and Conditional Sales (Con. Ord. N.W.T., 1898, c. 44; see also amendment, 1916, Alta., c. 3 s. 8). In an action to determine priorities between the parties, it was held that the purpose of the Act required a benevolent and broad meaning to be given to the term "mortgage," that the plaintiffs' debenture fell within such term and was entitled to priority over the defendant's agreement.

Foster v. International Typesetting Machine Co., 47 D.L.R. 329, [1919] 2 W.W.R. 652.

Priority as to judgments — Equitable mortgage—Merger in legal mortgage.

Even if as a general rule the taking of an ineffectual legal mortgage by an equitable mortgagee does not merge the equitable mortgage, as affecting his right of priority, the rule will be displaced by clear proof of intention to the contrary; and, hence, taking of a mortgage to replace a prior mortgage which was not registerable because of an incorrect description of a plan, and because the mortgagors were not then the registered owners of the land, gives priority to a creditor of the mortgagors who obtained judgment against them and filed an execution thereon after the first mortgage, but before the second was given, intention to abandon the prior mortgage

clearly appearing, though the mortgagees erroneously regarded the second mortgage as affording as valuable security as the first.

Rogers Lumber Co. v. Smith, 11 D.L.R. 172, 23 W.L.R. 946, 6 S.L.R. 187, 4 W.W.R. 441.

MORTGAGEE OF EQUITABLE INTEREST—OTHER PRIOR UNREGISTERED EQUITABLE INTERESTS — MORTGAGEE'S KNOWLEDGE OF—REGISTRATION—CAVEAT—LAND TITLES ACT, 1917, c. 18, s. 194—STATUTES—CONSTRUCTION.

In cases coming within s. 162 of the Land Titles Act (R.S.S. 1909, c. 41; see 1917, c. 18, s. 194) a registered purchaser or mortgagee for value of an equitable interest in lands, who has actual or constructive notice of other equitable unregistered interests prior to that which he acquired, does not, except in cases of fraud, take subject to those interests. Knowledge of an unregistered interest is not to be imputed as fraud.

Union Bank and Phillips v. Boulter-Waugh, 46 D.L.R. 41, 58 Can. S.C.R. 385, [1919] 1 W.W.R. 1046, reversing 42 D.L.R. 548, 11 S.L.R. 297, [1918] 3 W.W.R. 27, sub nom. Boulter-Waugh v. Phillips.

ATTORNMENT CLAUSE.

Under the Alberta system of land titles, the mortgagor does not convey the fee to the mortgagee as under the English system; the mortgage creates only a statutory charge against the land, the legal title still remaining in the mortgagor, and an attornment clause in the mortgage cannot create any real tenancy in the mortgagor, and, therefore, s. 1 of 8 Anne, c. 14, cannot apply. [Yates v. Ratledge, 5 H. & N. 249; Cox v. Leigh, L.R. 9 Q.B. 333; Morton v. Wood, L.R. 4 Q.B. 293, distinguished; Jellicoe v. Wellington Loan Co., 4 N.Y.R. 330, applied.]

Hyde v. Chapin, 26 D.L.R. 381, 33 W.L.R. 559, 9 W.W.R. 1142, reversing 8 W.W.R. 820.

(§ II B —44)—SUBSTITUTED MORTGAGE.

Where one to whom a voluntary conveyance of land was made, which was void as to the creditors of the grantor, upon retiring an existing mortgage thereon, gave a new one to the mortgagee for a larger amount, such mortgage is not affected by a subsequent proceeding to set aside such conveyance, to which the mortgagee was not a party.

Jack v. Kearney, 4 D.L.R. 836, 10 E.L.R. 298. [Reversed on another point 10 D.L.R. 48, 41 N.B.R. 293.]

III. Vendee of mortgagor; assumption of debt.

(§ III—45)—PAYMENT BY VENDOR—SURROGATION.

A mortgagor who is compelled to pay a mortgage debt after its assumption by an assignee of the equity of redemption, either by express agreement, or by virtue of s. 89 of the Real Property Act, R.S.M. 1902, c. 148, is entitled to an assignment of the mortgage.

Ross v. Schmitz, 14 D.L.R. 648, 6 S.L.R. 131, 25 W.L.R. 828, 5 W.W.R. 399.

RIGHTS ACQUIRED BY—EFFECT OF REGISTRY ACT.

One who purchases encumbered lands from a mortgagor takes subject to the true state of the mortgage indebtedness, having regard to the application of payments made between the mortgagor and mortgagee; and the purchaser acquires no better rights, by virtue of the Ontario Registry Act, R.S.O. 1914, c. 124, than the mortgagor himself had.

Thomson v. Stikeman, 14 D.L.R. 97, 29 O.L.R. 146.

An agreement by the purchaser of land to assume, "on the completion of" the deferred payments with interest thereon to the vendor, the payment of a mortgage to a third party for a stated amount (which, with the other payments, made up the total purchase price), and to take into consideration "at the time of assuming mortgage" yearly payments made by the vendor thereon, does not impose any liability on the purchaser, in the absence of anything in the agreement of sale to the contrary, for interest accruing on the assumed mortgage prior to the time fixed for completion of the deferred payments to the vendor or the time of their actual payment in the event of prepayment.

Miner v. Hinch, 15 D.L.R. 1, 26 W.L.R. 293, 23 Man. L.R. 802, 5 W.W.R. 797.

IMPLIED COVENANT.

Section 63 of the Land Titles Act, c. 41 (Sask.), which implies a covenant to pay the mortgage debt by a purchaser of the mortgaged premises has no application to the purchase of only an interest in the mortgaged premises. [Short v. Graham, 7 W. L.R. 787, followed.]

Montreal Trust Co. v. Boggs, 25 D.L.R. 432, 31 W.L.R. 914, 9 W.W.R. 1200.

ASSUMPTION BY PURCHASER OF MORTGAGED LAND — OBLIGATION TO PAY — ASSIGNMENT TO MORTGAGEE—ACTION AGAINST MORTGAGOR AND PURCHASER TO RECOVER MORTGAGE MONEYS—JUDGMENT—RELIEF OVER — INDEMNITY — STAY OF PROCEEDINGS.

Smith v. Wright, 8 O.W.N. 609.

Under ss. 114, 126 of the Real Property Act, R.S.M. 1902, c. 148, as they stood prior to the amendments made by 1 Geo. V. c. 49, a mortgagee, even after foreclosure under the Act, may, if he still retains the property, sue the mortgagor on his covenant for payment; and, therefore, in such a case, a mortgagor who has transferred the property may call upon his purchaser to pay the mortgage money under the implied covenant to indemnify him set forth in s. 89 of the Act. [Williams v. Box, 44 Can. S.C.R. 1; Platt v. Ashbridge, 12 Gr. at p. 106; Campbell v. Holyland, 7 Ch. D. 166, and Blunt v. Marsh, 1 Terr. L.R. 126, followed.] Pay-

ment by the mortgagor in such a case is not a condition precedent to his right of action on the purchaser's obligation to indemnify. Protection may be afforded to the purchaser by payment into court for the proper application of the money. [Cullin v. Rinn, 5 Man. L.R. 8; Mewburn v. Mackeclean, 19 A.R. (Ont.) 729, followed.]

Noble v. Campbell, 21 Man. L.R. 597, 18 W.L.R. 591.

(§ III—46)—Agreement for sale of land —Assumption of existing mortgage —Discharge of existing mortgage and creation of new mortgage for larger amount at increased rate of interest — Allowance — Adjustment—Costs.

Re Osterhout and Cada, 8 O.W.N. 30.

(§ III—47)—Grantee's liability to grantor.

Where land is conveyed subject to a mortgage, and the grantee assumes and covenants to pay and to indemnify the grantor against the mortgage, the grantor, if sued upon his covenant in the mortgage, is entitled, in third party proceedings against the grantee, to immediate judgment and execution for the amount of the judgment obtained against him, by the mortgagee, with costs, but the grantee, if he has disposed of the equity of redemption, is entitled to notice of proceedings for foreclosure.

McMurtry v. Leushner, 3 D.L.R. 549, 3 O.W.N. 1176, 21 O.W.R. 996.

Implied covenant of indemnity.

An assignee of an equity of redemption subject to a mortgage, by virtue of s. 89 of the Real Property Act, R.S.M. 1902, c. 148, impliedly covenants with his assignor, unless otherwise expressed, to pay the principal and interest of the mortgage, and to indemnify the assignor from liability thereon.

Ross v. Schmitz, 14 D.L.R. 648, 25 W.L.R. 828, 6 S.L.R. 131, 5 W.W.R. 399.

Indemnity by purchaser—Relationship—Parol evidence.

The rule that the purchaser of an equity of redemption is bound to indemnify the vendor against his liability for the mortgage debt does not apply when the purchaser is merely a nominee or agent; and parol evidence is admissible to prove this relationship.

Campbell v. Douglas, 32 D.L.R. 734, 54 Can. S.C.R. 28, affirming 25 D.L.R. 436, 34 O.L.R. 580.

The relationship subsisting between mortgagee, mortgagor and assignee of the equity of redemption who has covenanted to pay the mortgage debt, is not that of creditor, surety and principal debtor.

Brown v. Pike, 23 B.C.R. 246.

(§ III — 48) — Statutory liability of transferee — Implied covenant — Pleading.

A statement of claim in an action to enforce the statutory implied covenant of a transferee to pay the mortgage debt, alleging that the defendant is the present registered owner and that he became such since the execution of the mortgage, and praying for judgment in accordance with the implied covenant under the Land Titles Act (R.S.S. 1909, c. 41), sufficiently sets out the defendant as "transferee" under s. 63 of the Act and fully warns him of the nature of the relief claimed against him. [Colonial Invest. & Loan Co. v. Foisie, 4 S.L.R. 392, distinguished.]

Assiniboia Land Co. v. Acres, 27 D.L.R. 103, 9 S.L.R. 142, 34 W.L.R. 199, 10 W.W.R. 355, affirming 25 D.L.R. 439, 8 S.L.R. 426, 32 W.L.R. 580, 9 W.W.R. 368.

Implied covenant of transferee.

Under s. 52 of the Land Titles Act (Alta.), in every transfer of land subject to mortgage, a binding covenant is implied, both with transferor and mortgagee, that the transferee will pay the mortgage, and the mortgagee may sue the transferee directly upon this covenant in default of payment.

Great West Lumber Co. v. Murrin, 32 D.L.R. 485, 11 A.L.R. 173, [1917] 1 W.W.R. 945.

The implied covenant under s. 63 of the Land Titles Act (Sask.), of a transferee of land subject to a mortgage, so long as he remains the registered owner, to answer for the mortgage debts, is only applicable where the whole of the mortgaged estate, not merely a portion of it, has been transferred. [Montreal Trust Co. v. Boggs, 25 D.L.R. 432, followed.]

Dominion of Canada Investment & Debenture Co. v. Carstens, 36 D.L.R. 25, 10 S.L.R. 272, [1917] 3 W.W.R. 153.

A judge has power under s. 52 of the Land Titles Act (Alta.), as amended in 1916, to direct the registration of a transfer of land subject to a mortgage, in order to subject the transferee to the statutory implied covenant to pay the mortgage debt, unless the transferee within a reasonable time takes proper steps to effectively assert his claim against the registration.

Re Land Titles Act; Re Ronald and Summers, 37 D.L.R. 374, 13 A.L.R. 209, [1917] 3 W.W.R. 626.

Grantee's liability to mortgagor.

Where a person purchases part only of the lands comprised in a mortgage made by his vendor and takes a covenant against incumbrances, for further assurance and for quiet possession, he is entitled as against the mortgagor and as against a subsequent purchaser of the remainder of the mortgaged lands with notice of rights, to be indemnified against the amount due on the mortgage.

Home Building & Savings Ass'n v. Pringle, 7 D.L.R. 20, 4 O.W.N. 128, 23 O.W.R. 137.

Grantee's liability to mortgagee.

Where a mortgagor sells the mortgaged premises and the purchaser assumes the

mortgage, or retains in his possession an amount of purchase money equivalent thereto, the purchaser is compelled by s. 63 of the Land Titles Act, c. 41 (Sask.), to appropriate that money to the mortgage, just as formerly he was compelled in equity to hand it over to the mortgagor if the mortgagor was compelled to pay the mortgage.

Montreal Trust Co. v. Boggs, 25 D.L.R. 432, 31 W.L.R. 914, 9 W.W.R. 1200.

TRUSTEE TRANSFEREE—IMPLIED COVENANT TO PAY DEBT.

A trustee transferee of land subject to a mortgage cannot be held to covenant impliedly with the mortgagee that he will pay the principal money and interest secured by the mortgage, notwithstanding s. 52 of the Land Titles Act (Alta.).

Evans v. Ashcroft, 8 W.W.R. 899.

IMPLIED COVENANT TO PAY—PLEADING.

Where an action is brought against a transferee of registered land subject to a mortgage, and personal judgment is sought against him under s. 52 of the Land Titles Act (Alta.), there should be an express claim setting forth that such transferee is so liable, as the defendant sought to be charged ought to be distinctly informed as to how and by what authority he is alleged to be held personally liable. [Colonial Investment Co. v. Foisie, 1 W.W.R. 397, followed.]

Home Investment & Savings Ass'n v. Middleditch, 7 W.W.R. 1202.

IMPLIED COVENANT FOR PAYMENT BETWEEN TRANSFEREE AND MORTGAGEE — LAND TITLES ACT, S. 52.

Great West Lumber Co. v. Murrin, [1917], 1 W.W.R. 945, affirming 9 W.W.R. 1451.

THE LAND TITLES ACT, S. 52—TRANSFEREE OF MORTGAGED LAND—IMPLIED COVENANT WITH MORTGAGEE—LIABILITY CONTINUING AFTER TRANSFER OF OWNERSHIP.

The liability of a transferee of mortgaged land under the covenant implied with the mortgagee under s. 52 of the Land Titles Act (Alta.) persists after he has parted with the ownership of the land.

Trusts & Guarantee Co. v. Stephens, [1919] 3 W.W.R. 410.

IV. Assignment.

"Absolute assignment" collateral security, see Assignment, III—25.

(§ IV—50)—ASSIGNMENT OF MORTGAGE—RIGHT OF ASSIGNEE TO INCLUDE PAYMENT OF ARREARS IN MORTGAGE-CLAIM.

Stothers v. Borrowman, 33 D.L.R. 179, 38 O.L.R. 12.

HYPOTHEC—SUBSTITUTION.

The registration of the transfer of a debt has not the effect of creating the hypothec different from that created by the deeds of obligation, but simply substitutes new creditors for the former ones; therefore, if injured in any way, the debtor is not entitled to attack the deed of transfer but should attack the deeds of original obligation.

Martineau v. Pennington, 23 D.L.R. 746, 24 Que. K.B. 3.

ACTION ON, BY ASSIGNEE—SUMMARY JUDGMENT — DEFENCE — ASSIGNMENT BY MORTGAGEE-TRUSTEE IN BREACH OF TRUST—NOTICE TO ASSIGNEE—EVIDENCE.

Patterson v. Wurm, 9 O.W.N. 195.

(§ IV—51)—ACTION FOR PAYMENT OF MORTGAGE MONEY OR FORECLOSURE—TENDER OF PAYMENT AND DEMAND FOR ASSIGNMENT.

Horswell v. Campbell, 19 O.W.R. 952.

RIGHTS OF ASSIGNEE—COVENANT—DEFENCES.

The usual covenant in a mortgage for payment of the mortgage-debt is enforceable by an assignee of the mortgage, as an independent obligation, notwithstanding any defences arising from the transaction in which the mortgage was given; the assignment of a covenant is not an assignment of a chose in action contemplated by the Conveyancing and Law of Property Act (R.S.O. 1914, c. 109, s. 49); nor does an assignment pendente lite put an end to the action, but merely prevents proceeding with it without an order to proceed.

Neveren v. Wright, 36 D.L.R. 734, 39 O.L.R. 397, affirming 11 O.W.N. 409.

FRAUD—BONA FIDE ASSIGNEE—STATE OF ACCOUNT.

The fact that a mortgagee is fraudulently named in a mortgage executed in blank does not affect the right of a bona fide assignee to treat the person named as the valid holder of the charge, although in fact the latter had paid nothing to the mortgagor; it is only in so far as payments have been made that an assignee is affected by "the state of the account." The state of accounts can only affect the assignee of a charge or mortgage under the Land Titles Act, R.S.O., 1914, c. 126, in so far as payments have been made subsequent to the date of the mortgage; if without actual notice when the assignment is made the assignee is not affected by the fact that the amount for which the mortgage was given has in fact never been paid.

Dodds v. Harper, 32 D.L.R. 22, 37 O.L.R. 37.

ASSIGNMENT—FORECLOSURE BY ASSIGNEE—RIGHT TO PROCEEDS OF INSURANCE POLICY—MORTGAGE CLAUSE.

Quebec Fire Ins. Co. v. MacVicar, 27 D.L.R. 720, 22 B.C.R. 448.

(§ IV—53)—COVENANT FOR GOOD AND VALID SECURITY—CONSTRUCTION OF—ASSIGNMENT OF MORTGAGE.

[Clerk v. Joselin, 16 O.R. 68, distinguished.]

Toffey v. Stanton, 19 O.W.R. 405, 2 O.W.N. 1210.

(§ IV—54)—Of note secured by mortgage—Mortgage given to company as collateral security to notes for price of article sold—Right of holder of notes to assignment of mortgage.

Re Canadian Gas Power & Launches Ltd., 5 O.W.N. 43, 25 O.W.R. 51.

V. Satisfaction; discharge; release.

Application of payments, principal and interest, see Payment, IV—30.

Satisfaction, what constitutes, see Assignment for Creditors, VIII B—75.

(§ V—60)—Interest Act, R.S.C. 1906, c. 120, ss. 6, 9—Statement of rate — Damages for wrongful withholding discharge of mortgage.

Canadian Northern Invest. Co. v. Cameron 32 D.L.R. 54, 34 W.L.R. 866, 10 W.W.R. 959.

Action upon—Defence—Fraud and misrepresentation—Failure to prove—Mistake in mortgage as to amount payable—Plaintiff allowed as indulgence to recover full amount claimed—Amendment—Costs.

Sundstrom v. Yates, 17 O.W.N. 113.

Discharge of mortgage—Account—Promissory note—Payment into court—Reference.

Band v. Fraser, 6 O.W.N. 709.

Registration of—Mortgagee a company in liquidation—Execution of discharge by liquidator—Necessity of proof of appointment of liquidator.

Re Land Titles Act (Sask.), [1918] 3 W.W.R. 348.

(§ V — 63) — Fraudulent discharge — Fraud brought home to mortgagor's agent—Onus on benefited party.

A person cannot avail himself of what has been obtained by the fraud of another, unless he himself not only is innocent of the fraud but has given some valuable consideration, and where a mortgagee executes a release of his mortgage at the request of the mortgagor and his agent and such request is tainted with fraud which is brought home personally to the mortgagor's agent only, the onus is on the mortgagor not only to establish his own innocence of fraud in the transaction but to prove that he has given valuable consideration to the mortgagee for the release. On setting aside a discharge of mortgage which had been obtained by the fraud of another by which the defendant benefited although not chargeable with any direct knowledge of it, allowance must be made to him for disbursements made on the faith of the discharge being effective.

Rutledge v. Anderson, 20 D.L.R. 97, 24 Man. L.R. 401, 28 W.L.R. 593, varying 16 D.L.R. 29, 27 W.L.R. 73.

(§ V—64)—Discharge by administrator —As reconveyance—Estoppel.

Where a widow holds two mortgages on certain property, the first mortgage as administratrix of her deceased husband's estate, the second mortgage in her own name, and she executes and registers a discharge which recites the second mortgage, but is signed by her "as administratrix," she and her assigns are estopped, as against innocent parties without notice claiming title under a foreclosure of subsequent mortgages, from denying that her personal mortgage had been paid and discharged; the discharge operates by law as a reconveyance.

Hayden v. Cameron, 31 D.L.R. 219.

Mortgagee prisoner of war—Unable to sign discharge—Payment into court.

The Trustee Act, R.S.O. 1914, c. 121, does not enable the court to make an order vesting land in Ontario in the mortgagor when he is willing to pay off the mortgage and to pay the money into court, where the mortgagee's signature to a discharge cannot be obtained because of his internment abroad as a prisoner of war; but if the mortgagor has made a contract of sale of the lands free from incumbrance he may apply under the Conveyancing and Law of Property Act, R.S.O. 1914, c. 109, s. 21, for an order to pay into court sufficient money to meet the incumbrance and interest, including an allowance for the costs of a future motion for payment out, and may thereupon obtain the court's order declaring the land to be free from the incumbrance. [Re Keeler, 32 L.J. Ch. 101, disapproved; Re Underwood, 3 K. & J. 745, distinguished; see the subsequent Ont. statute of 1915, c. 21, amending the Mortgages Act, R.S.O. 1914, c. 112.]

Re Worthington, 21 D.L.R. 402, 33 O.L.R. 191.

(§ V—66)—Merger—Intention—Conveyance of equity to mortgagee after latter's assignment of mortgage.

The conveyance of encumbered land by a mortgagor to the original mortgagee by an instrument referring to the mortgage as being held by the bank to whom the mortgagee had transferred the same as security, will not effect a merger of the title sufficient to work a satisfaction of the encumbrance on the mortgagee subsequently obtaining a retransfer to himself of such mortgage, where it is apparent that the intention of the parties to the transaction was that it should be kept alive.

Robinson v. Ford, 14 D.L.R. 360, 25 W.L.R. 669, 5 W.W.R. 542. [Varied, 19 D.L.R. 572, 7 S.L.R. 443, 31 W.L.R. 13, 7 W.W.R. 747.]

(§ V — 69) — Discharge by assignee — Right to use assignor's name—Stipulation for reassignment on terms.

An assignment of mortgage which recites that it is given as collateral security for a loan to the assignor but which contains in its operative clause an assignment of the whole mortgage and the whole debt and not merely a part equivalent to the loan and interest, and which further provides for a reassignment of the mortgage on payment of

the loan, is sufficient under the Registry Act, R.S.O. 1914, c. 124, s. 62, to enable the assignee to receive the whole of the mortgage money and to give a statutory discharge of the mortgage without the assignor joining or giving a further release of his interest, if the assignment expressly grants power and authority to use the name of the assignor for the enforcement of the mortgage.

Re Bland and Mohun, 16 D.L.R. 716, 30 O.L.R. 100.

VI. Enforcement.

A. Generally; effect.

Preservation of incomes, receiver, equitable mortgagee, see Receivers.

Distress as incident of mortgage, see Landlord and Tenant, III D—110.

Concurrent remedies, foreclosure, personal judgment, see Land Titles, III—30; Execution, I—2.

(§ VI A—70)—Enforcement — Mortgage under Torrens system.

The court will not direct the registration of a final order of foreclosure made in a court proceeding as under the old registry system against lands in Manitoba subject to the Torrens system of title registration, upon a mortgage made under s. 99 of the Real Property Act, R.S.M. 1902, c. 148; the compulsory transfer of the mortgagor's title can be accomplished only by a proceeding in the land titles office under ss. 113, 114 of the Act.

Re Alarie and Frechett, 14 D.L.R. 298, 23 Man. L.R. 628, 25 W.L.R. 648, 5 W.W.R. 257.

Foreclosure — Covenant — Extinguishment of debt—Subsequent mortgage —Same mortgagee—Liability under.

A mortgagee who has foreclosed and subsequently sold the property cannot sue on the covenant for payment, but the wiping out of the indebtedness on the first mortgage does not deprive him of his right as mortgagee of a later mortgage to proceed on the covenant in such mortgage.

Isman v. Sinnott, 49 D.L.R. 238, 12 S.L.R. 445, [1919] 3 W.W.R. 719, reversing 12 S. L.R. 115.

Land Titles Act, Alta.—Foreclosure—Extinguishment of debt—Express application—Execution for balance —Intention.

An amendment to the Alberta Land Titles Act in 1919 provides that an order for foreclosure whether made by a court or judge or by the registrar shall operate as a full satisfaction of the debt secured by the mortgage. An order made upon an express application to be permitted to purchase for a certain agreed amount and for a vesting order and for leave to issue execution for the balance due, and where this is clearly intended to be granted by the order made, is not within this amendment. [Mutual Life Ass'ce Co. v. Douglas, 44 D.L.R. 115, reversing 39 D.L.R. 601, distinguished.]

Security Trust Co. v. Sayre, 49 D.L.R. 187, 15 A.L.R. 17, [1919] 3 W.W.R. 634, reversing [1919] 2 W.W.R. 863.

Covenant — Extinguishment of debt — Land Titles Act.

An order under s. 62 (a) of the Land Titles Act (Alta.), for foreclosure of a mortgagor's interest in mortgaged land, does not extinguish the mortgage debt, and the mortgagee may still proceed against the mortgagor upon the covenant or upon collateral security.

Mutual Life Ass'ce Co. v. Douglas, 44 D.L.R. 115, 57 Can. S.C.R. 243, [1918] 3 W.W.R. 529, reversing 39 D.L.R. 601, 13 A.L.R. 18 at p. 29 [1918] 1 W.W.R. 690, which reversed 38 D.L.R. 459, 13 A.L.R. 18, [1918] 1 W.W.R. 239.

Practice as to enforcement — Interest Act—"Just allowances"—"Extraordinary costs, charges and expenses."

Canadian Mortgage Invest. Co. v. Baird, 30 D.L.R. 275, 34 W.L.R. 985, 10 W.W.R. 1195.

Hypotheque — Default clause — Divisibility.

A provision in a mortgage (hypothèque), that upon the borrower's failure to make payment the property shall immediately vest in the lender, and all sums paid be forfeited as liquidated damages, does not vest the property in the lender, in discharge of the mortgage debt, in bar of the lender's right to sue for same, since under art. 1133 C.C. (Que.) he may elect between recourse under the penal clause or under the primary obligation; though the loan has been made by two persons jointly it is a divisible obligation, and may be enforced by each separately.

Halero v. Gray, 33 D. L.R. 140, 50 Que. S.C. 350.

Foreclosure—Personal judgment — Concurrent remedies.

A final order of foreclosure of a mortgage under the Land Titles Act (B.C.), vesting the mortgaged property in the mortgagee, does not prevent the latter from proceeding to realize the mortgage debt under his personal judgment, given by the order nisi, so long as he remains in a position to reconvey the mortgaged property; if he proceeds on his judgment, the foreclosure will be reopened to enable the mortgagor to redeem.

Orser v. Colonial Investment & Loan Co., 37 D.L.R. 47, 10 S.L.R. 349, [1917] 3 W. W.R. 513.

Where an action is in respect of a mortgage, and the claim is for personal judgment and in default foreclosure, the matter comes under either r. 129 or 130 and there must be an order before judgment can be signed under either of these rules.

Taylor v. Grunau, 9 W.W.R. 1120.

LAND TITLES ACT (ALTA.), SEC. 626—EXECUTION — CONDITIONS PRECEDENT — FORECLOSURE AND SALE — PURCHASE PRICE MORTGAGE.

Werth v. Davie, 32 D.L.R. 384, 11 A.L.R. 46, [1917] 1 W.W.R. 615.

FORECLOSURE — SPECIAL PROVISO AFFECTING REMEDY—ACCELERATION CLAUSE.

A purchase-money mortgage containing a proviso that the mortgagor may retain a certain sum out of the last instalment until he receives a conveyance of the interest of an infant who was a party to the conveyance with the vendor-mortgagee, does not disentitle the mortgagee to his remedy of foreclosure upon default, but the acceleration clause will not override the proviso as to the deferred sum, and recovery will be limited exclusive of that amount.

Thomson v. Willson, 23 D.L.R. 468, 51 Can. S.C.R. 307, varying 19 D.L.R. 593, 31 O.L.R. 471.

PROCEDURE—SPECIAL STATUTE—ACTIONS BEFORE MASTER.

The special procedure provided by s. 3, c. 6, of the statutes of 1914 (Alta.), that all actions for the enforcement of mortgages or agreements for the sale of land shall be brought before a Master in Chambers in the Supreme Court, does not debar plaintiffs from proceeding under the ordinary procedure.

Colonial Investment & Loan Co. v. Grady, 24 D.L.R. 176, 8 A.L.R. 496, 31 W.L.R. 575, 8 W.W.R. 995.

DISTRESS—RIGHTS OF ASSIGNS.

Section 5 of the Distress Act, R.S.S. c. 51, which entitles a mortgagee to distrain upon "the goods and chattels of the mortgagor or his assigns," is confined to an assignee of the land whose assignment is subsequent to the mortgage, but does not give a mortgagee the right to distrain on the goods of someone whose interest was prior to the mortgage. [Vousden v. Hopper, 4 S.L.R. 1, applied.]

Bowers v. Bowlen, 25 D.L.R. 87, 8 S.L.R. 436, 32 W.L.R. 955, 9 W.W.R. 604.

ATTORNMENT CLAUSE—POWER OF DISTRAINT.

A tenancy created by an attornment clause to secure mortgage interest is one created by estoppel, and binds those privy to the estoppel, but not third parties. The fact that the mortgagee has neither the legal estate in the lands, nor any reversion, does not disentitle him from distraining. [Morton v. Woods, L.R. 4 Q.B. 293; Ex parte Punnett, 16 Ch. D. 226, applied.]

Great West Saddlery v. Griesbach, 9 W.W.R. 528.

ACTION FOR FORECLOSURE—MOTION FOR SUMMARY JUDGMENT—ACCOUNT.

Halstead v. Sonshine, 7 O.W.N. 729.

FORECLOSURE—TITLE OF MORTGAGOR—REMEDY UPON MORTGAGOR'S COVENANT FOR PAYMENT—STATUTE OF LIMITATIONS—COUNTERCLAIM—BREACH OF AGREEMENT—STATUTE OF FRAUDS.

Curry v. Girardot, 7 O.W.N. 642.

PROCEEDINGS TO ENFORCE—APPLICATION FOR LEAVE UNDER MORTGAGORS AND PURCHASERS RELIEF ACT, 1915—ARRANGEMENT BETWEEN MORTGAGOR AND MORTGAGEE FOR RECEIPT AND APPLICATION OF RENTS OF MORTGAGED PROPERTIES.

Re Thomas and Morris, 8 O.W.N. 403.

MORTGAGE NOT EXECUTED — ACTION FOR MONEY LENT—INTEREST—RATE—PLEADING—AMENDMENT.

In an action upon a mortgage where it is found that the defendant did not execute the mortgage but that moneys of the plaintiff were paid for, and to the defendant through an agent whom he had authorized to obtain a loan for him, the action should not be dismissed before he has paid back the money received and paid out for his benefit [Lodge v. National Union Invest. Co., [1907] 1 Ch. 300, 306], and the plaintiff should be allowed to amend his claim so as to make it one for the repayment of money lent, and the plaintiff should be allowed the rate of interest which the defendant had notice was claimed and which he did not object to [Last West Lumber Co. v. Haddad, 25 D.L.R. 529, 8 S.L.R. 407, followed]. The mortgage should not be cancelled nor the registration removed until such payment back by the defendant, where the court is satisfied the defendant intended to mortgage the land in question.

Northern Trust Co. v. Wasylkovsky, 11 S.L.R. 388, [1918] 3 W.W.R. 204.

FOR FORECLOSURE — FORM OF JUDGMENT — FORECLOSURE WITH SIX MONTHS FOR REDEMPTION, OR SALE AFTER THREE MONTHS—COSTS.

Wiarton v. Canada Casket Co., 14 O.W.N. 321.

MOTION FOR SUMMARY JUDGMENT—DEFENCE—INTEREST—COSTS—STAY OF PROCEEDINGS.

Mason v. Florence, 13 O.W.N. 289, 14 O.W.N. 344.

REFERENCE TO ASCERTAIN AMOUNT ADVANCED AND DUE — FINDING OF MASTER — CREDIBILITY OF WITNESSES — ENTRIES IN BOOK — SUSPICIOUS CIRCUMSTANCES —APPEAL—COSTS OF DEFENDING TITLE TO MORTGAGE ADDED TO MORTGAGE-DEBT —ATTACK MADE BY OWNER OF EQUITY OF REDEMPTION.

Way v. Shaw, 14 O.W.N. 310.

SECURITY FOR LOAN BY CITY CORPORATION TO MANUFACTURING COMPANY—AGREEMENT —BY-LAW — CONSTRUCTION OF MORTGAGE-DEED—ENFORCEMENT OF SECURITY —BONUS—ASSIGNMENT FOR BENEFIT OF CREDITORS.

Woodstock v. Woodstock Automobile Mfg. Co., 6 O.W.N. 403.

ACTION ON—TITLE OF MORTGAGEE—FAILURE TO IMPUGN—EVIDENCE—AMOUNT DUE—INTEREST.

Macdonell v. Keefer, 14 O.W.N. 25. [Affirmed in 15 O.W.N. 45.]

FORECLOSURE—TITLE OF MORTGAGOR—REMEDY UPON MORTGAGOR'S COVENANT FOR PAYMENT—STATUTE OF LIMITATIONS—COUNTERCLAIM—BREACH OF AGREEMENT—STATUTE OF FRAUDS.

Curry v. Girardot, 15 O.W.N. 27, affirming 7 O.W.N. 642.

ACTION BY MORTGAGEE ON COVENANT FOR PAYMENT—MOTION TO STAY PROCEEDINGS—FORECLOSURE—PRESENT ABILITY TO RECONVEY MORTGAGED PREMISES—ABSENCE OF PREJUDICE TO MORTGAGOR.

Rea v. Polak, 15 O.W.N. 138.

ACTION BY FORECLOSURE—MOTION FOR SUMMARY JUDGMENT — DEFENCE — ORAL AGREEMENT TO TAKE NO PROCEEDINGS, NOT BINDING ON MORTGAGEE.

Cooper v. Abramovitz, 11 O.W.N. 35, 77.

ACTION ON MORTGAGE—DEFENCE—FAILURE

Coleridge v. Davis, 12 O.W.N. 272.

ACTION FOR FORECLOSURE—APPEARANCE SET ASIDE — PRACTICE — FINAL ORDER OF FORECLOSURE.

Found v. Gertzbein, 13 O.W.N. 179.

ACTION FOR FORECLOSURE—MOTION FOR SUMMARY JUDGMENT—DEFENCE—INTEREST, WHETHER PAYABLE FROM DATE OF MORTGAGE OR DATES WHEN MONEYS ACTUALLY ADVANCED — ARRANGEMENT BETWEEN MORTGAGOR AND MORTGAGEE—FORM OF COVENANT FOR PAYMENT OF INTEREST.

Mason v. Florence, 13 O.W.N. 289.

FINAL ORDER OF FORECLOSURE—OPENING UP ON APPLICATION OF ASSIGNEE OF EXECUTION CREDITOR, NOT MADE A PARTY AND NOT SERVED WITH NOTICE—RULES 469, 470—DOUBT AS TO WHETHER EXECUTION SATISFIED—NEW ACCOUNT AND NEW DAY FOR REDEMPTION—IMPROVEMENTS MADE BY MORTGAGEE—LIEN FOR—CONVEYANCEYING AND LAW OF PROPERTY ACT, S. 37.

Greisman v. Rosenberg, 13 O.W.N. 382.

EVIDENCE — JUDGMENT — FORECLOSURE — REFERENCE—COSTS.

Roos v. Swarts, 10 O.W.N. 446; 11 O.W.N. 166, 363, 393.

ENFORCEMENT—SALE UNDER—INSUFFICIENCY OF NOTICE—DAMAGES—INJUNCTION—COSTS.

Tucker v. Titus, 5 O.W.N. 651.

ACTION ON PERSONAL COVENANT FOR PAYMENT BY MORTGAGOR DESCRIBED AS "TRUSTEE" — DESCRIPTIVE WORD NOT LIMITING PERSONAL LIABILITY — MORTGAGE MADE AS PART OF TRANSACTION CONCERNING AN EXCHANGE OF PROPERTIES—DEFENCE BASED ON ALLEGED MISREPRESENTATIONS—FAILURE TO PROVE.

Shaver v. Young, 16 O.W.N. 16.

(§ VI A—71)—DEFECTIVE DESCRIPTION—MORTGAGE NOT REGISTERABLE—RECTIFICATION.

Where a mortgage by reason of a mistake in the description of a part of the land conveyed cannot be registered under the Land Titles Act, R.S.S. 1909, c. 41, but notice may be given of same to subsequent encumbrancers by the filing of a caveat, the filing of the caveat must be followed by an application to the court for a rectification of such mistake, and the registration of the corrected mortgage where the foreclosure of the mortgage is sought.

Reeves v. Stead, 13 D.L.R. 422, 25 W.L.R. 37, 4 W.W.R. 1353.

FORECLOSURE ON DEFAULT IN PAYMENT OF INSTALMENT — SALE BY COURT FREE FROM ENCUMBRANCES.

Where a mortgagee takes proceedings to enforce his security he cannot refuse to accept payment of the whole amount of principal and interest even though part of it has not yet matured, and a fortiori, the court may order a sale free from the encumbrance constituted by the immatured payments. [Ex parte Wickens, [1898] 1 Q. B. 543; Bovill v. Endle, [1896] 1 Ch. 648, applied.]

Great West Permanent Loan Co. v. Jones, 8 A.L.R. 45, 7 W.W.R. 767.

(§ VI A—72)—CUTTING TIMBER AS GROUNDS FOR FORECLOSURE.

A mortgagee is not entitled under Quebec law to foreclose a mortgage on the ground that the mortgage debtor has cut down timber on the property mortgaged, unless he can establish that the timber was cut to defraud him and for the purpose of diminishing or deteriorating his security.

Davis v. Smith, 8 D.L.R. 486.

B. ON DEFAULT OF INTEREST, INSTALMENT, TAXES, ETC.

(§ VI B—75)—DEFAULT OF INTEREST, ETC.

The relief against acceleration clauses in mortgages provided for by sub-sec. 10 added to s. 93 of the Land Titles Act (Sask.), by 1 Geo. V. c. 12, s. 7, applies to the general law relating to mortgages and not to a particular kind of foreclosure, and as soon as enacted it became in effect a part of every mortgage in the same way as if it had been inserted in the mortgage by the parties. The words "together with costs to be taxed by the registrar" in subs. 10, which gives relief against a mortgage acceleration clause in proceedings before the registrar of land titles, have not the effect of limiting the right of relief to a proceeding before the registrar, but the remedy may be had in court proceedings, e.g., a foreclosure action.

Wasson v. Harker, 8 D.L.R. 88, 5 S.L.R. 364, 22 W.L.R. 609, 3 W.W.R. 218, reversing in part 7 D.L.R. 526, 22 W.L.R. 320, 3 W.W.R. 25.

A sale of land under a mortgage for nonpayment of monthly instalments of principal was ordered in a foreclosure action in Saskatchewan in terms of an acceleration clause in the mortgage although the defendant offers to pay the sum which is in arrear without reference to the acceleration clause.

McGregor v. Hemstreet, 5 D.L.R. 301, 20 W.L.R. 642, 2 W.W.R. 284.

APPLICATION OF PAYMENTS — INTEREST — MORATORIUM.

Where a mortgagor makes a payment on the mortgage and does not direct whether the funds are to be appropriated in payment of the principal or interest, a duty arises on the part of the mortgagee to apply it towards the payment of the interest, otherwise the interest would be added to capital, and so become itself liable to interest, or the interest would be in default for more than 1 year and the mortgage thereby become liable to foreclosure under the Moratorium Act. [Cockburn v. Edwards, 18 Ch. D. 449; Wrigley v. Gill, [1906] 1 Ch. 165, followed.]

Burge v. Fines, 29 D.L.R. 360, 26 Man. L.R. 99, 33 W.L.R. 813, 10 W.W.R. 74.

FORECLOSURE—DEFAULT IN INTEREST.

Little v. Hill, 30 D.L.R. 483, 23 B.C.R 321.

REGISTRAR'S JURISDICTION AS TO DEFAULT JUDGMENT.

Canada Trust Co. v. Layton, 30 D.L.R. 283, 9 S.L.R. 244, 34 W.L.R. 429, 10 W.W. R. 580.

RIGHT TO DISTRESS—GOODS OF OTHER PERSONS.

Where a land mortgage contains an attornment clause in respect of the interest, and in addition purports to give the mortgagee the right to distrain upon any goods upon the mortgaged premises for arrears of principal and to recover same by way of rent reserved, a mere personal license is created by the latter power as between the mortgagor and the mortgagee, which does not justify the mortgagee distraining goods of persons other than the mortgagor which may be upon the premises. [Edmonds v. Hamilton Provident, 18 A.R. (Ont.) 347; Miller v. Imperial Land Co., 11 Man. L.R. 247; Trust & Loan Co. v. Lawrason, 10 Can. S.C.R. 679, applied.]

McDermott v. Fraser, 23 D.L.R. 430, 25 Man. L.R. 298, 8 W.W.R. 196.

ACTION FOR FORECLOSURE BEGUN BEFORE PASSING OF MORTGAGORS AND PURCHASERS RELIEF ACT, 1915—PRINCIPAL AND INTERSET IN ARREAR—RIGHTS OF MORTGAGEES UNDISTURBED BY ACT—SECTION 4, SUBS. C, OF ACT—LEAVE TO PROCEED UNNECESSARY—COSTS OF MOTION.

Hind v. Gidlow, 8 O.W.N. 327.

DEFAULT IN PAYMENT OF PRINCIPAL—ACTION FOR PRINCIPAL AND INTEREST — PAYMENT BY MORTGAGOR—CLAIM FOR BONUS — AMENDMENT — DISCRETION —REFUSAL.

Warren v. Cairns, 9 O.W.N. 232.

AS TO AMOUNT—DIVISIBILITY.

A creditor has the right to maintain an action for the amount of the loan, even where it has been stipulated in the deed that, on default of the borrower paying the loan with interest, on the date fixed, the immovable property hypothecated should become the absolute property of the lender, without the necessity of placing the borrower in default. A clause in a hypothecary obligation that "the loan is indivisible and may be claimed by the lenders in whole from each of the heirs of the borrower, conformably to art. 1133, C.C. (Que.)," does not mean that the lenders are bound to make their claim against the borrowers together and in one and the same action. It signifies merely that, if the debtor should die before payment of his debt, the plaintiff or the other lender might claim the whole amount from each of the heirs instead of dividing the claim and proceeding against each one of them for his proportionate share.

Halcro v. Gray, 50 Que. S.C. 350.

ACTION FOR FORECLOSURE AND POSSESSION—INTEREST AND INSTALMENTS OF PRINCIPAL PROVIDED FOR NOT IN ARREAR—BREACH BY MORTGAGOR OF COVENANT TO INSURE—INABILITY TO OBTAIN INSURANCE — REDEMISE CLAUSE — RIGHT OF MORTGAGEE TO POSSESSION, BUT NOT FORECLOSURE—COSTS.

Carrique v. Pilgar, 6 O.W.N. 101.

MOTION FOR LEAVE TO BRING ACTION FOR FORECLOSURE WHERE PRINCIPAL ONLY IN ARREAR — MORTGAGE MADE BEFORE AUGUST, 1914 — MORTGAGORS AND PURCHASERS RELIEF ACT—LEAVE GRANTED UNLESS PRINCIPAL REDUCED AND RATE OF INTEREST INCREASED.

Cruso v. Brown, 14 O.W.N. 244.

(§ VI B—76)—SPECIAL COVENANTS.

The "special covenants" which may be introduced into a statutory mortgage under the Torrens or "New System" title registration (Real Property Act, R.S.M. 1902, c 148), must not be such as are repugnant to the imperative provisions of the statute itself. While at common law the rights and powers of a mortgagee of land are incident to the legal or equitable estate vested in him as mortgagee, the statutory mortgage under the Torrens or "New System" registry law in Manitoba, R.S.M. 1902, c. 148, does not vest any estate in the lands in the mortgagee, but takes effect as a security only, with statutory powers for enforcement; the mortgagee's rights and powers are consequently dependent directly upon the statutory provisions, and any additional stipulations in a mortgage made under that statute, which purport to authorize the mortgagee or his assigns to sell the lands, are not effective to pass the registered title merely on a transfer by the mortgagee in purported exercise of the conventional power of sale without the judgment of a court or the compliance with the statutory proceedings for enforcing the security.

Smith v. National Trust Co., 1 D.L.R. 698, 45 Can. S.C.R. 618, 21 W.L.R. 97, 1 W.W.R. 1122, affirming 20 Man. L.R. 522.

REMEDY FOR BREACH OF COVENANT—RECEIVERSHIP.

National Trust Co. v. Brantford Street R.

Co., 11 D.L.R. 837, 4 O.W.N. 1341, 24 O. W.R. 787, reversing 4 D.L.R. 301 and new trial ordered.

RIGHT TO ENTER—INSUFFICIENCY OF ENTRY SEIZURE OF CROP BY SHERIFF.

Macdonald v. Doucet, 45 N.S.R. 114, 7 E.L.R. 529.

C. WHO MAY FORECLOSE; PARTIES.

(§ VI C—80)—SPECIALLY INDORSED WRIT—AMENDMENT—NECESSARY PARTIES.

A final order for foreclosure based upon amended judgment, not according to the indorsement upon the writ, is not a judgment on a specially indorsed writ, and is ineffectual; such a judgment is wholly invalid, and no laches can estop those who seek to have it set aside.

Martin v. Evans, 37 D.L.R. 376, 39 O.L.R. 479.

A mortgagee under a second mortgage cannot claim a judicial sale of the interest of the first mortgagee without the latter's consent, but he may sell the equity of the mortgagor subject to the prior mortgage without making the first mortgagee a party.

Wallace v. Smart, 1 D.L.R. 70, 19 W.L.R. 787, 48 C.L.J. 110, 22 Man. L.R. 68.

FORECLOSURE ORDER—NECESSARY PARTIES.

A motion for a foreclosure order nisi based on default in the delivery of a defence must make it appear that every allegation to sustain the order sought is contained in the statement of claim. An order for foreclosure cannot be granted in the absence of any of the persons entitled to the mortgage moneys.

Murray v. Stentiford, 20 B.C.R. 162, 6 W.W.R. 1407.

FORECLOSURE—SUBSEQUENT INCUMBRANCER ADDED AS PARTY IN MASTER'S OFFICE—ATTACK UPON JUDGMENT AND REPORT—LOCUS STANDI — REGULARITY OF PROCEEDINGS.

Elliott v. Byers, 13 O.W.N. 107.

PRACTICE—WRIT OF SUMMONS—SPECIALLY ENDORSED WRIT — MORTGAGE — FORECLOSURE—PARTIES—OWNER OF EQUITY REDEMPTION—APPEARANCE WITHOUT AFFIDAVIT—RULES OF COURT.

Palter v. Sher, 9 O.W.N. 49.

FORECLOSURE — COVENANT FOR PAYMENT — TITLE—QUIT CLAIM DEED—MISTAKE—REFORMATION — HUSBAND AND WIFE — FRAUD—UNDUE INFLUENCE — EVIDENCE —ASSIGNMENT OF INTERESTS BY ONE OF SEVERAL MORTGAGEES PENDENTE LITE—ADDITION OF ASSIGNEE AS PARTY—RULE 300 — RECOVERY ON COVENANT — ABILITY TO RECONVEY—FORM OF JUDGMENT —PAYMENT INTO COURT—LIEN FOR UNPAID PURCHASE-MONEY—COSTS.

Naiman v. Wright, 9 O.W.N. 165.

FORECLOSURE—PARTIES TO ACTION—EXECUTORS OF DECEASED MORTGAGOR—WILL—POWER TO SELL LAND—BENEFICIARIES NOT JOINED—RULE 74—TITLE TO LAND —APPLICATION UNDER VENDORS AND PURCHASERS ACT—VALIDITY OF TITLE DERIVED THROUGH FORECLOSURE.

Re Goldberg and Grossberg, 5 O.W.N. 885.

TIME FOR REDEMPTION — TIME GIVEN TO THIRD MORTGAGEE BEYOND TIME FOR SECOND MORTGAGEE.

In an action by a first mortgagee, a third mortgagee was given an extension beyond the time fixed by the order nisi for redemption so that if the second mortgagee did not redeem it could do so; it appearing that the second mortgagee held its mortgage not for a present existing indebtedness but for a possible contingent liability, and that the third mortgagee intended to redeem should the second mortgagee not do so.

Braid v. McDowell, [1919] 3 W.W.R. 596.

(§ VI C—81)—FINAL ORDER ON CONSENT—FAILURE TO DISCLOSE INTEREST OF PURCHASER OF EQUITY OF REDEMPTION—OPENING FORECLOSURE — PARTIES — COSTS.

Foster v. Mallory; McLaughlin v. Mallory, 10 O.W.N. 145.

ACTION BY THIRD MORTGAGEE—MOTION FOR SUMMARY JUDGMENT — JUDGMENT FOR PART ADMITTED, WITH STAY OF EXECUTION — TENDER BEFORE ACTION — PAYMENT INTO COURT.

Harris v. Altshuller, 10 O.W.N. 174.

(§ VI C—82)—PARTIES DEFENDANT—PARTIES ADDED IN MASTER'S OFFICE.

Under r. 118 of the Manitoba King's Bench Rules, R.S.M. 1902, c. 40, providing that upon a reference under a judgment for foreclosure or sale the master is to inquire and state whether any person other than the plaintiff has any charge upon the land subsequent to the plaintiff's claim, a party is added in the Master's office on the assumption that he is a subsequent encumbrance, and if he claims priority over the plaintiff he must move to discharge the order making him a party, or to add to, vary or set aside the judgment, and upon his failure so to do he is bound by the judgment to the same extent as an original party.

McDermott v. Bielschowsky, 3 D.L.R. 319, 22 Man. L.R. 319, 21 W.L.R. 77, 2 W.W.R. 182.

FORECLOSURE—PARTIES DEFENDANT—ADDING IN MASTER'S OFFICE.

The fact that all persons interested in an equity of redemption are not made parties to a foreclosure proceeding, or that the action is discontinued as to some of them, does not render the proceeding fatally defective, since all necessary parties may be added even after judgment. [Jones v. Bank of Upper Canada, 12 Gr. 429; Buckley v. Wilson, 8 Gr. 566; Portman v. Paul, 10 Gr. 458; Oxford v. Bayley, 1 Ch. Chrs. 272, fol-

lowed.] Where on an appeal from a judgment of foreclosure, it appears that all parties interested in the equity of redemption were not made parties to the proceeding, or added in the Master's office, the matter will be referred back to the Master so that they may be added by a formal order and not by the service of a Master's warrant, making them parties.

Home Building & Savings Ass'n v. Pringle, 14 D.L.R. 482, 5 O.W.N. 226, 25 O.W.R. 191, reversing 12 D.L.R. 856, 24 O.W.R. 889.

FORECLOSURE—ADDING EXECUTION CREDITORS AND LIENHOLDERS—ALBERTA RULES 46, 47—PURPOSE OF—REDEMPTION.

The purpose of rr. 46, 47 (Alta.) is to obviate the adding in the first instance of caveators, lienholders, execution creditors and subsequent mortgagees, in an action for foreclosure while the rights of the mortgagor and first mortgagee are being determined, and also until it is determined whether there will be a surplus available for subsequent encumbrances. Service of the order nisi gives an opportunity to subsequent encumbrancers to come in and redeem and in the case of a lienholder to establish his rights under the lien.

C.P.R. Co. v. Canadian Wheat Growing Co., 47 D.L.R. 102, 14 A.L.R. 452, [1919] 2 W.W.R. 313.

Plaintiffs brought action for foreclosure of a mortgage, joining the mortgagor and the registered owner as parties defendant, and claimed judgment on the covenant against the mortgagor and the registered owner. It was not expressly alleged that the present registered owner was a transferee through the mortgagor. On motion for judgment:—Held, where a proceeding is taken against a transferee of land subject to a mortgage, and it is sought to hold him personally liable under the Land Titles Act (Sask.) respecting implied covenants, there should be an express allegation setting forth that he is so liable, and, there being no such allegation in this case, the plaintiff was not entitled to personal judgment against the registered owner.

Colonial Investment & Loan Co. v. Foisie, 4 S.L.R. 392.

ABANDONMENT OF IMMOVABLE—MISTAKE—SURETY.

When appeals are successively taken to the Court of King's Bench and the Privy Council from a judgment of the Superior Court in an action en déclaration d'hypothèque ordering the defendant to surrender the immovables hypothecated within 15 days from date of service (which was made) and both appeals affirmed the original judgment, the said delay for surrender, suspended thereby, only runs from the date on which the final judgment of the Privy Council is registered as provided by art. 1252 C.C.P. The declaration of the defendant that he has surrendered all the immovables, followed by an enumeration in which one of them is omitted by an error in copying, is a valid surrender and does not give the plaintiff a right to proceed as if the one omitted had not been surrendered. The undertaking by the surety on appeal from the judgment in an action en déclaration d'hypothèque that he will pay the amount adjudged in capital, interest, costs and damages if the appellant fails to do so, does not make him liable for a loss resulting from the fact that the immovables having depreciated in value pending the appeals, and the taxes and interest on prior hypothecary claims accumulated, the proceeds of the judicial sale were insufficient to satisfy the judgment.

Canada Industrial Co. v. Walker, 22 Que. K.B. 442.

PARTIES—MORTGAGE ACTION—ADDITION OF NEW DEFENDANTS — PROPOSED PARTIES NOT NOTIFIED.

Mills v. Tibbetts, 9 O.W.N. 125.

FORECLOSURE—EXECUTION CREDITOR OF ONE OF THREE OWNERS OF UNDIVIDED SHARES IN EQUITY OF REDEMPTION—STATUS OF EXECUTION CREDITOR AFTER PROOF OF CLAIM IN MASTER'S OFFICE—SUBSEQUENT INCUMBRANCER—REDEMPTION OF PLAINTIFF'S MORTGAGE—CONSOLIDATION OF SECURITIES—MARSHALLING—UNDIVIDED INTEREST IN EQUITY ACQUIRED AFTER EXECUTION PLACED IN SHERIFF'S HANDS BUT BEFORE PROOF OF CLAIM—ASCERTAINMENT OF RESPECTIVE INTERESTS—APPORTIONMENT—EFFECT OF REDEMPTION—AVOIDANCE OF MULTIPLICITY OF PROCEEDINGS—JUDICATURE ACT, S. 16 (H)—PARTITION OR SALE—LEAVE TO APPLY.

In an action to enforce a mortgage by foreclosure, K., F., and G. were made defendants as the owners of the equity of redemption, and a company, an execution creditor of the defendant K., was added as a defendant in the Master's office, where its claim was allowed; and, as a subsequent incumbrancer, it redeemed the plaintiff's mortgage. K. was the mortgagor, and F. and G. were owners of undivided interests in the equity of redemption by transfer from K., subsequent to the placing of the company's execution in the sheriff's hands:—Held, that the company, after its claim had been allowed, became an incumbrancer, with all the rights incident to that status. [Federal Life Ass'ce Co. v. Stinson, 13 O.L.R. 127, affirmed in Scott v. Swanson, 39 Can. S.C.R. 229, followed.] (2) When the company redeemed the plaintiff, it became, as against K., entitled to a judgment of foreclosure, unless redeemed by payment of the full amount due on both its securities. [Gilmour v. Cameron, 6 Gr. 290, followed.] (3) That the company had no right to consolidate or marshall its securities as against F. and G., its right to consolidate not having attached until it had become an incumbrancer, which was not until after the severance of the equity of redemption. (4)

That the company was entitled to have the respective interests of K., F., and G. ascertained, and the moneys due under the first mortgage apportioned, so that each of them would be entitled to redeem his undivided interest on payment of the proper amount. [Flint v. Howard, [1893] 2 Ch. 54, applied.] (5) That redemption by F. of the plaintiff's mortgage would not put an end to this action and so force the company to take some other proceeding to enforce its rights—multiplicity of legal proceedings must be avoided: Judicature Act, s. 16 (h). (6) That leave to apply should be reserved, so that, when the proceedings for foreclosure or redemption should be concluded, partition or sale might be had in the same action.

Adams v. Keers, 46 O.L.R. 113. [Varied in 16 O.W.N. 347.]

PURCHASER OF EQUITY IN LAND—IMPLIED COVENANT TO INDEMNIFY VENDOR—FORECLOSURE, EFFECT OF.

Noble v. Campbell, 20 Man. L.R. 232, 15 W.L.R. 696.

(§ VI C—83)—INTERVENTION.

Where some of the defendants, against whom no claim was made in a proceeding to foreclose a mortgage, asked that a sale of the encumbered premises be made, and offered a satisfactory guarantee for the costs thereof, a sale, instead of a foreclosure, will be ordered.

McGregor v. Hemstreet, 5 D.L.R. 301, 20 W.L.R. 642, 2 W.W.R. 284.

(§ VI C—84)—RIGHT OF FORECLOSURE—INFORMALITIES AFFECTING REGISTRATION—TORRENS SYSTEM.

An informal charge given in respect of lands which are subject to the Land Titles Act (Sask.) for a debt, will not be enforced by foreclosure or sale if not in conformity with the statutory requirements for mortgages, but a personal judgment may be recovered in respect of the debt which it represents.

Shore v. Weber, 11 D.L.R. 148, 24 W.L.R. 343, 4 W.W.R. 714.

D. DEFENCES.

(§ VI D—85)—DEFECTIVE DESCRIPTION—MORTGAGE NOT REGISTRABLE—CAVEAT—SUBSEQUENT ENCUMBRANCER.

Notwithstanding the fact that a subsequent mortgagee fails to file a defence to an action to foreclose a prior mortgage, he may, under Sask. r. 232, on the plaintiff's motion for judgment, raise the objection that the plaintiff's mortgage, which, by reason of a mistake in the description of a part of the land conveyed, was not registrable under Land Titles Act, R.S.S. 1909, c. 41, could not be foreclosed until after the rectification of such mistake by the court, and the registration of the corrected mortgage.

Reeves v. Stead, 13 D.L.R. 422, 25 W.L.R. 37, 4 W.W.R. 1353.

OBTAINED AS PART OF FRAUDULENT TRANSACTION—DISHONESTY OF MORTGAGEE—NO MONEY ADVANCED—FORECLOSURE OR SALE—RIGHTS OF ASSIGNEE.

The assignee of a mortgage which has been obtained as part of a transaction which was in essence a fraudulent scheme of the mortgagee, the true agreement between the parties not being put in the proper form through the dishonesty of such mortgagee, who had no right under the circumstances to take the mortgage, and the amount agreed to be advanced never having been advanced cannot succeed in an action for foreclosure or sale because the original mortgagee could not have done so.

Jacobson v. Williams, 48 D.L.R. 51, [1919] 2 W.W.R. 891.

SUMMARY JUDGMENT — MORTGAGE — FORECLOSURE—DEFENCE—RULES 56, 57.

Taylor v. Edwards, 7 O.W.N. 119.

ACTIONS FOR FORECLOSURE—SUMMARY JUDGMENT—DEFENCES—HUSBAND AND WIFE—FORM OF JUDGMENT.

Standard Reliance Mortgage Corp. v. Biette, 10 O.W.N. 288.

(§ VI D—86)—EFFECT OF TENDER—INTEREST.

While, under ordinary circumstances, a mortgagee even if in possession is entitled to his full interest down to the date of payment, he is not entitled to rely upon that rule if he has denied the mortgagor's right to redeem; so on an accounting between a mortgagee in possession who had refused to be redeemed, where it appears that the mortgagee refused to accept a reasonable offer of the mortgagor, that a sum sufficient to satisfy the mortgagee's claim be set aside out of a fund then on deposit in court by reason of an expropriation of the land in question, the mortgagee is properly refused interest at the rate stipulated in the mortgage from the time of such failure to accept the offer and is allowed only the rate of interest accrued upon the fund in court. [National Bank of Australasia v. United Hand, etc., Co., 4 App. Cas. 391, applied.]

Williams v. Box, 12 D.L.R. 91, 24 Man. L.R. 31, 24 W.L.R. 93, 4 W.W.R. 244.

E. RELIEF; DECREE; EFFECT AS TO FUND.

War Relief Act, Volunteers and Reservists Relief Act, Mortgagors and Purchasers Relief Act, see Moratorium.

Application for relief, appearance, see Appearance, I—2.

(§ VI E——90)—RELIEF—STATUS OF MORTGAGOR—TRUSTEE.

A trustee personally responsible for a mortgage debt is entitled to the same protection as an ordinary debtor, and is within the provisions of 6 Geo. V. c. 21 (Man.).

Winnipeg Church Extension Ass'n v. Markiewicz, 37 D.L.R. 697, 28 Man. L.R. 221, [1917] 3 W.W.R. 831.

A proceeding by a mortgagee to collect rent from tenants under the terms of the

mortgage is not suspended by the Volunteers and Reservists Relief Act (Alta., 1916).

North American Life Ass'ce v. Morris, 31 D.L.R. 739, 11 A.L.R. 35, [1917] 1 W.W.R. 614.

MORATORIUM — SOLDIERS — RENTS — RECEIVER.

Though by s. 8 of the Volunteers and Reservists Relief Act (Alta. 1916, c. 6), the mortgagee's right to collect the rents is preserved, the remedy of enforcing that right by an action for the appointment of a receiver, particularly in connection with the foreclosure action itself, is suspended under the provisions of s. 3 of the Act.

Canada Life Ass'ce Co. v. Dickson, 30 D. L.R. 301, 11 A.L.R. 48, [1917] 1 W.W.R. 1.

VOLUNTEERS AND RESERVISTS RELIEF ACT—"INTERESTED IN HIS OWN RIGHT AS MORTGAGOR."

A volunteer has a bona fide interest "in his own right," in the land covered by a mortgage made by him as personal representative, out of which he was entitled to a distributive share, within the meaning of the Volunteers and Reservists Relief Act (Sask. 1916, c. 7, s. 2), and is therefore entitled to protection from sale under the mortgage by virtue of the provisions in that Act.

Quebec Bank v. Milding, 33 D.L.R. 694, 10 S.L.R. 227, [1917] 2 W.W.R. 390.

WAR RELIEF ACT—RENTS—FINALITY OF ORDER.

The War Relief Act (Man.), 1915, as amended in 1917, empowers a judge to make an order permitting a mortgagee to collect from a tenant of the mortgagor claiming protection of the Act, and from the subtenants, the rent due by them, and to have possession of the property in case of a default; but such an order is not necessarily final in its effect.

Gregory v. Nicholson, 35 D.L.R. 565, 28 Man. L.R. 126, [1917] 3 W.W.R. 8.

FORECLOSURE—ENLISTMENT AND DISCHARGE—ASSIGNMENT FOR CREDITORS—WAR RELIEF ACT (B.C.)

Buntzen v. Hill-Tout, 33 D.L.R. 383, [1917] 2 W.W.R. 286.

FINAL ORDER OF SALE—ACCOUNTING.

Home Building and Savings Association v. Pringle, 14 D.L.R. 482, 5 O.W.N. 226, reversing 12 D.L.R. 856, 4 O.W.N. 1583, 25 O.W.R. 191. [See also 3 D.L.R. 896, 3 O. W.N. 1595.]

WAR RELIEF ACT—APPLICABILITY.

The War Relief Act (Man.) cannot be invoked against a mortgagee proceeding with a mortgage sale commenced prior to the passage of the Act.

Palmason v. Kjernested, 39 D.L.R. 237, 28 Man. L.R. 429, [1918] 1 W.W.R. 607, affirming 36 D.L.R. 448, [1917] 3 W.W.R. 512.

WAR RELIEF ACT—CLUB.

A mortgagee of the real property of a club incorporated under the Benevolent Societies' Act is not affected in his proceedings to realize his security by foreclosure, by the provisions of the War Relief Act (B. C.) as amended in 1917, the land being held for the use of the corporate body.

Inman v. Western Club, 40 D.L.R. 9, 25 B.C.R. 276, [1918] 2 W.W.R. 583.

MORTGAGORS AND PURCHASERS RELIEF ACT—DATE.

The prohibition against proceedings under the Mortgagors and Purchasers Relief Act, 5 Geo. V. c. 22 (Ont.), and the amendment thereto, 6 Geo. V. c. 27 (Ont.), and the Statute Law Amendment Act, 7 Geo. V. c. 27 s. 59, as to mortgages, is expressly and plainly confined to mortgages "made or executed prior to August 4, 1914." A mortgage made after that date although in substance a renewal is not within the Acts.

Appelbe v. Windsor Security Co., 40 D. L.R. 256, 41 O.L.R. 217, reversing 40 O. L.R. 548. [See 42 O.L.R. 16.]

ORDER DISMISSING—RIGHT OF APPEAL—SUPREME COURT ACT.

The order dismissing this action (40 O. L.R. 548), having been set aside by an order made upon appeal to a Divisional Court of the Appellate Division (40 D.L.R. 256, 41 O.L.R. 217), the defendants, having no defence upon the merits to the action, asked the same Divisional Court to add to its order a direction that judgment be entered in the action in favour of the plaintiff—the defendants' purpose being to have a judgment from which they could appeal to the Supreme Court of Canada. The application was opposed by the plaintiff, and was dismissed: the court holding (1) that it was unnecessary, as a right of appeal existed even without the aid of the Act of 1913, 3 & 4 Geo. V. c. 51, s. 1, repealing para. (e) of s. 2 of the Supreme Court Act, R.S.C. 1906, c. 139, and substituting a new para. (e), which extended the right of appeal; and (2) that the defendants should not be given the conduct of the plaintiff's case against his will.

Appelbe v. Windsor Security Co., 42 O. L.R. 16.

MORTGAGORS AND PURCHASERS RELIEF ACT—DERIVATIVE MORTGAGE—STAY OF PROCEEDINGS.

The Mortgagors and Purchasers Relief Act, 1915, 5 Geo. V. c. 22 (Ont.) is a statute calling for a liberal interpretation; and the case of a derivative mortgage falls within its provisions without doing any violence to them. Section 2 (1) (a) of the Act and s. 2 (d) of the Mortgages Act, R.S.O. 1914, c. 112, considered. In this case, proceedings upon a derivative mortgage were stayed, at the instance of the mortgagees, the makers of the derivative mortgage. The intention of the Act is to permit delay; and delay should be granted so long as the ultimate recovery of the money is not jeopardised, and reasonable compensation by way of interest is paid.

Re Shepard and Rosevear and Moyes

Chemical Co., Re Moyes Chemical Co. and Halsted, 42 O.L.R. 184.

ACCOUNTS—REOPENING AFTER ORDER NISI—ADDING COSTS.

Where, after an order nisi in a mortgage action the defendant is permitted to bring an action to enforce an alleged agreement to discharge the mortgage, and fails thereon, the plaintiff is entitled to have the accounts in the mortgage action opened up and to an allowance therein of the costs in the other action.

Dillabough v. Delaney, [1918] 1 W.W.R. 795.

VEXATIOUS PROCEEDINGS—ACTION FOR ACCOUNT AND REDEMPTION—JUDGMENT FOR FORECLOSURE IN PREVIOUS ACTION—ATTEMPT TO OPEN UP—REFUSAL TO DISMISS ACTION AS FRIVOLOUS OR VEXATIOUS.

McFarlane v. Price, 14 O.W.N. 41.

FAILURE TO PAY INTEREST—RIGHT OF FORECLOSURE—EQUITABLE RELIEF.

Howe v. Howe, 28 D.L.R. 772, 22 B.C.R. 550, 34 W.L.R. 941.

FORECLOSURE ORDER—VARIATION.

Weyburn Security Bank v. Knudson, 30 D.L.R. 560, varying 27 D.L.R. 789, 9 S.L.R. 205.

The C. Co. sold certain land under mortgage, under the Land Titles Act. After paying its own claim and that of the second mortgagee, a balance remained to be divided among sundry execution creditors. The I. L. Co. also claimed under an unregistered instrument, in respect of which a caveat had been filed. An action had been taken to establish this claim, but it was not yet completed. The mortgagee alleging doubt as to the status of the I.L. Co. and lack of knowledge of the amount due the execution creditors, paid the money into court, under the Trustee Act, R.S.S. c. 46, s. 28 on an application by an execution creditor for payment out, it was held that the lack of knowledge of the amount due to the execution creditors would not justify the mortgagee in paying the money into court, and thus evading the responsibility cast upon him of distributing the money, unless some difficulty should arise, but the position of the I.L. Co.'s claim was sufficient to justify the mortgagee in taking advantage of the Trustee Act, and paying the surplus into court. Having paid the money into court, the mortgagee's responsibility did not end there, but he should then have proceeded to apply for directions. But the mortgagee not having applied for such directions, it was open to any person claiming the money to apply for the distribution thereof. While the I. L. Co. was not in a position to secure payment out of the amount claimed, yet, as it had brought an action for the purpose of establishing its claim, a stay should be directed until the determination of that action.

Re Fisher Mortgage Sale, 4 S.L.R. 374.

RELIEF AGAINST FORFEITURE — STATUTORY COVENANT FOR ACCELERATION UPON DEFAULTS—MODIFICATION.

Where a mortgage was made pursuant to the Short Forms of Mortgages Act (Ont.), but contained additional covenants and provisions, it was held, that a provision for acceleration of the time for payment of the principal upon default as to any of the covenants or provisos was an addition to or qualification of the statutory covenant for acceleration upon default of payment of interest and for relief upon payment of arrears of interest, and the same addition or qualification should be read into the power to relieve, so that where default was made in respect of the covenant for payment of taxes, the mortgagors should, upon payment of taxes, be relieved from immediate payment of the principal. And so as to a provision requiring the payment as an indemnity of three months' interest in advance, in addition to the payment of the arrears of interest: The mortgagors, being relieved from the consequences of default, upon payment of interest up to date, should not be required to pay a sum, in the nature of a penalty, for interest in addition to the future interest. The court has power to relieve against oppressive and unfair forfeiture.

Schwartz v. Williams, 27 D.L.R. 733, 35 O.L.R. 33. [The defendant appealed from the above judgment but after it had been in part heard, a settlement was effected, and the judgment was varied by consent.]

DECREE NISI — PARTIES — REPRESENTING MORTGAGOR.

A person, who has not got the mortgagor's estate to pay with, does not properly represent the mortgagor's estate in a foreclosure action, aand where the estate is only so represented a decree nisi will only be made on condition that if default be made in compliance therewith evidence is produced to shew that the party to the action has the mortgagor's estate under his control so as to make redemption possible.

Canada Life v. Cole, 7 W.W.R. 1207.

FORECLOSURE—FORM OF JUDGMENT.

Campbell v. Mazur, 24 D.L.R. 893, 32 W.L.R. 439.

ACTION FOR FORECLOSURE—ENTRY OF JUDGMENT—APPLICATION FOR STAY OF PROCEEDINGS—MORTGAGORS AND PURCHASERS RELIEF ACT, 1915 — PROCEEDINGS STAYED ON PAYMENT OF INTEREST IN ARREARS.

Tutty v. Heller, 8 O.W.N. 429. [See 9 O.W.N. 111.]

ACTION FOR FORECLOSURE—APPLICATION FOR LEASE TO CONTINUE—MORTGAGORS' AND PURCHASERS' RELIEF ACT, 1915—STAY OF PROCEEDINGS ON PAYMENT OF ARREARS AND COSTS.

Dolgoff v. Kenen, 8 O.W.N. 431.

ACTIONS FOR FORECLOSURE — MORTGAGORS AND PURCHASERS RELIEF ACT, 1915.

Paterson v. Gross, 8 O.W.N. 431.

FORECLOSURE — REDEMPTION — MORTGAGORS AND PURCHASERS RELIEF ACT, 1915—CONFIRMATION OF PROCEEDINGS IN MASTER'S OFFICE.

Gilbert v. Reynolds, 8 O.W.N. 434.

EXCESSIVE RATE OF INTEREST — ONTARIO MONEYLENDERS ACT, R.S.O. 1914, c. 175, s. 4—"HARSH AND UNCONSCIONABLE TRANSACTION"—REDUCTION OF INTEREST — JUDGMENT — ACCOUNT — FORECLOSURE.

Lavine v. Sonshine, 8 O.W.N. 439.

ESTATE PASSING — ESTOPPEL — CHARGE ON LAND—SALE—EQUITABLE RELIEF.

Miller v. Buchan, 8 O.W.N. 466.

MORTGAGORS AND PURCHASERS RELIEF ACT, 1915—INTEREST—LEAVE TO PROCEED FOR FORECLOSURE OR SALE.

Re Central Canada Loan, 8 O.W.N. 522.

ACTION ON MORTGAGOR'S COVENANT FOR PAYMENT—MOTION UNDER MORTGAGORS AND PURCHASERS RELIEF ACT, 1915, FOR LEAVE TO PROCEED—SCOPE AND MEANING OF ACT—ABILITY OF MORTGAGOR TO PAY—RIGHT OF MORTGAGOR TO INDEMNITY FROM PURCHASER SUBJECT TO MORTGAGE—APPREHENSION AS TO SOLVENCY OF PURCHASER.

Beswetherick v. Griesman, 8 O.W.N. 439, 566.

FORECLOSURE—FINAL ORDER—JUDGMENT OF SUPREME COURT OF CANADA—PROOF OF DEFAULT—ENTRY OF JUDGMENT IN SUPREME COURT OF ONTARIO—PRACTICE—ISSUE OF ORDER—MORTGAGORS AND PURCHASERS RELIEF ACT.

Willson v. Thomson, 9 O.W.N. 140.

JUDGMENT ON DEFAULT OF APPEARANCE IN MORTGAGE ACTION—REFERENCE—REPORT—NOTICE OF FILING—NECESSITY FOR—RULES 35, 429.

Currie v. Sperer, 9 O.W.N. 174.

ACTION FOR FORECLOSURE—APPLICATION FOR SUMMARY JUDGMENT—LEAVE TO DEFEND — SUGGESTED DEFENCE — DECEPTION PRACTISED ON FOREIGNERS—PURCHASE OF LAND WITH AGREEMENT FOR RESCISSION IF PURCHASERS DISSATISFIED—AGREEMENT SUPERSEDED BY CONVEYANCE AND MORTGAGE.

Walkey v. Yurtas, 9 O.W.N. 290.

MORTGAGORS AND PURCHASERS RELIEF ACT, 1915—APPLICATION FOR LEAVE TO SUE FOR OVERDUE PRINCIPAL—AGREEMENT FOR RENEWAL AT HIGHER RATE OF INTEREST—COSTS.

Re Wade and Mazza, 11 O.W.N. 418.

MORTGAGORS AND PURCHASERS RELIEF ACT, 1915—RIGHT TO BRING ACTION TO ENFORCE MORTGAGE—INTEREST AND TAXES IN ARREAR—EXTENSION OF TIME FOR PAYMENT OF PRINCIPAL AND INTEREST—EXPIRY OF TIME—STAY OF PROCEEDINGS—PRECARIOUS SECURITY.

Young v. Harty, 12 O.W.N. 17.

FINAL ORDER OF FORECLOSURE—APPLICATION TO VACATE ORDER AND TO STAY PROCEEDINGS UPON PAYMENT OF INTEREST AND TAXES IN ARREAR.

Parker v. Hossack, 13 O.W.N. 322.

FORECLOSURE—APPROPRIATION OF PAYMENTS—PRINCIPAL AND INTEREST—INSURANCE PREMIUM AND INTEREST IN ARREAR—MORTGAGORS AND PURCHASERS RELIEF ACT (ONT.) 1915.

Smith v. Jacobs, 10 O.W.N. 125.

MOTION FOR SUMMARY JUDGMENT—DISPUTE AS TO AMOUNT DUE—JUDGMENT DIRECTING ACCOUNT TO BE TAKEN—NOTICE OF ASSIGNMENT OF MORTGAGE—STAY OF PROCEEDINGS — MORTGAGORS AND PURCHASERS RELIEF ACT, 1915.

Halsted v. Priestman, 11 O.W.N. 32.

IMPROPER PROCEDURE BY MORTGAGEE—COSTS OCCASIONED BY.

Independent Lumber Co. v. Gardner, 4 S.L.R. 67, 16 W.L.R. 290.

CREDIT—MISCONDUCT OF MORTGAGEE—COSTS.

Burton v. Macfie, 19 W.L.R. 707.

ORDER NISI FOR FORECLOSURE—ORDER ABSOLUTE NEVER TAKEN OUT—SALE OF PROPERTY—KNOWLEDGE OF BY MORTGAGOR—ACQUIESCENCE.

[Jones v. North Vancouver Land & Improvement Co., 14 B.C.R. 285; [1910], A.C. 317, followed.]

Williams v. Sun Life Ass'ce Co., 16 B.C.R. 370.

F. STRICT FORECLOSURE; FORECLOSURE BY ADVERTISEMENT.

(§ VI F—95)—FINAL ORDER OF FORECLOSURE—EX PARTE ORDER—VALIDITY—DEFENDANT APPEARING BUT NOT DEFENDING.

A final order absolute for the foreclosure of a mortgage cannot be made ex parte where the defendant, although in default in making a defence, has entered his appearance in the action.

Re Corbor and Oakshott, 13 D.L.R. 528, 6 A.L.R. 245, 25 W.L.R. 311, 5 W.W.R. 1.

Section 7 of c. 12, Sask. Statutes 1910-1911, adding subs. 10 to s. 93 of the Land Titles Act, R.S.S. 1909, c. 41, providing that if default has occurred in making any payments due under any mortgage, or in the observance of any covenant contained therein and under the terms of the mortgage by reason of such default, the whole principal and interest secured thereby shall have become due and payable, the mortgagor may, notwithstanding any provisions to the contrary, and at any time prior to sale or foreclosure under a mortgage, perform such covenant or pay such arrears as may be in default under the mortgage, together with costs to be taxed by the registrar of land titles, and that he shall thereupon be relieved from the consequence of such default, applies only to proceedings taken before the registrar of land titles and not to be fore closure action, as the provision as to taxation by the land titles registrar could not

have been intended to apply to the taxation of the costs of court proceedings.

McGregor v. Hemstreet, 5 D.L.R. 301, 20 W.L.R. 642, 2 W.W.R. 284.

INSTALMENT CONTRACT—STIPULATION FOR NOTICE OF FORFEITURE.

Bourne v. Phillips, 13 D.L.R. 944, 4 W. W.R. 1215.

(§ VI F—97)—JURISDICTION.

A local judge or master of the Alberta Supreme Court has jurisdiction to make foreclosure orders and vesting orders without restriction of his jurisdiction with regard to the amount of the claim or the value of the property.

Re Land Titles Act, 11 D.L.R. 190, 24 W. L.R. 384, 7 A.L.R. 30, 4 W.W.R. 685.

FORECLOSURE DECREE—STAY OF PROCEEDINGS OR SALE—LEAVE TO BID.

In foreclosure proceedings an order may be made that upon payment of interest at the rate set out in the mortgage upon moneys due for principal, interest and costs, proceedings be stayed until conditions improve, and that, in default, the lands may be offered for sale at an upset price, with liberty to all parties to bid.

Benjamin v. Marsan, 8 W.W.R. 358.

G. SALE.

(§ VI G—100)—FORECLOSURE—STATUTORY REQUISITES.

Where a mortgagee gives notice under s. 62a (see amendment 1915), the Land Titles Act (Alta.) for directions for sale of the mortgaged land, the registrar has a right to require the production of (a) an affidavit of default and continued default (b) an affidavit of value of the property, (c) a statement of amount due under the mortgage with an estimate of cost of sale, proceedings, taxes, etc., (d) reserve bid form and envelope, (e) instructions to auctioneer; in order that he may satisfy himself: (1) that the mortgagee is entitled to offer the land for sale (2) (b), (c) and (d), for the purpose of enabling him to settle a reserved bid, subject to which the property may be offered for sale, having regard to its actual value and the amount of the mortgagee's claim, and (3) for the purpose of being sure that the sale will be conducted in accordance with the conditions.

Re Land Titles Act; Re Sun Life Ass'ce & Widmer, 26 D.L.R. 147, 33 W.L.R. 521, 9 W.W.R. 961.

SALE EN BLOC LESS ADVANTAGEOUS THAN SALE IN PARCELS.

If, in the bona fide exercise of discretion, where there is a doubt whether the land would sell more advantageously en bloc or in parcels, a mortgagee prefers to sell en bloc and does so, he will not be charged on that ground with wilful default where, after the sale, it is made to appear that a sale in parcels would have been more advantageous. [Aldrich v. Canada Permanent Loan Co., 24 A.R. (Ont.) 193, distinguished.]

Wilson v. Taylor, 11 D.L.R. 455, 4 O.W.N. 1376, 24 O.W.R. 669, affirming 7 D.L.R. 316, 4 O.W.N. 253.

SALE—AGREEMENT TO CONVEY LAND GIVEN AS SECURITY—SALE OF VENDOR'S INTEREST—NOTICE.

A person who accepts as security a transfer, absolute in form, of the borrower's interest in a land purchase agreement is under no obligation to give notice of sale to the borrower, on the latter's default in repayment, if it was agreed that the lender should have the right to sell such interest by way of realizing his security, and there was no stipulation for notice; in such case the proceeds of sale become subject to the trust in place of the interest sold. [Rose v. Peterkin, 13 Can. S.C.R. 677, distinguished.]

Hamilton v. York, 13 D.L.R. 3, 24 W.L.R. 579, 4 W.W.R. 859.

SALE UNDER—BASIS NECESSARY FOR SALE.

Colonial Investment & Loan Co. v. Weihe, 18 D.L.R. 797, 7 W.W.R. 672.

MORTGAGORS AND PURCHASERS RELIEF ACT—LEAVE TO CONTINUE SALE—MORTGAGOR FAILING TO PAY INTEREST, TAXES OR INSURANCE — APPLICATION UNNECESSARY.

Toronto General Trusts Co. v. Ritchie, 22 D.L.R. 905, 8 O.W.N. 328.

CONSENT JUDGMENT FOR IMMEDIATE SALE—STAY OF OPERATION PENDING OUTCOMM OF CLASS ACTION TO DETERMINE VALIDITY OF MORTGAGE—VALIDITY UPHELD BY SUPREME COURT OF CANADA—PENDING APPLICATION FOR LEAVE TO APPEAL TO PRIVY COUNCIL — NO APPEAL AS OF RIGHT—APPLICATION FOR FURTHER STAY GRANTED UPON ONEROUS TERMS — SECURITY—PAYMENT INTO COURT—RULES 369, 370—PRIVY COUNCIL APPEALS ACT, R.S.O. 1914, C. 54—MORTGAGORS AND PURCHASERS RELIEF ACT, 1915, S. 4 (3).

Hughes v. Cordova Mines, 8 O.W.N. 372.

PROPOSED SALE UNDER POWER—ARRANGEMENT BETWEEN MORTGAGOR AND MORTGAGEE AS TO PURCHASE BY MORTGAGOR—PREJUDICE OF PURCHASERS OF EQUITY OF REDEMPTION—INJUNCTION.

Hammill v. Millar, 10 O.W.N. 115, 215.

PRACTICE IN ACTION TO ENFORCE MORTGAGE—JUDGMENT FOR FORECLOSURE—SUBSEQUENT ORDER DIRECTING SALE INSTEAD OF FORECLOSURE—REPORT OF REFEREE—INCORRECT DATE—TIME FOR REDEMPTION AND FOR APPEAL—ONE DAY APPOINTED, WHERE SALE ORDERED, FOR ORIGINAL DEFENDANTS AND SUBSEQUENT INCUMBRANCERS TO REDEEM — INTEREST — AGREEMENT TO INCREASE RATE—WHETHER DIFFERENCE CHARGEABLE UPON LAND AGAINST SUBSEQUENT INCUMBRANCERS—CONSEQUENCES OF REDEMPTION OR FAILURE TO REDEEM—UNNECESSARY TO STATE IN REPORT—RULES 482, 487, 489—STAY OF REFERENCE—APPEAL FROM ORDER REFUSING TO STAY—RULES 2, 505 (3), 507 (6).

Richardson v. McCaffrey, 16 O.W.N. 247.

POWER OF SALE—EXERCISE BY ASSIGNEE OF MORTGAGE — NOTICE OF SALE — PROVISIONS OF MORTGAGE — OBJECTION TO TITLE MADE BY ASSIGNEE ON AGREEMENT FOR SALE—APPLICATION UNDER VENDORS AND PURCHASERS ACT.

Re Bennett and Skool, 13 O.W.N. 131.

LAND TITLES ACT, 1911, S. 30—SALE BY PLAINTIFF OF HALF INTEREST IN MINING LOCATIONS—MORTGAGE OR CHARGE BY PURCHASERS IN FAVOUR OF PLAINTIFF FOR PART OF PURCHASE MONEY — ENFORCEMENT — RELEASE UNDER SEAL — CONSTRUCTION — RESTRICTION TO PORTION OF MONEYS CHARGED—PURCHASERS NOT RELIEVED FROM ALL LIABILITY—MORTGAGE EXECUTED BY DEFENDANTS AS TRUSTEES FOR SYNDICATE—KNOWLEDGE OF PLAINTIFF—PERSONAL LIABILITY OF DEFENDANTS — SECRET COMMISSION — FINDING OF FACT—CONSIDERATION FOR RELEASE UNDER SEAL UNNECESSARY—RECOVERY OF MONEYS SECURED BY CHARGE LESS SUM RELEASED—REDUCTION IN EXTENT OF CHARGE—COSTS.

Mills v. Tibbetts, 11 O.W.N. 251.

ABORTIVE SALE—EXECUTION—LAND TITLES ACT.

The meaning of s. 62 of the Land Titles Act (Alta.), as amended in 1916 and 1917, is that where there has been an abortive sale in an action on a mortgage the plaintiff cannot issue execution before obtaining an order for foreclosure.

Ollon v. Montgomery, [1917] 3 W.W.R. 757.

(§ VI G—102)—REFERENCE FOR SALE—ADVERTISING—PROCEDURE IN MASTER'S OFFICE.

Gilbert v. Reynolds, 7 O.W.N. 827.

(§ VI G—105)—SALE UNDER POWER.

A mortgagor who consents to an abandonment of foreclosure proceedings and a sale of the encumbered property by the mortgagee without an order of court, cannot, four years later, have the sale set aside as against a purchaser from the mortgagee, where, with full knowledge of all the facts, the mortgagor, without questioning the regularity of the sale, but treating it as regular, remained passive while the purchaser made extensive improvements in the property and treated it as his own.

Williams v. Sun Life Ass'ce Co., 4 D.L.R. 855, 21 W.L.R. 271, 1 W.W.R. 1222.

NOTICE OF SALE—SIGNATURE.

The absence of a mortgagee's signature to a written notice of sale served upon the mortgagor under the power of sale contained in the mortgage is fatal to the validity of any sale thereunder.

Ansell v. Bradley, 31 D.L.R. 297, 37 O.L.R. 142.

ACTION BY MORTGAGEE FOR RECOVERY OF MORTGAGE MONEYS AND FOR POSSESSION—PROCEEDINGS UNDER POWER OF SALE—MORTGAGES ACT, S. 29.

A mortgagee of lands, who has brought an action to recover the mortgage moneys, and for possession of the mortgaged lands until paid, is not prevented from also taking proceedings under a power of sale contained in the mortgage-deed. Section 29 of the Mortgages Act, R.S.O. 1914, c. 112, has no application to such a case. [Stevens v. Theatres, [1903] 1 Ch. 857, distinguished.]

Shields v. Shields, 44 D.L.R. 763, 43 O.L.R. 111.

SHORT FORMS ACT—POWER OF SALE—ASSIGNMENT BY MORTGAGEE—POWER EXERCISED BY ASSIGNEE—INADEQUACY IN PRICE — FRAUD — COLLUSION — PRESUMPTIONS.

A mortgage made in pursuance of the Short Forms of Mortgages Act (Ont.) contained the following power of sale: "Provided that the said mortgagee on default of payment for two months may on one month's notice enter on and lease or sell the said lands. Provided that in case of default of payment as in foregoing proviso mentioned for three months, the foregoing powers of entry, leasing and sale of any of them, may be exercised without any notice having been given as therein provided." In an action by an executor of the deceased mortgagor, to set aside a sale of the mortgaged land by the assignee of the mortgagee, and also to set aside a mortgage given by the purchaser, the court held that the assignee of the mortgagee could validly exercise the power of sale upon three months' default, without notice, also on the evidence that the sale was made in good faith and without collusion and that the inadequacy in price was not so great as to lead to the presumption of fraud or negligence or unfaithfulness on the part of the assignee in the discharge of her duty in the exercise of the power of sale.

Hoehn v. Marshall, 46 D.L.R. 149, 44 O.L.R. 241.

POWER OF SALE—NOTICE—AUCTION SALE—VALUE OF LAND—EXPERT TESTIMONY.

In an action by the assignee of the equity of redemption to set aside a sale of vacant land under the power of sale contained in the first mortgage, by the first mortgagee to the second mortgagee, it was held:—(1) That the right to sell, on three months' default, without notice, as stipulated for in the mortgage, was not lost by notice being given to some of those entitled to notice under an earlier provision in the mortgage by which the power of sale might be exercised after default for two months on 10 days' notice. (2) That, when the land, which consisted of two separate parcels, was offered for sale at public auction, each parcel, should have been advertised and offered separately, instead of both together; but, as the land was not sold at the time that it was so offered, but later the sale actually made must be dealt with, without regarding the attempted sale as any real test of the selling value of the property. (3) That, upon the evidence, the sale to the second

mortgagee, by private contract, after the land had been offered at public auction, was a real sale, and free from any taint or suspicion of wrongdoing. (4) That, considering all the circumstances, the sale at $350 a foot was not a sale at an undervalue, though there was expert evidence that the land was worth $400 a foot. Remarks upon the weight of expert testimony as to the value of land.

Uren v. Confederation Life Assn., 40 O.L.R. 536.

POWER OF SALE—EXERCISE OF—ABSENCE OF NOTICE TO MORTGAGOR — CONSPIRACY — LANDLORD AND TENANT — RENT — SURPLUS PROCEEDS OF SALE.

Keane v. McIntosh, 6 O.W.N. 650.

MORTGAGE ACTION — ORDER PROVIDING FOR SALE—APPLICATION FOR CONFIRMATION OF SALE — DEFECTIVE PROCEEDINGS IN SALE.

On application for confirmation of a sale of land made by virtue of an order nisi, default in payment by defendant must be proved. It is a fatal defect in mortgage sale proceedings for the notice of sale in the newspaper to state a different date for the sale than the notice in the posters, although the sale is actually held on the date advertised in the posters and being the later date. Where the court order requires notices of sale to be posted in "conspicuous" places in the city, the posting of such notices in barristers' offices is not sufficient, and such insufficiency forms a fatal objection to confirmation of the sale. Where the court order provides that property of the defendant mortgagor shall be sold "subject to taxes (if any)," and advertisement is not sufficient which states that the property will be sold "free from all encumbrances save taxes, municipal claims and subject to any possible seed grain liens, and also subject to any statutory liens or encumbrances which may appear on the title." The form of order for sale provided for in the rules of court, and which requires insertion of the claims that the property is sold subject to, requires the draftsman to use reasonable diligence in ascertaining as accurately as possible the nature and amount of the claims which the property is sold subject to, and a recital of the same. The primal object of advertising is not the mortgagee's protection; it is that the property may be fairly placed in the market.

Todd v. Sampson, [1919] 1 W.W.R. 110.

LEASE BY MORTGAGOR AFTER MORTGAGE—SALE BY MORTGAGEE — POSSESSION — RIGHT TO, AGAINST TENANT.

Stevens v. Ullerich, 4 S.L.R. 170, 17 W.L.R. 568.

SALE UNDER POWER—ACTION TO SET ASIDE —NOTICE OF SALE.

Kenney v. Barnard, 2 O.W.N. 470.

SALE OF LAND UNDER—DISTRIBUTION OF PROCEEDS—SUBSEQUENT INCUMBRANCERS—EQUITABLE CHARGE.

Gilbert v. Reeves, 4 S.L.R. 97.

POWER OF SALE—SALE AT FAIR VALUE—CONDUCT OF SALE — CONDITIONS — WITHDRAWAL OF BID—COLLUSION.

Kaiserhof Hotel Co. v. Zuber, 23 O.L.R. 481, 18 O.W.R. 883. [Affirmed, 25 O.L.R. 194, 20 O.W.R. 582; 9 D.L.R. 877, 46 Can. S.C.R. 651, 23 O.W.R. 305.]

(§ VI G—106)—SUSPENSION OF POWER.

A mere extension of the time of payment and not an absolute sale of encumbered property to a mortgagee, was effected where a sawmill and its appurtenances were turned over to him under an agreement whereby his power of sale was suspended, and he was to operate the mill, paying the mortgagor a fixed monthly rental, the latter retaining an option to take back the property within nine months on certain conditions, and it was also agreed that a transfer of such property, which was given the mortgagee, should not be recorded except in the event of a sale of the property in the manner specified in such agreement, or upon the institution of suits against the mortgagor, or upon his not redeeming the property, and it was further stipulated that the mortgagee's rights should be those of a mortgagee in possession, and that nothing in the agreement should impair such right. [Davis v. Thomas, 1 R. & My. 506, and Bastin v. Bidwell, L.R. 18 Ch. D. 238, 247, distinguished.]

Manitoba Lumber Co. v. Emmerson, 5 D.L.R. 337, 18 B.C.R. 96, 21 W.L.R. 503, 2 W.W.R. 419.

(§ VI G—110) — SUMMARY JUDGMENT — MORTGAGE ACTION—FACTS AND CIRCUMSTANCES ENTITLING DEFENDANTS TO DEFEND—MARSHALLING OF ASSETS—JUDGMENT FOR SALE OF PART OF MORTGAGED LAND—RESERVATION OF RIGHT TO APPLY FOR SALE OF PART TAKEN BY MUNICIPAL CORPORATION FOR STREET.

McCowan v. Toronto, 7 O.W.N. 815.

(§ VI G—115)—PURCHASER—POWER OF REGISTRAR—RESALE.

Upon the land being knocked down to a purchaser at a mortgage auction sale held under the order of the registrar, the deposit paid and the conditions of sale signed, there is a completed contract between the mortgagee and the purchaser: and that, if for any reason, this contract is not carried out the registrar has no power to direct a resale or to deal further with the land excepting under the direction of the court.

Re Duty of Registrar in Mortgage Proceedings, [1917] 1 W.W.R. 331.

SALE UNDER POWER IN FIRST MORTGAGE—PURCHASE BY SECOND MORTGAGEE—ACTION ON MORTGAGE COVENANT—RIGHT OF MORTGAGOR TO REDEEM.

Croft v. McKechnie, 5 O.W.N. 606.

(§ VI G—118)—Property Act—Right of mortgagee to buy in at a mortgage sale—Rights to subsequently resell—Accounting.

Under s. 41 subs. (a) of the Property Act C.S.N.B., 1903, c. 152, a mortgagee may buy in the property offered for sale under the mortgage in the same way as can be done when "leave to all parties to bid" is given by a decree for foreclosure and sale in Chancery and is not accountable to the mortgagor for the proceeds of a subsequent resale. Default being made in principal and interest secured under a mortgage the property was offered for sale and bid in and conveyed to a third party who ten days later reconveyed it to the mortgagee. The mortgagee subsequently sold the property. In an action by the mortgagor against the mortgagee and subsequently purchaser for a reconveyance of the property a declaration that the various conveyances are inoperative and for an accounting of the rents and profits; Held, that the several conveyances were valid and effectual and that the mortgagor was entitled to an accounting of the proceeds of the first sale but not of the subsequent one.

Gauvin v. Dionne, 46 N.B.R. 377. [Affirmed 51 D.L.R. 294.]

(§ VI G—121)—Sale under prior mortgage—Purchase by subsequent mortgagee—Resale at profit—Effect on his mortgage.

Where a prior mortgagee duly exercises a power of sale, and a subsequent mortgagee becomes the purchaser; such subsequent mortgagee in the absence of anything to impeach the bona fides of the transaction, acquires the same irredeemable title as if he were a stranger, nor does such purchase merge his mortgage or even require him to credit thereon the profits of a resale.

Union Bank v. Bates, 18 D.L.R. 269, 24 Man. L.R. 619, 28 W.L.R. 602, 6 W.W.R. 1170.

Sale under power—Purchase by mortgagee—Validity.

A simulated sale by the mortgagee of the mortgaged premises to himself in pretended exercise of the power of sale contained in the mortgage will be declared invalid and the mortgagee compelled to account on the basis of the price he obtained on the later sale he himself made.

Carter v. Bell, 21 D.L.R. 243, 21 B.C.R. 55, 31 W.L.R. 1, 8 W.W.R. 47.

Judicial sale—Right of plaintiff mortgagee to purchase—Master's order—Appeal—Practice.

Gunn v. Johnson, 46 D.L.R. 656, [1919] 1 W.W.R. 698.

Real Property Act — Foreclosure proceedings — Certificate of title obtained by mortgagees—Effect of.

Noble v. Campbell, 21 Man. L.R. 597, 18 W.L.R. 591.

Seizure and sale of immovables—Resale on purchaser's default—Sequestration—Crops and revenue—Ownership—Distribution by prothonotary—C.C. (Que.) art. 1472—C.C.P., arts. 760, 778.

When land is sold by the sheriff, and the highest bidder does not pay the purchase price, and the court, at the request of the owners and the mortgagees orders a resale (falle enchère), and names a sequestrator to administer the property, the crops and revenue collected by the sequestrator during the course of litigation by the parties interested does not belong to the bidder, since not having paid the purchase price he has not become the owner, they are the property of the creditors. In such case the court will order the moneys to be deposited in court to be distributed by the prothonotary under a collocation order. A voluntary sale is completed merely by the consent of the parties, although there has been no delivery and the price has not been paid, while in a forced sale, by order of the court, it is not complete till the price is paid.

St. Catharine Street Realty Co. v. Loranger, 56 Que. S.C. 45.

Parties — Practice — Application to vacate order of foreclosure and set aside conveyance to third parties—Adding such parties as defendants—Proceeding in same action.

Before application for an order vacating a final order for foreclosure of mortgaged land and setting aside a conveyance made by the mortgagee to other parties who have become registered owners, the latter should be added as defendants in the action and should be notified of the grounds upon which relief is claimed against them. Such relief may be claimed in the original mortgage action.

Security Loan & Trust Co. v. Duhan, [1919] 3 W.W.R. 346.

(§ VI G—126)—Power of sale—Pretended exercise of—Fraud—Setting aside conveyance.

Chambers v. Le Burtis, 8 O.W.N. 453.

Practice — Opening up foreclosure — Rights of third parties.

The plaintiffs, mortgagees, brought action and obtained a final order of foreclosure, upon which a certificate of title issued. By error, V. Bros., execution creditors of the mortgagor, were not made parties to the proceedings. Some considerable time after they became aware of the foreclosure they applied to and obtained from the Master in Chambers an order setting aside the foreclosure and fixing a new date for redemption. The material used before the Master contained sufficient to indicate that the plaintiffs had since the foreclosure made a sale of the land to a third party under agreement. On appeal to the Court of Appeal, Held, that the order should be set aside and the matter referred back to the Master for the purpose of having the pur-

chaser added as a party to the application to open up the foreclosure.

Credit Foncier v. Redekope, 12 S.L.R. 83, [1919] 1 W.W.R. 494. [Reversed 46 D.L.R. 225.]

H. SURPLUS; PROCEEDS.

(§ VI H—130)—COMPENSATION TO MORTGAGEE FOR IMPROVEMENTS.

A mortgagee is entitled to retain out of the proceeds of the mortgage sale, as part of the mortgage debt, any moneys rightfully expended in connection with the mortgaged premises which has increased the selling value.

Waterloo Mfg. Co. v. Holland, 36 D.L.R. 216, 10 S.L.R. 300, [1917] 3 W.W.R. 198.

SURPLUS—TRUST.

A mortgagee who has sold land under power of sale is a trustee of the surplus proceeds remaining after the payment of its mortgage. Where a mortgagee is in doubt as to whom such surplus is payable he may at his own risk as to costs either with or without paying the money into court apply to the court under s. 49 of the Trustee Act, R.S.S. 1909, c. 46, and r. 642 of the Rules of court for a determination of the rights of the claimants.

Re Cudmore and Law Union & Rock Ins. Co., 11 S.L.R. 221, [1918] 2 W.W.R. 862.

SALE UNDER POWER—SURPLUS PROCEEDS OF SALE — DISTRIBUTION — FINDINGS OF MASTER — APPEAL — PRIORITIES — SYNDICATE — EQUALIZATION OF PAYMENTS.

Re Eoll and Hamilton, 16 O.W.N. 221.

(§ VI H—131)—SURPLUS PROCEEDS OF MORTGAGE SALE—EXECUTION CREDITORS OF MORTGAGOR—PAYMENT OUT TO SHERIFF—CREDITORS' RELIEF ACT.

Re Ferguson and Hill, 10 D.L.R. 855, 4 O.W.N. 1339, 24 O.W.R. 634.

SURPLUS.

A vendor of goods or chattels who, in addition to taking a lien note or conditional sale agreement, obtains a second mortgage on land as additional security, if there is a deficiency upon a resale of the goods or chattels for the vendee's default, is entitled to have it satisfied from the surplus arising from the sale of the land under the first mortgage.

Great West Life Ass'ce Co. v. Leib, 4 D.L.R. 392, 5 S.L.R. 332, 21 W.L.R. 877, 2 W.W.R. 781.

PRACTICE—SALE UNDER POWER—SURPLUS—APPLICATION AS TO DISPOSITION THEREOF, BY MORTGAGEE—COSTS.

A mortgagee after sale of the mortgaged lands had a surplus, and claiming to be in doubt as to the persons entitled to such surplus applied for and obtained a summons "for directions and advice as to the disposition of the moneys now in the hands of the said company, being the surplus money from the sale of certain lands under a mortgage made by Cudmore to the said company." A month later the mortgagee paid into court the amount in its hands less a certain sum which it claimed to be entitled to retain for costs incurred by it in previous proceedings. On the return of the summons it appeared from the statements of counsel for the mortgagee that the mortgagor had no claim upon any of the moneys and that the questions to be determined were those arising between various execution creditors of the mortgagor. Counsel for the mortgagee also took the position that the court had no jurisdiction on the motion to adjudicate upon the mortgagee's right to retain the amount claimed by it for costs and contended that the court was confined in authority to giving directions as to the disposition of the surplus moneys admitted by the mortgagee and paid into court. Held, that in view of the fact that the question to be determined was merely as to the rights of the several execution creditors to participate in the fund, the mortgagee could relieve itself from responsibility by paying the surplus to the sheriff, and in view of the further fact that the applicant repudiated the court's jurisdiction to give directions and advice as to disposition of all the moneys in its hands at the time the summons was issued, the application should be dismissed with costs and the moneys directed to be repaid out of court to the applicant.

Re Cudmore, 12 S.L.R. 273, [1919] 2 W.W.R. 400.

SURPLUS.

Where subsequently to the giving of a mortgage on land executions are lodged against the mortgagor, and after the giving of a second mortgage other executions are lodged and the property is sold in an action on the first mortgage, leaving a surplus after payment of the claim of the first mortgagee sufficient to pay the second mortgagee and the execution preceding it, and the second mortgagee is ordered to be paid, the intervening execution creditors are entitled to be paid in full and not merely pari passu with the subsequent execution creditors. [Principles involved in Roach v. McLachlan, 19 A.R. (Ont.) 486; Breithaupt v. Marr, 20 A.R. (Ont.) 689; Re Massey, 2 Terr. L.R. 84; and Howard v. H.R. Trading Co., 4 Terr. L.R. 109, applied.] Where after a first mortgage executions are lodged against the mortgagor and then a second mortgage is given, the latter mortgage is a specific charge upon the interest of the execution debtor, subject to, and, in respect to executions lodged after it, with the same effect as if expressed to be subject to the rights of the prior execution creditors. A new and different interest from that to which the prior executions attached is thus carved out of the debtor's interest and specifically charged with the second mortgage, leaving again a new and different interest subject to be charged or bound, voluntarily or involuntarily, by the act or default of the debtor, and it is only this latter interest that is affected by the subsequent executions. Section 22 of the Creditors' Relief Act contem-

plates only one fund and in the present case there are two funds, one representing the amount necessary to satisfy the intervening creditors, the other the ultimate residue. In view of the fact that subsequently to the decisions above cited the Territorial Ordinance, c. 26, 1898, was replaced by the Creditors' Relief Act, 1910 (2nd sess.) Alta., amending and consolidating the law and there is no indication in the latter Act that the sections carried without change into it had been wrongfully interpreted, any inclination to differ from those decisions should be disregarded.

Edmonton Mortgage Co. v. Gross, 3 A.L.R. 500.

SALE UNDER POWER IN FIRST MORTAGE—PAYMENT OF SURPLUS INTO COURT—MOTION BY SECOND MORTGAGEE FOR PAYMENT OUT—NOTICE TO PERSONS INTERESTED.

Re O'Connor & Hamilton Provident, 8 O.W.N. 610, 9 O.W.N. 208.

SALE BY FIRST MORTGAGEE UNDER POWER OF SALE—PURCHASE BY SECOND MORTGAGEE—SURPLUS AFTER PAYMENT OF FIRST MORTGAGEE'S CLAIM—DISPOSITION OF—EXECUTION CREDITOR—PRIORITY OVER SECOND MORTGAGEE—EXECUTION ACT, R.S.O. 1914, c. 80, ss. 31, 34.

Re Alexandra Realty Co. and Mitchell, 11 O.W.N. 202.

SALE OF MORTGAGED LANDS—DISTRIBUTION OF SURPLUS—SECOND MORTGAGE.

Edmonton Mortgage Co. v. Gross, 18 W.L.R. 385.

SURPLUS—PAYMENT OUT OF COURT—MONEY PAID IN BY MORTGAGEE—SURPLUS PROCEEDS OF MORTGAGE SALE—NOTICE—PERSONAL SERVICE—SERVICE BY PUBLICATION.

Re Weber and Morris, 5 O.W.N. 166, 25 O.W.R. 123.

SALE BY MORTGAGEE UNDER LAND TITLES ACT, S. 103—SURPLUS PROCEEDS OF SALE—PAYMENT INTO COURT.

Re J. I. Case Threshing & Machine Co., 19 W.L.R. 701.

MORTGAGE SALE — SURPLUS PROCEEDS IN COURT—DISTRIBUTION.

Gilbert v. Ullerich, 4 S.L.R. 56, 17 W.L.R. 157.

I. DEFICIENCY AND JUDGMENT THEREFOR.

(§ VI I—135)—POWERS OF MASTER—REDEMPTION.

Under the Nova Scotia practice rules, a Master, in making an order for foreclosure and sale in a mortgage action, has not the power to give a personal judgment for any deficiency, though defendant had appeared to the action; the order is particularly invalid if it fails to provide for redemption.

Thomas v. Parker, 34 D.L.R. 367.

FORECLOSURE — DEFICIENCY — PERSONAL REMEDY—CONDITIONS PRECEDENT TO.

The application of a mortgagee after foreclosure for leave to enforce his personal remedy against the mortgagor may be granted, provided the mortgagee is still prepared to retransfer the land to the mortgagor upon being paid in full, and the mortgagee in the framing of the vesting order may properly be saved against his implied liability under s. 52 Land Titles Act (Alta.).

Bernard v. Faulkner, 18 D.L.R. 174, 7 A.L.R. 439, 7 W.W.R. 162.

DEFICIENCY AND JUDGMENT THEREFOR.

Where after foreclosure and sale an order was applied for for judgment for the deficiency, the court granted the order applied for but without costs.

Acadia Loan Co. v. Legere, 45 N.S.R. 328.

EXECUTION FOR MORTGAGE DEBT AFTER FORECLOSURE—LAND TITLES ACT, S. 62 (AS AMENDED 1917)—AMOUNT "REMAINING UNSATISFIED."

Application by a mortgagee, who had obtained foreclosure nearly five years previously, for an order for sale of goods seized under execution for the mortgage debt, was refused on the ground that it had not established the amount "remaining unsatisfied." Section 62 of the Land Titles Act as amended by s. 40 of c. 3 of 1917 discussed.

Royal Loan & Savings Co. v. Bend, [1919], 1 W.W.R. 414.

(§ VI I—137)—DEFICIENCY—REALIZING ON COLLATERAL SECURITY.

Where a mortgage of land was given for the price of an engine and separator as well as a conditional sale contract, whereby title remained in the vendors, and, on foreclosure proceedings being brought on the mortgage, it was arranged at the trial that the mortgagor deliver up the machine at a railway station, and that the mortgagees (the original vendors) should sell it to the best advantage, retaining their expenses and commission for so doing, so as to reduce the sum required to redeem to the net amount which would have to be realized from the lands, the mortgagees will be chargeable with the loss sustained by their failure to take care of the machine within a reasonable time after notice of its delivery at the railway station in pursuance of the terms of the judgment in the foreclosure action, for which purpose the mortgagor may apply for an allowance of a credit on the judgment, whereupon the amount of the loss may be judicially determined.

American-Abell Co. v. Prytryszyn, 14 D.L.R. 290, 25 W.L.R. 697.

J. SUBSEQUENT SUIT.

(§ VI J—140) — OF AGREEMENT — MORTGAGEE SUBSEQUENTLY BECOMING OWNER OF FEE—ACTION FOR BALANCE OF DEBT—RIGHTS OF PARTIES.

The defendant mortgaged to the Quebec Bank his interest in an agreement of purchase of land. Instalments remaining to be paid were paid out of advances made by the bank, whose business and assets the plaintiffs subsequently acquired. Before such acquisition the mortgage had been

followed by a conveyance of the fee direct to the bank from defendant's vendor. The defendant, subsequently, in consideration of an extension of time for payment of his indebtedness to the bank, released by quit claim deed to the bank his equity of redemption. The bank thereupon became absolute owner of the land. Held, that the absolute character of the title acquired by the mortgagee did not prevent the reopening of the foreclosure in case the mortgagee afterwards sued for any part of the debt, but in this case the foreclosure could not be reopened by reason of the mortgaged property having passed into the hands of a bona fide purchaser for value and the right to sue for the balance of the debt was extinguished.

Royal Bank v. McLeod, 48 D.L.R. 500, [1919] 3 W.W.R. 544.

VII. Redemption.

A. In general; right of.

Redemption of mortgage as action within Limitations Act, see Limitations of Actions II M—95; Adverse Possession, I E—30.

(§ VII A—145)—Redemption—Improvements by mortgagee—Just allowances—Necessary repairs.

A mortgagee in possession who has made expenditure in the way of permanent improvements not falling within such terms as "just allowances" or "necessary repairs" must allege and prove to the court the substantial facts upon which he alleges a claim therefor. A mortgagee must not proceed with permanent improvements in the face of a suit for redemption.

Manitoba Lumber Co. v. Emerson, 6 W.W.R. 1450, affirming 14 D.L.R. 390, 18 B.C.R. 96.

Redemption — Terms — Proviso in mortgage-deed equivalent to covenant running with land—Benefit of assignee of equity of redemption—Costs—Contribution.

Oliver v. Robertson, 11 O.W.N. 244.

Bornage—Sale of land—Right to redeem.

Lepage v. Letourneau, 20 Que. K.B. 266.

Suit for redemption of mortgage—Power of sale—Duty of mortgagees—Alleged inadequacy of price.

Haddington Island Quarry Co. v. Huson, [1911] A.C. 722.

(§ VII A—146)—Withholding discharge—Breach of covenant to pay insurance premiums—Assignee.

Where an owner of property obtains from an insurance company a loan upon mortgage thereon, and is required by the company to take out and keep paid up a policy of insurance upon his life, which he assigns to the company as collateral security for the due repayment of the loan, and the mortgage contains a covenant by the mortgagor to pay the premiums, with a clause that if they are not paid by the mortgagor they may be charged upon the land and added to the amount due under the mortgage, the company may rightly refuse to give a discharge of the mortgage until such premiums charged have been paid in addition to the mortgage amount. Such a transaction does not involve a clog upon the equity of redemption. A transferee or assignee by purchase of the lands can have no higher right than the mortgagor himself.

Wiltse v. Excelsior Life Ins. Co. 29 D.L.R. 32, 10 A.L.R. 67, 34 W.L.R. 1114, reversing 34 W.L.R. 16, 10 W.W.R. 90.

Different estates.

If two or more distinct mortgages be made of different estates between the same parties, or if a sum of money be advanced on one estate, and other estates be afterwards made a security for the sum already advanced, and also for further advances, although without any agreement that the first estate shall be charged with the further advances, nevertheless, neither the mortgagor nor any one claiming under him the equity of redemption of one of the estates, although without notice of the other mortgage or charge, shall be permitted to redeem one mortgage without redeeming both.

Saskatchewan General Trusts v. Thompson, 34 W.L.R. 705.

Redemption—Mortgagee in possession—Rents and profits—Insurance moneys—Expenditure in rebuilding.

Patterson v. Dart, 24 O.L.R. 609.

(§ VII A—148)—Limitation of right.

The parties to a mortgage or to a conveyance given in absolute form but which, being given as security for the payment of a debt, operates as a mortgage, cannot in the instrument itself or by a contemporaneous agreement, limit the mortgagor's right of redemption to a stated period. [Fairclough v. Swan Brewery, [1912] A.C. 565, applied.]

Manitoba Lumber Co. v. Emmerson, 14 D.L.R. 390, 18 B.C.R. 96. [Affirmed 6 W.W.R. 1450.]

B. Who may redeem.

(§ VII B—150)—Assignee.

A purchaser pendente lite of the mortgaged premises added as a party defendant in a foreclosure action has a locus standi to apply to redeem without first entering an appearance. An assignee of the equity of redemption purchasing after an order nisi for foreclosure has been made at the suit of the mortgagee, is bound by the order nisi, and, when added as a party defendant, he is limited by the period fixed for redemption by the order nisi. [Re Parbola, [1909] 2 Ch. 437, followed.]

Wasson v. Harker, 8 D.L.R. 88, 22 W.L.R. 609, 5 S.L.R. 364, 3 W.W.R. 218, affirming in part 7 D.L.R. 526, 22 W.L.R. 320, 3 W.W.R. 25.

Plaintiff gave a second mortgage on certain land to defendant. Default being made, defendant instructed his solicitor to foreclose. On the day on which the summons was issued the mortgagor remitted the bulk of the amount due, leaving only a small

balance due, together with the costs. Defendant's solicitors asked for payment of the amount, repeatedly, and finally obtained an order nisi for foreclosure. The plaintiff then arranged with a party who was indebted to him to pay off the claim, but this party neglected to do so, and foreclosure was made absolute. Defendant then sold the land to one A., apparently at a price less than the true value, but otherwise there was no collusion or fraud shewn. In an action to reopen the foreclosure:—Held, that A. having acquired title from the registered owner of the land and being an innocent purchaser for value was protected by s. 65 of the Land Titles Act and his title could not be questioned.

Richards v. Thompson, 4 S.L.R. 213.

HYPOTHECATION OF—WHO MAY REDEEM.

Re Bland and Mohun, 5 O.W.N. 522, 25 O.W.R. 419.

C. TIME; AMOUNT.

(§ VII C—155)—TIME—PART PAYMENT AFTER FORECLOSURE ORDER NISI.

Where the mortgagee accepts a payment on account after the amount to be paid for redemption has been fixed in an order nisi for the sale or foreclosure of the mortgaged property, a new day must be fixed to redeem, or, if the amount of the claim as reduced can easily be calculated by the defendant mortgagor, he must at least have notice of the motion for the final order.

Allen v. Vair, 13 D.L.R. 194, 25 W.L.R. 203, 4 W.W.R. 1344.

EXTENDING TIME FOR REDEMPTION—WHEN GRANTED.

The principle upon which the court should be guided in enlarging the time for the redemption of a mortgage is that the security is sufficient and that there is a probability that the mortgagor will be able to pay off the mortgage if the extension is granted.

Idington v. Trusts & Guarantee Co., 34 D.L.R. 86, 11 A.L.R. 337, [1917] 2 W.W.R. 154.

TIME — AMOUNT — REDEMPTION — EXTENSION OF TIME FOR.

Brodie v. Patterson, 1 D.L.R. 901, 3 O. W.N. 685.

REDEMPTION—DISPUTE AS TO AMOUNT DUE —APPLICATION OF PAYMENTS—TENDER —COSTS.

Perney v. Doran, 11 O.W.N. 320.

INSTRUMENT COVERING TWO PARCELS—CONVEYANCES OF EQUITIES OF REDEMPTION BY MORTGAGOR TO DIFFERENT PURCHASERS—RELEASE OF ONE PARCEL FROM MORTGAGE—GIVING TIME TO MORTGAGOR —PRINCIPAL AND SURETY—MARSHALLING SECURITIES—REFERENCES—COSTS.

Halstead v. Sonshine, 8 O.W.N. 603.

(§ VII C—156)—DISCRETION AS TO EXTENDING TIME OF REDEMPTION—TERMS—REVIEW ON APPEAL.

McGregor v. Peterson, 27 D.L.R. 788, 9 S.L.R. 196, 34 W.L.R. 133, 10 W.W.R. 349.

PRACTICE IN MORTGAGE ACTIONS—FORECLOSURE—SALE—REPORT OF REFEREE—INCORRECT DATE—TIME FOR REDEMPTION AND APPEAL—ONE DAY FOR REDEMPTION BY ALL INCUMBRANCERS UNDER JUDGMENT FOR SALE—INTEREST—AGREEMENT BETWEEN MORTGAGOR AND FIRST MORTGAGEE FOR INCREASED RATE—DIFFERENCE NOT CHARGEABLE AGAINST SUBSEQUENT INCUMBRANCERS—CONSEQUENCES OF REDEMPTION OR FAILURE TO REDEEM—RULES 482, 487—STAY OF REFERENCE—APPEAL FROM ORDER REFUSING TO STAY —RULES 2, 505 (3), 507 (6).

In a mortgage action the plaintiff's claim was originally for foreclosure, and the judgment directed the ordinary proceedings for foreclosure. By an order made on March 4, 1919, the subsequent incumbrancers having paid $80 into court, it was directed that all due proceedings be had for redemption or sale instead of foreclosure. The referee made a report fixing August 27, 1919, as the day for redemption. The report was dated on a day in February, but was not signed until after the order of March 4, which order was mentioned in the report. Upon a motion to set aside the report:—Held, that the effect of misdating the report was to shorten the time for redemption and appeal: it is imperative that all judicial acts should bear true dates. (2) Under a judgment for sale, the practice is different from that under a judgment for foreclosure. In the case of a sale, an incumbrancer who desires to redeem may always do so, but he is not entitled to have a separate time fixed for him to redeem: one day 6 months off is to be given to the original defendants to redeem the plaintiff and all other incumbrancers who have proved claims. (3) The plaintiff's mortgage called for interest at 5 per cent; by an agreement between him and the mortgagor, made after the registration of the second and third mortgages, the mortgagor was to pay 5½ per cent; but prima facie this agreement gave the plaintiff no charge upon the land for the additional one-half per cent as against the subsequent mortgagees. (4) It is unnecessary to insert in the report any statement as to what will follow upon redemption or failure to redeem: r. 482, 487. (5) There is no stay of proceedings as the result of an appeal from a refusal to stay: r. 2, 505 (3), 507 (6).

Richardson v. McCaffrey, 45 O.L.R. 573.

(§ VII C—157) — REDEMPTION — TENDER AFTER MATURITY—NOTICE OR BONUS—LAND TITLES ACT (ALTA.).

As a mortgage of land in Alberta under the Land Titles Act (or Torrens System) constitutes merely a charge on the land and does not grant the mortgagor's estate subject to a right of redemption, a mortgagor in default after maturity of the principal money and before foreclosure may, in the absence of any stipulation therefor, redeem without giving 6 months' notice or 6 months' interest bonus in lieu thereof as it was

the practice in England to require under mortgages whereby the legal estate had passed and in regard to which the defaulting mortgagor was permitted to redeem only by the application of equitable doctrines. Re Pambrun and Short, 16 D.L.R. 193, 7 A.L.R. 314, 27 W.L.R. 301, 6 W.W.R. 68.

(§ VII C—158)—Foreclosure — Final order — Reopening accounts — Purchaser.

A final order of foreclosure may be reopened for concealment of material circumstances from the court in the foreclosure proceedings, where the motion is made promptly, and this although the mortgagee had purported to make an agreement for sale of the lands after the final order to a person having notice of the foreclosure proceedings, where there is evidence of collusion between the mortgagee and the purchaser. A final order of foreclosure may be vacated and the mortgage account reopened where there had been concealment from the court on the plaintiff's part of material circumstances on the application for the order nisi and serious error to the prejudice of the mortgagor is shewn in the plaintiff's account upon which the foreclosure is based, if there has been no laches on plaintiff's part in moving and he did not obtain information until after the making of the final order of the time fixed for redemption. Hill v. Handy, 17 D.L.R. 87, 50 C.L.J. 565, 27 W.L.R. 266, 6 W.W.R. 244.

After certificate of title.

Where foreclosure proceedings are instituted in a court there is power to open up the foreclosure and fix a new date for redemption, even after a final order of foreclosure has been granted and certificate of title issued thereon to the mortgagee. Colonial Investment v. McManus, 11 S.L.R. 61, [1918] 1 W.W.R. 561.

D. Mode and effect.

(§ VII D—162)—Effect generally.

A mortgagor upon redeeming, is not entitled to an account of the rents and profits from a saw-mill property of which the mortgagee was in possession under an agreement which required him to pay the mortgagor a stated monthly rental for the property during the time he was in possession. Manitoba Lumber Co. v. Emmerson, 5 D.L.R. 337, 21 W.L.R. 503, 18 B.C.R. 96, 2 W.W.R. 419. [Affirmed 14 D.L.R. 390, which is affirmed in 6 W.W.R. 1450.]

Interest post diem—Compound interest—Account.

Saskatchewan Land & Homestead Co. v. Leadlay, 2 O.W.N. 1.

Redemption — Account — Finding of referee — Interest — Insurance, etc. — Agreement.

Patterson v. Dart, 3 O.W.N. 127, 20 O.W.R. 213.

Opening up foreclosure proceedings — "Real Property Act," R.S.M. (1902), c. 148—Certificate of title.

Williams v. Box, 44 Can. S.C.R. 1, 13 W.L.R. 451.

Assignment of equity by mortgagor to assignee for creditors — Right of wife as dowress and surety.

Standard Realty Co. v. Nicholson, 24 O.L.R. 46, 19 O.W.R. 373.

MOTIONS AND ORDERS.

I. In general.

II. Orders.

I. In general.

(§ I—1)—Summary judgment after appearance—Default in delivery of defence—Motion pending.

A plaintiff who has launched a motion, under r. 135, Sask., District Court rules, for summary judgment after appearance, cannot sign judgment for default in delivery of defence, while the motion for judgment is still pending.

Neville v. MacMillen, 20 D.L.R. 685, 7 S.L.R. 303, 30 W.L.R. 206, 7 W.W.R. 751

Opposition—Motion to dismiss—Opposition not returned—Que. C.P. 561.

The court will not hear a motion to have an opposition declared frivolous if that opposition has not yet been returned.

Rubin v. Everybodys Store, 16 Que. P.R. 110.

Contestation—Dismissal.

A contestation which raises important questions will not be dismissed on a mere motion.

Archambault v. Alaska Feather & Down Co., 17 Que. P.R. 376.

Appeal from summary conviction—Fixing date for hearing—Endorsement of conviction not necessary.

When on the first day of the sittings of the county court a date is set for hearing an appeal from summary conviction, no endorsement thereof is necessary on the conviction.

R. v. Martinson, [1919] 3 W.W.R. 896.

Practice—Notice of motion—Form of—Marginal r. 559—Form 18, appendix B.

Barker v. Jung, [1919] 1 W.W.R. 13.

(§ I—2)—Originating notice — Scope — Determining whether perpetuity created.

Whether a bequest violates the rule against perpetuities may be determined on an originating notice given under Manitoba K.B. r. 994 (Man. Stat. 1913, c. 12). [Re Wilson, Alexander v. Calder, 28 Ch. D. 461, followed.]

Re Crichton Estate, 13 D.L.R. 169, 23 Man. L.R. 594, 25 W.L.R. 18, 4 W.W.R. 1184.

Originating notice—Scope—Construing will.

The construction of a will may be deter-

mined on an originating notice issued under Manitoba King's Bench r. 994.

Re Dion, 12 D.L.R. 831, 23 Man. L.R. 549, 24 W.L.R. 701, 4 W.W.R. 942.

Where notice of motion for interim alimony is given, and affidavits pro and con are filed, but the motion lapses, a second application, even a year later, is not irregular because for the same relief and on the same material as the former application, no judicial decision having been rendered on the earlier motion.

Standall v. Standall, 7 D.L.R. 671, 22 Man. L.R. 592, 3 W.W.R. 402.

It will be implied in a statute authorizing proceedings by summons to quash a municipal by-law or ordinance that the grounds for the motion are to be stated in the summons, but leave will be given to amend, if no statutory limitation interferes and the respondent is not prejudiced by the delay.

Re St. Boniface By-law, 1 D.L.R. 221, 22 Man. L.R. 27, 19 W.L.R. 943, 1 W.W.R. 759.

NOTICE OF MOTION TO SET ASIDE VERDICT—PREMATURE, WHEN.

Computing Scale Co. v. Sweet, 19 D.L.R. 896.

EXAMINATION OF PARTY AS WITNESS ON "PENDING" MOTION—NO NOTICE OF MOTION SERVED.

McLaren v. Tew, 3 D.L.R. 881, 3 O.W.N. 1376, 22 O.W.R. 617.

NOTICE OF MOTION.

Leave reserved to a defendant to move to set aside a verdict in favour of the plaintiff and to enter one for the defendant and judgment for nonsuit will not be set aside for delay in prosecution within a period in which a stay of proceedings was granted to the defendant.

Giberson v. Toronto Construction Co., 40 N.B.R. 307.

EX PARTE ORDER—LEAVE TO ISSUE EXECUTION—EXTENDING TIME—DISCRETION—PRACTICE RULES.

A judgment for the payment of money by the defendant was pronounced in favour of the plaintiff on April 19, 1894, but was not entered until April 15, 1914; on that day an order was made by the Master in Chambers, on the ex parte judgment, and execution was issued accordingly. There was no doubt that the judgment was unsatisfied. The defendant moved to set aside the order, but not within the time allowed by r. 217. The judge who heard the motion extended the time under r. 176, and set aside the Master's order on the ground that it was improperly made ex parte:—Held, notwithstanding that the judgment was unsatisfied, and that the right to enforce it might be lost by the plaintiff's slip, that the judge's order was right and could not be reversed on appeal—r. 213 being explicit as to the necessity for notice of the application being given to the defendant, and the case not falling under r. 216.

Joss v. Fairgrieve, 32 O.L.R. 117.

IRREGULARITY.

A motion for an order of foreclosure in a mortgage action, in which one of the defendants has appeared, comes under the head of "contested business" not to be transacted during vacation: and where notice of such a motion was issued and served in vacation without leave, the motion was dismissed: r. 693. Leave to renew was, however, given. That the notice of motion was not addressed to any one, and was not signed by the solicitors, made it irregular merely, and the irregularities could be cured by amendment. [Goetz v. Hall, 2 S.L.R. 184, and Beaver Lumber Co. v. Eckstein, 8 W.L.R. 439, followed.]

Manufacturers' Life Ins. Co. v. Walker, 25 W.L.R. 399.

(§ I—3)—SERVICE OF NOTICE OF MOTION.

A notice of a motion, on behalf of a subsequent mortgagee, to obtain payment out of the proceeds of the sale of encumbered property which had been paid into court, cannot be served upon the mortgagor and the other defendants by filing a copy of the notice of motion in the office of the local registrar.

Allin v. Ferguson, 5 D.L.R. 19, 5 S.L.R. 204, 21 W.L.R. 246, 2 W.W.R. 327.

SERVICE OF NOTICE OF MOTION BEFORE FILING AFFIDAVITS IN SUPPORT.

The failure to file an affidavit to be used in support of the motion before serving the notice of motion as directed by Sask. r. 417, is a mere irregularity which may be disregarded under r. 747 (Sask. rr. of 1911), where no one has been misled by the omission. [Re Price, 4 D.L.R. 407, followed.]

Weeks v. Schrader, 13 D.L.R. 70, 25 W. L.R. 34, 4 W.W.R. 1115.

NOTICE OF MOTION—SERVICE OF—RULE 693.

Mills v. Harris, 19 D.L.R. 872, 7 W.W.R. 215.

FOR PAYMENT IN COURT—FOREIGN CLAIMANTS—NOTICE.

An application for judgment upon admissions under O. 32, r. 6 (Marginal 376) the defendant company set up that the money sued for was claimed by third parties under a foreign jurisdiction. An order was made directing the payment of the amount claimed into Court, but that there be no order for payment out until notice of application therefor be served on the foreign claimants and that the motion for judgment be disposed of at the same time. The foreign claimants were duly served with notice but they did not appear on the motion and judgment was given for the plaintiff with an order for the payment out to him of the moneys in court. Held, on appeal that as the foreign claimants had been notified and given an opportunity to appear and prove their claims but did not do so, the order appealed from should be affirmed.

Lockwood v. National Surety Co., 22 B.C.R. 306.

PROVISIONAL GUARDIAN—PETITION FOR REVOCATION—C.C.P. 82, 83, 94, 127, 178, 179—C.C. (QUE.) 85.

A motion asking for the revocation of the appointment of a provisional guardian, served upon an advocate who has never appeared in the cause, is nul. Every motion ought to be served on the opposite party.

Frantz v. Smith, 16 Que. P.R. 40.

PEREMPTION OF SUITS—C.C.P. 279.

A motion for peremption of suits served personally on the plaintiff's attorneys, at their respective offices, is sufficient. Such a motion may be validly served also on the old firm, if there is nothing to shew that it has given a notice of its change of name.

Kennedy v. Clavette, 16 Que. P.R. 116.

PEREMPTION OF SUIT—LAWYERS PRACTISING IN DIFFERENT OFFICES— C.C.P. 279.

Service of a motion for peremption of suit must be made on all the lawyers who were acting for the adverse party. If the new firm occupies two different offices, the service is void, although the bailiff, in his return, claims to have served the motion on the whole firm. The plaintiff cannot by way of a motion, have a motion for peremption dismissed.

Leger v. Larue, 16 Que. P.R. 231.

NOTICE OF MOTION—RETURN—TIME.

When by special leave the time for the return of a notice of motion is curtailed, the leave must show the date when leave is given as well as the date returnable.

Blue Funnel Motor Line Co. v. Vancouver and B.C. Elec. R. Co. (B.C.), [1918] 3 W. W.R. 473.

SERVICE WHERE NO APPEARANCE ENTERED—SEVERAL DEFENDANTS — SUFFICIENCY — DELAY IN MOVING TO SET ASIDE— R.S.C. RR. 112 AND 748.

The fact that a copy of the notice of motion for judgment is not filed for each defendant in cases where no appearance has been entered is not a good reason for setting aside the judgment. The fact that a motion for judgment has been made in vacation without leave should not invalidate proceedings where the motion to set aside the judgment is not made for a considerable period thereafter, without a reasonable explanation of the delay. [Haacke v. Ward, 17 P.R. 520, distinguished.]

Northern Trust Co. v. Nelson, 7 W.W.R. 381, reversing 6 W.W.R. 1435.

(§ I—4)—ANSWERING DEMANDS—COPIES OF AFFIDAVITS.

The practice in Alberta requires that the moving party shall furnish his opponent in answer to the service of a "demand" with copies of the affidavits in support of the motion without requirng payment therefor as a condition, the cost of copies demanded being taxable in the ordinary course.

Watt v. Knox, 15 D.L.R. 900, 27 W.L.R. 234, 5 W.W.R. 1331.

AFFIDAVITS—FILING OF, SWEARING.

It is essential that the respondent on a preliminary motion in Chambers shall file his affidavits in answer before using them on the motion, under r. 417 of the Sask. Judicature Rules, 1911.

Peat v. Sexton, 8 D.L.R. 761, 22 W.L.R. 736, 3 W.W.R. 514.

The objection that affidavits in support of a motion were not filed in the proper office or department of the court although they were in fact filed and in the custody of the court and, copies were supplied in pursuance of a demand, is waived if the motion was enlarged without objection being taken; under such circumstances, the court will allow the affidavits to be refiled in the proper office nunc pro tunc.

Re West Nissouri School, 1 D.L.R. 252, 25 O.L.R. 550, 21 O.W.R. 533.

DESCRIPTION OF DEPONENT — OMISSION — DISCRETION OF JUDGE.

Whether, on a pending application, the judge will hear an affidavit of the plaintiff in which the deponent's occupation or calling was not stated, rests, under Judicature Order 38, r. 14, in the discretion of the judge.

Brown v. Bartlett, 13 D.L.R. 355, 42 N.B.R. 222, 13 E.L.R. 363.

PERSONAL KNOWLEDGE—AGENT OF CORPORATION.

An affidavit in support of a motion for judgment under r. 275 (Alta.) is not defective because "on the merits" is added to the denial of any defence; a manager of a company can as such have such personal knowledge as the rule requires although he may not have been an actual witness to all the transactions involved in a debt.

Advance Rumely Thresher Co. v. Laclair, 32 D.L.R. 609, 10 A.L.R. 446, [1917] 1 W. W.R. 875.

The failure to file, at the time of making a motion, affidavits which were read, with leave of the court, on the hearing, is, at most, an irregularity, which misled no one, and, under r. 747, Sask. Judicature Act, may be disregarded by the court. Affidavits that are read, pursuant to leave granted, on the hearing of an application, need not be filed before service of notice of the motion, as required by r. 418 of the Judicature Ordinances in the case of affidavits upon which the motion was originally based.

Re Price, 4 D.L.R. 407, 5 S.L.R. 318, 21 W.L.R. 299, 2 W.W.R. 394.

In an examination of an officer of a railway company in an action against the company for personal injuries, on a motion to require the production of certain reports of the company as to the happening of the accident on which the action was based, made by the company's officials who investigated the same, an affidavit filed by the officer being examined as to the privileged character of such reports must set forth and so clearly identify such reports and give names of the officials investigating the accident that there will be no diffi-

culty in procuring the conviction of the deponent for perjury should it afterwards appear that his affidavit was untrue.

Swaisland v. G.T.R. Co., 5 D.L.R. 750, 3 O.W.N. 960.

An affidavit which was not filed until after the service of a notice of motion which stated that a filed affidavit of a named deponent would be read in its support, cannot, without leave, be read on the hearing of the motion, as it does not answer the description given by the notice which specified the affidavit as one already filed.

Allin v. Ferguson, 5 D.L.R. 19, 5 S.L.R. 204, 21 W.L.R. 246, 2 W.W.R. 327.

ALBERTA R. 561—AFFIDAVIT FILED IN TERMS OF RULE—CROSS-EXAMINATION ON.

Merchants Bank v. Good, 47 D.L.R. 702, [1919] 3 W.W.R. 269.

An affidavit that was sworn on the day before a summons was issued in an action, cannot be read in support of a subsequent application for an interim injunction, unless, with the permission of the court, it is taken from the files and resworn. Where a notice of a motion for an interim injunction states that certain affidavits and exhibits will be read on the hearing thereof, other affidavits and exhibits cannot be read on a subsequent motion to continue such injunction, except with the leave of the court.

Pigeon v. Preston, 4 D.L.R. 483, 21 W.L.R. 875, 5 S.L.R. 330, 2 W.W.R. 783.

CROSS-EXAMINATION—DISCRETION OF COURT.

The discretionary power given to a judge under rules of court to order a cross-examination on an affidavit used on a motion is to be judicially exercised, and where it appears that the discretion in refusing a cross-examination was not exercised upon a proper ground, the Appellate Court will reverse the order.

Ewing v. McGill, 22 D.L.R. 834, 8 A.L.R. 105, 30 W.L.R. 452, 7 W.W.R. 1147.

MOTION BEFORE APPELLATE DIVISION—EXAMINATION OF WITNESS — LEAVE OF COURT.

An appointment issued without leave of the Divisional Court to examine witnesses by a party making a motion to a Divisional Court of the Appellate Division and proposing to read at the hearing of the motion the depositions of the witnesses, is irregular and will be set aside.

Crowley v. Boving & Co., 23 D.L.R. 696, 33 O.L.R. 491.

SERVICE.

Pursuant to practice r. 47, every motion should be supported by a declaration under oath which should be served on the opposite party, and the court will not allow the omission of the declaration to be supplied by an examination of the opposite party under oath.

Charpentier v. Hébert, 48 Que. S.C. 13.

CRIMINAL LAW—OFFENCE AGAINST ORDERS IN COUNCIL RESPECTING CENSORSHIP—PUBLISHING OBJECTIONABLE MATTER—WAR MEASURE ACT, 1914, 5 GEO. V. C. 2 (DOM.)—INFORMATION—INDICTMENT—NOLLE PROSEQUI—CRIM. CODE, S. 962—ENTRY OF STAY OF PROCEEDINGS—NEW INFORMATION FOR LIKE OFFENCE—DEFENDANT NOT PUT IN JEOPARDY UNDER INDICTMENT—FRESH PROSECUTION NOT BARRED—MOTION FOR PROHIBITION TO POLICE MAGISTRATE—DISMISSAL OF—APPEAL—RIGHT OF—MOTION NOT BASED ON WANT OF JURISDICTION—QUESTION FOR CONSIDERATION IN CRIMINAL PROCEEDINGS—ALTERNATIVE METHODS OF TRIAL—ELECTION OF CROWN TO PROCEED WITH SUMMARY TRIAL BEFORE MAGISTRATE—SECOND APPLICATION FOR PROHIBITION—REFUSAL—DISCRETION—APPEAL—CONSTRUCTION OF SS. 2 AND 10 OF ACT—AUTHORITY FOR ORDERS IN COUNCIL—LAWFUL EXERCISE OF JURISDICTION OF MAGISTRATE—REFUSAL TO PROHIBIT—POWER TO PROHIBIT—DISCRETION—REMEDIES UNDER CRIM. CODE.

In March, 1918, an information as laid against the defendant charging him with an offence against a Dominion order in council, made under the War Measures Act, 1914, 5 Geo. V. c. 2 (Can.) by having in his possession, or publishing, objectionable mattter, to wit, a book intituled "The Parasite." The defendant claimed a right of trial by jury, which was conceded by the Crown. The defendant was committed for trial, and an indictment was found against him by the grand jury. In November, further proceedings upon the indictment were stayed, by direction of the Attorney-General, under s. 962, Cr. Code—in effect by the entry of a nolle prosequi. In December, a new information was laid against the defendant, substantially to the same effect as the first information, and the defendant was brought before a magistrate. A preliminary objection was raised and a motion made by the defendant for an order prohibiting the magistrate from proceeding upon the new information:—Held, by Sutherland, J., in Chambers, dismissing the motion, that the stay directed upon the indictment was not a bar to the second information, the defendant not having been put in jeopardy upon the first. Upon appeal by the defendant from the order of Sutherland, J., it was held, by a Divisional Court of the Appellate Division, that the motion was properly dismissed, the jurisdiction of the magistrate not being attacked. The defendant had the right to appeal from the order dismissing the motion for prohibition; but the question considered upon the motion was not one of jurisdiction; it was a question for consideration in the criminal proceedings, and there only. After the decision of the Appellate Court, the Crown having elected to proceed with a summary trial before the magistrate, the defendant again moved for an order prohibiting the magistrate from proceeding up-

on the information, upon the grounds that he had no jurisdiction under the War Measures Act, or the orders in council respecting censorship, to try the defendant, and that the defendant was entitled to a trial by jury:—Held, by Masten, J., in Chambers, that a second motion for prohibition should not, in the circumstances, be entertained; and that the lack of jurisdiction did not appear with sufficient clearness to warrant the issue of an order of prohibition; and, in the exercise of a proper discretion, the motion should be refused. Held, by a Divisional Court on appeal from the order of Masten, J., that, assuming that the court had power to prohibit the magistrate from trying the case summarily if it was not lawful for him to do so, that power ought not to be exercised, because it was lawful for the magistrate, and he was in law bound, so to try it. If the court had no power that ended the matter; if it had power, and a discretion, no sufficient reason was shewn why the case should not be left to take the ordinary course of a criminal case under the Cr. Code. If the magistrate was wrong in considering that the case could be summarily tried against the will of the defendant, ample provision was made in the Code for relief in several ways.

R. v. Spence, 45 O.L.R. 391.

COMPANY—WINDING-UP—REPORT OF REFEREE—APPEAL FROM—ORDER OF REFEREE DIRECTING AMENDMENT OR SETTING ASIDE OF NOTICE OF APPEAL AND STAYING HEARING OF APPEAL—ORDER VACATED AS MADE WITHOUT JURISDICTION—COSTS.

Re Anglo-American Fire Ins. Co., 16 O.W.N. 149.

REPORT OF DISTRIBUTION—HOMOLOGATION—ABANDONMENT.

A party who demands the homologation of a report of distribution may before such homologation abandon his motion, and upon motion to that effect his abandonment will be given effect to and the order for homologation set aside.

Société d' Administration Generale v. Heroux, 18 Que. P.R. 179.

MOTION—NECESSITY—DILATORY EXCEPTION—QUE. C.P. 165, 62 V. c. 58—PRACTICE S. 47.

The petitions or motions which must be supported by an affidavit, according to the 47th Rule of Practice, are those constituting special demands, based on facts which do not appear in the record or in the entries in the minute book. In the present case the city of Montreal, being a party, is not bound to deposit the sum required by the rules of practice in order to be entitled to make the present motion, according to s. 552 of its charter.

Laliberte v. Montreal, 16 Que. P.R. 174.

EXTENSION OF TIME—SPECIFYING DATE.

Where a motion is made demanding the prolongation of the delay to contest the statement or bilan of an insolvent, alleging also that the extension of the delay to prove the allegation will be necessary, the judge may, without adjudicating ultra petita, grant both demands, although in the conclusions of the motion, the first only is prayed for. It is not necessary, in such a motion, to specify the date at which it will commence to run, as in such a case, the additional delay must be calculated from the expiry of the first delay granted by law.

Krauss v. Michaud, 26 Que. K.B. 504. [Appeal to Supreme Court of Canada quashed, 52 D.L.R. —, 59 Can. S.C.R. 654.]

A motion to suspend the proceedings until judgment has been rendered in another case between the same parties will not be granted if a plea is not filed in the case and if the motion is unsupported by affidavit.

Rousseau v. Marcotte, 13 Que. P.R. 219.

II. Orders.

(§ II—5)—APPLICATION TO VACATE.

A caveat based on a prima facie valid document will not be vacated on a summary application to a judge in Chambers where the facts are involved and each party has denied by affidavit the principal allegations made on affidavit by the other party; the application might be entertained if the facts were undisputed and the issue rested on the interpretation or validity of the written document on which the caveat is founded.

McGreevy v. Murray, 1 D.L.R. 285, 19 W.L.R. 947, 22 Man. L.R. 78, 1 W.W.R. 758.

WHEN GOING INTO EFFECT—DATING.

The word "made" in O. 52, r. 12, which provides that orders shall take effect from the time they are made, refers to the time when they are pronounced or announced, and are to be dated accordingly.

Cameron v. Hattie, 26 D.L.R. 496, 49 N.S.R. 456.

RAILWAY CO.—EXPROPRIATION PROCEEDINGS—ORDER RESTRAINING ARBITRATORS—RIGHTS OF OWNER.

Prohibition lies at the instance of the purchaser to restrain arbitrators in expropriation proceedings under the Railway Act (Can.), from proceeding upon a notice to treat served upon his vendor who had ceased to have any title to the land in dispute upon the registration of the purchaser's deed prior to such notice to treat.

Lachine, Jacques Cartier & Maisonneuve R. Co. v. Reid, 20 D.L.R. 816, 23 Que. K.B. 373.

PRACTICE—SETTING ORDERS AND JUDGMENTS.

Van Hemelyrck v. New Westminster Construction Co., [1919] 2 W.W.R. 882.

(§ II—6)—N.B. RAILWAY ACT, C.S.N.B., c. 91, s. 17—PURCHASE MONEY—PAYMENT INTO COURT—SERVICE OF—SETTING ASIDE.

An order made under the Railway Act, C.S.N.B., c. 91, s. 17, for claimants on purchase money for a railway right-of-way

paid into court by the railway will be set aside where the mortgagor who contracted for the sale had no authority to do so for the mortgagees, nor was service of the order made on an assignee of the mortgages, as had been directed by the court when the order was made.

Re Reardon & St. John & Quebec R. Co.; Ex parte Shea, 20 D.L.R. 910, 42 N.B.R. 244.

SETTING ASIDE.

Where an extra-provincial corporation, made a codefendant with an individual, obtains an order setting aside the service of process upon it on the ground of want of jurisdiction, and notice of the application was served on the plaintiff only and not upon the individual defendant, the order is as to the latter an ex parte order and is subject to rescission as such. An ex parte order of a referee may be rescinded by himself under Manitoba K.B. r. 438 if it appears, on the motion made to rescind, that such ex parte order was improperly made, and this notwithstanding that the application to rescind was not made within the four-day limitation of that rule, if it appears that the interests of the objecting party were not affected (Man. K.B. r. 342.)

Swanson v. McArthur, 7 D.L.R. 680, 22 W.L.R. 317, 3 W.W.R. 381. [Varied 12 D.L.R. 487, 23 Man. L.R. 84, 24 W.L.R. 1, 4 W.W.R. 231.]

SETTING ASIDE OR RECALLING ORDER—POWERS OF LOCAL JUDGE.

The restriction upon the powers of local judges under rr. 27, 34 of the King's Bench Act, R.S.M. 1902, c. 40, whereby neither a local judge nor the referee in Chambers may vary or rescind "an order made by a judge," does not apply to prevent a local judge rescinding or varying his own order.

Douglas v. C.N.R. Co., 13 D.L.R. 800, 24 W.L.R. 804, 23 Man. L.R. 490, 4 W.W.R. 1121.

POWER OF JUDGE OVER.

In the absence of express statutory, a judge of the Court of King's Bench is without power to set aside an order made by him in a controverted election proceeding; appeal being the only remedy in such case. [Munroe v. Heubach, 18 Man. L.R. 547; Re St. Nazaire Co., 12 Ch. D. 88; Preston Banking Co. v. Allsup, [1895] 1 Ch. 141; Charles Bright & Co. v. Sellar, [1904] 1 K.B. 6; McNabb v. Oppenheimer, 11 P.R. (Ont.) 214, and Robertson v. Coulton, 9 P.R. (Ont.) 16, followed.]

Re Gimli Election, Rejeski v. Taylor, 14 D.L.R. 414, 23 Man. L.R. 678, 25 W.L.R. 677, 5 W.W.R. 363. [Affirmed 14 D.L.R. 863, 23 Man. L.R. 851, 26 W.L.R. 20, 5 W.W.R. 590.]

RULE NISI—ERROR—SETTING ASIDE.

If a motion asks for a rule nisi against the defendant instead of the plaintiff, the plaintiff on whom the rule is served can demand that it be set aside for such error, although the judgment given on the motion, correcting the error in copying which was found in it, condemns the plaintiff.

Normandin v. Montreal Tramways Co., 17 Que. P.R. 390.

(§ II—7)—ORDER UNDER CREDITORS' RELIEF ACT—IRREGULARITIES—AMENDMENT.

Where an order made by a District Court Judge was not intituled in the matter of the Creditors' Relief Act R.S.S. c. 63, but it was plain from the nature of the order that it was made under that Act, such judge has power under s. 16 to amend the order to include the omitted words and generally to cure irregularities and defects in his prior order.

Royal Bank v. Lee, 23 D.L.R. 216, 30 W.L.R. 577. [Affirmed 23 D.L.R. 219, 8 S.L.R. 17, 8 W.W.R. 338.]

(§ II—8)—DEFEATING THROUGH IRREGULARITIES.

The erroneous statement in a sheriff's transfer of land under an execution sale, that the writ was issued out of the Supreme Court, instead of the District Court, will not defeat an application to confirm the sale, notwithstanding a new transfer will be necessary. A statement in an affidavit of the sheriff that an execution was renewed in the office of the "local registrar" of the District Court, instead of that of the registrar of the land titles office, will not defeat an application to confirm a sale of land under the writ, since, as there was no such office as the local registrar of such court, no one could have been misled by such error.

Re Price, 4 D.L.R. 407, 21 W.L.R. 299, 5 S.L.R. 318, 2 W.W.R. 394.

IRREGULARITY OF JUDGE'S SIGNATURE—VALIDITY.

Where an application to a District Court Judge was clearly made under s. 8 of the Creditors' Relief Act, R.S.S. c. 63, but by inadvertence the judge signed the order over the designation of Local Master (L.M.), the latter may be treated as surplusage, and will not affect the validity of the order.

Royal Bank v. Lee, 23 D.L.R. 216, 30 W.L.R. 577. [Affirmed 23 D.L.R. 219, 8 S.L.R. 17, 8 W.W.R. 338.]

(§ II—9)—TAKING OUT AND SERVING COPIES OF ORDERS.

Where leave is granted a defendant to enter an appearance and deliver a defence conditioned on payment of certain costs within a stipulated time after taxation, the defendant is in default at the expiry of the stipulated time after the costs have been taxed, although the party entitled to payment of such costs did not issue and serve the order.

Croome v. Leir, 9 D.L.R. 809, 23 W.L.R. 713, 4 W.W.R. 80.

(§ II—10)—ORDER OF MASTER—STAYING PROCEEDINGS—SUIT PENDING—APPEAL—ORDER OF JUDGE REVERSING—INTERLOCUTORY—LEAVE TO APPEAL—ONTARIO JUDICATURE ACT.

An order of a Judge in Chambers reversing an order of a Master in Chambers stay-

ing proceedings upon a reference pending an appeal is an interlocutory order within the meaning of s. 25 of the Ontario Judicature Act (R.S.O. 1914, c. 56) and leave to appeal from it must be obtained before an appeal is competent.

Richardson v. McCaffrey, 48 D.L.R. 614, 45 O.L.R. 153.

APPEAL—LEAVE TO APPEAL FROM ORDER OF JUDGE IN CHAMBERS—RULE 507—ORDERS STRIKING OUT PARAGRAPHS OF REPLY—UNNECESSARY PLEADING—UNIMPORTANT QUESTION.

Anderson v. Clarkson, 16 O.W.N. 287.

INJUNCTION—INTERIM ORDER—APPEAL FROM — REFUSAL OF APPELLATE COURT TO TREAT APPEAL AS MOTION FOR JUDGMENT—APPEAL FROM INTERIM ORDER DISMISSED—ACTION TO BE TRIED IN ORDINARY WAY.

Abell v. Woodbridge, 17 O.W.N. 55.

REPORT OF MASTER—MOTION TO OPEN UP—DEFENDANTS NOT APPEARING ON REFERENCE—DENIAL OF INDULGENCE—NOTICE OF SETTLING REPORT NOT GIVEN TO DEFENDANTS — RULE 424 — REPORT SET ASIDE FOR PURPOSE OF NOTICE OF SETTLING ONLY—COSTS.

Scott v. Gardiner, 17 O.W.N. 114, 236.

MUNICIPAL CORPORATIONS—BRIDGE OVER RIVER—LENGTH OF—MUNICIPAL ACT, S. 449—AMENDING ACT, 7 GEO. V. C. 42, S. 21—LIABILITY OF COUNTY CORPORATION FOR HALF COST OF MAINTENANCE—FINDING OF COUNTY COURT JUDGE—APPEAL.

Re Culross and Bruce, 17 O.W.N. 200.

(§ II—11)—DEBTOR GARNISHEE—ORDER TO PRODUCE BOOKS OF ACCOUNT.

Major v. Birchenough, 20 D.L.R. 979.

MOTOR VEHICLES.

See Automobiles.

MOVING PICTURES.

Unauthorized representation of a play, see Copyright, I—8.

Liability for delaying delivery of films, see Carriers, III D—420.

MUNICIPAL CORPORATIONS.

I. IN GENERAL.
- A. Incorporation.
- B. Division or annexation.
- C. Dissolution, succession or substitution.
- D. Charter.

II. POWERS, DUTIES AND LIABILITIES.
- A. In general.
- B. Delegation of power.
- C. Legislative functions; ordinances; by-laws.
- D. Contracts generally; ultra vires contracts.
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III. POWERS OF OFFICERS.

Annotations.

Taxation, authority to exempt from: 11 D.L.R. 66.

Leased property; private markets, by-laws and ordinances regulating the use of: 1 D.L.R. 219.

Streets, closing or opening: 9 D.L.R. 490.

Defective highway; notice of injury: 13 D.L.R. 886.

Drainage; natural watercourse; cost of work; power of referee: 21 D.L.R. 286.

By-law regulating building permits, power to pass: 7 D.L.R. 422.

License; power to revoke license to carry on business: 9 D.L.R. 411.

Nonrepair of highways and bridges, liability of municipal corporations for: 34 D.L.R. 589.

Ultra vires as defence in action on corporate contracts: 36 D.L.R. 107.

I. In general.

Municipal elections, see Elections.

Presumption as to legal constitution of districts, see Drains and Sewers, III—15.

A. INCORPORATION.

(§ I A—5)—POLICE VILLAGE—POWERS OF COUNTY COUNCIL.

A county council is without jurisdiction to enact, in creating a police village, that it is erected into an incorporated village apart from, and that its inhabitants shall be a body corporate separate from, the township in which it is situated.

Smith v. Bertie, 12 D.L.R. 623, 28 O.L.R. 330.

COSTS OF INCORPORATION—BY-LAW.

A town corporation, in providing for payment of the costs of its incorporation, may order that the costs incurred for the same object by a certain member of its taxpayers in connection with a prior petition rejected by the legislature, should be charged to the municipality, if it is proved that the opposition to the first project was not justified in the public interest and that a part of the costs incurred on that occasion have benefited the promoters of the second project.

Rioux v. Trois-Pistoles, 54 Que. S.C. 410.

(§ I A—7)—TERRITORY.

The prohibition in s. 3, subs. (d) of the Municipalities Incorporation Act, c. 143, R.S.B.C. 1897, against a district municipality including, at its incorporation, land subdivided into town lots, etc., is not absolute, but such lands may be included if all the conditions and provisions of s. 3, except subs. (c), of that Act, have first been complied with. In a proceeding collaterally attacking the validity of the incorporation of a district municipality, on the ground that it included within its area at

the time of incorporation land subdivided into town lots, in violation of s. 3, subs. (d) of the Act, it will be assumed in the absence of evidence to the contrary that all the conditions and provisions of s. 3, except subs. (c), making such inclusion valid, have been complied with, and that therefore the land in question, whether town lots or not, are properly included in the municipality.

Saanich v. French, 8 D.L.R. 637, 3 W.W.R. 270.

B. Division or annexation.

(§ I B—10)—Annexation—Duty to open highway—Mandamus.

Ratepayers of an annexed municipality have a sufficient interest to compel by mandamus the opening and maintaining a highway as required by the annexation statute.

Mountain Sights v. Montreal, 37 D.L.R. 688, 52 Que. S.C. 174, 23 Rev. de Jur. 597.

A petition for incorporation of a part of a municipality as a village, signed by two-thirds of those qualified under art. 52, Mun. Code, which has been presented to the county council remains valid notwithstanding the withdrawal of some of the signatures. The husbands of female owners of immovables of the value necessary to give the right to vote are electors and qualified to sign the petition. When an action has been brought to have the homologation by the county council under art. 57 Mun. Code, of the report of a special superintendent annulled, a resolution of the council revoking the homologation filed with an offer to pay the costs, is a defence which justifies the dismissal of the action.

Tremplay v. Chicoutimi, 41 Que. S.C. 333.

(§ I B—11)—Annexation of part of township to village—Powers of municipal board.

The Ontario Municipal Board has jurisdiction under ss. 17, 20 of the Municipal Act, R.S.O. 1914, c. 192, to make an order annexing part of a township to a village, and by virtue of s. 39 (1) of the Ontario Railway and Municipal Board Act, R.S.O. 1914, c. 186, it also has the power to make such order suspensive in its operation.

Bell v. Burlington, 25 D.L.R. 269, 34 O.L.R. 410.

Annexing county to city — Effect on franchises — Power of board.

The annexation of county territory to a city does not affect a railway franchise granted by the county and the income the county is entitled to thereunder; nor does the city thereupon become "successor" under the agreement between the county and the railway company. The Ontario Railway and Municipal Board, in making the annexation order, has no power to provide that such rights should pass to the city in whole or in part.

Wentworth v. Hamilton Radial Electric R. Co. and Hamilton, 33 D.L.R. 439, 54 Can. S.C.R. 178, reversing 28 D.L.R. 110, 35 O.L.R. 434.

D. Charter.

(§ I D—25)—Construction of.

The power and responsibilities contained in the Municipal Act (B.C.), 1914, c. 52, apply to all municipalities, and should not be held to be impaired by a collateral statute with restricted application such as the Shaughnessy Settlement Act (B.C.), 1914, c. 96, unless that intention is expressly shewn.

Fletcher v. Point Grey, 21 D.L.R. 819.

Revocation of charter—Power of province after incorporation — Usurpation of power—Exempting railway from taxation — Property situate within municipal territory.

E. & N. R. Co. v. Courtenay, 25 D.L.R. 821, 22 B.C.R. 362, 32 W.L.R. 914, 9 W.W.R. 618.

II. Powers, duties and liabilities.

A. In general.

See Expropriation; Arbitration; Highways; Bridges; Schools; Drains and Sewers.

Liability of councillors to mandamus, see Schools, III A—55.

Liability for costs of actions and proceedings, see Costs, I—1, 11, 17.

(§ II A—30)—Powers to municipality, restriction as to cancelling signature.

A signatory to a petition praying a municipal body to exercise statutory powers cannot remove his name from the signature where no statutory provision is made for such removal. A municipal council is a legislative body with certain statutory powers; it is not subordinate to the courts, and the exercise of its statutory powers is in the discretion of the council; and if there is good faith the court cannot interfere.

Re Robertson and Colborne, 8 D.L.R. 149, 4 O.W.N. 274, 23 O.W.R. 325.

Right to maintain an action — Public nuisance.

A municipal corporation cannot maintain an action, except as relator on an information by the Attorney-General, where a defendant neglects to perform a duty to the public under a municipal by-law and thereby creates a public nuisance. [Att'y-Gen'l v. Tod-Heatley, [1897] 1 Ch. 560; Bermondsey Vestry v. Brown, L.R. 1 Eq. 204, followed.]

Oak Bay v. Gardner, 17 D.L.R. 802, 19 B.C.R. 391, 27 W.L.R. 960, 6 W.W.R. 1023.

Expropriation — Conflicting statutes—"Avoisinant"—"Adjoining."

Section 6 of 6 Edw. VII. c. 50, authorizing the town of Fraserville (Que.) to expropriate lands outside its limits, impliedly repealed s. 193 of 3 Edw. VII. c. 69, limiting the application of art. 4561 R.S.Q. to expropriation of land within the town, and art. 4561 therefore became applicable to expropriation of lands outside the town.

Pouliot v. Fraserville, 34 D.L.R. 541, 54 Can. S.C.R. 310.

HOSPITALS AND CHARITABLE INSTITUTIONS ACT.

The corporation of the municipality in which an indigent person, admitted to a hospital, is resident, within the Hospitals and Charitable Institutions Act, R.S.O. 1914, c. 300, s. 23 (1), means the town, village or township municipality, not the county municipality.

Toronto Free Hospital for Consumptives v. Barrie, 34 D.L.R. 691, 39 O.L.R. 63.

POWERS OF—ONLY THOSE DELEGATED BY EXPRESS WORDS, OR NECESSARY IMPLICATION.

The only powers which a municipal corporation can exercise are those granted by express words, those necessarily or fairly implied in or incident to the powers expressly granted and those essential to the accomplishment of the declared objects and purposes of the incorporation.

McMillan v. Winnipeg, 45 D.L.R. 351, [1919] 1 W.W.R. 591.

"CHARITABLE" AID—CATHOLIC ARMY HUTS—BUDGET.

The powers conferred on municipal corporations by s. 398 (5) of the Municipal Act (R.S.O. 1914, c. 192), to grant "aid to any charitable institution or out-of-door relief to the resident poor," does not extend to a grant for the purpose of creating army huts to serve as chapels for Catholic soldiers and to supply the latter with their devotional aids, the huts also to serve as recreation places for all soldiers; a resolution purporting the granting of such aid is therefore ultra vires. Nor has a municipal council the power to require or authorize the raising of funds in one year to be paid out or expended in the next or future years.

Re Homan & Toronto, 45 D.L.R. 147, 43 O.L.R. 632.

MUNICIPAL LAW—THE HIRING OF OFFICERS—DISMISSAL—VOTE OF COUNCIL—ABSOLUTE MAJORITY—1909, ARTS. 5312, 5322.

The words "absolute majority of the whole council," in art. 5322, R.S.Q. 1909, permitting a municipal council to dismiss its officers, must be interpreted as meaning not only the majority of members present but including also those absent.

Hébert v. Beauharnois, 25 Rev. Leg. 419.

APPROVAL OF ACCOUNTS—ATTESTATION.

A municipal council accepting the account rendered by its secretary-treasurer, not attested under oath, but after examination by the auditors and discharging him from his obligations and responsibilities, is not ultra vires of the powers of the council, the provision of the law requiring a secretary-treasurer to render his account under oath not being of public order. But he cannot himself dispense with it and cannot invoke custom and precedent to be relieved of this obligation imposed upon him by law.

Pérodeau v. Richard, 26 Que. K.B. 206.

LIABILITY FOR COUNSEL FEES—REPRESENTATION BEFORE COMMISSION.

A municipality is not liable for the fees of counsel not retained by it merely because they represented some of its officers and citizens before a Royal Enquiry Commission.

Desaulniers v. Montreal, 24 Que. K.B. 135.

In deciding on the merits of an appeal from a resolution of a local council on the subject of a by-law, a County Council has power to grant costs to either party, and such costs may include all those incurred by such appeal. The council is not compelled to tax them at the same session at which the decision was rendered, but may do so at the next general session.

Ste. Foye v. Quebec, 18 Rev. de Jur. 99.

The powers conferred by arts. 758, 759, Mun. Code, on a county council and on the board of delegates, may be exercised by them in regard to a road to be made as well as to one already made; nevertheless, the declarations mentioned in arts. 758, 759 may be made legally only after public notice has been given to that effect (761 Mun. Code); and, the declarations must be published after the adoption of a resolution or approval of the procés-verbal which contains them.

Brunet v. Beauharnois, 18 Rev. de Jur. 141.

POWER OF LEGISLATURE AS TO.

On the creation of a municipal corporation, the legislature may confer on it the powers conferred upon municipal corporations generally by any particular law or body of laws in the province.

Wetaskiwin v. C. & E. Townsites, [1918] 3 W.W.R. 145. [Affirmed, 45 D.L.R. 482, 14 A.L.R. 307, [1919] 1 W.W.R. 515; 51 D.L.R. 252, 59 Can. S.C.R. 578, [1920] 1 W.W.R. 438.]

DUTY OF COUNTY CORPORATION TO PROVIDE OFFICES AND FURNITURE AND SUPPLIES FOR COUNTY CROWN ATTORNEY AND CLERK OF PEACE—MUNICIPAL ACT, R.S.O. 1914, c. 192, s. 377—REIMBURSEMENT OF MONEYS EXPENDED—MANDAMUS TO CORPORATION TO PROVIDE OFFICES—REMEDY AS TO FURNITURE AND SUPPLIES.

Hatton v. Peterborough, 15 O.W.N. *224.

(§ II A—31)—POWERS OVER POLICE DEPARTMENT—INVESTIGATION—POLICE BOARD.

Section 278, c. 192, of the Municipal Act, R.S.O. 1914, directing a Judge of the County Court to investigate upon a resolution of the city council any matter relating to malfeasance or misconduct on the part of an officer or servant of the corporation, does not apply to an inquiry into charges of misconduct in the police force, which by s. 354, etc., is within the jurisdiction of the Board of Police Commissioners.

Berlin v. County Judge of Waterloo, 22 D.L.R. 296, 33 O.L.R. 73.

POLICE STATION — EQUIPMENT OF — FURNITURE—STATIONERY.

Under R.S.O. 1914, c. 88, s. 23, the County Council shall furnish a police magistrate

for the county with a proper office, together with fuel, light and furniture, and (following Newsome v. Oxford, 28 O.R. 442) furniture shall include stationery for such office, and it is immaterial whether the appointment of such magistrate is made under s. 13 or s. 14 of the said Act, or that such magistrate may have a private office of his own as a barrister or solicitor in such township.

Holmested v. Huron, 24 D.L.R. 561.

DISMISSAL OF POLICE OFFICER—TOWNS ACT (ALTA.).

Under the Towns Act (Alta.), 1911-12, c. 2, s. 69, a municipality has an unconditional power of dismissing or suspending any member of its police force, even where there has been a contract in writing between the municipality and the dismissed official, and the term of employment contemplated in such contract has not been completed and no cause exists for the termination of it.

Irwin v. Blairmore, 6 W.W.R. 1032.

(§ II A—32)—LEGISLATIVE CONTROL OF.

A municipal by-law is ultra vires where it purports to provide a penalty for the identical offence which is already subject to penalty under a provision of the criminal law.

R. v. Laughton, 6 D.L.R. 47, 20 Can. Cr. Cas. 30, 22 Man. L.R. 520, 22 W.L.R. 199.

(§ II A—33)—POWER OVER SCHOOL FUNDS.

Under s. 7 of the Continuation Schools Act of Ontario, a school board has the right of determining the amount to be raised for maintenance purposes for the current school year, and the municipal council is under an absolute obligation to comply with a requisition of the board in that behalf.

Re West Nissouri School, 1 D.L.R. 252, 21 O.W.R. 533, 25 O.L.R. 550.

(§ II A—34)—POWER TO GRANT USE OF STREET.

A resolution of a township council is not an authorized municipal method granting a telephone company the privilege under certain conditions of constructing its telephone line, a by-law being necessary.

Howse v. Southwold, 5 D.L.R. 709, 27 O.L.R. 29, 22 O.W.R. 797.

TOWN OFFICERS — SALARY OF STIPENDIARY MAGISTRATE.

Re Pelton, 11 D.L.R. 623, 47 N.S.R. 103, reversing 7 D.L.R. 465.

B. DELEGATION OF POWER.

(§ II B—41)—TO MUNICIPALITY.

The rights of the city of Montreal by its charter are not proprietary rights, but are merely delegated rights conferred by the legislature; hence the city cannot grant privileges or rights beyond what are delegated to it.

Montreal Street R. v. Montreal, 3 D.L.R. 812, 23 Que. S.C. 412.

(§ II B—42)—DELEGATION OF POWER—BY MUNICIPALITY—POWER TO FIX HEIGHT OF WIRES.

The power of a town council to determine the height which electric wires shall be suspended above its streets cannot be delegated to a city official.

Att'y-Gen'l and Truo v. Chambers Electric Light & Power Co., 14 D.L.R. 883, 13 E.L.R. 443.

MUNICIPALITY—PUBLIC WRONG—REDRESS—ACTION FOR BY ATTORNEY-GENERAL—BRITISH COLUMBIA.

A municipality in British Columbia is not entitled to bring action to redress the public wrong done by obstructing a highway; such an action can be brought only by the Attorney-General. [Delta v. V.V. & E.R. Co., 14 B.C.R. 83, followed.]

Hope v. Surrey, 20 D.L.R. 540, 29 W.L.R. 525, 20 B.C.R. 434, 7 W.W.R. 175.

DELEGATING BRIDGE CONSTRUCTION TO CORPORATION—INTEREST OF RATEPAYER TO ATTACK PROCEEDINGS—PRESCRIPTION.

A municipal corporation of a county, which has decided to construct a county bridge and has adopted a procés-verbal directing the work to be done, but without determining its cost, cannot delegate to a local corporation the adjudication of the undertaking of the construction and the execution of the work. In making such delegation it acts ultra vires, and a rate payer has a sufficient interest to proceed to have the proceedings annulled by direct action. The provisions of the Mun. Code respecting appeal to the County Council or to the Circuit Court do not apply in such case, as there is a distinction between acts illegally performed by a municipal corporation in the exercise of its powers and those which are ultra vires.

Forest v. L'Assomption, 48 Que. S.C. 151. [Affirmed 25 Que. K.B. 568.]

(§ II B—45)—CITIES AND TOWNS ACT.

The rights and duties that the Cities and Towns Act confers on municipalities cannot be delegated, and can be exercised by no authority other than the municipal council itself.

Sisters of Charity, etc., of Montreal v. Chateauguay, 52 Que. S.C. 8.

(§ II B—49)—BY MUNICIPALITY.

A corporate body created by statute to own in trust, improve and manage a harbour bounded by its high-water mark, with a proviso that "it shall be incumbent upon it to erect land-marks," with general powers to alienate its property, has both implied and express power to contract with owners of land contiguous to the harbour and bounded by the same high-water mark, involving the alienation of land on the harbour side, and the acquisition of land on the other.

Harbour Com'srs of Montreal v. Record Foundry & Machine Co., 21 Que. K.B. 241.

C. LEGISLATIVE FUNCTIONS; ORDINANCES; BY-LAWS.

Regulation of fisheries, statutory license fee, see Fisheries, I B—5.

Regulation of commercial travelers, ultra vires, see License, II C—33.

Use of public funds for advertising tax sales, see Injunction, I J—84.

(§ II C—50)—BY-LAWS — QUASHING UNNECESSARY BY-LAWS—HIGHWAYS.

The fact that a by-law was unnecessary will not prevent the court from quashing a municipal by-law if it be irregular. Where the Municipal Act (Ont.), s. 632 (1), provides for notice of proposed by-laws for closing roads, the publishing of an intended by-law to sell the same is not such a notice as is required by the Act, and the by-law itself is irregular.

Re Seguin and Hawkesbury, 9 D.L.R. 487, 4 O.W.N. 521, 23 O.W.R. 857, varying 6 D.L.R. 903.

The illegality of a resolution providing for indemnifying a municipal council against the costs of upholding a by-law if attacked, even though such resolution has induced the council to pass the by-law, does not invalidate the by-law.

Re Robertson and Colborne, 8 D.L.R. 149, 4 O.W.N. 274.

A municipality cannot issue a license for the exhibition of wild animals within the municipality where there is an existing by-law of the municipality prohibiting the keeping of wild animals within its boundaries. Before a municipality can establish a claim that a license fee is payable to it, it must shew that it had intended to make such claim either by the production of the collector's roll, or by evidence of a demand upon the defendant for the amount or a notice to him that it would be exacted.

Saanich v. French, 8 D.L.R. 637, 3 W.W.R. 270.

LOCAL IMPROVEMENT ACT—ASSESSMENTS.

The general scheme of the Local Improvement Act, R.S.O. 1914, c. 193, is to authorize the council to undertake a work, then to execute it, then to procure an assessment roll to be made for imposing the tax; the latter follows automatically on the work being authoritatively undertaken and fully executed, and there is no appeal except that provided from the Court of Revision.

Re Kemp and Toronto, 21 D.L.R. 833, 7 O.W.N. 704.

VALIDITY OF BY-LAW—APPROVAL OF RAILWAY AND MUNICIPAL BOARD.

In order that the validity of a municipal money by-law shall not be open to question in any court, under the Municipal Act, R.S.O. 1914, c. 192, s. 295, by reason of the approval thereof by the Ontario Railway and Municipal Board, such approval must remain effective when the proceedings in which the by-law is attacked come on to be heard; the court will have jurisdiction to quash where the Board's approval order existing when the notice of motion to quash was served was afterwards withdrawn by the Board.

Re Harper and East Flamborough, 22 D.L.R. 547, 32 O.L.R. 490.

MODE OF ACQUIRING LAND—STATUTES—REPEAL BY IMPLICATION.

So far as the purchase and acquisition of real property are concerned, s. 5 of 1915, c. 46, amending the Municipal Act (B.C.), 1914, c. 52, as to the necessity of the assent of the electors, is incompatible with the powers under the by-laws conferred by subs. 155 of s. 54 of the Act of 1914, and therefore, to this extent, the latter must be deemed to have been repealed by implication.

Meldrum v. Black, 27 D.L.R. 193, 34 W.L.R. 314, 22 B.C.R. 574, 10 W.W.R. 519.

Where a municipal corporation by its municipal council has determined on the course to be taken in connection with pending litigation, that determination binds all the ratepayers, because the voice of the council is the voice of the municipality which, under the Ontario municipal system, is represented by its council and municipal action or inaction must be determined thereby.

Stoddart v. Owen Sound, 7 D.L.R. 377, 4 O.W.N. 171.

There is no provision of law compelling a municipal council to submit a by-law to the electors for the repeal of a local option by-law in respect of the sale of intoxicating liquors.

Stoddart v. Owen Sound, 8 D.L.R. 932, 27 O.L.R. 221.

BY-LAW—NOTICE OF MEETING—REPEAL BY RESOLUTION.

A failure to serve notice of meeting upon a member of a municipal council invalidates a by-law passed thereat; such by-law cannot be repealed by a resolution.

Loiselle v. Temiscaming, 33 D.L.R. 686, 50 Que. S.C. 387.

INDICTABLE OFFENCES—ULTRA VIRES.

A municipal by-law attempting to deal with and impose punishment for an indictable offence already dealt with by the Cr. Code is ultra vires.

The King v. Lorette, 43 D.L.R. 129, 30 Can. Cr. Cas. 238, 29 Man. L.R. 123, [1918] 3 W.W.R. 324.

PROTECTION AGAINST FIRE—ACCIDENT.

A by-law of the city of Vancouver and the legislative authority to make it "for causing all lands, buildings, and yards to be put in other respects in a safe condition to guard against fire and other dangerous risk and accident" (Vancouver Incorporation Act (1886, c. 32, s. 142, ss. 54 as amended by 1887, c. 37, s. 17) and by-law 941, s. 37, in part as follows: "Shall have all public halls, stairways and passageways properly lighted," must be considered only with reference to fire protection and cannot

be invoked in case of an accident, not being referable to a fire.

McKinlay v. Mutual Life Ass'ce Co., 43 D.L.R. 259, 26 B.C.R. 5 at p. 15, [1918] 3 W.W.R. 1002.

REGULATION OF JITNEYS—REASONABLENESS—INJUNCTION—QUASHING.

An injunction refused restraining the defendant city, until after the trial of an action to quash the by-law prohibiting "jitneys" from continuing the prosecution of the plaintiff's drivers for violations of such by-law [Preston v. Luck, 27 Ch. D. 497, applied]. A municipal by-law is not unreasonable merely because particular judges may think that it goes further than is prudent or necessary or convenient, or because it is not accompanied by a qualification or an exception which some judges may think ought to be there. [Montreal v. Beauvais, 42 Can. S.C.R. 211, at p. 218, quoting Kruse v. Johnson, [1898] 2 Q.B. 91, at p. 99, followed.]

Blue Funnel Motor Line v. Vancouver, [1918] 3 W.W.R. 405.

VILLAGE ACT—POWERS AS TO "BUILDING"—FENCE AROUND PARK AND GRANDSTAND—BY-LAW.

Imperial Elevator & Lumber Co. v. Ponteix, 39 D.L.R. 768, [1917] 3 W.W.R. 1087.

EXPROPRIATION—PRESUMPTION AS TO VALIDITY—PRESCRIPTION.

The rule of law omnia praesumuntur rite acta applies to the proceedings of municipal corporations. Where an expropriated party considers that the resolutions of the municipal council ordering to proceed with the expropriation is illegal, and that instead of taking steps to have the resolution annulled, nominates commissioners and joined in the proceedings to fix the indemnity, he cannot, after the award has been determined, take an action in law to have the resolution of the council and the award declared null and void. The direct action to have a resolution of the council of the city of Montreal declared null and set aside is prescribed by 6 months, provided it is adopted in matters within its jurisdiction.

Montreal v. Royal Trust Co., 26 Que. K.B. 557. [Affirmed, 44 D.L.R. 767, 57 Can. S.C.R. 352.]

BY-LAW OF COUNTY CORPORATION—HIGHWAY IMPROVEMENT ACT, R.S.O. 1914, c. 40, s. 26—ONTARIO HIGHWAYS ACT, 1915, 5 GEO. V. c. 17—IMPROVEMENT OF ROADS IN COUNTY—APPOINTMENT OF SUBURBAN AREA COMMISSION—REPORT OR AWARD—ENFORCEMENT OF—ALLEGATION BY CITY CORPORATION OF NONCOMPLIANCE WITH STATUTE—REMEDY—PROHIBITION, INAPPLICABILITY OF EXCEPT IN PLAIN CASE—ACTION FOR INJUNCTION.

Re Windsor and Essex, 14 O.W.N. 313.

REFUSAL OF MAYOR TO SIGN—AGREEMENT—INJUNCTION—RIGHT OF COUNCIL.

Where all the formalities surrounding the passage of a city by-law have been complied with, and all that remains to make the document complete and, on its face, a valid by-law is the signature of the mayor, which under the by-laws governing his office he is required to affix, the city is not entitled, because his signature is withheld, to an injunction restraining action under an agreement approved by such by-law, where the agreement has been acted upon by the other party to it on the faith of the passage of the by-law. Where an agreement with a city which has been approved of by by-law has been acted upon in good faith by the other party to it, the city council cannot, of its own motion, reconsider the by-laws so as to nullify such agreement.

Vancouver v. B.C. Electric R. Co., 26 B.C.R. 162, [1918] 3 W.W.R. 558.

MUNICIPAL COUNCIL—MAYOR—RESIGNATION—SUCCESSOR — VALIDITY OF PROCEEDINGS—ELECTION.

The second part of art. 84, Mun. Code, which states that "the mayor remains in office, even if he ceases to be a member of the council, until his successor is sworn in," does not apply to a case where the mayor has resigned. It only relates to a mayor who is in office at the period when this office legally expires. A motion adopted by a municipal council upon the casting vote of the person presiding over the meeting is void, if such person had no right to preside. Arts. 314 et seq., Mun. Code, only relate to contestations of municipal elections under arts. 245 et seq., and not those by the municipal council itself. In the latter case the contestations fall under arts. 430 et seq.

Darche v. St. Mathias, 24 Rev. Leg. 209, 24 Rev. de Jur. 16.

BY-LAW—PROCÈS VERBAL—AMENDMENT AND REPEAL—DISCRETION.

A municipal council has the right to amend or repeal a by-law by another by-law, or a procès verbal by another procès verbal. In the exercise of this discretionary power the courts cannot intervene unless a grave injustice equivalent to fraud has resulted. There is nothing illegal in a municipal council, the composition of which has been changed by an election, reconsidering the propriety of a measure with the object of conforming to the opinion expressed by the vote of the electors.

St. Leon-le-Grand v. Bauger, 26 Que. K.B. 183.

RESOLUTION OF MUNICIPAL COUNCIL—SLANDEROUS WORDS—ACTION TO STRIKE OUT OF MINUTES.

One who is slandered in a resolution of a municipal council has a right of action against the municipality to have the resolution expunged from the municipal minute book. The municipality cannot claim that the council, in adopting the resolution exceeded its powers and that the municipality is therefore not liable. [Vallieres v. St. Henri, 14 Que. K.B. 16, and Patoine v. Arthabasca, 4 D.C.A. 364, followed.]

Galienne v. Letellier, 23 Que. K.B. 69.

RESOLUTION OF MUNICIPAL COUNCIL—IRREGULARITY—TIME LIMIT.

An application to annul a resolution of a municipal council on the ground of irregularity or illegality, without alleging special injury to the plaintiff, must be made within the time prescribed by arts. 100 and 708 Mun. Code. [Patoine v. Arthabasca County, 14 D.C.A. 364, followed.]

Galienne v. Letellier, 23 Que. K.B. 75.

QUORUM.

Where a city charter provides that a majority of the members of the council shall be present for the transaction of business, a majority of the members when present in the regular manner for the transaction of business constitute the council for whatsoever business is within the ordinary scope of its authority, and a vote of the majority thereupon is a vote of the council.

Strathcona v. Edmonton & Strathcona Land Syndicate, 3 A.L.R. 259.

MONEY BY-LAW PASSED BY VILLAGE COUNCIL FOR ERECTION OF SCHOOL-HOUSE—MOTION TO QUASH—MUNICIPAL ACT, R.S. O. 1914, c. 192, s. 258—BY-LAW NOT SIGNED BY REEVE—REMEDY BY MANDAMUS—COST OF SCHOOL-HOUSE—APPORTIONMENT—POWER OF COURT TO INTERFERE.

Re Davis and Creemore, 11 O.W.N. 217.

FENCING PARK—"BUILDING"—GRANDSTAND—TICKET OFFICE.

The expenses of the erection of a fence surrounding a public park can be defrayed by a village council without the necessity of a by-law. A grandstand is not a "building" within the meaning of s. 145 of the Village Act, R.S.S. 1909, c. 86, as amended in 1915, c. 18, but a ticket office is.

Imperial Elevator & Lumber Co. v. Ponteix, [1917] 1 W.W.R. 1211. [Affirmed 39 D.L.R. 768, 10 S.L.R. 395, [1917] 3 W.W.R. 1087.

BUILDING BY-LAW — DANGEROUS CONSTRUCTIONS—CONDITION PRECEDENT—NOTICE—ORDER TO REPAIR—DEMOLITION OF STRUCTURE.

Riopelle v. Montreal, 44 Can. S.C.R. 579.

MUNICIPAL BY-LAW FOR THE SUPPRESSION OF INSULTING AND PROVOKING LANGUAGE—LABOUR STRIKE—MEANING OF WORD "SCAB."

R. v. Elderman, 9 E.L.R. 459.

MUNICIPAL CORPORATION — BY-LAW — APPOINTMENT OF MAYOR.

Lemire v. Faucher, 40 Que. S.C. 363.

BY-LAW REGULATING TRADE—POWER TO REGULATE DOES NOT INCLUDE POWER TO PROHIBIT.

French v. North Saanich, 16 B.C.R. 106.

(§ II C—51)—NOTICE OF MEETING—ADJOURNED MEETING.

By the terms of art. 931a Mun. Code, a county council cannot take into consideration an application for an appeal, unless a public notice to make known the day and the hour of the session when the application will be proceeded with, is given by the secretary-treasurer or by the commissioner of the municipality. This public notice should be published at least 7 days before the day fixed for the session during which the examination of the application will take place. When an application for an appeal is filed in the office of the council on a date approaching one of the next regular meetings of the council, and which public notice of 7 days, as above mentioned, cannot be given, the council in such a case, must order a public notice and to call a special meeting for the purpose of considering such an application, and such a special meeting is then properly held, when it is called and held within 30 days from the date the application was filed in the office of the council. In addition to the notice published in the municipality, art. 931a requires a special notice to mayors and members of the council to call them to such a special session. Such notice should be given by a registered letter, at least 10 days before the time fixed for holding of the session. Under art. 224 each special notice must be drawn up or given in the language of the person to whom it is addressed, but when the special notice is addressed or given to a person who speaks both languages, French and English, such notice may be given to him in either language. In absence of evidence as to which language is the right one of the councilmen or mayors not present at the special session, the only presumption which may be inferred from the fact that the names may be English names, is not sufficient to decide that such persons use the English language, because such a presumption is not authorized by the Code, and it is an established fact, that person with an English name speaks French, and he may speak both. Two sessions of a municipal council, before and after noon of the same day, do not constitute one meeting, when it does not appear as a fact that they simply adjourned for the purpose of having dinner.

Ste-Foye v. Quebec, 18 Rev. de Jur. 99.

(§ II C—53)—AMENDMENT.

The power given to the common council of the city of Montreal, by the city charter, to amend by a two-thirds vote a report from the Board of Control respecting the expenditure of money authorizes the amendment to a report, approving of the lowest tender put in for furnishing supplies, by substituting the name of a higher tenderer at the price of the one approved.

West v. Montreal, 21 Que. K.B. 289.

(§ II C—54)—ORDINANCES AND BY-LAWS—FRANCHISE—REPEAL.

Cunningham v. New Westminster, 14 D.L.R. 918, 18 B.C.R. 188.

TEMPERANCE ACT—BY-LAW REPEALING ANTI-PROHIBITION BY-LAW DECLARED LEGAL.

Pelland v. Joliette, 25 Rev. de Jur. 246.

(§ II C—55)—ENACTMENT—ENTITLING—PUBLICATION.

When a by-law is prescribed by the statute as the method by which a municipal corporation may exercise the power of closing a highway, such power can only be exercised in that way and effect cannot be given to a mere resolution of the municipal council.

Re Bassano, 7 D.L.R. 601, 3 W.W.R. 189.

BY-LAW AGAINST DRUNKENNESS IN PUBLIC PLACES—REMEDYING OMISSION TO AFFIX SEAL—CONVICTION FOR OFFENCE PRIOR TO SEALING.

Because of the validating provisions of the Ontario Municipal Act, 1913, s. 258 (3), R.S.O. 1914, c. 192, 258 (3), in respect of municipal by-laws which were not duly sealed when passed, a summary conviction under an unsealed municipal by-law cannot be quashed, although the by-law was sealed only after objection taken before the magistrate at the hearing of the charge, as the effect of the statute is to permit the sealing to relate back to the date of passing the by-law.

R. v. Faux, 17 D.L.R. 718, 23 Can. Cr. Cas. 75, 6 O.W.N. 663.

BY-LAWS — RESOLUTIONS — "QUESTIONS"—VALIDITY — THREE READINGS — ENACTMENT.

A proviso in a city charter that no "question" once decided by the city council shall be reversed without notice from at least one meeting to another, will apply to invalidate a by-law which was given its third reading at the session of its introduction which could only be done on a suspension of the rules of order, when the motion to suspend had carried only after a like motion had been lost, the vote on the lost motion to suspend being upon a "question" within the meaning of the restriction in the charter.

Reaman v. Winnipeg, 20 D.L.R. 226, 24 Man. L.R. 567, 27 W.L.R. 807, 6 W.W.R. 576, affirming 17 D.L.R. 582, 6 W.W.R. 1329.

MUNICIPAL BY-LAW AND ASSESSMENT WITH STATUTORY PROVISIONS—STRICT COMPLIANCE WITH STATUTE—LOCAL IMPROVEMENT ACT—PUBLICATION.

Where a municipal by-law and an assessment under it purport to be made in pursuance of a statute, the statutory provisions must be strictly complied with "in the sense that nonobservance of any of them is fatal." A prerequisite to the valid passing of a by-law under the Local Improvement Act (R.S.O. 1914, c. 193) is publication of the council's intention under s. 11.

Fleming v. Sandwich, 46 D.L.R. 613, 44 O.L.R. 514.

Under the Liquor License Act (Sask.), the council of the district prepared for submission a local option by-law. Notice of intention to submit the by-law (published in the proper paper on Nov. 10, 17 and 20, and Dec. 1, voting being fixed for Dec. 12), is sufficient under the Act. The notice sufficiently complied with the Act in indicating the office of the secretary-treasurer as the place where the by-lay might be inspected, and the council chamber as the place where the by-law would be finally considered, without specifically stating the location of such places. The word "passed" where used in the Act, referring to the passing of the local option by-law by the council, refers to the final motion of the council in enacting the by-law and has no reference to any signing or sealing of the same. The omission of the officials of the district to sign and affix the seal to the by-law in question within the time limited for passing it, the by-law having been duly passed by the council, did not in any way invalidate it.

Re Local Improvement District No. 189, 4 S.L.R. 522.

MUNICIPAL LAW—ACTION FOR ANNULMENT—RESOLUTION—PROPOSAL OF A COUNCILOR SECONDED BY THE MAYOR—PROHIBITION OF BILLIARD ROOMS—ABSENCE OF PREJUDICE—INTEREST—C MUN., ART. 14—5 GEO. V., [1915] c.

In meetings of a municipal council a motion by a councilor need not necessarily be seconded before being put to a vote and adopted as a resolution of the council. The fact that it was seconded by the mayor does not affect its validity. Except in the cities of Quebec and Montreal, the Act only authorizes the licensing of billiard tables, upon a resolution approved by the local municipal council, therefore a rate payer has no right to demand the rescinding of a resolution which, in place of refusing the application for a permit, made to the council, restricts itself to declaring that billiard saloons shall be prohibited within the limits of the municipality for one year.

Bélanger v. Beauport, 55 Que. S.C. 8.

(§ II C—56)—APPROVAL OR DISAPPROVAL OF MAYOR.

The affixing of a schedule read at the meeting at which a by-law is passed, and the signing and sealing of the by-law, need not be done at the meeting; they are matters of routine only and can be done by the proper officers at a later date.

Re Robertson and Colborne, 8 D.L.R. 149, 4 O.W.N. 274, 23 O.W.R. 325.

(§ II C—59)—PROMULGATION OF BY-LAWS—QUASHING—ACTION.

There is nothing in the Winnipeg Charter 1-2 Edw. VII. c. 77 making promulgation by publication in a newspaper or otherwise essential to the validity of any by-law and, under s. 527, no application to quash a by-law can be entertained unless made within one year from the passing of it, notwithstanding that it is made within 2 weeks after the promulgation provided for by s. 524. The provisions as to promulgation and moving to quash thereafter are merely intended to enable the city to greatly abridge the time within which an application might be made to quash a by-law imposing a rate.

An action for a declaration that a by-law is illegal and to restrain the municipality from enforcing it is not the kind of action referred to in s. 532 of the charter, and will lie although the by-law has not been quashed or repealed and no notice of the action has been given. [Rose v. Wawanash, 19 O.R. 294, followed.] A delay of five months after the plaintiff became aware of the effect of the by-law complained of is not sufficient to debar him from bringing such an action. The fact that the city had sold the debentures issued for the cost of the extension of the street is no bar to granting the plaintiff relief in such an action.

McPherson v. Winnipeg, 27 Man. L.R. 450, [1917] 2 W.W.R. 197.

PUBLICATION.

By the Liquor License Act the provisions of the Rural Municipalities Act as to quashing by-laws are made applicable to local option by-laws; but this does not make the procedure of the Controverted Municipal Election Act applicable; that Act applying only where an election is contested or a vote questioned and not where a by-law is attacked for irregularity. Where a District Court Judge is acting as persona designata in the proceedings, the rules of court do not apply, and no provision having been made as to how service should be effected the head officer of the municipality, e.g., the reeve, is the only person who can be served. The reeve being the proper person to be served the municipality was not served with the notice or material in support thereof, within the time limited, but, by appearing on the return day and making application for an adjournment which was granted, giving the municipality ample time to meet the applicant's case, the irregularity was waived.

Re Devitt and Usborne, 4 S.L.R. 479.

MONEY BY-LAW—MUNICIPAL ACT, SS. 8 (o), 263 (5)—NECESSARY PUBLICATION OF BY-LAW—NONCOMPLIANCE WITH DIRECTION OF STATUTE—RESULT NOT AFFECTED—SAVING ENACTMENT, S. 150—OBJECT OF BY-LAW — IMPROVEMENT OF HIGHWAYS AND ERECTION OF BRIDGE—SUBMISSION TO ELECTORS—TWO SUMS TO BE RAISED UPON ONE BY-LAW.

Re Poulin and L'Orignal, 13 O.W.N. 374.

(§ II C—60)—BY-LAW CONSENTING TO SPECIAL PRIVILEGE OR FRANCHISE CONFERRED BY LEGISLATURE.

A municipal by-law directing the execution of an agreement between the municipality of Point Grey and an electric railway company consenting to the construction of a tramway on certain streets of the municipality and also imposing terms on which cars should be operated, does not confer such a particular privilege, right or franchise as to require the submisson of the by-law to the ratepayers for approval under s. 64 of the Municipal Clauses Act, (B.C.) 1906, where the railway company was empowered by c. 55, B.C. 1896, to construct and operate a tramway in that and other municipalities subject to the consent of the municipal council being first obtained and to the latter's designation of the streets upon which the tramway should be built, although the permission of the municipal council was further specified by statute to be upon such conditions as to plan of construction and for such period as might be agreed upon between the company and the council; the purpose of the proviso requiring the consent of the municipality is restrictive and not donative in character, and its function is to circumscribe, or impose conditions upon the exercise of the rights already conferred by the legislature.

B.C. Electric R. Co. v. Stewart, 14 D.L.R. 8, [1913] A.C. 816, 25 W.L.R. 227, 5 W.W.R. 25, reversing 16 B.C.R. 374, sub nom. Re Point Grey.

ELECTRIC TRAMWAY BY-LAW.

A ratepayer in a municipality which passes a by-law purporting to bind lands in an adjoining municipality has no status to object to the by-law on that ground.

Re Robertson and Colborne, 8 D.L.R. 149, 4 O.W.N. 274.

MOTION TO QUASH BY-LAW — PROCEDURE — WINNIPEG CHARTER.

Section 526 of the Winnipeg charter, 1902, c. 77, (Man.) as to the procedure on moving to quash a by-law is controlled by the later provisions of the King's Bench Act, R.S.M. 1913, c. 46, s. 85, and the proceeding may be begun by notice of motion. [Re Peck and Ameliasburgh, 12 P.R. (Ont.), 664; Re Colemutt and Colchester North, 13 P.R. (Ont.) 253, applied.]

Reaman v. Winnipeg, 17 D.L.R. 582, 24 Man. L.R. 567, 27 W.L.R. 807, 6 W.W.R. 576.

BY-LAWS—EXTENT OF POWER—DISCRETION WITHIN STATUTORY LIMITATIONS.

Re Coleman and McCallum, 12 D.L.R. 140, 24 O.W.R. 754, reversing 11 D.L.R. 138.

BONUS — BUSINESS "ESTABLISHED ELSEWHERE IN ONTARIO"—BY-LAW—VALIDITY.

It is not legal for a municipality to bonus an industry already existing elsewhere in Ontario. Whether a particular business is one "established elsewhere in Ontario," within the meaning of s. 396 (c) of the Municipal Act (R.S.O. 1914, c. 192) is a question of fact.

Re Alliston and Trenton, 35 D.L.R. 128, 38 O.L.R. 579, affirming 34 D.L.R. 294, 38 O.L.R. 341.

ATTACKING BY-LAW—INTEREST OF RATEPAYER.

Under the charter of the city of Montreal, a municipal resolution may be attacked by petition to the same extent as a by-law; but a contract or franchise approved thereby cannot be attacked by such procedure. A ratepayer without any other special interest has no legal status to launch such attack. [Robertson v. Montreal, 26 D.L.R.

228, 52 Can. S.C.R. 30, affirming 23 Que. K.B. 338, followed.]

Shepherd v. Montreal, 36 D.L.R. 437, 52 Que. S.C. 16.

Where legal proceedings are taken to set aside or declare invalid a proceeding taken by a municipal council in alleged exercise of its statutory powers, the party called upon to defend the impeached proceedings is entitled ex debito justitiae to notice of the grounds of attack in due time to prepare the defence.

Re St. Boniface By-law, 1 D.L.R. 221, 19 W.L.R. 943, 22 Man. L.R. 27, 1 W.W.R. 759. [See 1 D.L.R. 366, 22 Man. L.R. 733, 1 W.W.R. 844.]

Where a city charter makes provision for a judicial inquiry as to the probable grounds for a motion to quash a by-law of the municipality, the order for an inquiry may be made upon an affidavit of information and belief, if it seems likely that facts will be elicited on the inquiry bearing upon the facts alleged.

Re St. Boniface By-law, 1 D.L.R. 366, 20 W.L.R. 332, 22 Man. L.R. 733, 1 W.W.R. 844. [See 1 D.L.R. 221, 22 Man. L.R. 27, 1 W.W.R. 759.]

BY-LAW—PUBLIC LIBRARY SITE.

Re McKenzie and Teeswater, 16 D.L.R. 865, 6 O.W.N. 32.

BY-LAW—SUBMISSION OF WATER SCHEME—UNAUTHORIZED QUESTION TO BE VOTED UPON BY THE ELECTORS.

Re Gaulin and Ottawa, 16 D.L.R. 865, 6 O.W.N. 30.

BY-LAWS—WATERWORKS BY-LAW—EXPENDITURE OF MONEY.

Re Clarey and Ottawa, 16 D.L.R. 876, 6 O.W.N. 116.

LOAN BY-LAW—HOTEL ACT, 1915, S. 33—PROCEEDINGS TO QUASH—STYLE—PARTIES.

Craig v. Qu'Appelle, 36 D.L.R. 593, 10 S. L.R. 307, [1917] 3 W.W.R. 176.

CRIMINAL MATTER—DOMINION STATUTE—ULTRA VIRES.

When the Parliament of Canada, in exercise of its power to legislate in regard to criminal matters, has prohibited the doing of a certain act, a municipal by-law attempting to prohibit the same act is ultra vires.

Drapeau v. Recorder's Court, 43 D.L.R. 309, 27 Que. K.B. 500, 30 D.L.R. 249, reversing 52 Que. S.C. 505.

BY-LAW OF TOWN—SANITARY REQUIREMENTS—MUNICIPAL ACT, S. 500—PORTIONS OF BY-LAW EXCEEDING POWERS OF MUNICIPALITY—DISTINCT AND SEPARATE CLAUSES—QUASHING PART OF BY-LAW—COSTS.

Re Taylor and Port Stanley, 14 O.W.N. 108.

BY-LAW TO PROVIDE MONEY FOR ERECTION OF HIGH SCOOL BUILDING—REQUISITION BY BOARD OF EDUCATION—DISAPPROVAL BY MUNICIPAL COUNCIL—SUBMISSION TO AND DISAPPROVAL BY ELECTORS—FRESH REQUISITION—APPROVAL BY COUNCIL—RIGHT OF COUNCIL TO RECONSIDER—MOTION TO QUASH BY-LAW—REQUISITIONS NOT ABSOLUTELY IDENTICAL—HIGH SCHOOLS ACT, R.S.O. 1914, c. 268, s. 38.

Re Garrett and Barrie, 14 O.W.N. 194.

INVALIDITY OF BY-LAW—BONUS TO INDUSTRIES—COUNCILLORS INTERESTED.

A municipal by-law for the purpose of granting a bonus to an industrial undertaking, adopted at a council meeting where the quorum is five members, is illegal and void if two of the councillors who have voted for the measure are personally interested in obtaining such bonus. A by-law adopted under such conditions is ultra vires and may be contested by any municipal elector in his individual capacity.

Daveluyville v. Beaumier, 27 Que. K.B. 23.

INTEREST OF PERSON ATTACKING BY-LAW—RESOLUTION — REMEDIES — DIRECT ACTION.

The capacity of citizen, taxpayer, elector and property owner, of the city of Montreal, is not an interest sufficient to entitle him to apply for the rescission of resolutions which do not specially affect him. One having the capacity to do so, can proceed under art. 978, C.C.P., without having recourse to a direct action, which is only taken in the absence of any other remedy. Art. 304 of the Montreal charter, which allows a taxpayer to attack a by-law adopted by the municipal council, does not thereby give him the right to attack a resolution which is simply an act of routine administration. It is not the duty of courts to seek for the motives which might have inspired the acts complained of.

Menard v. Montreal, 20 Que. P.R. 31.

ANNULMENT OF PROCEEDINGS—RESOLUTIONS—CONTRACT—FORM OF ACTION—INTEREST OF PARTY.

An application to annul resolutions passed by the municipal council of Montreal, and to void a contract made under such resolutions, should be by action and not by petition. The capacity of taxpayer and elector of the city of Montreal, without special interest distinct from that of such persons collectively, does not permit an application to annul resolutions of the municipal council or to void a contract made to carry them out.

Rourke v. Montreal, 20 Que. P.R. 89.

VALIDITY OF BY-LAW—SPECIAL CHARTER—AMENDMENT—TAXES.

Canada Investment v. Scotstown, 24 Rev. de Jur. 129.

LAND ENTERED UPON AND EXCAVATED FOR SEWER — DRAINAGE SYSTEM — BY-LAW PASSED IN 1913—INTRA VIRES—MUNICIPAL ACT, 1903, SS. 2 (8), 554—EXPROPRIATION OF "EASEMENT"—COMPENSATION—DAMAGES.

On Feb. 10, 1913, the council of the defendants, a city corporation, passed a by-law which, after reciting that it had become necessary to acquire an easement over certain lands described "for the right of way of the . . . drainage system," authorized the city engineer to proceed with the construction of sewers across the lands described, to enter upon the lands, etc.:—Held, that, under s. 554 of the Municipal Act of 1903, 3 Edw. VII. c. 19, which was the Act in force when the by-law was passed, and s. 2 (8) of that Act, which interpreted "land" as including "lands, tenements and hereditaments, and any interest or estate therein, or right or easement affecting the same," the council had power to pass the by-law. The right to construct the sewer upon the land of another was not in strictness an easement, but an hereditament. The intention of the statute, however, as shewn by Re Davis and City of Toronto, 21 O.R. 243, decided under the Municipal Act in force in 1891, R.S.O. 1887, c. 184, and by the amendment made in 1892, 55 Vict. c. 43, s. 1, embodied in s. 2 (8) of the Act of 1903, was to enable a municipality to take the right to construct a sewer through land without taking the land itself; and there was no reason why a municipality should be compelled to acquire absolute title to the lands through which the sewers were to pass. In an action for trespass, for an injunction, and other relief, brought by one of the persons whose land was entered upon and broken up by the defendants, in pursuance of the by-law, it was declared that the by-law was intra vires the defendants and that the plaintiff was entitled to compensation, to be determined under the Municipal Act, for all that was authorized by the by-law, and to damages for anything done beyond what was authorized.

Snow v. Toronto, 44 O.L.R. 623.

URBAN MUNICIPALITY — APPLICATION OF SCHOOL BOARD TO COUNCIL FOR SUM FOR PURCHASE OF SITE AND ERECTION OF SCHOOL — SUBMISSION TO ELECTORS — VOTE NEGATIVING APPLICATION—RENEWAL OF APPLICATION—REFUSAL TO PASS BY-LAW—RESOLUTION OF COUNCIL AUTHORIZING SUBMISSION TO ELECTORS OF ORIGINAL QUESTION AND TWO ADDITIONAL QUESTIONS—DUTY OF COUNCIL UNDER S. 43 OF PUBLIC SCHOOLS ACT, R.S.O. 1914, C. 266—MUNICIPAL ACT, R.S.O. 1914, C. 192, S. 398 (10)—QUESTION SPECIFICALLY AUTHORIZED—INJUNCTION RESTRAINING SUBMISSION OF ADDITIONAL QUESTIONS.

The school board of a town, under the authority of the Public Schools Act, R.S.O. 1914, c. 266, s. 43 (1), made an application to the town council to pass a by-law for borrowing $30,000 for the purpose of purchasing a new site and erecting a new schoolhouse. The council refused to pass such a by-law, but submitted the proposal to the vote of the qualified electors, under s. 43 (3). Out of an electorate of 900, only 189 voted, and of these 110 were unfavourable to the proposal. The vote was taken in the summer of 1918. In November, 1918, the board again asked the council to pass a by-law for the same purpose or to submit the proposal to the electors at the municipal election in January, 1919. The council again refused to pass a by-law, but resolved to submit questions to the electors—not only the question which the board wished to have submitted, viz., "Are you in favour of school and site to cost $30,000?" but also, "Are you in favour of school on old site to cost $23,000?" and, "Are you opposed to new school?" An action having been brought by the school board to restrain the defendants from submitting the two additional questions, it was held, upon a motion for an interim injunction, that it was the duty of the council, on the application being renewed by the board, either to pass a by-law under s. 43 (1) or to submit the question again to the vote of the electors, and to submit it simpliciter, without the additional questions, which might tend to confuse the minds of the electors and prevent a proper vote on the one question involved in the application of the board. Held, also, that the real question which the council should submit to the electors was specifically authorized to be submitted to them, and s. 398 (10) of the Municipal Act, R.S.O. 1914, c. 192, did not apply. [Re Gaulin and Ottawa, 6 O.W.N. 30, 16 D.L.R. 865, and Gaulin v. Ottawa, 6 O.W.N. 38, followed.] An injunction was granted.

Burlington Public School Board v. Burlington, 44 O.L.R. 561.

MUNICIPAL LAW—VALUATION ROLL—QUASHING—JURISDICTION—ENTRY IN LAW—C.C.P., ART. 191—C. MUN., ART. 430, 433.

The recourse given by the Cities and Towns Act against a valuation roll is not limited, and the Supreme Court has jurisdiction to annul a valuation roll, when in its entirety, it is made on an illegal basis. The following allegations forming part of the declaration of an action commenced to declare void 2 by-laws and a valuation roll are relevant to the action and cannot be taken away under an entry in law, namely: "16 The council of the said defendant corporation has pretended to adopt and to have approved by the municipal elections, the said by-laws Nos. 52 and 53 in basing itself on the municipal valuation roll then in force, which is altogether irregular, illegal and void, in as far as the said valuation roll was made, prepared and approved irregularly and illegally, whereas the said defendant corporation was bound to make or has made

the said valuation roll, including or having included therein the true value of lands of the said municipality, subject to municipal tax and on the contrary, illegally and fraudulently, said valuation is too high and fictitious and does not at all represent the value of said lands to such an extent that by the decisions recently rendered by the courts of this district, the valuations made at $6,000 and $3,000 per acre have been reduced to $500, showing that it was greatly exaggerated. The whole system adopted by the council of the defendant corporation in so far as its valuation roll is concerned, is wrongful, illegal and void, the said valuations carried upon the said roll are exaggerated and raised too high, illegally and fraudulently, for the illegal object of leading to mistake and deceive the holders of debentures and creditors of said defendant corporation, and the said valuation roll pretended to be in force is radically void, has no real value, and all proceedings and procedures adopted for the vote on approval of said by-laws Nos. 52, and 53, based on such valuation roll, are in consequence irregular and void, and should be annulled."

Northern Lands Co. v. The Town of St. Michel, 28 Que. K.B. 378.

QUASHING—INTEREST OF RATEPAYER.

Every ratepayer whose interests are affected, may demand the quashing of a municipal by-law before its coming into force when the corporation attempts to enforce it without complying with the formalities essential to give it force and effect.

Morrissette v. Tremblay, 51 Que. S.C. 474.

Ratepayers called upon by municipal by-law to pay a tax have a sufficient interest to apply for the repeal of the by-law in a common law action after the expiration of the delay during which they could exercise the recourse given by art. 100 Mun. Code.

Matthieu v. St. Francois, 26 Que. K.B. 411.

A direct action founded upon fraud to have a municipal resolution quashed can, like that based upon excess of power or injustice, be brought by a municipal elector or by any person directly interested, provided that it be brought within a reasonable delay after the discovery of the fraud.

Prevost v. Montreal, 52 Que. S.C. 349.

HIGHWAY — MUNICIPAL BY-LAW CLOSING STREET—MOTION TO QUASH—NO PROVISION FOR COMPENSATION — MUNICIPAL ACT, S. 632 (1)—NOTICE UNDER—UNNECESSARY BY-LAW — DAMAGES — SUGGESTED ASSESSMENT OF, BY ARBITRATION —ORDER OF RAILWAY BOARD.

Re Seguin and Hawkesbury, 4 O.W.N. 521, 23 O.W.R. 857.

BONUS IN AID OF INDUSTRY ESTABLISHED ELSEWHERE—MUNICIPAL ACT, 1913, S. 396 (c)—BRANCH BUSINESS TO BE ESTABLISHED IN BONUSING MUNICIPALITY —BY-LAW—ORDER QUASHING.

Re Wolfenden and Grimsby, 5 O.W.N. 901.

BY-LAWS—MOTION TO QUASH—MUNICIPAL WORKS — PAYMENT TO CONTRACTORS — DELAY—DISCRETION—MALA FIDES OF APPLICANT.

Re Marchand and Tilbury, 13 O.W.N. 14. [Affirmed 13 O.W.N. 45.]

BY-LAW AUTHORIZING CONSTRUCTION OF SEWER—ILLEGALITY—POWERS OF COUNCIL—EXTRA-TERRITORIAL OPERATION — BENEFIT OF SUBURBAN AREA—PUBLIC POLICY —PUBLIC HEALTH ACT—LOCAL IMPROVEMENT ACT—NOTICE OF INTENTION TO PASS BY-LAW—INSUFFICIENCY—MALA FIDES—ULTERIOR PURPOSE—ULTRA VIRES.

Hatton v. Peterborough, 16 O.W.N. 191.

MUNICIPAL CORPORATIONS—CITY BY-LAW APPOINTING HOUSING COMMISSION AND AUTHORIZING BORROWING OF MONEY FOR PURPOSES THEREOF—MOTION TO QUASH —ONTARIO HOUSING ACT, 1919—FAILURE TO PASS BY-LAW APPLYING ACT TO MUNICIPALITY — URGENT NEED FOR HOUSE ACCOMMODATION — BY-LAW PASSED IN CONTEMPLATION OF SPECIAL ACT TO BE OBTAINED—STATUS OF APPLICANT—SPECIAL DAMAGE NOT SHEWN—UNUSUAL CONDITIONS—LARGE EXPENDITURE—MUNICIPAL ACT, S. 250—DELAY IN MOVING—DISCRETION OF COURT—ADJOURNMENT OF MOTION UNTIL AFTER NEXT SESSION OF LEGISLATURE—COSTS.

Re Lake and Toronto, 16 O.W.N. 386-387.

(§ II C—61)—BY-LAW FOR ACQUIRING LAND—INVALID IN PART.

A municipal by-law passed for the purpose of purchasing certain properties for street widening and the erection of a fire hall, which has not received the assent of the electors as required by the Municipal Act (B.C. 1914, c. 52, s. 54, as amended by 1915, c. 46, s. 5), even if operative under the Act as to one of the purposes but incapable of segregation from the general scheme, it fails as a whole, and should be quashed.

Meldrum v. Black, 27 D.L.R. 193, 34 W.L.R. 314, 22 B.C.R. 574, 10 W.W.R. 519.

BY-LAW—INVALIDITY IN PART.

A by-law or resolution of a municipal council may be valid in part and void as to the rest if the valid portion is distinct from, and has no connection with, that which is void. Otherwise, the nullity of one part makes the whole void. For example, where the highway committee of a municipality had approved of the prices of contracts for supplying material for gutters for a sidewalk and for certain work to be done in laying asphalt, and the council had ratified their act, and passed a resolution adopting a report of the Finance Committee recommending a modification of the contracts by requiring a specified portion of the work to be done by the municipality by day work, which resolution is void for want of a two thirds majority. A resolution repealing the latter annuls the whole of the above contracts.

Brunet v. Montreal, 22 Que. K.B. 188.

(§ II C—62) — By-laws — Validity — Quashing—Divers objects, when fatal.

A city by-law which provides for the raising of a certain sum of money for the purpose of building certain specific bridges in the city is a by-law which authorizes the borrowing of money to accomplish more than one object, and is, therefore, illegal unless it can be shewn that the money was asked for to carry into effect a comprehensive bridge policy, the carrying out of each detail of which was essential to the success of the scheme as a whole.

Taprell v. Calgary, 10 D.L.R. 656, 5 A.L.R. 377, 23 W.L.R. 498, 3 W.W.R. 987.

License on commercial travelers—Reasonableness.

A summary conviction under a municipal by-law imposing a license tax on commercial travelers selling direct to the consumer will be quashed on certiorari if the court is satisfied by evidence that the license fee sought to be imposed is prohibitive. [R.S. S. c. 84, s. 184 and City Act 1915 (Sask.) c. 16, s. 204, considered.]

R. v. Pierce, 30 D.L.R. 753, 26 Can. Cr. Cas. 140, 9 S.L.R. 89.

By-law—Buildings for designated purpose—Right to prescribe localities—Municipal Act (Ont.) — Reasonable construction.

While the Municipal Act (Ont.) contains no express power to limit the operation of a by-law passed under the authority of s. 541a to a defined area of the municipality, the power conferred, to prevent, regulate and control the location, erection and use of buildings for a designated purpose; reasonably construed, in its very nature carries with it the right to prescribe in what localities they may be located, erected or used and in what localities they may not. A permit by a corporation official to do something prohibited by by-law is of no force or validity.

Toronto v. Solway, 49 D.L.R. 473, 46 O.L.R. 24.

Validity of by-laws passed—Reasonableness—Grounds of invalidation.

Re Dinnick v. McCallum, 11 D.L.R. 509, 28 O.L.R. 52, reversing 5 D.L.R. 843.

By-law—Unauthorized garbage collection—Summary conviction.

A provincial legislature may authorize a city municipality to give the exclusive rights of garbage collection by contract to one person, and to authorize summary conviction proceedings against any other person collecting garbage in the city without its authority.

R. v. Chadderton, 30 Can. Cr. Cas. 142, [1918] 3 W.W.R. 209.

Discrimination.

The recorder of the city of Montreal has no jurisdiction to declare null a municipal by-law or resolution passed by the City Council or by the police commission in a matter which is left to its discretion, on the ground that it is discriminatory and contrary to the public interest; the duty of the recorder is to ascertain if the by-law has been violated, and to decide accordingly without considering any such question.

Donnely v. Semple, 26 Can. Cr. Cas. 63, 49 Que. S.C. 127.

School by-law—Unreasonableness—Not signed by head of municipality—Remedy by mandamus.

Where a municipal council is acting entirely within its statutory powers, the court has no right to interfere. Upon a motion to quash a village by-law authorizing the raising of money for the purpose of erecting a school-house, the court refused to entertain objections that the whole cost should not be charged against the ratepayers of the village, and that the by-law was unreasonable because the cost of the proposed school was excessive. Passing the by-law was a legislative act, and it was not for the court to sit in judgment on the reasonableness of it. That a municipal by-law is not signed by the head of the municipality is not a ground for quashing it. The person whose duty it is, under the Municipal Act, R.S.O. 1914, c. 192, s. 258, to sign and seal a by-law, may be compelled by mandamus to do so.

Re Davis and Creemore, 38 O.L.R. 240.

By-law — Regulation of building — Unreasonableness and discrimination—Quashing of by-law.

A by-law passed by the council of a city corporation in pursuance of a legislative powers, prohibiting the erection of apartment blocks within a certain defined area, should not be held to be unreasonable or discriminating and, therefore, invalid, by reason only that there are already several apartment blocks in the same neighbourhood and the applicant has bought a lot within the area described with the intention of erecting an apartment block thereon or of selling the site to some one who would do so. The discretion of the council bona fide exercised in giving such a by-law three successive readings at one sitting, under a rule of procedure providing that such might be done on urgent and extraordinary occasions, should not be interfered with, and the by-law should not be quashed for irregularity on that account. [Stiles v. Galinski, [1904] 1 K.B. 615, distinguished.]

Re Maycock and Winnipeg, 24 Man. L.R. 646, 29 W.L.R. 182.

Legislative functions—Extent of power—Procès verbal — Reasonableness of.

A procès verbal which imposes on a single ratepayer nearly the whole cost of opening and maintaining a road which is no benefit to him, and which is declared to be a front road for the manifest purpose of so imposing the cost, is unjust and oppressive and should be quashed on proceedings by the ratepayers affected.

St. Louis du Ha Ha v. Thomas, 22 Que. K.B. 303.

(§ II C—63)—By-law—Definiteness—Quasi-expropriation — Building restrictions.

Re Coleman and McCallum, 12 D.L.R. 140, 24 O.W.R. 754, reversing 11 D.L.R. 138.

By-law—Power to pass given by statute—Language of by-law—Authorization.

A by-law containing language which means the same to the ordinary person as the language contained in the authorizing statute, is an effective and enforceable by-law.

R. v. Liggetts-Findlay Drug Stores, 49 D.L.R. 491, [1919] 3 W.W.R. 1025.

Indefiniteness—Sidewalks.

A municipal by-law imposing upon an abutting owner the duty of constructing a cement sidewalk in front of his property, is void and illegal and may be set aside in an action by such owner (a) if it designates the work to be done in a general manner and without precision; (b) if it does not indicate the site or the side of the road upon which it should be made; (c) if it does not mention the street or road on which it is to be built.

Sisters of Charity, etc., of Montreal v. Chateauguay, 52 Que. S.C. 8.

Although a municipal by-law ordering the construction of a cement sidewalk is indefinite as to the exact situation of the sidewalk, if the municipal council executes the work in the best possible manner to give effect to the by-law, the court will not order the demolition of the work on the application of a municipal councillor who himself proposed the adoption of the by-law and who allowed the work to be finished without taking any steps to have it stopped.

Veronneau v. Beloeil, 52 Que. S.C. 180.

(§ II C—66)—Want of jurisdiction.

Vested rights cannot be interfered with by municipal by-laws except where the language of legislation conferring power to enact them clearly discloses such intent. The completion of a building on a certain street, which was begun under a permit from a city, for use as a garage for hire and gain, cannot be prevented by a municipal by-law prohibiting the "location" of structures of that character on such street, which was adopted subsequently to the granting of such permit.

Toronto v. Wheeler, 4 D.L.R. 352, 3 O.W.N. 1424, 22 O.W.R. 326.

Want of jurisdiction.

The city of Toronto has power under s. 6 of its building by-law, No. 4861, to revoke a building permit already given, where the erection of the building in question would be an infringement of such by-law passed under the authority of clause (c) of s. 541a of the Ontario Municipal Act, 1903, as enacted by 2 Geo. V. (Ont.), c. 40, s. 10, if the permit previously granted has not been followed up by acts as constituting a "location" of the building in question, e.g. the actual construction, in whole or in part, of the building for which the permit was granted.

Toronto v. Williams, 8 D.L.R. 299, 4 O.W.N. 58, reversing 5 D.L.R. 659.

Resolution in excess of authority—Defence of ultra vires.

Elliott v. Pictou, 44 N.S.R. 556, 8 E.L.R. 141.

Powers of council—Removal of dangerous building—Nuisance—Notice to owner.

Horne v. Vancouver, 19 W.L.R. 654.

(§ II C—68)—Municipal Law—Action to annul a municipal by-law — Facts subsequent to the putting in force of the new Mun. Code, 1916—Mun. Code, 445, 574.

In an action to annul a municipal by-law, when the facts alleged occurred subsequently to Nov. 1, 1916, the date of the putting into effect of the new Mun. Code, any question arising must be decided according to the new Code. Courts ought not to interfere with legislative acts of municipal councils unless such acts are ultra vires or produce a great and flagrant injustice.

Ste. Cecile v. Beauharnois, 25 Rev. de Jur. 141.

(§ II C—69)—Municipal Drainage Act—Complaint as to drain — Order of council to survey and report—Adoption of report — Ratification — Validity.

Where a complaint is made by a ratepayer as to the repair of a drain, and a request is made to have it repaired as soon as possible, there is nothing in the Municipal Drainage Act to prevent the municipal council from going beyond the complaint in ordering the engineer to make a survey of the drain and report. The adoption of the report which treats the work as a new one is a ratification and equivalent to previous instructions, and a by-law to carry it into effect is valid and should not be quashed.

Re Labute and Tilbury North, 47 D.L.R. 97, 44 O.L.R. 522.

Health by-law—Future date for giving effect.

A by-law passed by a municipality as a provision of public health may legally provide that it shall not become effective until the beginning of the next year after the one in which it was enacted.

Re Shelly, 10 D.L.R. 666, 24 W.L.R. 285, 4 W.W.R. 741.

Resolution of town council to cancel a contract.

Ethier v. Ste. Rose, 39 Que. S.C. 458.

Franchise — Agreement between tramway company and municipality for operation of trams—Necessity for approval of ratepayers.

Re Point Grey Electric Tramway By-law, 16 B.C.R. 374.

MONEY BY-LAW — VOTING — VOTERS' LIST — FREEHOLDERS.

Re Dale and Blanchard, 23 O.L.R. 69, 18 O.W.R. 360.

APPROVAL BY ELECTORS—DEBENTURE BY-LAW POSTING COPIES IN PUBLIC PLACES.

Re Angus and Widdifield, 24 O.L.R. 318, 19 O.W.R. 709.

MONEY BY-LAW—APPROVAL BY ELECTORS—MOTION TO QUASH—CONSENT—JURISDICTION.

Re Angus and Widdifield, 23 O.L.R. 479, 18 O.W.R. 913.

MONEY BY-LAW — CONTRACT IN EXCESS.

Lacroix v. Laframboise, 12 Que. P.R. 119.

(§ II C—70)—FRANCHISE TO OPERATE AUTOBUS LINE — RATEPAYER ATTACKING GRANT.

Where a municipal corporation, presuming to act under a by-law and a special statute and the general powers conferred by the city charter, passed a resolution authorizing the municipality to grant to a stock company the exclusive privilege of operating an autobus line on certain streets of the city, a ratepayer who is also a shareholder in a tramway company which held similar privileges, has no interest entitling him to bring an action against the city unless he has suffered special injury beyond that which is public in its nature and affects all the inhabitants alike.

Robertson v. Montreal, 26 D.L.R. 228, 52 Can. S.C.R. 30, affirming 23 Que. K.B. 338. [Followed in Warner-Quinlan v. Montreal, 27 D.L.R. 540, 25 Que. K.B. 147.]

CLOSING OF HIGHWAYS—POWERS OF MUNICIPAL COUNCIL.

In the case of the closing of a highway the question of what is or is not in the public interest is a matter to be determined by the judgment of the municipal council, and if within the limits of its powers, is not open to review by the court; and a by-law will not therefore be set aside on the ground that it was passed in the interest of a certain person where there is nothing to shew that the action of the council was in bad faith.

Jones v. Tuckersmith, 23 D.L.R. 569, 33 O.L.R. 634. [See 47 D.L.R. 684.]

OPENING OF HIGHWAY—"TRAIL"—VALIDITY OF PROCEDURE.

Section 196 (5) of the Rural Municipalities Act (Alta.), empowering the council of every municipality to pass by-laws for the opening and maintaining of temporary roads, is permissive and not imperative, and permits the exercise of such powers, under s. 185 of the Act, under the power of resolution; nor will such resolution be deemed bad for want of certainty by a mere reference to the opening of an existing "trail" without a more definite description. [Bernardin v. North Dufferin, 19 Can. S.C.R. 581, followed; Young v. Leamington, 8 App. Cas. 517; Waterous v. Palmerston, 21 Can. S.C.R. 556, distinguished.]

Blomfield v. Starland, 25 D.L.R. 43, 9 A.L.R. 203, 32 W.L.R. 905, 9 W.W.R. 552, affirming 21 D.L.R. 859, 31 W.L.R. 573.

MUNICIPAL LAW—A REPORT OUGHT TO INDICATE WORK DONE AND DELAYS IN WHICH IT OUGHT TO HAVE BEEN DONE—MUN. CODE, ARTS. 579, 577, 52 AND 594; 518 AND 574 — SPECIAL INTEREST IN DEMANDING THE ANNULMENT OF THE CONTRACT.

The provisions of the law that procès verbal ought to indicate clearly the work to be done and the time in which it ought to be done, are imperative and the procès verbal is void if such provisions are not followed. Where the evidence showed that the plaintiff suffered considerable prejudice on account of the procès verbal, this gave him a special and distinct personal interest over all the other contributors to demand its annulment.

Fernet v. Ste. Genevieve de Berthier, 25 Rev. de Jur. 492.

BY-LAW AUTHORIZING CLOSING OF LANE AND SALE OF LOCUS—LANE SHEWN ON REGISTERED PLAN—EVIDENCE OF DEDICATION —FAILURE TO SHEW ACCEPTANCE—CUL DE SAC—BY-LAW NOT IN PUBLIC INTEREST SET ASIDE—TOWN-PLANNING—INJUNCTION — DAMAGES — AMENDMENT NECESSITATING TAKING OF FURTHER EVIDENCE—COSTS.

Hutchinson v. Sandwich, 16 O.W.N. 114.

HIGHWAYS—CLOSING— POWERS—REPEAL OF BY-LAW.

A statute authorizing a municipality, either by carrying out its existing by-laws or any other law, to order the closing or changing any of its public roads, does not inhibit the municipal council, which has passed a by-law ordering the closing of a public road within the municipality, to repeal such by-law. It is not necessary to submit such a by-law to a vote of the electors under art. 5782, R.S.Q. 1909.

Drummond v. Beaconsfield, 54 Que. S.C. 85.

REGULATION OF STREETS—RESIDENTIAL PURPOSES—PERMIT FOR GARAGE—CONTRACTOR—COSTS.

By-law No. 570 of the city of Montreal, to reserve certain portions of streets for residential purposes only, is legal, duly passed and promulgated, and in full force and effect. When a law is doubtful or ambiguous, it is to be interpreted so as to fulfil the intention of the legislative body passing it, and to obtain the object for which it was passed; and every provision of law so adopted shall be deemed to have for its objects the remedying of some evil, and the promotion of some good, and shall receive such fair, large, and liberal construction as will insure the attainment of its objects and the carrying out of its provisions according to their true intention, meaning and spirit. Therefore, the by-law, in reserving that part of "Mance street" in question therein, must be construed as meaning and intending the

portion of the street now officially known as "Jeanne Mance street," but commonly known as "Mance street." The by-law is a regulation for the good government of the city; and is within the power of the city of Montreal. Where the city or its officers issue a permit to erect an establishment of trade, on a lot fronting on a commercial street, which lot extends to another street in the rear, reserved by law for residences only, the permission does not and could not allow the owner to build a commercial house on this last street. Where a person obtains from the city a permit to erect a garage on a lot, he waives his right, if, subsequently, the city grants him, at his demand, the permission to build, on the same lot, an apartment building. A contractor who represents himself as the owner of a lot, and obtains from the city a permit to build a commercial establishment, and who is sued for having erected this construction on a street reserved for residences only, may have the action dismissed on the ground that he is not the proprietor, but only the contractor; in that case, however, the action will be rejected without costs.

Montreal v. Morgan, 54 Que. S.C. 481.

BY-LAW AUTHORIZING OCCUPATION OF STREET BY TRAMWAY—AGREEMENT WITH COMPANIES — BY-LAW NOT SUBMITTED TO ELECTORS — MUNICIPAL FRANCHISES ACT, R.S.O. 1914 c. 197, s. 3 (1)—QUASHING BY-LAW — DISCRETION — COSTS—SERVICE OF NOTICE OF MOTION ON COMPANIES.

Re Stinson and Fort Francis, 14 O.W.N. 196.

VEHICLE LICENSES—DISCRIMINATION.

By the amendment of 1917 to subs. 130a of s. 125 of the Vancouver Incorporation Act, c. 5, 1900, the city has the power to make by-laws discriminating between holders of vehicles licenses.

Re McKay, 24 B.C.R. 598, [1917] 3 W.W.R. 447.

CHANGE OF MARKET SITE.

A municipal corporation has power to change the destination of a public market site so as to render it alienable, by complying with the legal requirements to validate the disposal of it. Such change may be implied.

Lamontagne v. Levis, 49 Que. S.C. 293.

VALIDITY OF POWER—PUBLIC ROAD—CHANGE—MUN. CODE, ARTS. 526, 527.

A municipal corporation has not the right to change and remove a public road by a simple resolution.

Daoust v. Ste. Jeanne de Chantal, 46 Que. S.C. 386.

AS TO USE OF STREETS.

Where a municipal council has jurisdiction to deal with the subject of opening up a new road, mere irregularities in the procedure cannot be relied on by way of collateral attack. The task of locating the new road belongs in the first place exclusively to the commissioner. Objections to the project as a whole, or as to the location or payment of damages, etc., may be urged when the council is asked to confirm or adopt the proceedings, and where such objections are not then urged they cannot be afterwards raised as ground for invalidating the prior proceedings. The municipal authorities having entered, or being entitled to enter, have the right, especially after notice, to remove obstructions from the way.

Carr v. Ferguson, 45 N.S.R. 132, 9 E.L.R. 218.

(§ II C—71)—CAB-DRIVING REGULATIONS—LOITERING IN STREET—SUFFICIENCY OF CONVICTION.

Whether or not the accused cabdriver loitered about the streets with his cab in contravention of a police commissioner's by-law, subject to which he obtained his cab license, is a question of fact for the determination of the justice, which will not ordinarily be disturbed on a motion to quash a summary conviction under the by-law.

R. v. Atchison, 25 Can. Cr. Cas. 36, 9 O.W.N. 65.

AS TO CABMEN—INVALID CONVICTION.

A summary conviction which declares a cabman guilty of waiting for fares at a place other than that stated in his license, whilst the complaint against him stated merely that he had done so at a place other than a cabstand, is illegal and can be set aside by a certiorari under art. 1293 C.C.P. if the complaint was not amended.

Donnely v. Semple, 26 Can. Cr. Cas. 63, 49 Que. S.C. 127.

(§ II C—81)—ANIMALS RUNNING AT LARGE.

Under the authority of subss. 1 and 2 of s. 540 of the Consolidated Municipal Act, 1903, a municipality has power to pass a by-law justifying the killing of dogs found running at large anywhere in the municipality, and the by-law need not be limited to dogs found in a street or public place.

McNair v. Collins, 6 D.L.R. 510, 22 O.W.R. 891, 27 O.L.R. 44.

(§ II C—90) — REGULATION OF STREET RAILWAYS — REMOVAL OF SNOW FROM TRACTS—SAFE PASSAGE FOR VEHICLES.

A provision in a municipal by-law requiring an electric railway company to remove accumulations of snow or ice from its tracks to afford a safe passage for "sleighs and other vehicles," is not ejusdem generis intended in its limited sense, and includes also the safe passage for wheeled vehicles, and a failure of the railway company to comply with a written demand by the city's engineer to remove the snow entirely from the streets will entitle the municipality to recover, under the terms of the by-law, the expenses it had incurred in carrying out the work.

Winnipeg v. Winnipeg Electric R. Co., 25 D.L.R. 308, 26 Man. L.R. 63, 9 W.W.R. 889, 33 W.L.R. 219.

STREET RAILWAY — PERMISSION TO USE STREETS — BY LAW — SUBMISSION TO ELECTORS.

Re Point Grey By-law, 19 W.L.R. 638.

(§ II C—94)—CONTRACTS—ELECTRIC LIGHT COMPANY—ERECTION OF POLES IN HIGHWAY—REMOVAL AT INSTANCE OF MUNICIPAL CORPORATION—EXPENSE OF, BY WHOM BORNE—CONSTRUCTION OF AGREEMENTS—CONTROL OF HIGHWAYS.

Interurban Electric Co. v. Toronto, 8 O.W.N. 288.

(§ II C—95)—NUISANCE—WATER COURSES FOR INDUSTRIAL PURPOSES — FLOODING, RIGHT TO RECOVER DAMAGES FOR.

A municipal corporation has no right of action against an industrial company to recover the cost of work to be done to repair damage due to floods over its roads caused by the construction of dams in a river, or water courses in the neighbourhood.

Kenogami v. Chicoutimi Pulp Co., 45 Que. S.C. 26.

(§ II C—99)—GAS WORKS OR HOLDERS.

Three city by-laws, one of which forbade the erection of any gas works or gas holders within the city without first obtaining the permission of the city council, another prohibiting the erection of buildings within the city without a permit from the building inspector, and the third prescribing an area within the city within which no gas works should be erected or continued, have within the territorial limits of the city the same effect as an Act of Parliament has upon the subjects at large. [Hopkins v. Swansea, 4 M. & W. 621, per Lord Abinger, C.B., at p. 640, followed.]

Att'y-Gen'l v. Winnipeg Electric R. Co., 5 D.L.R. 823, 22 Man. L.R. 761, 21 W.L.R. 906, 2 W.W.R. 854.

(§ II C—104)—NUISANCES—SMOKE REGULATION—RAILWAY ROUNDHOUSE.

The smokestack of a locomotive engine is not a flue stack or chimney within clause 45 of s. 400 of the Municipal Act, R.S.O. 1914, c. 192, which empowers municipal councils to pass by-laws for smoke regulation; and a railway company is not liable to conviction under clause 45 for the discharge of smoke from its locomotives while in the roundhouse.

R. v. C.P.R. Co., 25 D.L.R. 444, 24 Can. Cr. Cas. 226, 33 O.L.R. 248, 19 Can. Ry. Cas. 311, affirming, on a different ground, 23 Can. Cr. Cas. 487.

SMOKE REGULATION — RAILWAY ROUNDHOUSE.

The ventilating flue of a railway "roundhouse" used for the purpose of taking away the smoke emitted from locomotives standing in the round-house is not within clause 45 of s. 400 of the Municipal Act, R.S.O. 1914, c. 192, dealing with smoke regulation by-laws; and the railway company is not liable to conviction under a municipal by-law passed under clause 45 for the discharge of the smoke of locomotives through the round-house ventilating flue. [R. v. C.P.R., 25 D.L.R. 444, 24 Can. Cr. Cas. 226, followed.]

R. v. G.T.R. Co., 27 Can. Cr. Cas. 138, 37 O.L.R. 457.

(§ II C—105)—REVOCATION OF POOL-ROOM LICENSE — RIGHT OF LICENSEE TO BE HEARD BEFORE TOWN COUNCIL.

Where a town council, having the right to revoke a pool-room license for certain infractions of a by-law of the town, revokes the license, without giving the licensee a chance to be heard at a judicial hearing, such action is not illegal, where it appears that the town in question is a small place, and the pool-room one of the principal loitering places and one that may very quickly become notoriously objectionable, and the court is satisfied that, even if the members of the council did not have a knowledge from personal observation, there were sufficient grounds to justify their action, especially where there is no suggestion that the council acted arbitrarily or in bad faith. A town council has the right to revoke a pool-room license, for an infraction of a by-law of the town by the licensee, where such by-law existed at the time of the application for the license, and where the infraction was expressly made ground for such revocation at the time of such application.

Re Crabbe and Swan River, 9 D.L.R. 405, 23 Man. L.R. 14, 22 W.L.R. 860, 23 W.L.R. 372, 3 W.W.R. 1047.

AS TO TRANSIENT TRADERS—CONSIGNMENTS BY FARMERS.

A fruit farmer who consigns a carload of fruit to his town agent and gives him written authority to sell the same on his account is not liable to conviction as a "transient trader" in respect of sales made to the public generally by the agent from the car at its destination, although he did not take out a "transient trader's" license under a town by-law passed in conformity with the Municipal Act, R.S.O. 1914, c. 192, s. 420; the words "transient traders and other persons whose names are not entered on the assessment roll, etc.," which appear in that section mean transient traders and other trading persons, and do not include a farmer selling his own produce, although he may ship in carload lots to a far distant point in the province, nor is the farmer pro hâc vice a trader within the meaning of the section read in conjunction with the exemptions of farmer's product contained in other sections of the Municipal Act.

R. v. Geddes, 28 D.L.R. 378, 25 Can. Cr. Cas. 198, 35 O.L.R. 177.

LICENSE TO PRACTISE LAW—ULTRA VIRES—CONSTRUCTION OF STATUTES.

Municipal by-laws, in so far as they purport to regulate, license and control barristers or solicitors, are ultra vires. The general legislation in the City Act, as to the regulation and licensing of businesses or callings, cannot override the special legislation as to barristers and solicitors con-

tained in the Legal Profession Act (R.S.S. 1909, c. 104).

The King v. Macdonald, 33 D.L.R. 770, 28 Can. Cr. Cas. 311, 10 S.L.R. 138, [1917] 2 W.W.R. 269.

ORDINANCES AND BY-LAWS — NUISANCE — OPERATION OF TANNERY.

A summary conviction for creating a nuisance in the operation of a tannery may be prosecuted in Montreal under a city by-law passed under the Montreal Charter, 1851, and 1899, notwithstanding the provisions of the Crim. Code, 1892 and 1906, in respect of public nuisances. By-law 39 of the City of Montreal (1878) is intra vires.

Galibert v. Recorder's Court, 31 Can. Cr. Cas. 386, 53 Que. S.C. 82.

POWERS OF LICENSING AND REGULATING—BY-LAW — "PUBLIC GARAGE" — WHAT CONSTITUTES — MUNICIPAL ACT, S. 406a., PAR. 4 (a) (MUNICIPAL AMENDMENT ACT, 1914, S. 13).

Section 406a. of the Municipal Act, as enacted by s. 13 of the Municipal Amendment Act, 1914, authorizes the passing of by-laws by the councils of cities (4) "for licensing and regulating the owners of public garages . . ." By cl. (a) of par. 4: "For the purpose of this paragraph, a public garage shall include a garage where motor-cars are hired or kept or used for hire, or where such cars, or gasoline, oils, or other accessories are stored or kept for sale." In the exercise of the power conferred by sec. 406a., the council of the plaintiffs, a city corporation, passed a by-law enacting "that no person shall carry on the business of a public garage as defined by the Municipal Amendment Act, 1914, unless and until he shall procure a license," etc.:— Held, that the defendants, whose business, carried on in a building, alleged by the plaintiffs to be a "public garage," consisted in supplying gasoline and air to persons using automobiles, and whose building did not afford storage for automobiles, were not carrying on the business of a public garage within the meaning of the statute and by-law. Definition of "garage."

Toronto v. Canadian Oil Companies, 45 O.L.R. 225.

TRANSIENT TRADERS.

A man carrying goods in a motor-truck and selling them from place to place without localizing his trade in any particular place is a hawker or pedlar and not a "transient trader" within the licensing clauses of the Municipal Act, R.S.O. 1914, c. 192, s. 420; and as a hawker he is exempt from the license fee under s. 416 of that Act if he sells to retail dealers only.

R. v. Scales, 30 Can. Cr. Cas. 82, 41 O.L.R. 229.

PROHIBITING ADVERTISEMENT OF FUNERAL ORNAMENTS—CONSTITUTIONALITY.

A provincial legislature may, without encroaching on the powers of the Dominion Parliament, empower a municipality to prohibit, by by-law, advertisements of funeral ornaments, and to impose fines for the infraction of such by-law and imprisonment in default of the fines. Such by-law does not become unjust and illegal for the reason that incorporated companies transgressing the by-law are exempt from imprisonment.

Belair v. Montreal, 19 Que. P.R. 314.

WEIGHT OF BREAD—SCOPE OF REGULATION.

The Act 1 Geo. V., c. 40, respecting the making and selling of bread, did not effectively abrogate art. 579 of the Mun. Code (old) authorizing municipal councils to "determine the weight and quality of the bread sold or offered for sale in the municipality." It has only limited the field of action of municipal councils by limiting their regulation to provisions which must not conflict with their own.

Bourassa v. St. Barnabe, 53 Que. S.C. 198.

RESTRICTING TRADE DISTRICTS—MUNICIPAL JURISDICTION — REGULATION OF BUSINESS—STRICT CONSTRUCTION OF BY-LAW.

Where a statute confers upon a municipal council power to determine upon the expediency or necessity of measures relating to its affairs, its judgment upon matters thus committed to it, while acting within the scope of its authority, cannot be controlled by the courts, the decision of the council being, in the absence of fraud, final and conclusive, and in the creation of a restricted district for a lawful calling the question of expediency and necessity is for the municipal council and not for the court. [Kruse v. Johnson, [1898] 2 Q.B. 91, applied.] When a legislature interferes with a legitimate and necessary business or calling, the statutory power conferred upon a municipality must be clearly indicated and then specifically followed in any by-law passed thereunder, and a by-law providing that no building or structure of any kind shall be "constructed and used for a laundry or wash-house" within a specific portion of a municipality is ultra vires under a statute empowering the municipality to define the limits within which laundries or wash-houses might be established, maintained or operated.

Glover v. Sam Kee, 22 Can. Cr. Cas. 297, 27 W.L.R. 886, 20 B.C.R. 219, 5 W.W.R. 1276.

BY-LAW REQUIRING COAL SOLD TO BE WEIGHED UPON MUNICIPAL SCALES—NECESSITY FOR REQUEST FROM BUYER OR SELLER — CONSTRUCTION OF BY-LAW — PROSECUTION FOR INFRACTION OF BY-LAW FAILURE TO PROVE REQUEST—MAGISTRATE'S CONVICTION QUASHED.

R. v. Butterworth, 13 O.W.N. 263.

(§ II C—108)—REGULATION OF BUSINESS—SALE OF BREAD.

A municipal by-law making is compulsory for bakers to deliver bread in wrappers intended to keep it clean is, on its face, a health by-law within the terms of a city charter empowering the municipality to pass by-laws "for providing for the health

of the city and against the spreading of contagious or infectious disease."

Re Shelly, 10 D.L.R. 666, 24 W.L.R. 285, 4 W.W.R. 741.

AS TO SALE OF MILK—FEDERAL ADULTERATION LAWS.

Section 58 of the statute of the Province of Canada 1851, 14-15 Vict. c. 128, which confers on the city of Montreal power to pass by-laws for the welfare, health and local government of the city, remains in force, notwithstanding subsequent Federal and provincial legislation upon those subjects; and a milk regulation by-law passed thereunder is not repugnant to the Federal statutes dealing with the adulteration of foods.

Savaria v. Geoffrion, 27 Can. Cr. Cas. 36, 22 Rev. Leg. 433.

(§ II C—110)—TEAMSTERS.

The municipal regulations which require carters and contractors doing business within the municipality who use teams, to take out licenses do not apply to one who, under an agreement with the municipality, contracts to raise the carcasses of dead animals in order to convey them beyond the municipal limits. Therefore, a conviction by the Recorder imposing on the latter a fine for violating these regulations is a nullity and a certiorari will be granted to have it quashed.

Lesage v. Montreal, 42 Que. S.C. 144.

(§ II C—111)—PEDDLERS AND HUCKSTERS.

A person is not a "transient trader" requiring a municipal license as such under the Ontario Municipal Act, 1903, 3 Edw. VII., c. 19, s. 583, where, although not permanently resident within the municipality nor assessed therein, he takes orders for hair goods and toilet articles to be supplied directly to the public and not to the retail trade only, if the samples from which orders are solicited are not sold by him and the orders are taken and the business transacted at one place only (e.g. an hotel) and the orders so taken are addressed to a firm located in another municipality subject to acceptance or rejection by the firm after being transmitted to its place of business. [R. v. St. Pierre, 4 O.L.R. 76, followed.] In order to constitute an offence against a municipal by-law passed under the authority of s. 583 (30, 31) of the Ontario Municipal Act relating to "transient traders," the goods offered for sale must be goods in the municipality.

R. v. Pember, 3 D.L.R. 347, 21 O.W.R. 915, 20 Can. Cr. Cas. 60, affirming 2 D.L.R. 542.

BY-LAWS OF COUNTY—REGULATION OF BUSINESS—EXTENT OF COUNTY BY-LAW OVER COUNTY LINE ROAD.

A county by-law prohibiting hawking and peddling within a county without a license does not apply to a boundary road between two counties by virtue of ss. 433 and 439 of the Ontario Consolidated Municipal Act, 3 & 4 Geo. V. c. 43, R.S.O. 1914, c. 192, which provides that the soil and freehold of every highway shall be vested in the municipality or corporation that for the time being has jurisdiction over it, and that the councils of townships between which they run shall have joint jurisdiction over boundary roads, where it does not appear that the county council enacting such by-law ever assumed control of such boundary road under s. 446 (3) of such Act.

R. v. Hamilton, 13 D.L.R. 898, 5 O.W.N. 58, 25 O.W.R. 33, 22 Can. Cr. Cas. 57. [Affirmed 15 D.L.R. 150.]

TRANSIENT TRADERS.

The mere delivery of goods within a municipality by a person employed to make delivery in accordance with customers' orders for fixed quantities given elsewhere, with the taking of which the defendant employee was not connected, will not support a conviction of such employee for conducting the business of a transient trader in contravention of a transient traders' by-law passed under the Municipal Act, R.S. O. 1914, c. 192, s. 420 (6).

R. v. Borror, 28 D.L.R. 377, 25 Can. Cr. Cas. 97, 9 O.W.N. 64.

BY-LAW REGULATING TRANSIENT TRADERS—WHEN OFFENCE.

A conviction under a municipal by-law regulating transient traders can be supported only where the offence is within the precise terms of the by-law itself, although the powers of the municipality had been extended so as to enable it to regulate the acts relied upon as constituting the offence.

R. v. Pure Milk Corp., 25 Can. Cr. Cas. 47, 9 O.W.N. 120.

HAWKERS AND PEDDLERS—TAKING ORDERS.

Where there is no sale by sample nor delivery from a tank car, the mere taking of orders directed to a foreign corporation for the shipment by it of a quantity of coal oil, c.o.d., is not a "sale" within the meanng of s. 416, of the Municipal Act, R.S.O. 1914, c. 192, relating to hawkers and peddlers. [R. v. St. Pierre, 5 Can. Cr. Cas. 365, 4 O.L.R. 76; R. v. Pember, 3 D.L.R. 347, 20 Can. Cr. Cas. 60, followed.]

Re Garnham, Re Richardson, 26 Can. Cr. Cas. 114, 35 O.L.R. 54.

PEDDLERS—BIBLE DISTRIBUTORS.

A colporteur of the British and Foreign Bible Society when he sells bibles cannot be said to be trading within the meaning of the Municipal Clauses Act (B.C.), such selling of bibles is a minor incident to the main object of the society, which is to distribute the bibles among the people.

Duncan v. Gairns, 10 W.W.R. 789.

REGULATION OF HAWKERS AND PEDDLERS—BY-LAW—MUNICIPAL ACT, 1903, S. 583, SUBS. 14—CONVICTION FOR PEDDLING "CARPET SWEEPERS"—CONSTRUCTION OF STATUTE.

Wright v. Jarvis, 7 O.W.N. 608.

(§ II C—112)—Closing hours for shops —Validity of by-law dependent upon number of signatures — Taking names from directory is no compliance with ordinance.

Under subs. 3 of s. 44 of the Ontario Shops Regulation Act, R.S.O. 1897, c. 257, giving a local municipal council the right to pass a by-law regulating the closing hours of certain classes of shops if the council is satisfied that the application therefor is signed by at least three-fourths in number of the occupiers of shops of the class to which such application relates, it is not an accurate method to rely merely on the taking of names from the city directory in order to ascertain the number of persons who conduct shops of the class in question. If the name of one of the signers to a petition, praying for the passing of such a by-law is obtained by deception it should be rejected in the count of signatures. Where one of the names to a petition, praying for the passing of a by-law regulating the closing hours of barber shops, is that of a person who did not sign the petition but whose name was affixed thereto by his employee without the employer's authority, the name is not properly attached to the petition and should be rejected from the count of signatures, and a subsequent ratification by the person whose name was thus affixed, made after a motion to quash the by-law in question, is inoperative. The provisions of subs. 3 must be strictly complied with and, if it appears that the three-fourths requirement has not been complied with, the by-law is invalid.

Re McCoubrey and Toronto, 9 D.L.R. 84, 23 O.W.R. 653.

Closing stores.

A municipal council in Ontario has power under the Shop Regulation Act, R.S.O. 1897, c. 257, s. 44, to pass a by-law regulating the time of closing of shops not earlier than 7 p.m., within the municipality, independently of the presentation to the council of a petition of electors. Where various petitions are presented to a municipal council under the Act for an early closing by-law, but the petitions together contain the signatures less than the requisite three-quarters in number of the occupiers of shops to be affected by the proposed by-law, the petitions may be treated as supererogatory, and the council may, without reference thereto, pass a by-law for closing of shops, and may therein provide for closing at the same or a different time than had been petitioned for, subject to the restriction in such case of the closing hour being not earlier than 7 p.m., which restriction does not apply, where the by-law is made upon a duly signed petition under s. 44 (3).

Re Simpson and Caledonia, 1 D.L.R. 15, 3 O.W.N. 503, 20 O.W.R. 874.

By-laws—Early closing petition—Requirements.

The early closing by-law passed by a municipality under the Early Closing Act, (Alta.), must conform exactly to the petition so where the petition was to regulate the closing of all retail mercantile shops, its signature by the necessary two-thirds in the aggregate of those engaged in certain classes of trade will not support a by-law limited to those trades. The municipal council receiving a petition under the Act, must, under s. 9, make careful inquiry and investigation to satisfy it that the petition is signed by the requisite two-thirds of the tradesmen affected; it is not enough that some party interested in the by-law makes affidavit that to the best of his knowledge and belief the signatures obtained covered the statutory two-thirds. [Halladay v. Ottawa, 15 O.L.R. 65, applied.]

Re Medicine Hat By-law, 20 D.L.R. 149, 8 A.L.R. 41.

Shops regulation—Early closing—Drug stores—Jurisdiction.

Sections 1 to 14 of the Shops Regulation Act (R.S.M. 1913, c. 180) are in force in the city of Winnipeg; a by-law passed thereunder requiring that shops be closed at and after six p. m. each week day does not apply to druggists' shops; except as to goods the sale of which after hours is specially prohibited by such by-law, there is no limitation as to what a druggist may sell; a magistrate has no power to decide what goods fall within the description of "goods usually sold or kept for sale" by druggists; but such goods may be defined in a by-law.

Stevens v. Gordon Mitchell Drug Co., 32 D.L.R. 185, 27 Man. L.R. 318.

Sunday—Restaurants—Ultra vires.

A by-law of a municipal corporation forbidding the opening of restaurants and the sale therein of any merchandise on Sundays is ultra vires, as it deals with the observance of Sunday or the Lord's Day, a matter within the legislative powers of the Dominion Parliament.

St. Prosper v. Rodrigue, 40 D.L.R. 30, 56 Can. S.C.R. 157, affirming 37 D.L.R. 321, 26 Que. K.B. 396, which reversed 51 Que. S.C. 109.

By-law restricting number of restaurants—Validity—Hotel Act.

In view of s. 6 of the Hotel Act (Man.), c. 42, 1917 (as amended by c. 33, 1918), whereunder a person who has obtained an hotel license is authorized, without further or other license, to conduct a general restaurant or café and s. 7 (as amended by c. 33, 1918), which provides that no person other than licensee under the Act shall operate a restaurant or café without a license from the municipality in which the same is situate, a town by-law forbidding the carrying on of a restaurant without a license from the town and providing that a licensee shall not conduct more than one place of business under a license, and that not more than one such license shall be granted in

any year, does not create a monopoly, and is not otherwise invalid.

Wong Sing v. Minnedosa, [1918] 3 W.W. R. 181.

(§ II C—113)—REGULATING SUNDAY BUSINESS.

Whether or not a by-law under the Montreal charter, passed by the Quebec Legislature, purporting to authorize certain Sunday sales by traders is ultra vires as dealing with a question of criminal law, the Provincial statute is a protection to those who exercise the privileges or exemptions, which it purports to confer; and until such statute has been declared invalid by a court of superior jurisdiction after due notice to the Attorney-General, a police magistrate's summary conviction, based upon his finding that such Provincial legislation was ultra vires, will be quashed.

Kokoliades v. Kennedy, 18 Can. Cr. Cas. 495.

SUNDAY CLOSING—THEATRES—INTRA VIRES.

A municipal by-law which, for the purpose of securing the maintenance of peace and good order, forbids theatrical performances on Sunday, is a mere police regulation, and intra vires.

Drapeau v. Recorder's Court of Quebec, 52 Que. S.C. 505.

(§ II C—114)—FIXING LICENSE FEE OF POOL-ROOMS — REGULATION OF POOL-ROOMS—BY-LAW FIXING LICENSE FEE—REASONABLENESS — QUASHING CONVICTION.

Crookston v. Miller, 7 D.L.R. 771, 3 W. W.R. 10.

REGULATION OF POOL ROOMS—REASONABLENESS.

A by-law limiting the number of billiard and pool-room licenses to one is a proper exercise of the municipal police power, and reasonable, and does not contravene s. 254 of the Municipal Act, R.S.O. 1914, c. 192, providing against the creation of monopolies. [Re McCracken, etc., 23 O.L.R. 81; Rowland v. Collingwood, 16 O.L.R. 272, distinguished.]

Re Stewart and St. Mary's 24 D.L.R. 26, 34 O.L.R. 183.

LICENSE—CONFIRMATION—REVOCATION.

A municipal Council, in confirming a certificate for the issue of a license, exercises judicial and administrative functions which the law declares to be final, and therefore the confirmation cannot subsequently be revoked.

Paquet v. Plante, 23 D.L.R. 737, 24 Que. K.B. 13.

BILLIARD LICENSES—REGULATION OF BY-LAW —PROHIBITIVE LICENSE FEE.

Re Foster and Raleigh, 22 O.L.R. 342, 18 O.W.R. 195.

(§ II C—115)—MUNICIPAL ACT (ONT.)—ERECTION AND MAINTENANCE OF WEIGHING MACHINES—CITIES, TOWNS AND VILLAGES—INTERPRETATION ACT.

Section 582 of the Municipal Act, Ont. (3 Edw. VII., c. 19) provides that the councils of townships, cities, towns and villages may pass by-laws "for erecting and maintaining weighing machines in villages or other convenient places, and charging fees for the use thereof . . ." Held, that the section conferred upon the councils of cities power to do what the section provides for, otherwise it would be necessary to read out of the section the words "or other convenient places." To limit the right of cities and towns to erecting and maintaining weighing machines in villages would be absurd. But the councils of cities, towns and villages have power to erect weighing machines and to appoint weigh masters independently of the above section, derived from s. 580. See also ss. 326, 537. It was unnecessary to decide whether the provisions of the by-law authorising the imposition of fees for weighing ceased to be in force when s. 582, the authority by virtue of which the by-law was passed, assuming that that was the only authority, was repealed by the Municipal Act of 1913, 3 & 4 Geo. V. c. 43; but, if the validity of those provisions depended on s. 582 only, they ceased to be operative upon its repeal, for they were inconsistent with the provisions of the substituted enactment: Interpretation Act, R. S.O. 1914, c. 1, s. 16. The city corporation was entitled to judgment upon its claim for fees for weighing loads of coal for the company: If the council of the corporation had power to enact the provisions of the by-law independently of the power conferred by s. 582, that result followed as of course; if that view was not the right one, the company, having taken advantage of the facilities for weighing its coal, was properly ordered to pay for the services rendered; and, in the absence of any evidence to the contrary, the fees prescribed by the by-law might be taken well to be a reasonable compensation for the services rendered.

Butterworth v. Ottawa, 49 D.L.R. 262, 46 O.L.R. 49.

BY-LAW AUTHORIZING TAKING OF GRAVEL FROM LAND OF PRIVATE PERSON—MUNICIPAL ACT, S. 483 (10)—TAKING UNLIMITED BOTH AS TO TIME AND AMOUNT—SECTION 322 (3)—FIXING OF PRICE—APPOINTMENT OF ARBITRATOR UNDER S. 339.

Re Mitchell and Saugeen, 17 O.W.N. 148.

DESTRUCTION BY FIRE OF BUILDINGS IN TOWN —BY-LAWS AUTHORIZING ISSUE AND SALE OF DEBENTURES TO PROVIDE FUND FOR RESTORATION—VALIDATION BY STATUTE—REMISSION OF TAXES FOR YEAR IN RESPECT OF PRIVATE BUILDINGS DESTROYED—DISPOSITION OF SURPLUS OF FUND—POWERS OF COUNCIL—ACTION BY RATEPAYER FOR DECLARATION AS TO ADMINISTRATION OF FUND — PLAINTIFF SUING ON BEHALF OF ALL RATEPAYERS—STYLE OF CAUSE—AMENDMENT.

Rothschild v. Cochrane, 16 O.W.N. 60. [Affirmed 17 O.W.N. 59.]

As to bonding corporations—Motor vehicles.

By resolution, the city council of Vancouver instructed the city license inspector to refuse to accept the bonds of any insurance or casualty company not holding a Dominion license. The resolution was passed in pursuance of authority alleged to be contained in the by-law providing for the filing of a bond by the owner of a motor vehicle. On a motion to quash the resolution, held, that the resolution was invalid on the ground that the Act of the legislature giving the city authority to pass by-laws regulating motor vehicles and providing for such a bond was never intended to give the council the right to create a monopoly or arbitrarily exclude from the position of bondsmen any person, company or class and that any investigation having in view the object of rejecting any person or company as bondsmen should be a fair and impartial one in which all parties interested are given an opportunity of being heard.

Re Vancouver Incorporation Act, 10 W. W.R. 1362.

(§ II C—119)—Temperance by-law—Notice.

All licensed hotel keepers have a sufficient interest to enable them to attack the validity of a by-law passed pursuant to the Quebec Temperance Act. When a by-law prohibiting the sale of intoxicating liquors has to be approved by the municipal ratepayers, the by-law and the public notice mentioned in R.S.Q. 1909, art. 1321, should be published and affixed at the same time within the delay required by the Act. This formality is essential and art. 16 Mun. Code, and arts. 1327-8 R.S.Q. 1909, do not apply.

McCann v. Pontiac, 51 Que. S.C. 440.

Prohibition of liquor—Election—Validity.

A municipal elector is sufficiently qualified without proving special interest, to bring action, under the common law, to quash a prohibition by-law, on the ground of fraud, and illegality in the voting of the municipal electors. The provisions of the Mun. Code, respecting municipal elections should apply to the voting taken upon the occasion of the adoption or rejection of a by-law for the prohibition of the sale of intoxicating liquors. The public has a right to be present during the voting, and if the presiding officer refuses the electors entrance into the voting room where he remains alone with the secretary-treasurer, the voting upon the by-law will be voided.

Longpré v. Dumoulin, 27 Que. K.B. 155.

(§ II C—126)—Unprotecting wells.

In a municipal by-law requiring the "owner or occupant" to guard or cover a well when not in use, the word "owner" must be read "owner in occupation," and the by-law would not apply to render the equitable owner of the fee in lands let to a tenant liable for breach of the by-law by the tenant resulting in the loss of plaintiff's horse of which the tenant was bailee.

Love v. Machray, 1 D.L.R. 674, 20 W.L.R. 505, 22 Man. L.R. 52, 1 W.W.R. 925.

(§ II C—130)—Exclusive franchise.

A municipal by-law giving a person exclusive power to carry on a certain business in the municipality, which is approved and ratified by the Legislature does not affect a company subsequently incorporated and given the right to carry on the same kind of business in a territory within said municipality.

St. Paul Electric Light & Power Co. v. Montreal Light, Heat & Power Co., 42 Que. S.C. 289.

(§ II C—134)—By-law prohibiting erection of buildings upon certain residential streets — Validity of — 4 Edw. VII (Ont.) c. 22, s. 19.

Re Dinnick v. McCallum, 11 D.L.R. 509, 28 O.L.R. 52, reversing 5 D.L.R. 843.

(§ II C—135)—Enforcement of local option liquor law—Defending proceedings taken against mayor as ex officio magistrate.

Where, under statutory authority, prosecutions for offences against a local option liquor law might be taken before the mayor of the municipality acting as an ex officio justice of the peace even where the municipality was in effect the prosecutor and interested in the fines, the municipality may lawfully undertake the defence of a prohibition motion seeking to prevent the mayor from acting in such cases so as to establish his jurisdiction; and the municipality may obligate itself to the defending attorney for the costs to be incurred in opposing the prohibition motion by a resolution of the corporation. [Thibaudeau v. Corp. d' Aubert Gallion, 4 Que. S.C. 485; and Rousseau v. Levis, 14 Q.L.R. 376, distinguished.]

Gaudet v. Megantic, 10 D.L.R. 553, 19 Rev. de Jur. 494.

By-law—Irregularity of exercising power—Capable of being remedied—Appellate Court will not quash.

When the subject legislated upon by a municipal council is clearly within the municipal authority, and the objection is merely to the mode in which the particular power has been exercised, and that defect can be remedied by further or different action, the by-law will not be quashed unless it is clear that the method adopted cannot be supported in any view of the matter.

Re Butterworth and Ottawa, 45 D.L.R. 426, 44 O.L.R. 84.

Ratepayer attacking by-law — Ultra vires—Fraud—Irregularities.

A ratepayer may prosecute an action under art. 50, C.C.P., where a corporation has enacted ultra vires by-laws or in a case of fraud, but, if the matter relates to irregularities, such an action would not lie, on the part of a ratepayer whose interests are

not distinguishable from those of other ratepayers of the municipality.

L'Assomption v. Forest, 25 Que. K.B. 568, 48 Que. S.C. 151.

D. CONTRACTS GENERALLY; ULTRA VIRES CONTRACTS.

Contract as to construction of sewers, see Contracts, 10 A—321.

(§ II D—140)—COMPLETION—FINAL CERTIFICATE—"HOLD BACK" OF PORTION OF CONTRACT PRICE.

The certificate of the engineer made binding on the parties under a construction contract may be a "final certificate" if it certifies the completion of the work, although against the contract price certified as earned it further certifies for a "hold back" of a portion thereof; the latter may be disregarded by the court in an action to recover the price if the certificate does not state what the "hold back" is for (whether for damages for defective work or otherwise), and the contract contained no provision warranting the hold-back as such.

Manders v. Moose Jaw, 20 D.L.R. 408, 28 W.L.R. 821, 7 S.L.R. 158.

TENDERS—FAIR WAGE CLAUSE—EXTENT OF AUTHORITY.

A municipal council may validly stipulate as a condition under which tenders are called for that the contract awarded to the successful tenderer shall contain a fair-wage clause to the effect that all employees of the contractor shall in respect of their work in the execution of the contract receive union wages or the prevailing rate of wages for their work; the authority of the municipality in this regard is not restricted to work to be done under the contract within the territorial limits of the municipality, but extends to a contract for the purchase of crushed stone where the work, or the bulk of the work, is to be done outside such limits. [Kelly v. Winnipeg, 12 Man. L.R. 87, approved; Crown Tailoring Co. v. Toronto, 33 O.L.R. 92n, not followed.]

Rogers v. Toronto, 21 D.L.R. 475, 33 O. L.R. 89.

AS TO COMPENSATION — CONFIRMATION — GRADING STREETS—LIABILITY.

An agreement as to compensation for lands taken for an electric power plant must be authorized by a resolution of the council or be afterwards confirmed by it. Otherwise it is not binding on a city. The fact that two readings are given to a money by-law to provide for the raising of the compensation does not constitute a confirmation. The damages for breach of such an unconfirmed agreement assessed by arbitration are not payable by the city. An agreement providing for the grading of streets outside the limits of a town is not binding on the town. Quære, as to whether disputes of this nature should be the subject of arbitration by a town.

Swift Current v. Leslie, [1917] 1 W.W.R. 1089, 10 S.L.R. 1. [See also 26 D.L.R. 442, 9 S.L.R. 19.]

RESOLUTION—MINUTES—CORPORATE SEAL.

If a city council has power to contract by resolution, a resolution which is entered on the minutes of the council and sealed with the seal of the corporation is sufficient, and any further sealing is not necessary.

Butler v. Saskatoon, 38 D.L.R. 480, 11 S.L.R. 1, [1917] 1 W.W.R. 297, affirming 35 D.L.R. 387, [1917] 2 W.W.R. 647.

IMPERATIVE PROVISIONS AS TO.

By s. 337 of the Montreal city charter, as amended by 3 Geo. V., c. 54, no contract can bind the city of Montreal unless it has been approved by the council or the board of commissioners, and upon production of a certificate of the controller of finances showing that the city has voted money for such contract. These provisions are imperative, and a claim against the city based on a pretended contract will be rejected, in the absence of proof that the formalities required by the city charter have been fulfilled.

Godin v. Montreal, 24 Rev. de Jur. 73.

LEGISLATIVE AND ADMINISTRATIVE POWERS—LOCAL IMPROVEMENT — SIGNING — SEAL —MAYOR—POWER OF COUNCIL.

By a by-law, passed under ss. 9, 11 of the Local Improvement Act, R.S.O. 1914, c. 193, the council of a town enacted that a roadway should be constructed as a local improvement, and afterwards accepted the tender of a contractor for the doing of the work. A contract was prepared and was approved by resolution of the council. The mayor refused to sign the contract:—Held, that a by-law approving of the contract was unnecessary. Distinction between the legislative and administrative powers of the council pointed out. (2) There being no statute requiring the mayor to sign contracts, and the corporate seal being the essential thing, the council had power by resolution to authorize the sealing and delivery, with the countersignature of any designated person, of any contract within its power. (3) The contract as drawn having been approved by the council, it was not necessary that it should be in accordance with the original resolution. (4) A by-law is not void because passed in violation of some domestic rule or practice of the council. (5) As a matter of discretion, the court ought not to interfere with the construction of a work within the competence of the council—save in very exceptional circumstances.

Wilson v. Ingersoll, 38 O.L.R. 260.

PUBLIC WORKS.

A municipal corporation, which awards contracts for municipal works to several persons without accepting any tender or passing any formal by-law, may be bound and held to pay for the work, (1) if the terms of the contracts have been publicly discussed and adopted by the council; (2) if no proposal has been voted on nor entry made of the discussion merely by inadvertence; (3) if the work has been divided and

distributed among the contractors by a vote of the council recorded in its minutes; (4) if the works have been executed, accepted and used by the municipality. The price of the above works fixed by the contract cannot afterwards be changed by the council without the consent of the contractors. A contract fixing no term for payment, the price of the works will be payable at the time they are accepted, and the council cannot, by a resolution adopted long after, declare that they will be paid for at some other time. Impossibility of payment does not prevent the debt from becoming due.

Charette v. Point Fortune, 51 Que. S.C. 7.

AGREEMENT BETWEEN MUNICIPALITY AND BANK—CURRENT ACCOUNTS—DEALINGS WITH OTHER BANKS.

The obligation assumed by a municipality towards a bank to "keep its current account there" does not bind it to deposit there all its moneys, especially a sum borrowed for a special purpose (e.g., the construction of a bridge). The fact that it had, for some 20 years, deposited all its moneys with the said bank, does not affect the construction to be given to the above expression. When a municipality undertakes to deposit with a bank the sinking funds of its loans, "unless owing to the very nature of the loan or the conditions under which it is made," such deposit cannot be made, if it makes a loan from another bank and deposits with it the sinking funds for the said loan in conformity with resolutions passed by its council, the municipality will not be considered as having violated its first agreement, and the burden of proof that it has acted fraudulently, or that the conditions mentioned in the said exception have not happened, falls on the interested bank.

La Caisse d'Economie v. Quebec, 23 Que. K.B. 207.

CONTRACTOR FOR DRAINS — ENGINEER — INTERPRETATION OF CONTRACT—ARBITRATION—ACCEPTANCE OF WORKS—ACQUIESCENCE.

When, in a contract made by a municipal corporation for the construction of drains in a street, under the superintendence of an engineer, it is stipulated that either party may refer to arbitration by giving written notice to the other party and to the arbitrator, such clause must be interpreted as making notice necessary in order that the parties be bound by the arbitrator's award. When, such contract, declares that the works shall not be accepted by the engineer in the name of the corporation until 1 month after the works have been put in operation, it means that the engineer cannot accept them before such period has expired, but it does not mean that the corporation shall be finally bound by the engineer's acceptance. In such case the corporation is not bound by its engineer's acceptance of works which were incomplete, defective, and done contrary to the plans and estimates. The fact that the corporation has only kept back, from its contractors, 10 per cent of the contract price instead of 20 per cent which it was entitled to, does not constitute acquiescence of the works by its engineer. A contractor with estimates and contracts can only recover the price of his works when he has fully carried out his obligation.

Drummondville v. Simoneau, 23 Que. K. B. 392.

AGREEMENT FOR SALE OF LAND TO MUNICIPAL CORPORATION—ACTION BY CORPORATION FOR SPECIFIC PERFORMANCE—DEFENCE—REPRESENTATION AS TO FORMATION OF PUBLIC PARK—RESOLUTION OF MUNICIPAL COUNCIL—COSTS.

Burlington v. Coleman, 12 O.W.N. 218.

(§ II D—142)—TOWNS—PROMISSORY NOTE—POWER TO MAKE—ULTRA VIRES CONTRACT.

A town has no authority to execute promissory notes even though in payment for services rendered, and, though they are sealed and signed by the mayor and secretary-treasurer of the town in its behalf.

Pigott v. Battleford, 12 D.L.R. 171, 6 S. L.R. 235, 24 W.L.R. 365.

PARTLY ULTRA VIRES — SEGREGATION BY COURT.

In an action by a municipal corporation to obtain a declaration that a contract between it and an electric railway company is void because a portion of its conditions were ultra vires, the court will not, on such general claim, make a selection of such of its provisions as are ultra vires, but will leave that to be settled in concrete cases questioning the validity of specific clauses of the agreement.

Burnaby v. British Columbia Electric R. Co., 12 D.L.R. 320, 3 W.W.R. 628.

ULTRA VIRES—BREACH—DAMAGES.

If a municipal corporation, apparently in the due exercise of its powers, enters into a contract, but by reason of the non-fulfilment of some statutory duty imposed on it in connection therewith, such contract is declared to be ultra vires, the corporation is liable in damages for breach of such duty. A municipal corporation having made a contract imposing an obligation on such corporation must provide sufficient means to fulfil such obligation.

Quinlan v. St. John, 41 D.L.R. 365, 24 Rev. de Jur. 321.

ULTRA VIRES CONTRACT.

Where a municipal by-law and a contract based upon it for the construction of certain works have both been annulled by the courts for non-observance of the necessary formalities in regard to the publication of the by-law, but the subject-matter of the by-law and contract are within the powers of the municipality, the opposite party is entitled to recover from the municipality the damages he has suf-

tered from the non-execution of the contract.

Poutres Siegwart v. Deschambault, 5 D.L.R. 395, 41 Que. S.C. 453.

ILLEGAL TENDERS—ATTACK BY RATEPAYER.

A municipal corporation, after calling for tenders for supply of materials, cannot disregard without justification the lowest bidder and allow a higher bidder to amend his bid. The court, at the instance of a ratepayer having a special interest in the transaction, will enjoin the municipality from entering into the contract.

Dubuc v. Montreal & Aztec Oil Co., 48 Que. S. C. 366.

BONUS FOR PROMOTION OF MANUFACTURES—"INDUSTRY ALREADY ESTABLISHED ELSEWHERE IN THE PROVINCE"—MEANING OF "ESTABLISHED"—BUSINESS CARRIED ON FOR TEN MONTHS IN RENTED PREMISES.

Re Black and Orillia, 5 O.W.N. 67, 25 O.W.R. 17.

SANITARY BY-LAW—COLLECTION OF GARBAGE—DELEGATION OF AUTHORITY—MINISTERIAL MATTERS.

Re Knox and Belleville, 5 O.W.N. 237, 25 O.W.R. 201.

CONTRACT OF, WITHOUT BY-LAW—EMPLOYMENT OF COUNSEL BY CITY—ACCEPTANCE OF SERVICES.

Manning v. Winnipeg, 21 Man. L. R. 203.

ILLEGAL EXPENDITURE—MONTREAL CITY CHARTER (62 VICT. C. 58)—PENALTIES ON MEMBERS—EXCEEDING APPROPRIATION.

Lapointe v. Larin, [1911] A.C. 520, 10 E.L.R. 35.

(§ II D—143)—POWERS OF—CONTRACTS, MODE OF EXECUTING—CONTROL OF COMMISSIONERS.

A municipality in Alberta transferring its estate in realty may do so without a recommendation from the city commissioners, in the absence of express statutory inhibition. [Alta. 1908, c. 36, s. 185, respecting powers and duties of commissioners, as read with charter of city of Calgary, being Ord. 33, N.W.T. 1893.] A municipality in Alberta may authorize the transfer of its estate in realty by resolution; a by-law is not essential.

Re McEwan and Calgary, 13 D.L.R. 791, 6 A.L.R. 136, 25 W.L.R. 401, 5 W.W.R. 87.

EXECUTION—MODE OF CONTRACTING.

A contract by a municipal corporation for carrying out permanent improvements to streets and the construction of sewers and contemplating a large expenditure is within § 325 of the Municipal Act (Ont.) 1903, and a by-law is essential to its validity. [Waterous Engine Works v. Palmerston, 21 Can. S.C.R. 556, followed.]

O'Donnell v. Widdifield, 1 D.L.R. 271, 3 O.W.N. 597, 21 O.W.R. 1.

CONTRACT FOR GAS WORKS—WHAT CONSTITUTES—RESOLUTION OF COUNCIL.

A resolution by a municipal council authorizing a contract with a corporation for gas drilling operations, which, if satisfactory, are later to be taken over by the municipality, is a mere expression of willingness, but not necessarily in itself a contract.

R. ex rel. La Fleche v. Sheppard, 24 D. L.R. 404, 9 A.L.R. 1, 8 W.W.R. 1020.

EXECUTION OF CONTRACTS—WHEN BY-LAW AND SEAL UNNECESSARY.

Malcolm v. Blairmore, 10 D.L.R. 835.

(§ II D—146)—RATIFICATION—RESCISSION—CANCELLATION.

Where a settlement of a claim for water rates by a municipal corporation against a consumer is made by unanimous resolution of the council, and the terms of the settlement are in part carried out by payment to and acceptance by the treasurer of the municipal corporation of successive instalments of money due to the municipality under the settlement, there is such ratification of the contract as to preclude a successful attack upon it by reason of the settlement not having been formally adopted by the council.

Brandon Electric Light Co. v. Brandon, 1 D.L.R. 793, 22 Man. L.R. 500, 20 W.L.R. 658, 2 W.W.R. 22.

MUNICIPAL COUNCIL—EXCLUSIVE LIGHTING FRANCHISE—ESTABLISHMENT OF MUNICIPAL LIGHTING SERVICE—VALIDITY OF.

A contract with a municipal council for an exclusive lighting franchise for 10 years with a proviso that the municipality would give the contractor the preference over any other person tendering at the end of the term at the rates quoted in the competing tender for another 10 years, is not a bar to the council establishing its own electric lighting plant on the expiry of the first 10 years pursuant to statutory authority conferred meanwhile; the municipal by-law establishing a municipal lighting service for the citizens having been ratified by the legislature pendente lite, a resolution of the municipality passed in conformity with the validated by-law was declared valid and the judgment below varied accordingly.

Ricard v. Grand'Mere, 20 D.L.R. 768, 50 Can. S.C.R. 122, varying 23 Que. K.B. 97.

MODE OF CONTRACTING—POWERS OF COMMISSIONERS—RATIFICATION BY COUNCIL.

Under the Edmonton charter the power of the commissioners is subject to the supervision of the council, and when, after submitting to the council, the latter authorized a particular contract, the commissioners have no authority to make a contract in conflict with the council's authorization; nor will a resolution of the council authorizing tests of the proposed undertaking and the submission of a by-law to raise funds presumably necessary under the agreement, in the absence of knowledge of the terms thereof, operate as a ratification of the agreement. It is not necessary to follow the procedure under s. 578 of the Edmonton charter by a motion to quash a

resolution where no exception is taken to the resolution, but only to an agreement because not in accord with the resolution.

Livingstone v. Edmonton Industrial, 25 D.L.R. 313, 9 A.L.R. 343, 9 W.W.R. 794, varying as to costs 24 D.L.R. 191, 31 W.L.R. 609, 8 W.W.R. 976.

CONTRACT TO BUILD BRIDGE—EXECUTION ACCORDING TO CONTRACT—RIGHT TO RECOVER—NO BY-LAW AUTHORIZING—DUTY OF MUNICIPALITY TO KEEP HIGHWAYS IN REPAIR.

A plaintiff who has, according to the true meaning of a contract in writing and sealed by a municipal corporation, done what he contracted to do in constructing a bridge to replace one which formed part of a highway in the township is entitled to recover the contract price. The absence of a by-law authorizing the construction is no defence to an action to recover the contract price, it being part of the duty of the municipality to keep the roads in repair and fit for ordinary traffic including the building and repair of bridges. [MacKay v. Toronto, 43 D.L.R. 263, distinguished.]

Witherspoon v. East Williams, 47 D.L.R. 370, 44 O.L.R. 584.

The ratepayers' right to prevent an expenditure of municipal funds for purposes ultra vires the corporation does not justify an action to rescind a completed purchase and to compel the vendor to repay the price he has received; his remedy in such case is to hold the individual councillors responsible for the loss.

Verner v. Toronto, 1 D.L.R. 530, 3 O.W.N. 586, 21 O.W.R. 170.

(§ II D—148)—CONTRACTS WITH UNINCORPORATED ASSOCIATION—EFFECT ON SUBSEQUENT INCORPORATION.

A resolution of a municipal council which authorizes the municipality to enter into an agreement with an unincorporated association has no binding effect on the corporation subsequently formed of the unincorporated body.

Livingstone v. Edmonton, 24 D.L.R. 191, 8 W.W.R. 976, 31 W.L.R. 609. [Varied as to costs in 25 D.L.R. 313, 9 A.L.R. 343, 9 W.W.R. 794.]

AGENCY—BINDING SUCCESSOR.

A municipal council cannot bind succeeding councils by the appointment of a fiscal agent with exclusive right to sell municipal bonds. Quære, whether such appointment is not ultra vires.

Wood-Gundy Co. v. Vancouver, 10 W.W.R. 928.

(§ II D—149)—POWERS OF—CONTRACTS GENERALLY—TRANSFER SUBJECT TO ENABLING ACT—"PROCEEDING."

A municipal resolution authorizing a city solicitor to take all "proceedings" and the mayor and clerk to sign all documents necessary to transfer the municipality's estate in certain land to the Dominion Government as an armoury site, will be given effect, although part of the "proceedings" is the bringing about of provincial legislation as a condition precedent to a legal transfer.

Re McEwan and Calgary, 13 D.L.R. 791, 6 A.L.R. 136, 25 W.L.R. 401, 5 W.W.R. 87.

INADEQUACY OF PRICE ON SALE.

The court will not sit in review of the action of municipal councils while acting within the scope of its authorized powers, except upon the ground of fraud; and a sale of municipal property cannot, in the absence of fraud, be impeached on the ground that the council did not obtain as much for the property as it should have received in the exercise of its duty towards the ratepayers.

Parsons v. London, 1 D.L.R. 756, 25 O.L.R. 442, 21 O.W.R. 205.

E. BORROWING MONEY; INDEBTEDNESS.

(§ II E—150)—BY-LAW CERTIFIED BY MINISTER OF MUNICIPAL AFFAIRS, CONCLUSIVENESS.

Under s. 207 of the City Act, R.S.S. 1909, c. 84, the discretion given to the Minister of Municipal Affairs to grant a certificate approving a city by-law authorizing the borrowing of money by the municipality, is absolute, and its validity cannot be attacked in any court.

Canadian Agency v. Tanner, 11 D.L.R. 472, 6 S.L.R. 152, 24 W.L.R. 71, 4 W.W.R. 467.

PROMISSORY NOTE—LIABILITY.

A municipal corporation cannot be held liable for the amount of a promissory note signed by its secretary-treasurer without evidence that the corporation authorized the signature or that the corporation has derived benefit from the signing of the note.

St. Elizabeth v. Lavallée, 32 D.L.R. 520, 25 Que. K.B. 507.

ISSUE BY TOWNSHIP COUNCIL OF DEBENTURE TO RAISE MONEY FOR PUBLIC SCHOOL PURPOSES—BY-LAW—RATE OF INTEREST—COMPUTATION OF AMOUNT OF PRINCIPAL AND INTEREST LUMPED TOGETHER—REFORMATION OF BY-LAW AND DEBENTURE—ACTION BY EXECUTORS OF PURCHASER OF DEBENTURE.

Krug v. Albemarle, 17 O.W.N. 79.

(II E—151)—SCHOOL BOARD—POWER TO BORROW.

School trustees as public non-trading corporations are restricted to the powers expressly given them by the creating statute as to their borrowing powers.

Quinlan v. School Trustees, 14 D.L.R. 376.

(§ II E—152)—VOTE FOR—DATE OF ISSUE OF DEBENTURES.

The power to issue debentures under the Ontario Telephone Act, 2 Geo. V., c. 38, s. 17 (1), may be exercised without a vote of the ratepayers, and a municipality may fix any convenient date as the date

of issue of the debentures issued thereunder.

Re Robertson and Colborne, 8 D.L.R. 149, 4 O.W.N. 274, 23 O.W.R. 325.

CONTRACTING DEBTS NOT PAYABLE WITHIN CURRENT YEAR—PURCHASE OF SITE FOR TOWN AND FIRE HALL—ILLEGAL PROCEEDINGS—RIGHT TO MANDAMUS.

Manning v. Bergman, 25 D.L.R. 797, 9 W.W.R. 220, 32 W.L.R. 519.

MONEY BY-LAW—PUBLICATION.

The provisions of s. 263 of the Municipal Act, R.S.O. 1914, c. 192, are imperative, and failure to publish a by-law, which requires the assent of the electors, in the village if there is a newspaper published there, is a disregard of the principles of the Act and the defect or irregularity is not cured by the saving provisions of s. 150.

Re Poulin and L'Orignal, 42 D.L.R. 681, 42 O.L.R. 483, reversing 42 O.L.R. 6.

MONEY BY-LAW—VALIDITY—SUBMISSION TO ELECTORS — "RATEPAYERS" — AGREEMENT FOR PURCHASE OF POWER PLANT.

Re Campbell and Rainy River, 15 O.W.N. 63.

(§ II E—153)—GRANTS OF MONEY—WINTER SPORTS AND PEACE CARNIVAL—CURLING ASSOCIATION—ULTRA VIRES—SAILORS' RELIEF FUND WITHIN POWER OF.

Grants of money by the city of Winnipeg to the "Winter Sports and Peace Carnival" and to the "Manitoba Curling Association" are beyond the power of the city, as they are neither grants to "charitable institutions" or for the entertainment of important "guests" and so are not within §§ 589, 590 of the charter of incorporation. A grant to the "Mercantile Sailors' Relief Fund" is within the powers of the city, it being a charitable institution of a permanent character which has received the approbation of the Civic Charities Bureau (s. 700, sub-s. 198). The latter grant is not ultra vires as being contrary to s. 92 (2 and 7) of the B.N.A. Act although the objects to be relieved are outside the limits of the province. [Re Homan and Toronto, 45 D.L.R. 147, 43 O.L.R. 632, referred to.]

McMillan v. Winnipeg, 45 D.L.R. 351, [1919] 1 W.W.R. 591.

DEBENTURE BY-LAW—TOWNSHIP COUNCIL—PURCHASE OF SITE FOR SCHOOL—HIGH SCHOOL DISTRICT COMPOSED OF TOWNSHIP AND VILLAGE—SCHOOL-HOUSE SITUATE IN VILLAGE—HIGH SCHOOLS ACT, R.S.O. 1914, c. 268, s. 38—JURISDICTION TO PASS BY-LAW VESTED IN VILLAGE COUNCIL ONLY.

Re Dougherty and East Flamborough, 6 O.W.N. 487.

(§ II E—156)—CONSOLIDATING BY-LAW COVERING CONSTITUENT BY-LAWS—TAXPAYERS' RIGHTS.

A city council has the power in consolidating by-laws under s. 209 (c) of the City Act (c. 84, R.S.S. 1909), as amended by s. 7, 1910-11, c. 18, to provide for a higher rate of interest to be paid on consolidated stock of the municipality, than the aggregate amount of annual interest on such stock as provided for under the constituent by-laws which authorized the issue of such stock; and a ratification of such consolidating by-law by the burgesses is not essential to the validity of such increase in the rate of interest where the constituent by-laws had been previously ratified by the burgesses.

Canadian Agency v. Tanner, 11 D.L.R. 472, 6 S.L.R. 152, 24 W.L.R. 71, 4 W.W.R. 467.

INJUNCTION — MUNICIPALITY SPENDING MONEY FOR ROADWAY NOT FOR PUBLIC BENEFIT—RIGHT OF RATEPAYERS TO SUE FOR INJUNCTION.

Individual ratepayers of a municipality (although not injuriously affected more than other ratepayers), are entitled to maintain an action for an injunction restraining the municipality from expending moneys on a roadway which was not for the public benefit.

Dods v. Minitonas, [1919] 1 W.W.R. 717.

(§ II E—160)—WATERWORKS BY-LAW—POWERS OF COUNCIL—EXPENDITURE OF MONEY—EXCEEDING MONEY FIXED BY ACT.

Re Clarey and Ottawa, 5 O.W.N. 370.

F. AS TO LIGHTS, WATER SUPPLY AND OTHER PROPERTY AND PRIVILEGE.

Franchise, gas, rates, right to require minimum user, see Contracts, II D–157.

(§ II F—165)—GAS AND ELECTRIC LIGHTS—POWERS OF EXPROPRIATION—MUNICIPAL ACT.

Sarnia Gas & Electric Light Co. v. Sarnia, 5 O.W.N. 532, 25 O.W.R. 415.

FRANCHISE—LIGHTING PLANT—AREA—DISTRICT—CITY—NOTICE.

The right of a district municipality to assume ownership of an electric lighting system, under the terms of its agreement or franchise, extends to an area comprising a portion of the district which has been formed into a city corporation; the notice of the termination of the franchise is effective, as against both municipalities, when given to the district municipality.

Vancouver Power Co. v. North Vancouver, 36 D.L.R. 462, [1917] A.C. 598, affirming 27 D.L.R. 727, 22 B.C.R. 561.

POWER TO CHANGE SYSTEM OF POWER PLANT AND WATER WORKS—ASSENT OF RATEPAYERS—APPROVAL OF BOARD OF HEALTH—FINANCING—INJUNCTION.

Poser v. Vegreville, 37 D.L.R. 778, [1917] 3 W.W.R. 1003.

ELECTRIC CURRENT SUPPLIED BY MUNICIPALITY FOR LIGHTING HOUSES — BOARD OF COMMISSIONERS.

Young v. Gravenhurst, 24 O.L.R. 467.

(§ II F—170)—Powers—As to lights—Municipal plant—Supplying electricity beyond limits.

A city which owns an electric light and power plant, in supplying electricity to consumers in another municipality, is to be regarded as a private corporation operating a public utility. It is not ultra vires for a city owning an electric light and power plant to supply power to consumers in other municipalities.

Re Winnipeg and St. Boniface, 14 D.L.R. 186, 25 W.L.R. 618, 5 W.W.R. 293.

Light and water franchises—Time periods—Legislative regulations.

In a statute authorizing the council of a municipality to pass by-laws authorizing "any contract with any person or corporation to supply light or water for the use of the corporation for any period not exceeding five years," the words "for the use of the corporation" do not confine the operation of the statute to contracts requiring the council to make payments from the public treasury for corporate purposes, but the statute applies as well to a contract to supply the inhabitants individually with electric light and power.

Weeks v. Vegreville, 9 A.L.R. 56. [See 25 D.L.R. 795.]

Distribution and supply of electrical power—Public Utilities Act, R.S.O. 1914, c. 204, ss. 34, 35, 36—Management of works and operations entrusted to commission—Company authorized to supply electric power—Erection of poles and wires in streets of municipality—By-law of municipal corporation authorizing use of company's poles for stringing wires of corporation—Restriction to supply of power and light for use of corporation—Interference with company's appliances—Declaration—Injunction—Damages.

Lincoln Electric L. & P. Co. v. Hydro-Electric Com., 7 O.W.N. 688, 9 O.W.N. 159.

Electric company—Lighting system—By-law—Repeal—Injunction.

A municipal corporation may proceed by injunction against an electric company attempting to instal within the municipality a system of electric lighting, under a by-law which is subsequently repealed and replaced by another because the first was illegal, and neither the company nor its grantors had done anything to take advantage of the privileges granted by the repealed by-law. The right of the corporation to an injunction is more evident, because the by-law was not attacked as illegal. As long as the second by-law remains in force the first must be without effect.

Trois-Pistoles v. Compagnie Electrique des Trois-Pistoles, 24 Rev. de Jur. 178.

Lighting company—Poles—Private property—Necessity.

Although art. 5674, R.S.Q., requires the owners "of houses or lands in cities and towns to permit the pipes, lamps and posts necessary for the lighting for public purposes to be placed on their houses, buildings or lands," a lighting company can only avail itself of this provision to place a pole upon private property without expropriation, by showing an absolute necessity of so acting, and subject to using the privilege only for lighting purposes.

North Shore Power Co. v. Lebel, 27 Que. K.B. 294.

Street lighting — Contract — Breach — Third person—Verdict.

An action for damages cannot be based upon a violation of the obligations of a contract to which the plaintiff is not a party and to which he is a stranger. 2. A verdict based upon acts of negligence not alleged in the declaration cannot be received. 3. The city of Montreal cannot be held responsible for an accident because it had not sufficiently kept watch over a contract which it had made with the M. L. & P. Co. for lighting its streets, and had not seen that the company's lights in the streets did not go out during the night.

Desautels v. Montreal Light & Power Co., 53 Que. S.C. 73.

Municipal law—Setting aside an order—Electric lighting—Lighting part of the municipality—Exclusive privilege—C. Mun., art. 408.

A municipal corporation subject to the Mun. Code cannot light the streets of a portion of the town at the expense of all the taxpayers. It must assess such expenses only on the portion benefited. A municipality cannot grant an exclusive privilege, or a franchise to a public utility company unless its charter, or the general law which regulates it, expressly authorizes it.

Bureau v. St. Ubalde, 28 Que. K.B. 130.

Lighting—Defective service.

An electric lighting company which provides light for the streets of a town for several years without contract, the lamps being furnished by the town, may recover the price agreed upon for this lighting without the municipality being able to have the amount reduced on the claim that the light furnished was not strong enough. The town should refuse the light and serve a protest on the company.

St. Jerome Power & Electric Light Co. v. St. Jerome, 26 Que. K.B. 534.

Subterranean pipes—Rent—Rates.

Par. 8 of s. 39 of 9 Edw. VII. c. 81, which provides that: "The city is authorized to fix, determine, charge and receive rentals on all underground constructions reserved by the persons, firms, syndicates, companies or corporations, and all overhead constructions owned by the city. Such rentals shall be fixed from year to year, to cover the cost of maintenance and administration of the same, the interest and sinking fund calculated in such manner as to extinguish the debt in not less than 40

years on the capital invested by the city for the construction or purchase of such underground conduits as well as the salaries and expenses of the electrical commission. When the said debt has been extinguished, the rental shall no longer include the interest and sinking fund on the extinglished debt: but the amount of such rental for each person or company shall be in proportion to the portion of the conduits occupied or reserved by him or it," means that the companies are obliged to pay an annual rent sufficient to pay the cost of administration, maintenance and sinking fund, calculated to extinguish the debt incurred for the construction of the drain and subterranean conduits in 40 years; in other words, they should pay this rent not only for the space occupied or reserved for that by them, but also for the space unoccupied.

Montreal Light, Heat & Power Co. v. Montreal, 26 Que. K.B. 368.

ERECTION OF POLES AND WIRES IN STREETS OF TOWN—PERMISSION OF MUNICIPALITY—ELECTRIC SYSTEM—INTERFERENCE—INJUNCTION—JOINDER OF DIRECTORS AS CO-DEFENDANTS.

Toronto & Niagara Power Co. v. North Toronto, 24 O.L.R. 537.

POLES AND WIRES—"TERRAIN"—"LOT"—IMMOVABLE PROPERTY.

Westmount v. Montreal Light, Heat & Power Co., 44 Can. S.C.R. 364.

USE OF STREETS BY ELECTRIC LIGHT COMPANY AFTER EXPIRATION OF TIME LIMITED—INJUNCTION—ORDER TO REMOVE POLES AND WIRES—ESTOPPEL.

Selkirk v. Selkirk Electric Light Co., 20 Man. L.R. 461, 15 W.L.R. 703.

(§ II F—171)—AS TO LIGHTS—POWER TO CONSTRUCT ELECTRIC LIGHT SYSTEM.

A town that is expressly empowered by law to light its streets may construct an electric lighting system for that purpose when not prevented by any exclusive charter vested in some other person or company.

Att'y-Gen'l and Truro v. Chambers Electric Light & Power Co., 14 D.L.R. 883, 13 E.L.R. 443.

ELECTRICITY — ERECTION OF POLES AND WIRES.

The letters patent of the Toronto Electric Light Co., together with the Act of 1882 (45 Vict. c. 19), conferred upon the city of Toronto the absolute right to permit or prohibit the erection of poles for the maintenance of wires for electric supply on the streets and public places of the city, and this right has always, by the subsequent agreements and contracts, been consistently guarded and preserved.

Toronto Electric Light Co. v. Toronto, 31 D.L.R. 577, 38 O.L.R. 72, affirming 21 D.L.R. 859, which reversed 20 D.L.R. 958, 31 O.L.R. 387.

(§ II F—172)—PURCHASE OF EXISTING PLANT.

Under s. 5281, R.S.Q. 1909, providing that a municipal corporation shall have "jurisdiction for municipal and police purposes and for the exercise of all the powers conferred upon it, over the whole of its territory, and also beyond its territory in special cases where more ample authority is conferred upon it," a town has no authority to establish a light and power plant beyond its boundary unless there is something in the special Act by which the power is conferred indicating an intention that it is to be exercised beyond the municipal limits, and, therefore, a by-law of the town authorizing the purchase of such plant so situated is invalid in the absence of statutory authority.

Shawinigan Hydro-Electric Co. v. Shawinigan Water & Power Co., 4 D.L.R. 502, 10 E.L.R. 521, 45 Can. S.C.R. 585.

(§ II F—174)—GAS LEASES—ASSENT OF RATEPAYERS.

Under ss. 223, 227 of the city charter (Edmonton, Alta.), the municipal council has no power to commit the city on a lease of natural gas rights, unless with the assent of a majority of the burgesses.

Livingstone v. Edmonton, 24 D.L.R. 191, 8 W.W.R. 976, 31 W.L.R. 609. [Varied as to costs in 25 D.L.R. 313, 9 A.L.R. 343, 33 W.L.R. 164, 9 W.W.R. 794.

WORKS AND UTILITIES—GAS WORKS—INTERESTED PARTIES—MEMBERS OF COUNCIL.

Gas works are not the "works" or "utilities" covered by the Edmonton charter, and therefore not within the purview of s. 470, which prohibits any member of council or commissioner from being interested in any contract in connection with the works under the charter.

R. ex rel. La Fleche v. Sheppard, 24 D.L.R. 404, 9 A.L.R. 1, 8 W.W.R. 1020.

GAS FRANCHISES—EXCLUSIVE GRANT—TERRITORIAL LIMIT.

Agreements for supplying gas "throughout" a city, and regulating the prices chargeable to the "inhabitants of the city," are not limited to the city as it was when the agreements were entered into, but are applicable to all extensions of the city subsequently made; a reference in the agreement to the exclusive rights and privileges granted and a provision that "the city shall not grant similar privileges to any person, firm or corporation" are not exclusive as against the city itself.

Calgary v. Canadian Western Natural Gas Co., 40 D.L.R. 201, 56 Can. S.C.R. 117, [1918] 1 W.W.R. 121, affirming 33 D.L.R. 385, 10 A.L.R. 180, which reversed 25 D.L.R. 807, 32 W.L.R. 558, 9 W.W.R. 252, 10 A.L.R. 180.

(§ II F—175)—WATER SUPPLY.

Where a contract is made between a municipality and a water company to furnish water for fire purposes and of a particular pressure, and a violation of the contract is

committed by the water company, the liability for such violation is limited to the penalty in the contract, and to be enforced only by the municipal council.

Belanger v. St. Louis, 8 D.L.R. 601.

WATER FOR DOMESTIC, FIRE AND OTHER PURPOSES — MOTIVE POWER — DISCRETION OF COUNCIL.

Crockett v. Campbellton, 44 Can. S.C.R. 606.

CONTRACTS—AS TO WATER SUPPLY—"EPIDEMIC EMERGENCY"—ABSENCE OF SEAL.

The absence of a formal contract under the seal of the municipality cannot be set up by a ratepayer in bar of the municipality paying the agreed consideration under an executed contract which was beneficial to it, e.g. the supply of water to the inhabitants in an emergency during an epidemic; nor is it an objection that the water was not supplied to the city itself but on the direction of the municipal council to those requiring it.

Wright v. Ottawa, 19 D.L.R. 712, 7 O.W.N. 151.

AQUEDUCT—WATERS—RIPARIAN RIGHTS.

The sections of the charter of the city of Quebec authorizing it to construct aqueducts within a certain radius, and to take therefrom necessary water, do not authorize it to take water from a river to the damage of riparian owners without expropriating their rights.

Quebec v. Bastien, 32 D.L.R. 499, 25 Que. K.B. 539.

PUBLIC WATER SUPPLY — BY-LAW MAKING REASONABLE CHARGE FOR—COMPELLING USE BY CITIZENS—CONSUMERS.

By the Municipal Act, R.S.O. 1914, c. 192, s. 399, "by-laws may be passed by the councils of local municipalities . . . (70) for making reasonable charges for the use of public water and (72) for compelling the use within the municipality or any defined area therein for drinking and domestic purposes of water supplied from the waterworks of the municipality. Where a by-law has been passed under the above Act a ratepayer within the defined area cannot escape payment of the assessed rates on the ground that he does not use the water supplied. He is in the eyes of the law a consumer, and cannot escape payment by setting up that he is an offender against the law.

Simpkin v. Englehart, 48 D.L.R. 230, 45 O.L.R. 275.

MUNICIPAL LAW—WATER COURSE—PATH OF DITCH — PATH OF DRAIN — SPECIAL SUPERINTENDENT — JURISDICTION OF MUNICIPAL COUNCIL AND OF THE SUPERIOR COURT—C. MUN. ART. 867.

A municipal council has power to name a special superintendent, and to confirm his report, with the object of making an official report setting out a statement either of the path of a ditch or the path of a drain and of changing a watercourse. The municipal council can establish watercourses wherever it sees fit to do so, provided that it does not cause the water to flow over lands where nature did not intend it to flow. When a municipal council has pronounced on the sufficiency or insufficiency of a watercourse and has acted in good faith, within the limits of its powers, its decision is not subject to the jurisdiction of the Superior Court; it is a question of fact left to the discretion of the municipal authority.

Arbique v. St. Placide, 56 Que. S.C. 512.

WATER FRANCHISE—APPROVAL OF ELECTORS.

A village municipality has the right to grant the exclusive privilege of laying drains in all the streets for the purpose of operating an aqueduct during a period of 25 years. When a by-law granting such franchise does not give any bonus nor impose any tax nor oblige the ratepayers or residents of the municipality to take the water from the aqueduct, it is not necessary that it should be approved by the municipal electors nor by the Lieut.-Gov. in Council. Where a notice has been given for a special meeting for the purpose of adopting municipal by-laws it is not necessary to renew this notice if the by-law is not adopted at such special session but at a subsequent general session. A ratepayer or municipal elector can only demand the quashing of a municipal by-law by a direct action on proving that the by-law is or will be prejudicial to him.

Stuart v. Napierville, 50 Que. S.C. 407.

CONTRACT—WORK AND LABOUR—CONSTRUCTION OF SEWER SYSTEM FOR MUNICIPALITY — INTERPRETATION OF CONTRACT — BONUS—COST OF WORK—EXTRAS.

Armour v. Oakville, 6 O.W.N. 453.

(§ II F—176)—BUILDING OR PURCHASING WATERWORKS.

A city has power under the Municipal Public Works Act, 1909, c. 91, R.S.S., to construct waterworks and to acquire necessary land therefor either within a city or in the neighbourhood thereof.

Ex parte Young, 5 D.L.R. 83, 5 S.L.R. 351, 21 W.L.R. 860, 2 W.W.R. 758.

WATERWORKS BY-LAW — EXPENDITURE OF MONEY — POWER OF COUNCIL — NECESSITY FOR SUBMISSION OF BY-LAW TO RATEPAYERS—SPECIAL ACT, 3 & 4 GEO. V. C. 109 (O.)—MOTION TO QUASH BY-LAW—FORMER BY-LAW QUASHED—RES JUDICATA — MANDATE OF PROVINCIAL BOARD OF HEALTH—EFFECT OF—PUBLIC HEALTH ACT—ABSENCE OF PLANS AND DETAILS OF WATERWORKS SCHEME — STATUTES — DOMINION ACT — AUTHORIZATION OF WATERWORKS IN QUEBEC—NECESSITY FOR QUEBEC LEGISLATION.

Re Clarey and Ottawa, 5 O.W.N. 673.

BOARD OF WATER COMMISSIONERS—RIGHTS AND DUTIES—ALTERATION AND EXTENSION OF PLANT AND EQUIPMENT—SURPLUS OF REVENUE OVER COST OF OPERATION—PAYMENT BY COMMISSIONERS TO MUNICIPAL TREASURER—POWER OF COMMISSIONERS TO DRAW UPON—RIGHT OF COMMISSIONERS TO DETERMINE WHAT EXTENSIONS NECESSARY — MUNICIPAL WATERWORKS ACT, R.S.O. 1897, c. 235, ss. 2, 38, 40, 47—PUBLIC UTILITIES ACT, 3 & 4 GEO. V. c. 41, ss. 3, 26, 34, 35, 43.

Re Berlin and Breithaupt, 6 O.W.N. 423.

(§ II F—178)—COLLECTION OF RATES.

Appeal from a decision of council to omit the names of electors from the lists because they had not paid their taxes. It is a principal that the municipal law of parishes, towns and villages ought to be interpreted in a broad manner when it is a question of imposition of taxes or penalties. In this case the usual formalities that the law required in the impositon of water taxes and rent have not been complied with by the council of the respondents and as a result such taxes are extinct. Under these circumstances the appeal should be allowed with costs against the respondents.

Bouchard v. Baie-St. Paul, 25 Rev. de Jur. 178.

(§ II F—180)—"CREMATORIES"—"INCINERATORS."

Section 232 of the City Act (Sask.), 1915, c. 16, relating to crematories, does not apply to incinerators, which are entirely different things.

Butler v. Saskatoon, 38 D.L.R. 480, 11 S. L.R. 1.

WATER COURSE — DITCH — APPEAL—JURISDICTION—IRREGULARITY.

Municipal council having jurisdiction to establish a water course, may utilize, for this purpose, either a line ditch or a road ditch already existing. Art. 867 of Mun. Code (old) by which road ditches and line ditches appear to be excepted from the category of municipal water courses, ought to apply to such ditches only as long as they do not alter their nature. Art. 100 of Mun. Code (old) does not give an appeal to the parties upon questions of fact; it can only be invoked in cases where a municipal council has exceeded its authority, or has committed a grave irregularity or has rendered itself guilty of a grave injustice.

Bélanger v. St. Barnabé, 53 Que. S.C. 255.

SUPPLYING ELECTRICITY—ESSENCE OF TIME—DELAY—LIABILITY.

Kettle River v. Winnipeg, 31 D.L.R. 564.

EXPROPRIATION BY CITY BY-LAW OF OUTSIDE LAND FOR ADDITION TO INDUSTRIAL FARM—"ACQUIRE"—STATUTORY POWERS—EXHAUSTING BY ORIGINAL PURCHASE.

Re Boyle and Toronto, 5 O.W.N. 97, 25 O. W.R. 67.

(§ II F—183)—BRIDGES—WATERCOURSE.

Art. 5639, R.S.Q. 1909, Cities and Towns Act, does not authorize a county council to make regulations in regard to the construction and maintenance of a bridge situated in a town, unless such bridge crosses a watercourse which lies within its jurisdiction and that there should be a necessity therefor.

Baie St. Paul v. Charlevoix, 50 Que. S.C. 380.

(§ II F—188)—OPERATION OF RAILWAY—DOMINION FRANCHISE—ASSENT OF MINISTER.

A municipality may acquire the undertaking of a Dominion railway, but under s. 299 of the Railway Act, 1906, is without power to operate it under the Act except under the authority of the Minister of Railways and Canals with the obligation of applying for an enabling Act at the next session of Parliament.

Re Grand Valley R. Co., 26 D.L.R. 651, 18 Can. Ry. Cas. 430.

(§ II F—190)—POWERS—ESTABLISHMENT OF MUNICIPAL GAZETTE.

The establishment of a "municipal gazette" or municipal publication dealing exclusively with the details of the city's government is within the powers of the city of Edmonton under the Edmonton charter, Alta. 1913, 1st sess. c. 23; and a resolution of the city council to that end will not be quashed unless it be shewn that the council acted otherwise than in good faith.

Tookey v. Edmonton, 16 D.L.R. 795, 28 W.L.R. 98, 6 W.W.R. 690.

(§ II F—192)—PURCHASE OF LAND.

A municipal council is not restricted as to the price to be paid for land purchased for administrative purposes, and it may be determined upon between the corporation and the vendor without any reference to the values appearing on the assessment roll. In the absence of special provisions as to the procedure to be followed, a municipal corporation (e. g., the city of Montreal) desirous of purchasing realty for administrative purposes, may do so on resolution of its municipal council as in ordinary cases of administrative functions.

Birchenough v. Montreal, 3 D.L.R. 299, 21 Que. K.B. 467. [See 13 Que. P.R. 179.]

Whether a municipal corporation with power to purchase and hold real estate for certain purposes has acquired and is holding said property for other purposes is a question that can only be determined in a proceeding at the instance of the Crown.

Verner v. Toronto, 1 D.L.R. 530, 3 O.W. N. 586, 21 O.W.R. 170.

PURCHASE OF LAND—MARKET BUILDING.

The fact that a municipal corporation's statutory authority was in terms to continue the market theretofore established and to establish and regulate "other markets" will not debar the municipality in case of destruction by fire of the market building so continued, from building a new market in another and more fitting location within the municipality to the exclusion of the former

site, or from using the former site for other purposes.

Steeves v. Moncton, 17 D.L.R. 560, 42 N.B.R. 465.

(§ II F—193)—Municipal telephones.

A municipality may establish a telephone system under 2 Geo. V., c. 38, upon being properly petitioned to do so, without giving effect to all the prayers of the petition, if the system complies with the Act in question.

Re Robertson and Colborne, 8 D.L.R. 149, 4 O.W.N. 274.

G. Liability for damages.

(§ II G—195)—Liability for damages—Torts not under power of council—Form of action.

The provisions of s. 10 of title 27 and s. 26 of title 35 of the charter of the city of Medicine Hat, providing for the appointment of an arbitrator to fix the compensation of one whose lands have been "injuriously affected in the exercise of any power of the council," in the event of the council not being able to agree with the claimant as to the amount of compensation or damages, do not apply to a claim for damages of an owner of lands abutting on a street the grade of which has been cut down by the city, since such action by the city is not an "exercise of any power of the council," but is a tortious interference by the city with the owner's right of free access to the street, in the absence of any express or implied provisions in the charter granting such power to take away from the owner such right of access, and the correct remedy is by action against the city.

Forster v. Medicine Hat, 9 D.L.R. 555, 5 A.L.R. 36, 23 W.L.R. 200, 3 W.W.R. 618.

Highway—Guard-rail.

A township is liable for injuries sustained by a traveler along one of its roads by reason of its failure to supply a guard-rail or barrier at a place which is notoriously dangerous, where it appears that the failure to supply such guard rail was the direct cause of the injury and that the attention of the township had been frequently called to the fact that a guard-rail was necessary at that point.

Barclay v. Ancaster, 10 D.L.R. 363, 4 O. W.N. 764, 24 O.W.R. 60.

Abandonment of expropriation proceeding—Relief from liability for—Subsequently enacted statute.

Where a city, which was required by s. 52 (20) of 3 Edw. VII. (Que.) c. 62, to expropriate land for public purposes within a designated time, abandoned the proceeding after notice to the landowner, the appointment of commissioners, and the taking of testimony, the city is not relieved from liability to the landowner for the deprivation of the use of his property as the result of the imminence of the expropriation, by the subsequent enactment of 7 Edw. VII. (Que.) c. 65, providing that the city need not proceed with such expropriation, and that its right to expropriate should expire after a delay of 3 months from the time the Act came into force if not proceeded with.

Robillard v. Montreal, 13 D.L.R. 681.

Abandonment of expropriaton proceedings.

Where arrangements to build a factory on land has been completed before the passage of a by-law for its expropriation, the repeal thereof 4 months afterwards, and after the commencement of an arbitration, does not render a municipality liable to the landowner for losses occasioned by reason of his not proceeding with the building of the factory because of the institution of the expropriation proceedings.

Grimshaw v. Toronto, 13 D.L.R. 247, 28 O.L.R. 512.

Raising street and sidewalks to injury of adjoining owner.

A municipal corporation is liable in damages to owners, where property abuts on streets or sidewalks, the level of which is raised, thereby causing depreciation to their property, such change of level in effect constituting a sort of expropriation entitling interested parties to compensation.

Hull v. Bergeron, 9 D.L.R. 28. [See 18 Rev. de Jur. 167.]

Conditions precedent—Plaintiff's title—Misfeasance.

Although an action may not lie against a municipal corporation by the owner of lands for damages in respect thereto, through the misfeasance of the corporation if the damages occurred before the plaintiff acquired his title, the action will not be defeated, as to damages resulting after he acquired title, by the circumstance that the act of misfeasance itself occurred before that time. [Montreal v. Mulcair, 28 Can. S.C.R. 458, distinguished.]

Stott v. North Norfolk, 16 D.L.R. 48, 24 Man. L.R. 9, 26 W.L.R. 774.

Contractor—Excavation work—Delay in furnishing grades—Engineer's certificate—Extras—Delay in work—Damages.

Damages by the contractor for unreasonable delay by the city in giving the grades and levels for excavation work on the streets may constitute "extras" for which the city engineer's certificate must first be obtained as a referee under the terms of the contract; and in any case the contractor need not have delayed the whole work over the more favourable season for the operations by waiting for the city engineer to give him the grades and levels, but on the city's default, should have himself employed an engineer to do so and added the expense to the contract, when the matter was one of detail only and could have been worked out by any engineer from the plans shewing the depths and from the corner stakes already put on by the city engineer.

Manders v. Moose Jaw, 20 D.L.R. 408, 7 S.L.R. 158, 23 W.L.R. 821.

PUBLIC WORK AUTHORIZED BY STATUTE—REMEDIES.

The fact that the municipal Public Works Act (R.S.S. 1909, c. 91) gives the city power to construct certain work therein mentioned in the nature of public utilities, does not preclude the city from constructing a subway under the Cities Act (R.S.S. c. 84, s. 184), which is an altogether different class of work; an individual suffering special injury by reason of the construction thereof, done in a proper manner and under statutory authority, cannot maintain an action therefor, but his only remedy is the one provided by the statute. The plaintiff is entitled to amend his claim to establish his right to an action for damages instead of arbitration under the statute.

Armour v. Regina, 29 D.L.R. 676, 8 S.L.R. 368, 33 W.L.R. 318, 9 W.W.R. 928.

NEGLIGENCE — NUISANCE — FRANCHISE — ELECTRICITY—HIGHWAYS.

A municipal corporation cannot be held liable for injuries resulting from the negligent construction and operation of an electric lighting system in pursuance of a franchise granted by it, on the ground of a breach of duty to keep its highways free from nuisances; the power of such corporation, under art. 5461, R.S.Q. 1909, to regulate the use of highways and public places, are legislative or governmental, and unless specifically provided a failure to exercise them does not give rise to a right of action.

Lefebvre v. Grand-Mère, 37 D.L.R. 450, 55 Can. S.C.R. 121, affirming 25 Que. K.B. 124.

CLAIM AGAINST CORPORATION FOR LOSS OF SHEEP—DOG TAX AND SHEEP PROTECTION ACT, R.S.O. 1914, c. 246, ss. 17, 18—ACTION UNDER — PLEADING — STATEMENT OF CLAIM—CAUSE OF ACTION—MANDAMUS TO COUNCIL.

Noble v. Esquesing, 41 D.L.R. 99, 41 O.L.R. 400.

NEGLIGENCE—ICE ON SIDEWALK—LIABILITY OF MUNICIPALITY FOR INJURY TO PEDESTRIAN—STATUTORY OBLIGATION.

A municipality, under statutory obligation to keep a street in repair, which allows ice to remain on the sidewalk, is liable for damages in respect of injuries sustained by a pedestrian who slips and falls.

Sydney v. Slaney, 50 D.L.R. 351, 59 Can. S.C.R. 232, affirming 46 D.L.R. 164.

PERSONAL INJURIES TO PEDESTRIAN—CARE OF SIDEWALK — STATUTORY OBLIGATION TO REPAIR—LIABILITY.

A municipal corporation under a statutory obligation to keep its streets in good repair, fails to fulfil such obligation if it allows boards in a sidewalk to rot and become a source of danger to pedestrians, and is liable for personal injuries sustained by reason of the condition of the sidewalk. [Lottine v. Langford, 37 D.L.R. 566, 28 Man. L.R. 282, distinguished.]

Winnipeg v. Einarson, 50 D.L.R. 440, 30 Man. L.R. 98.

LIABILITY FOR ACCIDENT CAUSED BY CHILDREN SKATING ON SIDEWALK—ENFORCEMENT OF REGULATION—ARTS. 1053, 1054 C.C. (QUE.).

Payette v. Montreal, 25 D.L.R. 857, 47 Que. S.C. 169.

CONDITION PRECEDENT TO LIABILITY—NOTICE.

It is not necessary that an action for damages which does not arise from a délit or quasi-délit, but from an obligation created by law, should be preceded by the notice of action required by the charter of the city of Montreal.

Del Sole v. Montreal, 24 Que. K.B. 550.

ACTING IN PURSUANCE OF STATUTORY POWER—SPECIAL DAMAGE TO INDIVIDUAL.

Where a city, acting in the execution of a public trust and for the public benefit, does an act which it is authorized by a statute to do, and does it in a proper manner, an individual suffering special injury by reason of such act cannot maintain an action. He is without remedy, unless a remedy is provided by the statute. [East Fremantle v. Annois, [1902] A.C. 213, applied.]

Armour v. Regina, 8 S.L.R. 368, 9 W.W.R. 928.

STREETS—CLOSING—INJURY TO ADJOINING PROPERTY — EXCAVATION — RETAINING WALL—COMPENSATION.

The plaintiff's land held to have been affected injuriously by the closing of a lane and compensation awarded him. [Randall v. Calgary, 9 W.W.R. 1508, distinguished.] A claim for compensation, on the ground that the excavation of a street will render necessary the construction of a retaining wall to prevent the soil of the lot from falling into the highway, disallowed, following Forster v. Medicine Hat, 17 D.L.R. 391, 6 W.W.R. 548.

Stringer v. Edmonton, [1918] 2 W.W.R. 436.

CLOSING OF STREET — TRAFFIC — TRADE — DAMAGES.

The city of Montreal has the power in the public interest to prohibit the passage of vehicles in certain streets; but if an individual sustains damages in his trade, the city must indemnify him for the injury it causes him.

Cogne v. Montreal, 24 Rev. Leg. 238.

PUBLIC WORKS — NEGLIGENCE — DAMAGES — LOSS OF PROFIT—PRESCRIPTION.

The city of Montreal is responsible for damages sustained by the owner of a place of business situated 1,000 feet from a place where it was carrying on public works, if it has been negligent in delaying such works unreasonably and unjustly. The diminution of profits sustained by such owner in his trade and undertakings, shewn by a comparison of his business during the year the works were in progress with that of the preceding year, as well as by contracts in hand, is not indirect damage or too remote under arts. 1074, 1075, C.C. (Que.), and should be allowed in accordance with the

evidence in the action. The 6 months prescription, mentioned in art. 537 of the Montreal charter, against damage actions resulting from offences, quasi-offences, or irregularities, is not a denial of the right of action as in art. 536a of the same Act; therefore the court cannot of its own motion apply such prescription under art. 2188 C.C. (Que.).

Dambrosio v. Montreal, 54 Que. S.C. 65.

PUBLIC WORKS — NEGLIGENCE — NOTICE OF ACTION.

The city of Montreal is responsible for damages it caused even in making necessary public streets authorized by law and undertaken in the public interest, when guilty of negligence in the execution of such works. Actions for damages so caused are not governed by art. 536 of its charter, relating to notice of action to which it is entitled.

Newman v. Montreal, 53 Que. S.C. 481.

CITY OF MONTREAL—ACTION FOR DAMAGES—NOTICE OF ACTION—REASONS EXCUSING DEFAULT OF NOTICE — 63 VICT. C. 58 (CHARTER OF MONTREAL), ART. 536.

No action exists against the city of Montreal for damages resulting from bodily injuries caused by an accident unless, within 30 days after the accident, a written notice, conforming to the city charter has been received by the city. Ignorance of this obligation on the part of the victim of an accident, and lack of prejudice suffered by the city by the fact that it has not received this notice or has received it too late, are not sufficient to justify the absence or insufficiency of the notice.

Dupuis v. Montreal, 56 Que. S.C. 121.

INJURY TO SHEEP BY DOGS—DIVISION COURT.

By s. 18 of the Dog Tax and Sheep Protection Act, R.S.O. 1914, c. 246, a right of relief is given to sheep-owners, whose sheep have been killed or injured by any dog, on an application satisfactory to the council; but nothing in the Act or otherwise makes the municipal corporation liable in a court of law for the amount of the damage done. A Division Court was prohibited from entertaining an action to recover from a township corporation the value of sheep alleged to have been killed, in the township, by dogs of unknown owners.

Re Hogan v. Tudor, 34 O.L.R. 571.

NOTICE OF EXPROPRIATION—ABANDONMENT—DAMAGES—RAISING OF STREET LEVEL—PARTIAL EXPROPRIATION.

An owner, put en demeure by notice from a municipality that it intends to expropriate his immovable, and who is thereby prevented from renting it, can recover, as compensation for a partial expropriation, the damages incurred by loss of tenants and an unnecessary removal, even when the notice in question has not been followed up. A municipality which raises the level of streets, public places, parks, etc., must pay to the owners of land fronting thereon, as compensation for a partial expropriation, the real damages caused to their buildings.

Paquet v. Montreal, 22 Que. K.B. 353.

DESTRUCTION OF RATEPAYER'S HOUSE BY FIRE—ACCUMULATION OF COMBUSTIBLE MATTER IN HIGHWAYS—DELAY OF FIRE DEPARTMENT.

Gagnon v. Haileybury, 5 O.W.N. 435.

MOTION TO SET ASIDE THIRD PARTY NOTICE—DEATH BY ELECTRIC SHOCK—ACTION FOR DAMAGES AGAINST MUNICIPAL CORPORATION SUPPLYING ELECTRIC LIGHT—CLAIM FOR RELIEF OVER AGAINST TELEPHONE COMPANY—CROSSING OF WIRES.

Harker v. Oakville, 5 O.W.N. 441.

WORK DONE UNDER LOCAL IMPROVEMENT ACT, R.S.O. 1914, C. 193—INVASION OF LANDOWNER'S PROPERTY—PRIVATE LANE—IRREGULAR PROCEDURE — INJUNCTION — DAMAGES.

Dean v. Guelph, 12 O.W.N. 149.

(§ II G—203)—INJURY TO LAND FROM GRADING STREETS.

The work of grading streets is specifically conferred by ss. 378, 390 of the City Act, R.S.S. 1909, c. 84, and is therefore a work in the "exercise of powers under the Act" within the meaning of s. 245 as entitling an owner to compensation for land injuriously affected though no part of the land itself is actually taken.

Prince Albert v. Vachon, 27 D.L.R. 216, 34 W.L.R. 106, 10 W.W.R. 359, affirming 33 W.L.R. 470, 9 S.L.R. 80.

REPAIR OF HIGHWAY—INJURY TO HORSE BY DEBRIS.

A municipal corporation is guilty of negligence, if, when repairing the public roads in the municipality, it deposits on the land material taken out containing rusty nails or other waste of demolition. It is therefore liable for the loss of a horse which is injured on this debris.

Maltais v. Pointe-Au-Pic, 48 Que. S.C. 87.

PREPARING MATERIALS FOR REPAIRING STREETS.

Where a municipal corporation is guilty of negligence, default by nonfeasance of the statutory duty imposed upon it to keep its highways in good repair, and adequate means have been provided by statute for the purpose of enabling it to perform its obligations in that respect (e.g., 64 Vict., c. 54 (B.C.)), persons suffering injuries in consequence of such omission may maintain civil actions against the corporation to recover compensation in damages, although no such right of action has been expressly provided for by statute, unless something in the statute itself, or in the circumstances in which it was enacted, justifies the inference that no such right of action was to be conferred. The common law obligation under which the inhabitants of parishes in England, through which highways passed, were responsible for their re-

pair, has no application in the Province of British Columbia.

Vancouver v. McPhalen, 20 W.L.R. 263, affirming 15 B.C.R. 367, 14 W.L.R. 424.

(§ II G—205)—Pole on street.

The only liability upon a township for injuries to a person caused by a collision while driving on a highway in a township with a pole erected upon the highway, not by the municipality but by a telephone company which had no statutory or other right to erect poles upon the highway, is that imposed by subs. 1 of s. 606 of the Municipal Act, R.S.O. 1897, c. 223, making municipal corporations civilly responsible for all damages sustained by any person through the municipality's negligent failure to repair the highway by removing the pole.

Howse v. Southwold, 5 D.L.R. 709, 27 O.L.R. 29, 22 O.W.R. 797.

Excavation on streets.

Where the municipal charter imposes a duty to keep its streets in repair, and the facts demonstrate an actual want of repair causing damage, an action is prima facie shewn to be well founded, and the defaulting municipality is called upon for excuse.

Vancouver v. Cummings, 2 D.L.R. 253, 22 W.L.R. 164, 45 Can. S.C.R. 194, 2 W.W.R. 66, affirming 16 B.C.R. 494, 19 W.L.R. 322.

Negligence — Misfeasance — Excavation—Repairing sidewalks.

A city in laying a concrete sidewalk, broke up a portion of the asphalt sidewalk of a crossing street and replaced it with earth and ashes. The rain washed away the filling and T. was injured by stepping into the excavation. Held, that the city was guilty of misfeasance.

Halifax v. Tobin, 50 Can. S.C.R. 404, 50 C.L.J. 109, affirming 47 N.S.R. 498.

Pole on street—Negligence—Burden of proof.

Where an act of negligence is committed by a municipal corporation such as allowing a public street to be obstructed by a telephone pole, the plaintiff suing for damages must prove that the negligence was the cause of the accident which resulted.

Lamothe v. St. Pierre of Verone, 48 Que. S.C. 481.

(§ II G—207)—Authority to construct bridge — Permissive only — Common law rights—Nuisance—Injunction—Damages.

Legislative authority, merely permissive in terms, does not abrogate common law rights, hence where under the Ontario Municipal Act, authority is given a municipality to build a bridge over a river, the work must be done with due regard to the rights of others, and the resultant stopping or partial stopping of flowing water gives to persons injured thereby a prima facie right of action for damages and an injunction against the nuisance.

Guelph Worsted Spinning Co. v. Gueiph; Guelph Carpet Mills Co. v. Guelph, 18 D.L.R. 73, 30 O.L.R. 466.

Nuisance — Damage to business — Obstructing street — Consequential damage.

Where a decrease ensued in the volume of business of a merchant, and which he attributed to the fault of a municipal corporation which obstructed, to more than 1,000 feet distant, the street where he carried on his business, the obstruction being caused by works which took a much longer time than necessary to construct. The loss is not the direct or immediate consequence of the matters complained of, consequently an action by the merchant will not lie to recover the amount he lost. [Harold v. Mayor of Montreal (1867), 11 L.C.J. 169; Robillard v. Montreal, 5 B.R. 292, and Ricket v. Metropolitan R. Co., L.R. 2 H.L. 188, followed.

D'Ambrosio v. Montreal, 45 Que. S.C. 282.

(§ II G—209)—Board of commissioners—Negligence of engineer.

A member of a municipal council or board of commissioners which has directed work to be done by its engineer, who from curiosity or from any other motive is present when the work is being done, and is injured owing to the negligence or want of skill of the engineer, may recover from the corporation damages for the injuries sustained.

Mahoney v. Guelph, 43 D.L.R. 490, 43 O.L.R. 313, reversing 41 D.L.R. 60, 41 O.L.R. 308.

(§ II G—210)—Liability for acts of officers—Collusive refusal to grant building permit.

A city is not liable for damages caused by delay in the erection of a building by reason of its officers' collusive refusal to grant a building permit.

Grimshaw v. Toronto, 13 D.L.R. 247, 28 O.L.R. 512.

Liability for act of officers—Receiving cheque in payment of taxes—Non-presentment.

Collings v. Calgary, 37 D.L.R. 804, 55 Can. S.C.R. 406, [1917] 2 W.W.R. 241, affirming 29 D.L.R. 697, 10 A.L.R. 102, 34 W.L.R. 1032, 10 W.W.R. 974.

Liability for acts of independent contractor.

A municipal corporation is not liable for the negligent acts of an independent contractor in the course of carrying out a work for the city, notwithstanding that the workmanlike execution of the work was supervised by the city.

Smith v. Montreal, 37 D.L.R. 159, 52 Que. S.C. 284.

LIABILITY OF CITY CORPORATION FOR NEGLECT OF POLICE FORCE TO PROTECT PROPERTY OF RATEPAYERS FROM ROBBERY AND VIOLENCE—RELATION OF POLICE FORCE TO CORPORATION—MUNICIPAL ACT, SS. 354-370—PLEADING—RULE 124—SUMMARY DISMISSAL OF ACTIONS.

The plaintiffs, residents and ratepayers of a city, sued for damages for loss sustained by rioters invading their business premises and stealing and injuring their goods, alleging that the police force employed and maintained by the corporation, and paid out of the rates and taxes to which the plaintiffs had contributed, should have protected their premises and prevented the riotous and unlawful conduct complained of:—Held, that the duty of preserving the peace and of preventing robberies and other crimes and offences was a duty cast by the Municipal Act, R.S.O. 1914, c. 192, s. 367, upon the police force, and not upon the corporation; what was complained of was merely inaction; and, unless the act left undone was an act which the city corporation was under legal obligation to do, the failure to do it did not bring the corporation under liability, even if the person who was charged with the duty of doing it was one who, for some purposes and in respect of certain matters, could be looked upon as the servant of the corporation. It was not alleged that the corporation failed to perform any of the duties expressly cast upon it or its council by any of the provisions of the Municipal Act from s. 354 to s. 370; and proof of the facts alleged would not establish legal liability on the part of the corporation.

Baker v. Toronto; Speal v. Toronto, 45 O.L.R. 256.

ILLEGAL ARREST—CONSTABLE—PUBLIC OFFICER—NOTICE OF ACTION.

A constable of the city of Montreal who arrests in a public street a person on a charge of having committed a theft, does not act as an employee and officer of the city, but must be considered as a peace agent in the service of the state, and therefore the city of Montreal is not responsible for his conduct. The constables of the city of Montreal are public officers, and, in such capacity, they cannot be sued for damages by reason of an act done by them in the exercise of their functions without notice of action of at least 1 month before the issue of the writ of summons, in accordance with art. 88 C.C.P. The court is bound to take notice of such want of notice, although it has not been raised as a part of the defence.

Gratton v. Montreal, 53 Que. S.C. 259.

SCOPE OF AUTHORITY.

A municipal corporation is not bound by the actions of its officials when they exceed their authority.

Levis v. Bienville, 49 Que. S.C. 156.

(§ II G—212)—FIRE—TARDINESS OF RESPONSE TO THE CALL—NEGLECT TO INSTALL HYDRANTS—DAMAGES—LIABILITY—C.C., ART. 1053.

A resolution of a municipal council, ordering the installation of hydrants in a given place in order to insure efficient fire protection, is a simple administrative measure and not a reciprocal contract, the breach of which would have implied a contractual error and liability for damages on the part of the corporation in the case of a fire which could not be fought effectually. If, however, a resolution of this nature is equivalent to a contractual undertaking, the liability and damages for the omission of the corporation to carry out the terms would only be fixed after a formal demand.

Fournier v. Victoriaville, 28 Que. K.B. 216.

(§ II G—218)—APPOINTMENT BY COUNCIL OF COMMISSION TO MANAGE ELECTRICAL POWER WORKS—INJURY TO WORKMAN—STATUS OF COMMISSION—AGENT OF MUNICIPAL CORPORATION—LIABILITY IN ACTION FOR NEGLIGENCE—3 & 4 GEO. V. C. 41, S. 34 (O.).

Scott v. Hydro-Electric Commission of Hamilton, 7 O.W.N. 385.

(§ II G—222)—LIABILITY FOR ALLOWING INDEPENDENT CONTRACTOR TO PLACE DANGEROUS IMPLEMENT IN STREET—ATTRACTION TO CHILDREN.

Where a municipal corporation allowed an independent contractor, engaged in repairing a street, to negligently place a cauldron of boiling pitch in a busy street without taking any precautions to protect the public, and where it might be an attraction to children, the corporation is liable in damages for injuries sustained by a child, who, while playing in the street, was splashed with the boiling pitch, by reason of the breaking of the wooden handle of a ladle used by an employee of the independent contractor in handling the pitch.

Waller v. Sarnia, 9 D.L.R. 834, 4 O.W.N. 890, 24 O.W.R. 204, affirming 8 D.L.R. 629.

HIGHWAYS—REASONABLE SAFETY.

A municipal corporation is not an insurer of travellers using its streets; its duty is to use reasonable care to keep its streets in a reasonably safe condition for ordinary travel by persons exercising ordinary care for their own safety.

Fafard v. Quebec, 39 D.L.R. 717, 55 Can. S.C.R. 615, affirming 35 D.L.R. 661, 26 Que. K.B. 139; 50 Que. S.C. 226.

NEGLIGENT OPERATION OF HIRED MACHINERY—FRIGHTENING HORSES.

Damages sustained by the frightening of horses caused by the negligent operation of a steam waggon hired by a municipality having the control and full power of direction over the engineer furnished with it, renders the municipality not the owner liable therefor, particularly where the cause of the accident is not attributable to any de-

fect in the engine, but to the failure of the municipality to take the necessary precautions. [Donovan v. Laing, [1893] 1 Q.B. 629, followed.]

Mack v. Lake Winnipeg Shipping Co., 24 D.L.R. 128, 25 Man. L.R. 364, 8 W.W.R. 525.

OPERATION OF STEAM DRILL—FRIGHTENING HORSES.

A municipality is liable for the consequences of a runaway caused by the noise and fumes from the operation of a steam drill without adopting practicable precautions to avoid the accident.

Deschamps v. Montreal, 48 Que. S.C. 351.

(§ II G—223)—FIRE DEPARTMENT—VOLUNTARY ESTABLISHMENT—NEGLIGENCE.

Where a municipal corporation is not bound by law to establish and manage a fire department, but has elected to create it by by-law, it is liable for damages sustained by the negligence, during their performance of duty, of the servants employed by the municipality to carry on the department. [Hesketh v. Toronto, 25 A.R. (Ont.) 449; Shaw v. Winnipeg, 19 Man. L.R. 234, followed.]

Thomas v. Winnipeg, 16 D.L.R. 390, 24 Man. L.R. 106, 27 W.L.R. 314, 6 W.W.R. 179.

IN FIRE DEPARTMENT.

A municipal corporation is not liable at law for damages resulting from the destruction of the property of its ratepayers by fire as a result of an inefficient fire department, unless such fire were the direct result of a tort formally authorized by such municipality.

Quesnel v. Emard and City of Montreal; Cote v. Emard and City of Montreal, 8 D.L.R. 537.

NEGLIGENCE—REMOVAL OF DANGEROUS SUBSTANCE FROM BURNING BUILDING BY CITY FIREMEN—EXPLOSION AFTER REMOVAL—INJURY TO PERSON—LIABILITY—AGENCY OF FIREMEN FOR OWNER OF BUILDING—FINDINGS OF JURY—LIABILITY OF CITY CORPORATIONS—EVIDENCE.

Lester v. Ottawa, 8 O.W.N. 295, 591.

(§ II G—224)—IN SEWER DEPARTMENT.

It is actionable negligence for the servants of a municipality to leave a trench connecting the plaintiff's premises with a public sewer, in a street, partly filled with frozen chunks of earth so that water caught therein during a sudden thaw, percolated through them and followed the trench into the plaintiff's cellar, causing damage therein, notwithstanding that the last few feet of the trench were filled in the same manner by the plaintiff.

Davidson v. Lethbridge, 4 D.L.R. 523, 21 W.L.R. 273, 2 W.W.R. 317.

(§ II G—225)—IN POLICE DEPARTMENT—NEGLIGENCE OF CONSTABLE IN DRIVING MOTOR AMBULANCE IN CARRYING INJURED PERSON TO HOSPITAL—DAMAGES — LIABILITY OF CITY — LIABILITY OF BOARD OF POLICE COMMISSIONERS—LIABILITY OF INDIVIDUAL MEMBERS OF BOARD.

The city of Winnipeg is not liable under the charter of incorporation for the negligent acts of a police constable appointed by the Board of Police Commissioners, over whom it has no right of discharge or control. The city having purchased and delivered a motor ambulance to the police department, and having no control or power to issue orders to, or discipline, or dismiss for misconduct the constable driver of such motor is not liable as owner for the negligence of such driver under the Motor Vehicles Act (Man.), although technically the owner of such ambulance. The possession of an ambulance is essential to the proper and efficient performance by the police of an important part of their public duty, and in driving it to convey an injured person to a hospital a constable is discharging his public duty as a policeman. The Board of Police Commissioners is an agency of the state, appointed by the state to perform a public duty and cannot be held liable for anything done in the discharge of such public duty. [Winterbottom v. London, 1 O.L.R. 549, affirmed 2 O.L.R. 105, followed.] The Chief of Police has no power to authorize a speed in excess of that allowed by law, and the Board is not liable for the acts of a constable acting under such illegal order, given by him on his own responsibility and without authority derived from them. The Board of Police Commissioners is created by statute, a bare administrative agency, without property out of which any judgment recovered against it can be realized, and a judgment would be absolutely futile; also being unable to own anything it cannot be held liable as owner under the Motor Vehicles Act. The individual members of the Board cannot be held liable for an act which they did not sanction either individually or as a Board.

Bowles v. Winnipeg, 45 D.L.R. 94, [1919] 1 W.W.R. 198. [See [1918] 2 W.W.R. 529.]

IN POLICE DEPARTMENT.

Where constables in the ordinary course of their duty and in pursuance of civic by-laws take into custody a person in a state of intoxication, they are bound to exercise every reasonable care and precaution to afford their charge proper protection, and failure to do so renders the city which employs them liable in damages for injuries that may result from imprudence and negligence.

Dubé v. Montreal, 7 D.L.R. 87, 19 Rev. Leg. 181, 19 Rev. de Jur. 1, 42 Que. S.C. 533.

ACTS OF POLICE OFFICERS.

Levinson v. Montreal, 39 Que. S.C. 259.

LIABILITY FOR ACTS OF POLICEMEN.

Rey v. Montreal, 39 Que. S.C. 151.

APPLICATION OF FUNDS IN PAYMENT OF COSTS OF OFFICER INCURRED IN ACTION AGAINST HIM—CLASS ACTION AGAINST COUNCILLORS TO RECOVER.

Rochford v. Brown, 25 O.L.R. 206, 20 O. W.R. 591.

(§ II G—227)—IN HEALTH DEPARTMENT—LIABILITY FOR ACTS OF MEAT INSPECTOR—UNLAWFUL CONFISCATION.

The city of Montreal is liable in damages when its inspectors without lawful cause and without complying with the formalities required by law confiscate in a butcher shop meats not fit for consumption.

Gaudreau v. Montreal, 48 Que. S.C. 388.

(§ II G—228a)—ARREST—NONPAYMENT OF TAXES—DEFENCE—BURDEN OF PROOF.

In an action for assault and wrongful imprisonment arising from the arrest and imprisonment of the plaintiff for nonpayment of school rates and taxes the plaintiff contended that the rate was not made up as required by the statute. The court held that the burden of proving this was, under the pleadings, on the plaintiff and he had not satisfied this burden.

Taylor v. Durno, 45 D.L.R. 450.

IN MAKING ARREST.

By application of the rule that the principal is responsible for the acts of his agent, an action for damages by a person illegally arrested by a constable lies against the municipality by which such constable is appointed and paid.

Chevalier v. Three Rivers, 43 Que. S.C. 436.

MALICIOUS PROSECUTION—ARREST OF EMPLOYEE OF POWER COMPANY—LIABILITY FOR ACTS OF MAYOR—COSTS.

Waters v. Toronto, 24 O.W.R. 746.

LIABILITY FOR ACTS OF OFFICERS—TOWN CONSTABLES.

The appointment of police officers is devolved upon cities and towns by the Legislature as a convenient mode of exercising a function of government, but this does not render them liable for the unlawful or negligent acts of such police officers even when committed in attempts to enforce ordinances or by-laws of the corporation employing them, as such acts are done by them in their public capacity, and not as agents or servants of the corporation.

Gibney v. Yorkton, 31 W.L.R. 523.

ILLEGAL ARREST BY CONSTABLES—LIABILITY—RESPONDEAT SUPERIOR.

Where a constable illegally arrests a person without a warrant and the chief constable approved of the act and detains the prisoner, both are guilty of a trespass. Where police constables appointed by a justice of the peace under the Constables Ordinance (Con. Ord. 1905, Alta.), are engaged and paid by a municipal corporation in its efforts to maintain peace in the community, the municipality possesses the like immunities as the Crown, and cannot be held liable for wrongful acts of such constables in their efforts to secure the observance of the law. The doctrine of "respondeat superior" does not apply. [Griffin v. Coleman, 4 H. & N. 265, approved; McCleave v. Moncton 32 Can. S.C.R. 106, followed.]

Pon Yin v. Edmonton, 31 W.L.R. 402, 8 W.W.R. 809.

(§ II G—231)—DESTRUCTION OF PROPERTY—TOWN ACT (SASK.)—INJURIOUS AFFECTION—DAMAGES.

Under s. 340 of the Town Act (Sask. 1916, c. 19) the owner of property is entitled to damages for injurious affection to the property by the exercise of the powers conferred by the Act upon the town although no property has, in fact, been taken. The effect of s. 343 of the Act is that the town may, if it sees fit, give notice in a local newspaper of the completion of the work, and in such notice may state the last day on which a claim for damages may be filed, and claims must be filed within the time limited by the notice. In the absence of such notice by the town, notice within a year as provided by s. 342 is sufficient.

Anson v. Radisson, 45 D.L.R. 597, [1919] 1 W.W.R. 1036. [Reversed in 49 D.L.R. 517, 12 S.L.R. 406, [1919] 3 W.W.R. 580.]

(§ II G—235)—DRAINS—IMPROPER CONSTRUCTION—FLOODED DRAINS—LIABILITY FOR.

It is negligence for a municipality to begin digging a ditch at the wrong end, the result of which was to bring large quantities of water to a point on the land of the plaintiff, where it remained an unreasonable time, and it is answerable in damages for same.

Mondor v. Tache, 11 D.L.R. 620, 24 W.L. R. 355, 4 W.W.R. 702.

Where under the Municipal Drainage Act, one township initiates proceedings for the building of a drain which would invade another township, whether what is proposed to be done is more than is required for the purpose is not a question of law but of fact, depending upon the evidence.

Re Anderdon and Malden, 8 D.L.R. 812, 4 O.W.N. 327, 23 O.W.R. 320.

SEWERS—WORK ON—DELAY IN RESTORING STREET—MUNICIPAL LIABILITY.

A city may be held liable in an action for damages for injury sustained by want of proper access to business premises by reason of the city's failure to exercise reasonable expedition in completing the restoration to a travellable condition of a street abutting the business premises after it had been opened up for the purpose of putting in a concrete sewer.

Rickey v. Toronto; Schofield-Holden Machine Co. v. Toronto, 19 D.L.R. 146, 30 O.L. R. 523.

DRAINAGE—INSUFFICIENCY OF DRAIN—REPORT OF ENGINEER — ASSESSMENT AGAINST ADJOINING TOWNSHIPS—"SURFACE WATER" — MUNICIPAL DRAINAGE ACT, R.S.O. 1914, c. 198, s. 3, subs. 6.

Sandwich South v. Maidstone, 17 D.L.R. 835, 6 O.W.N. 538.

DEFECTS IN SEWERS—DRAINAGE—NATURAL WATER COURSE—OBSTRUCTION BY INADEQUATE CULVERT—INJURY TO PRIVATE PROPERTY—DAMAGES—QUANTUM.

Ruddy v. Milton, 16 D.L.R. 879, 6 O.W.N. 255.

OBSTRUCTION OF SEWERS—OVERLOADING THE SYSTEM—ADDITIONAL SEWERS—LIABILITY, TEST OF.

Where a city, for sanitary or other reasons, attaches additional sewers to its system, well knowing that such additional sewers will overload the system, it must be responsible for the damage resulting from such overloading, unless by contract with the owners of property served by such additional sewers it makes it a condition of granting a sewer connection that it shall not be liable for resulting damage.

Brown v. Regina, 20 D.L.R. 470, 7 S.L.R. 197, 29 W.L.R. 537, 7 W.W.R. 228.

CONSTRUCTION OF DAM—DIVERTING WATER.

A rural municipality in Manitoba is liable in damages for constructing through its servants a dam in the improvement of its roadways and so diverting water from its natural course that more water came upon the plaintiff's farm than would otherwise have reached it.

Thorsteinson v. North Norfolk, 22 D.L. R. 34.

(§ II G 3—235)—MANHOLES IN STREETS—DEFECTIVE COVER.

The city of Montreal is responsible for the condition of the manholes in its streets, and is liable in damages for injury caused by a pedestrian falling in; the cover having been removed and improperly replaced by parties unknown.

Spedding v. Montreal, 23 D.L.R. 681, 47 Que. S.C. 493.

SEWERS — GAS MAINS — INJURY — PARAMOUNTCY OF HEALTH—VESTED RIGHTS.

Space occupied by gas mains, and the mains themselves, are of the nature of "land," as defined by s. 321 (b) of the Municipal Act, R.S.O. 1914, c. 192, and the lowering of a gas main, necessitated by the municipality constructing a sewer, is an "injurious affection of land" in respect of which the gas company, as "owner" is entitled to compensation from the municipality under s. 325 (1) of the Act. The cost of the lowering operation is the measure of compensation. There is, in English law, no doctrine of "paramountcy" in the abstract, with respect to the duty of a municipality in providing sewers on their streets, and, in the absence of legislative authority, the vested rights of parties must not be displaced or withdrawn except by legislative authority; it is not permissible to have any preferential interpretation or adjustment of rights flowing from statute.

Toronto v. Consumers' Gas Co., 30 D.L.R. 590, [1916] 2 A.C. 618, 37 O.L.R. 586, affirming 19 D.L.R. 882, 32 O.L.R. 21.

HIGHWAYS—SURFACE WATER—DAMAGE TO BUILDING — EXCAVATION — LICENSE —LIABILITY.

The Ontario Municipal Act (R.S.O. 1914, c. 192, ss. 406a, 483) confers no power upon a municipal corporation to give a license to make excavations on a highway in the course of building operations by an abutting owner; and where the latter, on the assumption that the license gave him the right, did make such excavations, in consequence whereof a wall of the building fell in from the accumulation of water on the highway, the injury will be deemed occasioned by his own unlawful act and he has no recourse against the corporation.

Holland v. Walkerville, 48 D.L.R. 418, 45 O.L.R. 455.

RISE OF CANALS—FLOOD—LEVEL OF CELLAR —NOTICE OF ACTION—LIMITATION—C. C. ART. 1053, 62 VICT. [1890] c. 58, ARTS. 536, 537. (CHARTE DE MONTREAL.)

Whether or not the city of Montreal had built a sewer in the street in front of a building to a level higher than the cellar of this building, it is not responsible for damages caused by a flood of the cellar if it has not committed any fault and is not guilty of negligence. It is for the owner to make the levelling between the sewer and his house in such a way as to prevent the water from entering his cellar.

Laurin v. Montreal, 25 Rev. Leg. 167.

INUNDATION — DAMAGES — VALUATION — FLOODING OF THE WATERS OF THE S. LAWRENCE—VIS MAJOR—C.C. ART. 17, SS. 24, 1053.

An owner who sues a municipality for damages suffered by reason of annual floods, and who is nonsuited, cannot commence a new action, for a subsequent flooding, if the evidence shows that the damages claimed are mixed up with the previous floodings, so that it is impossible to distinguish between them and to make a separate valuation. The inundation of riparian lands by flooding of the waters of Lake St. Louis, in the St. Lawrence river, in the spring and autumn, is a case of vis major for which no one is responsible.

Paradis v. The City of Lachine, 56 Que. S.C. 137.

In this case it was held, that the city of Vancouver was under no statutory or common law liability to provide means of drainage to plaintiff's basement, and that the latter voluntarily assumed the risk, which resulted in the damage complained of, by connecting with the drain in the manner he did.

Woodward v. Vancouver, 16 B.C.R. 457, 19 W.L.R. 297.

BURSTING OF WATER MAIN—FLOODING OF BASEMENT.

Where damages are caused by inanimate things, a legal presumption exists as to the fault of the proprietor or guardian thereof. Therefore, the city of Montreal is responsible for the damages caused by the inundation of the basement of a house, through the cracking of a water main pipe, the property and under the care of the municipality.

Delahanty v. Montreal, 54 Que. S.C. 50.

CHANGE OF WATER COURSE—EXPROPRIATION.

A municipal corporation has no right, except in cases provided by law, to change, by minutes of proceedings, the natural direction of a water course in such a way as to cause it to flow over lands which nature has not subjected to such servitude. A corporation can only order the expropriaton of land in order to secure the carrying out of its minutes, when the works ordered are of general public interest, but not when they only concern a few taxpayers.

Cloutier v. Notre Dame-du-bon-Conseil, 53 Que. S.C. 128.

INJURY TO LAND BY FLOODING CAUSED IN PART BY UNAUTHORIZED ACT OF CORPORATION IN MAKING DITCH ON PRIVATE PROPERTY—BRINGING WATER ON HIGHWAYS—OVERFLOW ON NEIGHBOURING LAND—REMEDY—COMPENSATION UNDER ARBITRATION CLAUSES OF MUNICIPAL ACT—SETTLEMENT OF CLAIM IN FORMER ACTION—HIGHWAYS VESTED IN CORPORATION.

Simm v. Hamilton, 16 O.W.N. 1.

DEEPENING OF DITCH—CREATION OF OUTLET—INJURY TO PLAINTIFF'S LAND BY OVERFLOW OF WATER—NEGLIGENCE—AWARD UNDER DITCHES AND WATERCOURSES ACT, R.S.O. 1914, c. 260—APPLICATION OF S. 23—DAMAGES FOR INJURY TO CROPS—ASSESSMENT OF—INJUNCTION—LEAVE TO APPLY IF CAUSE OF COMPLAINT NOT REMOVED—COSTS.

Rynd v. Tp. of Blanshard, 15 O.W.N. 406.

CONSTRUCTION OF CULVERT — LOWERING GRADE OF STREET—WORKS AUTHORIZED BY-LAW — INJURIOUS AFFECTION OF ABUTTING LANDS — REMEDY—ARBITRATION—MUNICIPAL ACT, R.S.O. 1914, c. 192, s. 325.

Reid v. Sault Ste. Marie, 10 O.W.N. 283.

DRAINAGE — WATERCOURSE — AGREEMENT WITH LANDOWNER—BY-LAW, FORM OF.

McBain v. Cavan, 5 O.W.N. 544, 25 O.W.R. 434.

EXCAVATION—FOREMAN—NEGLIGENCE.

An error of judgment is not an inexcusable fault; consequently a municipality in Quebec is not liable for the death of a workman employed on a road through the caving in of an unshored excavation after the foreman has decided that shoring is not necessary.

Audet v. Sherbrooke, 39 D.L.R. 306, 24 Rev. Leg. 117.

DRAINS AND SEWERS—CLAIM FOR FLOODING OF PREMISES—FAILURE TO PROVE THAT FLOOD CAME FROM MUNICIPAL SEWER—FOUNDATION OF LIABILITY—SEWER BECOMING INADEQUATE BY REASON OF GROWTH OF CITY—DAMAGES—REMOTENESS.

Crompton Corset Co. v. Toronto, 14 O.W.N. 197, 15 O.W.N. 87.

DRAINAGE—CELLAR OF HOUSE CONNECTED WITH MUNICIPAL DRAINS—INJURY BY FLOODING—DEFECTIVE SYSTEM—ACTION FOR DAMAGES—FINDING OF JURY—JURISDICTION — STATUTORY REMEDY—MUNICIPAL DRAINAGE ACT—MUNICIPAL ACT—LOCAL IMPROVEMENT ACT—QUESTION NOT RAISED BEFORE APPELLATE COURT WHICH DIRECTED TRIAL OF ACTION.

Manie v. Ford, 14 O.W.N. 83. [Affirmed in 15 O.W.N. 27.]

DRAINAGE—UNLAWFUL INTERFERENCE WITH NATURAL WATERCOURSE — FLOODING PLAINTIFF'S PREMISES — CAUSE OF FLOODING—INFERENCE OF FACT—FINDING OF TRIAL JUDGE—UNDERTAKING TO REMEDY DIFFICULTY BY NEW DRAIN—DAMAGES.

Jeffries v. Toronto, 14 O.W.N. 220.

STREET DRAIN IN TOWN DESIGNED FOR CARRYING STORM-WATER — IMPROPER USE FOR CARRYING SEWAGE — EVIDENCE — PERMISSION TO CONNECT HOUSE WITH DRAIN—CONDITION AS TO RISK—NEGLIGENCE—NEW TRIAL.

Manie v. Ford, 12 O.W.N. 11.

NEGLIGENCE—LIABILITY OF MUNICIPALITY FOR FAILURE TO TURN OFF UNUSED WATER SERVICE PIPE—MUNICIPAL PUBLIC WORKS ACT, S. 15.

A municipality was held liable for damages caused by flooding of a basement by a leak in an unused water service pipe which it had failed to turn off as requested, or apart from being requested, as was its duty on knowing, as the court believed it did, that the said pipe was not being used. Section 15 of the Municipal Public Works Act, protecting a municipality from liability for breaking of service pipes, etc., refers only to service pipes upon property of the municipality.

Elite Cafe v. Regina, [1919] 2 W.W.R. 120, affirming [1919] 1 W.W.R. 308.

[§ II G—236)—DEFECTS IN SEWERS GENERALLY.

A municipality is answerable where the waters of a ditch constructed along a highway undermined the land of the abutting owners and caused the fall of fences thereon.

Lamontagne v. Woodlands, 5 D.L.R. 524, 22 Man. L.R. 495, 21 W.L.R. 881.

SEWERAGE SYSTEM—AUTHORIZED BY LEGISLATURE—NEGLIGENCE IN CONSTRUCTION AND OPERATION—DAMAGES.

No action will lie against a municipal corporation for doing that which the Legis-

lature has authorized if it be done without negligence although it causes damage; but an action does lie for doing that which the Legislature has authorized if it be done negligently causing damage.

Fieldhouse v. Toronto, 44 D.L.R. 392, 43 O.L.R. 491.

NEGLIGENCE—DRAINAGE—DAMAGE TO PROPERTY—EXTRAORDINARY RAINFALL.

Judge v. Liverpool, 45 D.L.R. 755, 57 Can. S.C.R. 609, affirming 28 D.L.R. 617, 49 N.S.R. 513.

LIABILITY FOR FLOODING FROM SEWERS—FORCE MAJEURE — PRESUMPTION OF FAULT.

Gelinais v. Montreal, 29 D.L.R. 228.

DRAINS—POLLUTION AND ODORS.

A municipal corporation which permits a cheese manufacturer to drain his factory into a defective drain, established by process verbal, which runs across the property of the plaintiff, is liable in damages for the injury which the latter may sustain therefrom in consequence of the offensive odors escaping from the drain.

Sevigny v. St. David, 50 Que. S.C. 291.

(§ II G—237)—DRAINS—OBSTRUCTIONS—SURFACE WATERS — LIABILITY—NOTICE AND OPPORTUNITY.

Where negligence, for want of adequate municipal provision to carry off drainage or overflow highway waters, is charged against a municipality under the Municipal Act, R.S.M. 1902, c. 116 (s. 516a, added by Man. 1904, c. 36, s. 1), reasonable notice of danger or damage must be brought home to the municipality, and it must be given a reasonable opportunity to avert the danger and prevent the damage. [Rice v. Whitby, 25 A.R. (Ont.) 191, applied.]

Portage Fruit Co. v. Portage La Prairie, 14 D.L.R. 21, 23 Man. L.R. 822, 25 W.L.R. 438, 5 W.W.R. 145.

OBSTRUCTIONS OF SEWER.

The neglect of a town to clean out an open drain which it had defectively constructed adjacent to the land of the plaintiff in such a manner that the drain would fill up, will render the municipality liable for injuries sustained because of the water of the drain backing up and flooding the plaintiff's land, and also for causing a more continuous seepage of water into it, notwithstanding that some small portion of the injury was occasioned by the backing up of the waters of a creek, and that the plaintiff might have diminished the damage by digging a watercourse, where, on the whole, the greater portion of the injury was due to the negligence of the town.

Moore v. Cornwall, 7 D.L.R. 413, 4 O.W.N. 145, 23 O.W.R. 113.

DRAINAGE — NATURAL WATERCOURSE — OBSTRUCTION BY INADEQUATE CULVERT—INJURY TO PRIVATE PROPERTY—NEGLIGENCE—PLACING OF PROPER CULVERT—MANDATORY ORDER—DAMAGES—COSTS.

Ruddy v. Milton, 6 O.W.N. 253.

(§ II G—240)—FOR COMPLETION OF DRAINAGE WORKS—NONCOMPLETION OF DRAIN — NEGLIGENCE — DAMAGES — MANDATORY ORDER—REFEREE'S REPORT—APPEAL.

Moshier v. Eastnor, 6 D.L.R. 853, 4 O.W.N. 114, 23 O.W.R. 96.

DRAINAGE PROCEEDINGS REVIEWED ON APPEAL.

On an appeal under the Municipal Drainage Act (R.S.O. 1914, c. 198, s. 67) from the report of an engineer to the Drainage Referee, the Referee has jurisdiction to examine into the cost of the proposed work and the pecuniary advantage to be gained by such work, and where the cost of the work is greatly in excess of the pecuniary advantage to be gained, the Referee should refuse to allow such work to be carried out.

Colchester North v. Anderdon; Gosfield North v. Anderdon, 24 D.L.R. 143, 34 O.L.R. 437, reversing 21 D.L.R. 277, 34 O.L.R. 437.

(§ II G—241)—DRAINAGE—AS TO SURFACE WATER — CONTRIBUTORY NEGLIGENCE.

Where negligence for want of adequate municipal provision to carry off drainage or overflow waters from the highway is charged against a municipality by a contiguous landowner, evidence of such owner's omission to protect his own property from the overflow, where, owing to the level surface of the locality such protection would have been simple and inexpensive, is relevant to shew want of reasonable precaution by the owner himself.

Portage Fruit Co. v. Portage La Prairie, 14 D.L.R. 21, 25 W.L.R. 438, 23 Man. L.R. 822, 5 W.W.R. 145.

LIABILITY FOR DAMAGES—FAILURE TO PROVIDE SUFFICIENT OUTLET FOR DITCH—BACKING UP OF WATER.

A rural municipality is answerable in damages for a failure to provide a sufficient outlet for a ditch opened by it adjacent to the plaintiff's land, by reason of which water backed up and inundated the land so as to destroy the fertility thereof, and render it useless for cultivation.

Kenny v. St. Clements, 15 D.L.R. 229, 26 W.L.R. 432, 24 Man. L.R. 51, affirming on this point 4 D.L.R. 304.

A municipality is answerable in damages where it entered upon the land of the plaintiff and enlarged a ravine that was not a natural watercourse, into which it wrongfully carried water by the construction of a drainge ditch.

Lamontagne v. Woodlands, 5 D.L.R. 524, 21 W.L.R. 881, 22 Man. L.R. 495.

As to surface waters.

If a municipal corporation, about to drain into a natural watercourse, proceeds, without due regard to the right of an adjoining property owner and without any attempt at preliminary amicable negotiations with a view to obviating or lessening the damage to adjoining lands, to overflow the course and damage neighbouring lands, the municipality which committed the wrong cannot complain if the damages awarded against it for both past and future injury, in lieu of an injunction, should slightly exceed a sum which would compensate the landowner, the situation having been brought about by its own wrongdoing. Where a drainage ditch is constructed by a defendant municipal corporation opposite the plaintiff's farm so as to drain surface water into a natural watercourse, it may not, apart from statutory authority, bring into it a larger volume of water than can be carried at its natural capacity, and if it does so, the injured party has a remedy in damages or by injunction.

McGuire v. Brighton, 7 D.L.R. 314, 4 O.W.N. 137, 23 O.W.R. 223.

Release of lake water—Overflow of lands.

A municipality is answerable for the damages caused by an overflow of lands, where it permits the accumulation of water in a lake after a heavy rainfall, and later, at the end of the rain, releases the water in large volumes on the lands of riparian owners.

James v. Bridgewater, 24 D.L.R. 634, 49 N.S.R. 188, affirming 20 D.L.R. 799.

Watercourse — Drainage — Legal servitude—Acquiesence.

No person is obliged to assist in making upon his own land a watercourse of a size greater than may be necessary for the drainage of such land. (Art. 881, Mun. Code). A procès-verbal of a watercourse which contravenes the provisions of the law and renders lands subject to drainage works which, by reason of their situation, cannot be of benefit to the lands, is pro tanto illegal and null; and the owner who has so suffered injury is entitled to have it set aside so far as it affects him. Such a violation of the law constitutes an aggravation of the servitude which the owner of the lands subjected thereto has the right to repudiate at any time; it cannot be urged against him that he has acquiesced in the construction of the works on account of the fact that he has temporarily submitted to the provisions of the procès-verbal which are ultra vires.

Dionne v. Drummond, 50 Que. S.C. 22.

Ditches and watercourses—Failure to provide sufficient outlet—Injury to land—Damages—Third party.

McConnell v. Toronto, 10 O.W.N. 234, 11 O.W.N. 38.

(§ II G—242)—As to water works—Liability of municipal corporation for damages—Water leaking from service pipe—Inability by reason of wet to operate bake oven—Notice of complaint—Absence of negligence—Statutory defences.

Gatto v. Toronto, 4 O.W.N. 356, 23 O.W.R. 350.

Negligence—Unused water pipe — Break in—Damages.

The plaintiff was tenant of premises supplied by a city with water. The old service pipe that supplied a former building had not been removed nor used since the erection of the present building. The water in this old service pipe, unknown to the plaintiff or its landlord, had never been turned off by the city, and in course of time a leak occurred therein and the basement of the plaintiff's premises was flooded whereby it sustained damage. Held, that the defendant was liable.

Elite Cafe v. Regina, 12 S.L.R. 161.

Bursting of water pipes.

A municipal corporation is not responsible for injury caused by inundation in the streets due to the breaking of the pipes of an aqueduct, when the cause of the break is unknown and the municipality proves that it could not foresee nor prevent it and is not guilty of any negligence.

La Sage v. Montreal, 51 Que. S.C. 196.

Waterworks — Riparian rights — Damages—Notice of action.

The authority given, in its charter of incorporation, by the legislature to a city, "to construct and maintain an aqueduct" and to "take" within a radius of 50 miles of its boundaries, such water as it may require, does not in any manner derogate from art. 503 C.C. (Que.). If the city establishes the intake for its aqueduct in a river, it cannot invoke this authority for the purpose of storing the waters of the river and depriving the riparian proprietors above that point of the rights which they possess under the common law without previously expropriating such rights. The notice of action required by the charter of the city of Quebec, as a condition precedent to the bringing of any action for damages, and which is required to be given within thirty days "from the day when the accident occurred," is not necessary when the cause of action does not arise from an accident. In such a case, a protest may take the place of notice, subject to the discretion of the court.

Quebec v. Bastien, 25 Que. K.B. 539.

Escape of water from city water-main—Flooding of premises of citizens — Negligence — Vis major — Unprecedented frost—Reasonable precautions—Notice of action—London Water Works Act, 36 Vict. c. 102, ss. 1, 17—Parties—Water commissioners—City corporation.

O'Dell v. London; Brownlee v. London, 17 O.W.N. 284.

(§ II G—243)—ACTION AGAINST CITY CORPORATION AND PUBLIC UTILITIES COMMISSION FOR LOSS BY FIRE—FAILURE OF WATER SUPPLY—ORDER OF ONTARIO RAILWAY AND MUNICIPAL BOARD—ABSENCE OF PRESSURE AT OUTBREAK OF FIRE—DUTY TO MAINTAIN SUPPLY—NEGLIGENCE—OBLIGATION TO PROTECT PROPERTY OF RATEPAYERS.

Alexander v. London, 15 O.W.N. 320.

(§ II G—255)—FAILURE TO KEEP MARKET-PLACE SANITARY—LIABILITY FOR RESULTING INJURIES.

Wood v. Hamilton, 12 D.L.R. 451, 28 O.L.R. 214, reversing 8 D.L.R. 825.

GAOL SUPERVISION.

A small rural municipality whose only police officer arrests a person for drunkenness and disorderly conduct, and, after taking away from the prisoner the matches found upon him, imprisons him in a frame "lock-up" building to await his trial before a magistrate, is under no legal obligation to keep a caretaker or watchman in constant supervision over the prisoner; and the municipality is not liable to the prisoner's relatives for his death by a fire which burned up the lock-up in an interval between the police officer's hourly calls of inspection, where the cause of the fire is not shewn.

McKenzie v. Chilliwack, 8 D.L.R. 692, [1912] A.C. 888, affirming 15 B.C.R. 256.

CONDITION OF PUBLIC LAVATORY—ACCUMULATION OF SNOW AND ICE—NEGLIGENCE—LIABILITY OF MUNICIPALITY.

A person using a public lavatory established by a municipal corporation under a power to that effect, although there was no statutory obligation compelling such establishment can sue for injuries caused by the negligence of servants employed therein in the performance of their duties. [Tregellas v. London County Council, 15 T.L.R. 54, distinguished.]

Arder v. Winnipeg, 7 W.W.R. 294, affirming 6 W.W.R. 1127.

ERECTION OF BRIDGE—TRESPASS UPON LAND OF PRIVATE OWNER—PATENT FROM CROWN—RESERVATION OF ROAD—EXTRINSIC EVIDENCE TO DETERMINE WIDTH—DEPRIVATION OF ACCESS TO HIGHWAY—ABSENCE OF EXPROPRIATION PROCEEDINGS—REMEDY UNDER S. 325 OF MUNICIPAL ACT, R.S.O. 1914, c. 192—DAMAGES.

Billings v. Ottawa and Carleton, 10 O.W.N. 450, 11 O.W.N. 148.

(§ II G—260)—PRESENTING CLAIMS AGAINST—ARBITRATION—INJURY TO LANDS BY GRADING STREET.

On an application for the appointment of an arbitrator to fix compensation for altering the grade of a street, under s. 10 of title 27 of the charter of the city of Medicine Hat, the fact that the applicant's property is benefited rather than injured by the change of grade, or that the city has not yet completed its work upon the street, is not fatal to such application.

Forster v. Medicine Hat, 9 D.L.R. 555, 5 A.L.R. 36, 23 W.L.R. 200, 3 W.W.R. 618.

LIABILITY FOR DAMAGES—NOTICE CONDITION PRECEDENT TO LIABILITY.

Where by statute notice of claim must be served on a municipal corporation within a fixed delay from the date of the accident, which notice should contain particulars as to time, place and date, and a notice is served, the corporation cannot escape liability by pleading an irregularity in the notice which has not caused it any prejudice, more particularly where the plaintiff gave notice of his having fallen opposite a public building fronting on two streets and the name of one street is added after the designation of the building, and after the expiry of the delays for serving the notice the plaintiff amends the notice by stating he fell opposite the same building, but on the other street, his action will not be dismissed for want of notice, especially where the corporation has obtained full possession of the facts and proceeded in warranty for indemnity against the owners of the building opposite which the plaintiff fell. The statute requiring notice of action against a municipal corporation was not enacted to allow corporations to escape liability on technical grounds, but to enable them by investigation to come into possession of all facts, so as to either compromise or properly prepare its defence.

West v. Montreal and St. Martin's Church, 9 D.L.R. 9.

DEFECTIVE SIDEWALK—NOTICE—DELAY—"REASONABLE EXCUSE."

Failure to give notice to the municipality of injuries sustained, by reason of a defective sidewalk, as required by s. 460 (4) of the Municipal Act, R.S.O. 1914, c. 192, within the time specified by the Act, is fatal to the plaintiff's action, unless there was reasonable excuse for delay. It is not a reasonable excuse to say that plaintiff failed to apprehend the seriousness of the injury.

Wallace v. Windsor, 28 D.L.R. 655, 36 O.L.R. 62.

Claiming damages against a municipality "for smashing plaintiff's automobile by car No. 46 on Cumberland St. North this morning" is a sufficient notice of action.

Kuusisto v. Port Arthur, 31 D.L.R. 670, 36 O.L.R. 146.

NOTICE OF ACTION—SUFFICIENCY.

Where the notice of action to a municipality sufficiently sets out the place of the accident, a slight variation as to the exact spot does not affect its validity.

Robertson v. Montreal, 30 D.L.R. 312, 50 Que. S.C. 208.

NOTICE OF INJURY—DESCRIPTION—SUFFICIENCY—MISTAKE.

It is not necessary that the notice of injury required under the Municipal Act,

R.S.O. 1914, c. 192, s. 406 (4) should state the day on which the accident happened so long as it is given within 7 days of the happening of the injury. An evident mistake in the description does not invalidate the notice when sufficient information is left therein to identify the place where the accident took place, and the mistake does not mislead the defendants.

Killeleagh v. Brantford, 32 D.L.R. 457, 38 O.L.R. 35.

NOTICE OF INJURY—DIVERSION OF WATER.

Section 561 of the charter of the city of Quebec requires a notice to be given within 30 days in the case of a claim for damages resulting from accident; in an action for damages to a tannery by reducing the supply of water from a river used for power purposes, s. 58 applies, and the 30 days' notice is unnecessary.

Quebec v. Bastien, 32 D.L.R. 499, 25 Que. K.B. 539.

NOTICE OF ACTION — CITIES AND TOWNS ACT—ESSENTIALS—LOSS BY FIRE.

Art. 5864 of the Cities and Towns Act, reproduced in the defendant's charter, as amended by 2 Geo. V., c. 59, requires that before instituting an action for damages for personal injuries, or for damages to movable or immovable property, written notice be given to the city clerk within 60 days from the date on which the right of action accrued of the claimant's intention to sue, the details of the claim, and the place where he resides; in default whereof the defendant is not bound to pay damages, notwithstanding any provision of law to the contrary. That provision makes the notice which it requires previous to service of the summons an essential formality, the omission of which entails the nullity of the action. Knowledge which the defendant might have of the accident, or of damages to movable or immovable property, does not dispense with the notice. Service on the defendant of a simple deed of quittance and subrogation of the rights, remedies and claims of the victim of the accident, or damages to the property, does not free the assignee of the obligation to give the notice. The notice must be written, previous to the action; it must particularize, within the delay fixed, the nature, character and amount of damages; the place where the damages were sustained; the date—if not exact, at least approximate—at which they occurred; the intention to sue; the residence of the claimant; all the facts and circumstances which bring about the liability of the defendant. An omission of the notice does not give rise to a preliminary exception to form; while the 4 months prescription enacted by the same provision always produces a peremptory exception of the action. The losses caused by a fire constitute damages to movable and immovable property of the same nature as those intended by art. 5864.

Strathcona Fire Ins. Co. v. Sorel, 24 Rev. de Jur. 609.

NOTICE OF ACTION — HIGHWAY — LOSS OF HORSE.

A claim, with threats to refer it to an advocate, addressed to the mayor of a municipality after a road accident, is equivalent to the notice of action required by art. 453, Mun. Code, if it is established that such claim has been communicated to council. In the present case the court held that a claim for $75 can take the place of a notice of action preliminary to an action for $125. A municipal corporation is responsible for the loss of a horse which fell and broke a foot, after having slipped on a stone sticking out of the roadway, unless it is shown that the stone was there by a mere accident, or force majeure.

Gaudreau v. Beauport, 54 Que. S.C. 23.

NOTICE OF ACTION—WORKMEN'S COMPENSATION ACT—PRESCRIPTION.

Sections 536, 536a and 536b of the charter of the city of Montreal, which relate to the notice to be given to it in the case of actions for damages, to the 6 months prescription for such actions, and to the city's recourse in warranty having as their object actions based on liability for offences or quasi offences, do not apply to actions brought under the Workmen's Compensation Act, which are based on a legal and contractual obligation.

Robin v. Montreal, 54 Que. S.C. 2.

NOTICE OF ACTION—EXCUSE.

The failure to give the notice of action required by the charter of the City of Montreal is an absolute bar to the right of action, but the plaintiff is not deprived of his right if, through sickness or other disability, he was prevented from giving the notice, or was unable to write. If the lower court admitted that the plaintiff had good reasons for not having given the notice, and that he has not lost his right of action as aforesaid, a court of appeal should not interfere with the discretion so exercised by the first judge.

Fee v. Montreal, 52 Que. S.C. 336.

INJURY TO LAND—NOTICE—LIMITATIONS.

Upon the proper construction of s. 245, of the City Act of Prince Albert, R.S.S. 1909, c. 84, the council is liable to pay damages for any land injuriously affected by the exercise of the powers conferred by that Act upon the city, and its liability to pay compensation for land injuriously affected is not limited to a case where some land had been actually taken by the city and other land injuriously affected thereby.

Vachon v. Prince Albert, 9 S.L.R. 80, 33 W.L.R. 470, 34 W.L.R. 107.

NOTICE OF SUIT—PARTICULARS.

An action in damages against a municipal corporation governed by the Cities' and Towns' Act (Que.), will be dismissed

on exception to the form, if the notice of suit previously given did not contain the particulars of plaintiff's claim, or state the place of his residence.

Potter v. St. Lambert, 17 Que. P.R. 295.

DAMAGE FROM LOWERING STREET GRADE—CONTINUOUS CAUSE—NOTICE.

Where an owner of property upon which he proposes to build, excavates to bring the top of the foundation to the required height above the then existing grade of the street, and the lowering of the grade renders it useless as it stands, the cause of action is not a continuing one. [Darley Main Colliery Co. v. Mitchell, 11 App. Cas. 133, followed; Mason v. South Norfolk R. Co., 19 O.R. 132, and Carr v. C.P.R. Co., 14 Can. Ry. Cas. 40, distinguished]; and if the necessary notice is not given under s. 125 (a) of the Calgary charter the cause of action is barred.

Randall v. Calgary, 33 W.L.R. 886.

NEGLIGENCE—DEFECT IN SIDEWALK—ACCIDENT—WANT OF NOTICE IN MUNICIPALITY.

In order that a municipality liable for an accident by reason of nonrepair, it must be shown that it had notice of the existence of the defect, or that defect has existed for such a length of time as makes it probable that it knew of it or ought to have known of it.

Bell v. Winnipeg, [1919] 2 W.W.R. 535.

GG. COLLECTION OF CLAIMS AGAINST.

(§ II GG—264)—LIABILITY OF COUNTY OR TOWNSHIP.

Where under ss. 352 and 353, subs. 5, c. 192, R.S.O. 1914, the council of a city or town establishes and maintains a police office, etc., and where by-law a police office is provided by that council, a claim for stationery and furniture should be brought against the town and not against the county.

Holmested v. Huron, 24 D.L.R. 561.

DAMAGES FROM GRADING STREETS—REMEDY—ACTION AT LAW—ARBITRATION.

The fact that the affidavit on a motion to appoint an arbitrator claims damages in consequence of excessive and unnecessary grading does not thereby restrict the applicant to the remedy by an action at common law, but it is for the arbitrator, acting under s. 370 of the City Act, 1915, c. 16, to determine the amount of damages resulting from the exercise of powers under the Act.

Prince Albert v. Vachon, 27 D.L.R. 216, 34 W.L.R. 107, 10 W.W.R. 359, affirming 33 W.L.R. 470, 9 S.L.R. 80.

LIABILITY FOR CARE OF THE SICK—RESIDENCE—RETROACTIVENESS OF STATUTE.

The residence required to charge a town with the statutory liability under ss. 171, 172 of the Town Act, R.S.S. 1909, c. 85, for hospital treatment of persons falling sick, refers to the place where the person happens to fall sick and not to the place where the person is admitted to the hospital; the fact that the statute has been amended as to make notice of receiving the patient a condition precedent to such liability cannot apply to cases arising before the passage of the amendment.

Regina v. Gull Lake, 27 D.L.R. 422, 9 S.L.R. 127, 34 W.L.R. 222, 10 W.W.R. 246.

LANDS INJURIOUSLY AFFECTED—CLAIM FOR COMPENSATION—LIMITATION OF TIME FOR MAKING.

Winnipeg v. Toronto General Trusts Corp., 18 W.L.R. 50, affirming 16 W.L.R. 213.

CITY AND COUNTY — SEPARATION — AGREEMENT AS TO ASSETS—SUBSEQUENT DISCOVERY OF FUNDS NOT INCLUDED—ACTION FOR CITY'S SHARE.

Woodstock v. Oxford, 44 Can. S.C.R. 603.

H AS TO TAXES.

See Taxes.

(§ II H—265) — LOCAL IMPROVEMENTS — NOTICE OF ASSESSMENT—SUFFICIENCY.

A notice of assessment for local improvements is sufficient if when published it signifies, as required by statute, an "intention of making such assessments," and those affected are benefited by the proposed work of improvement.

B.C. Electric R. Co. v. Victoria; Re Pandora Ave., 36 D.L.R. 671, 24 B.C.R. 346, [1917] 3 W.W.R. 542.

DUTY AS TO WATER SUPPLY—ASSESSMENT FOR—CROWN.

Apart from any statutory duty under the Cities and Towns Act (Que., 1909) and any by-laws passed in pursuance thereof, there is an implied obligation on the part of a municipal corporation, arising from necessity, to give a water supply to buildings of the Dominion government, so long as the latter is willing, in consideration of such supply, to make fair and reasonable payment; it is subject to a special charge imposed by the municipality for the use of such supply.

Minister of Justice for Canada v. Levis, 45 D.L.R. 180, [1919] A.C. 505, affirming 51 Que. S.C. 267, sub nom. Doherty v. Levis.

FRONTAGE TAX — NOTICE — QUASHING BY-LAW—ACTION.

Sections 525, 527a of the charter of the city of Winnipeg was not intended to extend the time within which a by-law may be moved against under s. 526, but provide a means whereby the city may much abridge the time within which an application may be made to quash a by-law imposing a rate. [Bogart v. Belleville, 6 U.C.C.P. 425, distinguished.] The imposition of a frontage tax is in the nature of a judicial proceeding, of which the party affected must have notice, and be allowed to be heard. The ignoring of the provisions of s. 644 in the imposition of a frontage tax on an owner's property, without

giving him an opportunity of being heard renders the assessment illegal and void. Notwithstanding s. 532 of the Winnipeg charter, an action may be brought to have a by-law declared illegal and to restrain its enforcement without first procuring it to be quashed. [Rose v. West Wawanash, 19 O.R. 204; Kerfoot v. Watford, 24 O.R. 235, followed.]

Wanderers Investment Co. v. Winnipeg; Re McPherson and Winnipeg, 27 Man. L.R. 450, [1917] 2 W.W.R. 197.

SPECIAL ASSESSMENT—ELECTRIC COMPANY.

A special assessment by a municipal corporation, on an electric company furnishing light for its streets, cannot be considered as having been imposed arbitrarily and illegally if intra vires of the powers of the municipality.

St. Jerome Power & Electric Light Co. v. St. Jerome, 26 Que. K.B. 534.

ASSESSMENT AND TAXATION—MEETINGS OF COUNCIL—COURT OF REVISION—TRANSACTING BUSINESS OUTSIDE LIMITS OF MUNICIPALITY — PLACE OF MEETING — —REVISION OF ASSESSMENT ROLLS— BY-LAWS—SALE FOR ARREARS OF TAXES —CONSTRUCTION OF STATUTES—55 V. c. 33, s. 83 (a) (B.C.)—R.S.B.C. 1897, c. 144—STATUTORY RELIEF—ESTOPPEL — ACQUIESCENCE — LACHES — LIMITATION OF ACTION.

Anderson v. South Vancouver, 45 Can. S.C.R. 425, 20 W.L.R. 434.

MUNICIPAL VALUATION—LAND IN CULTIVATION—JURISDICTION—SUPERIOR COURT.

The Superior Court has jurisdiction in an action to declare illegal a municipal valuation of real estate by assessors of the City of Montreal when the object of the action is, not only to reduce the entry on the valuation roll, but also to declare that the principle of the valuation is erroneous, as in the case where the municipal assessors have disrégarded the owner's right to have his real estate valued as land under cultivation and have assessed it as building lots.

Laberge v. Montreal, 27 Que. K.B. 1.

VALUATION ROLL—AGRICULTURAL LAND AND CITY PROPERTY—APPEAL.

Although the Cities and Towns Act restricts to the lowest rate the tax which corporations can levy upon agricultural lands situated within the limits of their municipalities, the omission to state in the valuation roll any reference to distinguish agricultural lands from city property is not a reason for voiding the roll. It is at the time of the making up of the collector's roll that interested taxpayers ought to appeal if their properties are taxed in excess of the rate fixed by law.

Delisle v. Roberval, 54 Que. S.C. 103.

VALUATION OF LAND—ANNEXATION—AGREEMENT—REVIEW.

Where there was an agreement, confirmed by law, between the City of Montreal and a neighbouring municipality, that after the annexation of the latter the land under cultivation in the municipality shall not be valued at more than $100 an arpent, and later the city's assessors valued one piece of land much higher, the court of revision has power to set aside such valuation and give effect to the agreement between the two municipalities, at the suit of the owner of the land.

Montréal v. Décarie, 24 Rev. Leg. 241.

(§ II H—266)—ASSESSMENTS FOR LOCAL IMPROVEMENT — LEVYING — UNIFORMITY.

A municipality, empowered by a by-law to levy by special assessments for the costs of certain local improvements, has the authority to make separate and distinct special assessments, one to cover the expenses of grading and paving the streets, and another for the cost of the land required. The power of a municipality to levy a special assessment for local improvements, to be borne by the property owners directly benefited thereby, enables the municipal council, under s. 51 of 8 Edw. VII. (1908), c. 89, as amended by s. 1 of 4 Geo. V. (1914), c. 77 (Que.), to effect such assessment by resolution and at a varying rate, according to the benefit acquired by each lot, though a by-law provided for a uniform rate.

Simpson v. Westmount, 27 D.L.R. 94, 49 Que. S.C. 341.

ASSESSMENT AND TAXATION FOR LOCAL IMPROVEMENTS — WIDENING OF STREET — POWERS OF MUNICIPALITY.

Upper Canada College v. Toronto, 10 O.W.N. 211.

UNDERGROUND VAULTS.

A municipality can impose a land tax upon the space occupied by any underground vault in any street of the city, although such vault has been constructed under the permission of the municipality.

Montreal v. Dionne, 24 Que. K.B. 133.

AGREEMENT TO ACCEPT FIXED SUM—RATES SUBSEQUENTLY INCREASED—VALIDITY.

A municipal council having agreed to accept a certain fixed sum for water rates, and a subsequent by-law having been passed materially increasing the rates imposed and prohibiting the granting of any bonus unless the consent of the ratepayers is obtained (the supplying of water at rates less than those charged to other persons in the municipality being included in the word "bonus") it is not illegal where no statutory prohibition exists for the municipality to recognize its moral obligation and adhere to an understanding for a commutation of rates and refrain from collecting the taxes levied over and above the amount agreed on.

Norfolk v. Roberts, 23 D.L.R. 547, 50 Can. S.C.R. 283, affirming 13 D.L.R. 463, 28 O.L.R. 593.

EXEMPTING FROM TAXATION — RELIGIOUS INSTITUTIONS.

An arrangement made by a municipality which claims to have a right to tax a certain property belonging to a religious community, which, on its side, submits that the municipality has no such right, an arrangement by which the latter undertakes to pay annually a fixed sum less than and instead of the usual taxes, is not a donation but really a contract. Although a municipal corporation cannot under common law agree to such an arrangement, the Legislature has the right to authorize it to make such agreement by a resolution of the municipal council. A council which has adopted such a resolution, implying, once it has been accepted by the other party, a bilateral contract, cannot rescind it by another resolution.

Maisonneuve v. College Ste. Marie, 24 Que. K.B. 563.

EXEMPTION FROM TAXATION.

A municipal exemption from "taxes or any other dues to the said city" includes not only municipal taxes but also school taxes and the special tax for sidewalks.

Montreal v. Garneau, 54 Que. S.C. 520.

AS TO EXEMPTIONS—INDUSTRIES.

Although a municipal corporation cannot grant any subsidy to bring within its limits an industrial establishment already existing in the province, it may, as a condition to such subsidy, stipulate that the subsidized industry will transfer into the municipality an accessory establishment carried on in another locality. Having the power to exempt manufactures from taxation, so as to encourage industries, it may determine the quota of taxes that it will collect for a certain time.

Lamontagne v. Levis, 49 Que. S.C. 293.

(§ II H—268)—MUNICIPAL RIGHT—ROLE OF VALUATION — ANNULMENT — NEW ROLE—MANDAMUS—C.C.P. ART. 992—C. MUN., ARTS. 430, 450, 650, 653, 675, 676.

The municipal council is not bound to make a new role of valuation each time the latter is annulled. It can do so, but if it follows arts. 650, 675, and 676 of the Municipal Code it is not subject to a writ of mandamus.

Royer v. Parish of St. Bernard, 25 Rev. Leg. 275.

(§ II H—271)—TAX SALES UNDER SUMMARY PROCEEDINGS.

Although sales of immovables by the sheriff for municipal assessments, due to the city of Montreal, are made under the summary proceedings provided by the charter, and appointed for October 15 in each year, nevertheless, when a first opposition to such sale was only decided by the court subsequently to Oct. 15, the city may continue summary proceedings for the sale of the immovables even on a date other than Oct. 15, under art. 401 of the charter and art. 733, C.C.P.

Montréal v. Tritt, 24 Rev. de Jur. 197.

(§ II H—275)—ANNEXED TERRITORY.

A municipality cannot validly collect taxes on land of annexed territory not on the assessment roll at the time of annexation, and it may be enjoined from so doing.

Bell v. Burlington, 25 D.L.R. 269, 34 O.L.R. 410, 692.

POWERS—AS TO TAXES—FIXED ASSESSMENT—PUBLIC SCHOOLS, HOW AFFECTED BY.

Section 77 of c. 39 of the Public Schools Act (Ont.), 1901, as amended by s. 39 of c. 89 of 1909, carried into R.S.O. 1914, c. 266, as s. 39, covers an exemption by means of a fixed assessment, so that where under the by-law of a township a company's ratable property is to be assessed at a fixed commuted gross sum for a fixed period of years and relieved from any "assessment or taxation" in excess thereof, the company is not thereby exempted from assessment for school rates.

Re Ontario Power Co. and Stamford, 18 D.L.R. 64, 30 O.L.R. 378.

WHAT TAXABLE—CITY PROPERTY—HOMOLOGATED LINE.

A ratepayer who, after the formalities of the charter have been complied with by the city of Montreal in imposing a tax, does not complain within the delays and in the manner prescribed by the charter, is debarred from afterwards complaining, except if in imposing such tax the city exceeded its power, in which case such imposition would have no legal authority and be absolutely null and void; and a taxpayer would not be deprived of the right to invoke, before the court, that illegality and nullity, even after the roll had come into force. A house situated on a residential street, built upon and occupied, bounded in front by an homologated line, upon which strip of reserved ground are shade trees, lawn, flowers and a well covered by a structure, is considered as one single property, and the portion within the homologated line can be assessed by the city together with the rest of the property.

Montreal v. Smith, 54 Que. S.C. 124.

SPECIAL TAX—PUBLIC ROADS—ISLAND.

Municipal corporations have a right to levy a special tax upon all taxable real property situated within their territory, for the improvement of their public roads, and the fact that a portion of the real property is on an island, where there are no roads, does not exempt it from the tax.

Choquette v. Varennes, 54 Que. S.C. 33.

CITY OR TOWN—TAX ON TELEPHONE POLES—POWERS AS TO.

The erection of the town of Fraserville into a city confers upon it many powers,

but it is not authorized to impose taxes on telephone posts.

National Telephone Co. v. Fraserville, 16 Que. K.B. 192.

(§ II B—279)—Telephone poles and wires.

A municipal tax imposed by a village municipality on the telephone poles and wires situate in the streets of the village is illegal and cannot be recovered.

Pierreville v. Bell Telephone Co., 23 D.L.R. 635, 17 Que. P.R. 161.

I. Examination of corporate books and records.

(§ II I—280)—Right to inspect records.

A ratepayer or resident of a municipality in Ontario has no common law right to inspect the record of the corporation; all rights of examination or inquiry by a ratepayer into municipal affairs are limited to those given by statute. [Tenby v. Mason, [1908] 1 Ch. 457, followed; Williams v. Manchester, 13 Times L.R. 299, distinguished.]

Journal Printing Co. v. McVeity, 21 D.L.R. 81, 33 O.L.R. 166.

Investigation as to forcible interference with municipal records—Powers—Criminal proceedings.

The council of a town has a right, under art. 5320, R.S.Q. 1909, to appoint a committee to inquire into the facts of a violent entrance into the vault containing its archives, its debentures and its money, and to do so upon the proposal of two members of the council without information by or representation of the ratepayers. The council can also assign to this committee the right, in case the facts mentioned in the resolution should prove to be true, to institute criminal proceedings against such persons. It is not necessary that the resolution should order the committee to report to the council.

Labadie v. Levis, 47 Que. S.C. 16.

Verification of the accounts of the secretary—Treasure of a municipality.

There can be only one special verification of the accounts of a municipality. The council may ask for it, or 5 taxpayers or the treasurer may do so. If one is made at the request of one of these interested parties he cannot require another. The powers of the council under the C. Mun., art. 642, are then exhausted. The secretary's accounts having been specially verified for the years preceding 1918, the council cannot order a second. The council may order a verification of the accounts of 1918, seeing that the previous verification made for that year was an ordinary one. The verification ordered for the years preceding 1918 is now set aside. The verification ordered for 1918 is maintained with costs against the defendant.

Cordeau v. Village of St. Pie, 25 Rev. de Jur. 385.

Audit of treasurer's account—Acceptance of audit for year last past.

The acceptance by a municipal council of the accounts of its secretary-treasurer for the year past, after audit by the municipal auditors, does not prevent the council ordering an audit of the accounts for the last 5 years, when there is reason to believe that the annual accounts and their auditing contain errors. The amendment to art. 176, Mun. Code, by c. 23 of 5 Edw. VII. (Que.) which gives 15 electors the right to demand this new audit confers the same right, by implication, on the council, which represents all the electors. The council is not bound to have this audit made by municipal auditors or officers, or to fix the time within which it should be made.

Gagnon v. St. Raphael, 45 Que. S.C. 134.

III. Powers of officers.

City solicitor as officer, see Discovery, IV—31.

(§ III—285)—Right to resign.

Under s. 106 of the Municipal Ordinance, Con. Ord. 1898, c. 70, there is an implied right given to a member of a municipal council in Alberta to resign, and this right, apart from a statutory disclaimer, may be exercised even before the member elect has taken full possession of the office for which he was a candidate.

R. ex rel. Hogan v. Jollivette, 4 D.L.R. 697, 20 W.L.R. 264, 4 A.L.R. 233, 1 W.W.R. 829.

Engineer—Certificate under construction contract — Reconsideration — Clerical error, correction of.

The certificate of an engineer made binding upon the parties under a construction contract cannot after it is issued be changed by him as upon a reconsideration and change of opinion; but, semble, a clerical error might be corrected.

Manders v. Moose Jaw, 20 D.L.R. 408, 28 W.L.R. 821, 7 S.L.R. 158.

A meeting of a municipal council is not properly called or constituted if a member of the council, not in attendance thereat, has not been given any notice of it.

O'Donnell v. Widdifield, 1 D.L.R. 271, 3 O.W.N. 597, 21 O.W.R. 1.

A municipal council has power to declare the original act, by virtue of which one has claimed to be a proprietor, occupant or lessee of real estate to be entered on the valuation roll, false or fictitious, but it has no right to pronounce it a nullity. The council exercises, at the time of annual revision of the valuation roll, or at the time of examining the triennial roll, functions of a judicial nature.

Herbert v. Saint Michel, 18 Rev. de Jur. 228.

Authority of engineers superintending public works.

Engineers charged with the superintendence of public works are not agents, but

only salaried employees. Therefore they cannot bind the city by ordering, without legal authority in writing, changes or increases in the works entrusted to them. See art. 1089, C.C. (Que.), and s. 337 of the city charter.

Harris Construction Co. v. Montreal, 24 Que. K.B. 330.

ACCOUNT BY SECRETARY-TREASURER—NON-COMPLIANCE WITH FORMAL REQUIREMENTS—RIGHT OF RATEPAYER TO ATTACK.

The rendering of an account by a municipal secretary-treasurer, without attestation under oath according to the constant usage in the municipality and without the secretary-treasurer being required to comply with this formality, cannot be contested by a ratepayer, (a) because the action pertains only to the municipal corporation, and the plaintiff in his capacity of ratepayer is not competent in law to bring it; (b) because the municipal council had accepted this account as rendered and had discharged the secretary-treasurer by repaying to him the balance of the account which was due to him.

Pérodeau v. Richard, 48 Que. S.C. 165.

AS TO APPROVAL OF WORK.

A municipal corporation is only bound by the action of its municipal council. Consequently, unless having special authority to that effect, an official of the corporation cannot accept for it works which it has entrusted for execution to a contractor, reserving the right to receive them itself.

Connolly v. Quebec, 25 Que. K.B. 29.

DISMISSAL OF EMPLOYEES — MEMBERSHIP IN ASSOCIATION—INJUNCTION.

Fortier v. Guerin, 12 Que. P.R. 108.

EMPLOYMENT OF ENGINEER — PAYMENT BY PERCENTAGE — PLANS AND SPECIFICATIONS FOR WATER WORKS.

Addie v. Thetford Mines, 39 Que. S.C. 412.

(§ III—286) — INSTRUCTIONS GIVEN BY MAYOR TO DO CERTAIN WORK — COUNCIL'S REFUSAL TO PAY — NO EXECUTED CONTRACT — RATIFICATION BY BY-LAW — MISCONCEPTION OF WORK REQUIRED.

The plaintiff, an accountant, was instructed by the mayor of Toronto by letter to examine the books of the Toronto Electric Light Co. "and give me a report of the company as an accountant shewing the probable financial results if the city takes over the company's business and operates at the present load of about 30,000 h.p." These instructions were afterwards extended to include also the Toronto Railway Company. No sum was agreed upon as remuneration. The negotiations for purchase having failed, the plaintiff sent in a bill for $42,546.50 which the council refused to pay, and the plaintiff then brought action to recover this sum. Their Lordships held that there was no executed contract in the sense that the council, knowing the facts, had accepted or ratified the act of the mayor. The work could only be authorized by the council itself, by by-law under seal upon full knowledge of the facts, and this had not been done. [Waterous Engine Works Co. v. Palmerston, 21 Can. S.C.R. 556, applied; Clark v. Cuckfield Union, 21 L.J.Q.B. 349, distinguished.]

Mackay v. Toronto, 48 D.L.R. 151, [1919] 3 W.W.R. 253, affirming 43 D.L.R. 263, 43 O.L.R. 17, which affirmed 39 O.L.R. 34.

POWERS OF MAYOR—ARREST.

The mayor of a town, although he has power under the authority of the municipal council to cause the arrest of any person who makes a disturbance during a sitting of the council, cannot of his own initiative and without authorization from the council, 17 days after such sitting, procure the arrest of such person, on the ground that the majority of the councillors had resigned and that the matter was urgent; in such case the mayor cannot claim from the municipality the costs he has incurred by such arrest.

Bailey v. Aylmer, 26 Que. K.B. 125.

PLAN OF SUBDIVISION — REFUSAL OF MAYOR TO APPROVE—DISCRETION.

Moffet v. Ruttan, 16 B.C.R. 342.

(§ III—287)—EXPENSE OF RECEPTIONS TENDERED GUESTS OF CITY.

Prior to the amendment to the Winnipeg charter (s. 584 B) the city had no power to expend municipal funds for the reception and entertainment of distinguished guests.

Davis v. Winnipeg, 17 D.L.R. 406, 24 Man. L.R. 478, 28 W.L.R. 93, 6 W.W.R. 703. [Affirmed, 24 Man. L.R. 478 at 483, 28 W.L.R. 634.]

MUNICIPAL AND RAILWAY BOARD.

See also Railway Board.

CONSTITUTION — POWERS AND DUTIES — NOT A COURT.

The Ontario Railway and Municipal Board although it has for some purposes, as part of its powers and duties, judicial functions to perform, is not a Superior Court within the meaning of s. 96 of the B.N.A. Act.

[Winnipeg Electric R. Co. v. Winnipeg (1916), 30 D.L.R. 159, distinguished.]

Re Toronto R. Co. and Toronto, 46 D.L.R. 547, 44 O.L.R. 381, 24 Can. Ry. Cas. 278.

MURDER.

See Homicide; Criminal Law.

MUTUAL BENEFIT SOCIETIES.

See Benevolent Societies.

Benefit certificates, see Insurance.

NAME.

See Trademark; Tradename; Companies.

NATURALIZATION.

See Aliens.

Annotation.

How affected by war as against rights of alien enemies: 23 D.L.R. 375, 383.

NAVIGABLE WATERS.

See Waters.

NAVIGATION.

See Waters; Collision; Shipping.

NEGLIGENCE.

I. As basis of action.
- A. General rules.
- B. Dangerous agencies.
- C. Dangerous premises.
- D. On highways or waters.

II. Contributory.
- A. Generally.
- B. Of persons under disability.
- C. On highways.
- D. Other cases.
- E. Imputed.
- F. Injury avoidable notwithstanding contributory negligence; last clear chance.

Annotations.

Contributory negligence of children injured on highways through negligent driving: 9 D.L.R. 522.

Contributory negligence; navigation; collision of vessels: 11 D.L.R. 95.

Defective premises; liability of owner or occupant; invitee, licensee or trespasser: 6 D.L.R. 76.

Duty to licensees and trespassers; obligation of owner or occupier: 1 D.L.R. 240.

"Negligence or wilful act or omission" within meaning of Railway Act: 32 D.L.R. 397; 33 D.L.R. 423; 35 D.L.R. 481.

Ultimate negligence: 40 D.L.R. 103.

Sufficiency of evidence of negligence to go to jury. 39 D.L.R. 615.

Highway defects—Notice of claim: 13 D. L.R. 886.

I. As basis of action.

A. General rules.

Wilful neglect, see Companies, IVG—130.

Rights and liabilities of owner as to animals at large, see Animals.

For injuries to animals by trains, see Railways, IID.

Lack of sanitation causing sickness, see Master and Servant, IIA—35.

Liability of Crown for negligence, "public work," see Crown, II—20.

For liability of carrier for negligence, see Carriers.

Negligence of municipality, see Municipal Corporations; Highways; Bridges.

Municipal liability for negligence of officers or servants, see Municipal Corporations, IIG—222.

Negligence of sheriff as to crops seized under execution, see Levy and Seizure, IIIA —40.

Liability of sheriff for negligence of deputies, see Sheriff, I—3.

Illegal execution of work under statutory power, see also, Expropriation, IIIE—186.

In operating factory; nuisance, see Landlord and Tenant, IIIA—40.

In construction and operation of railways, see Railways; Street Railways; Carriers; Master and Servant.

As to negligence in professional capacity, see Engineer I—5; Solicitors; Physicians and Surgeons.

As to sufficiency of proof of, see Evidence.

As to instructions; questions for jury; arguments of counsel; in action for, see Trial.

Negligence of master or servant, see Master and Servant.

Fires negligence as to, see Fires.

(§ I A—1)—Owner's liability to servant of third party—Dangerous machinery.

A company operating a factory will be liable in damages for negligence causing personal injury through leaving a projecting set screw on a shaft unprotected although the injured person was a sub-employee of the person who had contracted with the company on a piece-work basis with free use of that part of the factory, if the company still retained control of the machinery and equipment and were under obligation to keep it in repair.

Desparois v. Frothingham, 19 D.L.R. 806, 46 Que. S.C. 93.

Absence of privity—Untrue statements —"Negligently but not fraudulently" made—Effect, as basis of action.

No action will lie for damages suffered by a plaintiff in consequence of his reliance on untrue statements made negligently but not fraudulently by the defendant when there is no contract between them.

Berge v. MacKenzie, Mann & Co., 20 D. L.R. 1, 7 W.W.R. 886, 8 A.L.R. 235.

Absence of negligence on part of defendant.

Stone v. C.P.R. Co., 13 D.L.R. 93, 15 Can Ry. Cas. 408, reversing 4 D.L.R. 789, 26 O.L. R. 121, 21 O.W.R. 785.

Res ipsa loquitur—Flooding—Open tap—Burden of proof.

Where damage is caused to the goods of a lower tenant by an overflow of water from a tap left open on a floor above, and the defendant has shewn that it has not been caused by any act of his, or of those in his employ, it not being within the normal duties of his employees to use the tap, the presumption as to his prima facie liability, under the rule of res ipsa loquitur, is sufficently rebutted.

Imperial Tobacco Co. v. Hart, 36 D.L.R. 63, 51 N.S.R. 379.

Causing death—Right of action.

A legal right of action for negligence causing death under art. 1056, C.C. (Que.), is not taken away from an ascendant of whom the deceased was not the "only support" in the terms of arts. 3, 15, of the Workmen's

Compensation Act, 9 Edw. VII. c. 66 (Que.) (now R.S.Q. 1909, arts. 7323, 7335); such ascendant if only partially dependent upon the deceased may still maintain an action under art. 1056, C.C. (Que.).

Lamontagne v. Quebec R., L., H. & P. Co., 22 D.L.R. 222, 50 Can. S.C.R. 423, reversing 23 Que. K.B. 212.

(§ I A—2)—Gross, wanton or wilful negligence.

The gross negligence for which alone a gratuitous bailee can be made liable in the care of the goods which are the subject of the bailment must be such that any reasonable man would have considered insufficient the means of protection (if any) used by the bailee.

Carlisle v. G.T.R. Co., 1 D.L.R. 130, 25 O.L.R. 372, 20 O.W.R. 860.

(§ I A—3)—Concurrent negligence.

Where an injury is the direct immediate result of two operating causes, viz., the negligence of the plaintiff and that of the defendant, the plaintiff cannot recover damages.

Long v. Toronto R. Co., 10 D.L.R. 300, 15 Can. Ry. Cas. 35, 24 O.W.R. 39. [Reversed 20 D.L.R. 369, 50 Can. S.C.R. 224.]

Presumption of fault—How rebutted—Recourse.

The presumption of fault created by art. 1054 C.C. (Que.), against the owner of the thing which causes an accident resulting in injury can only be refuted by proof of force majeure, fortuitous event, or the victim's fault. It is not sufficient for the owner to prove that the thing was in good condition. When there are several plaintiffs in an action for damages, and only some of them succeed in obtaining them, the defendant has on that ground no right to damages against the others.

Fortin v. Montreal Tramways Co., 54 Que. S.C. 428.

Responsibility — Workman — Laundry —Damages—C.C. (Que.) arts. 1053, 1685.

Where a workman gives his labor and industry only, the loss of an article before delivery does not fall on him, unless it is caused by his fault. So, if goods are given to a laundry to be cleaned, and the laundryman gives all necessary care to the work and does not commit any imprudence or wrong, he is not responsible for the depreciation which the goods may suffer.

Dutch Cleaner v. Filiatrault, 56 Que. S. C. 457.

Concurrent negligence.

In an action of negligence, a plaintiff, whose want of care was a direct and effective contributory cause of the injury complained of, cannot recover, however clearly it may be established that, but for the defendants' earlier or concurrent negligence, the mishap, in which the injury was received, would not have occurred.

Herron v. Toronto R. Co., 11 D.L.R. 697, 28 O.L.R. 59, reversing 6 D.L.R. 215.

(§ I A—4)—Injury to cattle being taken to pound for trespass.

In taking trespassing cattle or horses to the pound, the landowner must take the same care of them which a man of ordinary discretion and judgment might be expected to exercise if they were his own, and where he directs another to remove the animals to the pound he is responsible for such person's wrongful and negligent method of fastening the animal to a vehicle whereby the animal was injured, although there was no intention to commit the injury. [Lloyd v. Grace, [1912] A.C. 716; Bignell v. Clarke, 5 H. & N. 485, and Union Bank v. McHugh, 10 D.L.R. 562, [1913] A.C. 299, applied.]

Kennedy v. Grose, 18 D.L.R. 414, 7 S.L.R. 104, 29 W.L.R. 364, 7 W.W.R. 74.

Loss through carelessness and incompetence.

Wattsburg Lumber Co. v. Cooke Lumber Co., 16 B.C.R. 154, 17 W.L.R. 129.

(§ I A—4a)—Breach of statutory duty.

Every one for whose benefit a duty is imposed by statute upon any person has a right to have that duty performed, and, if he suffer by reason of its nonperformance, he has a right of action against the person guilty of such nonperformance.

Stewart v. Steele, 6 D.L.R. 1, 5 S.L.R. 358, 22 W.L.R. 6, 2 W.W.R. 902.

Shipping company—Notice of arrival of goods — Elevator — Storage — Loss —Insurance—Damages.

A shipping company is liable in damages for negligence in not sending notice of arrival of the ship and her unloading at destination in accordance with 9 & 10 Edw. VII. (Can.) c. 61, s. 11; and where a grain cargo was stored in an elevator without the knowledge of the cargo owners due to failure to give such notice and was lost on the destruction of the elevator by fire, the net loss which the owners sustained after deducting the marine insurance and which would have been protected against by placing a fire insurance policy to the full value had notice of unloading been given, is not too remote as damages.

Richardson v. C.P.R. Co., 20 D.L.R. 580.

Laying gas pipes—Breach of statutory duty—Rule in construing such statutes.

Statutory authority given a defendant company to locate and construct gas pipes in a municipality with a provision that the work must be done "so as not to endanger the public health of safety" is construed to mean that no such danger shall ensue without regard to time upon the principle that such provisions are given a liberal construc-

tion. [Purmal v. Medicine Hat, 1 A.L.R. 209, distinguished.]

Raffan v. Canadian Western Natural Gas Co., 18 D.L.R. 13, 29 W.L.R. 161, 7 A.L.R. 459, 6 W.W.R. 1295.

RAILWAYS—BREACH OF STATUTORY DUTY—FAILURE TO PROVE—CONTRIBUTORY NEGLIGENCE BY DECEASED EMPLOYEE.

A railway company is not necessarily liable for personal injuries received by trainmen because of a derailment at a depression or "sink hole" on a new piece of road due to an inherent weakness in the ground underneath the roadbed and not to negligent construction of the road; and it is properly absolved from liability for the death of the engineer of a heavy freight train if the derailment was caused by his running the engine at a rate of speed much in excess of that to which his orders limited him, and if the railway company, in addition to restricting the speed limit, took all reasonable precautions to ballast with gravel, from time to time, the depressions varying from two to four inches occurring at the spot.

Lewis v. G.T.P.R. Co., 19 D.L.R. 606, 24 Man. L.R. 807, 29 W.L.R. 969, 7 W.W.R. 504.

DEFECTIVE CODE OF MINE SIGNALS AS NEGLIGENCE.

Where a statutory code of mine signals is compulsorily adopted, a defect incident to such code cannot be made the basis of a negligence action on the theory that the statutory signalling system should have been supplemented by another such as a speaking tube system.

Ganzini v. Jewel-Denero Mines, 21 D.L.R. 406, 21 B.C.R. 317.

WORK AUTHORIZED BY STATUTE—DRAINAGE—OVERFLOW.

No statutory remedy exists under the Drainage, Dyking, and Irrigation Act (R.S. B.C. 1911, c. 69), nor under s. 21 thereof which merely refers to damages resulting from the execution of the work carried out under s. 11, for the negligence of the commissioners in carrying out the scheme of the work not under s. 11; but since negligence in the execution of a work authorized by statute is actionable at common law, the commissioners are liable at common law for damages caused by the overflow of water from ditches constructed by them, in not providing, as authorized by their scheme, a reasonable and safe outlet, under proper municipal authority, in a way of averting such overflow. [Raleigh Corp. v. Williams, [1893] A.C. 540, distinguished.]

Hemphill v. McKinney, 27 D.L.R. 345, 21 B.C.R. 561, 33 W.L.R. 688.

ACTION FOR DAMAGES—LAW FOR THE PROTECTION OF THE PUBLIC—S.R. ART. 6210—COMMON FAULT.

There results, without any possible doubt, from the evidence, that the accident of which the plaintiff complains, is partially due to the negligence of the injured child; but above all from the fact that the defendant did not to the slightest degree fulfill the duty which S.R., art 6210 imposed upon him. Every company should build and place its gas or water works so that the apparatus and property may connect in such a manner that there may be in these works, wherever they are, no menace to health and public safety. In law the defendant company is liable (Cooke v. Midland Great Western Railway of Ireland [1909] A.C. 229). In fact the evidence showed that the action of the plaintiff is well founded to the amount of $7,454.48, with costs.

Peloquin v. Sorel Light and Power Co., 25 Rev. de Jur. 277.

B. DANGEROUS AGENCIES.

Delictual liability of manufacturer or seller for structural defects, see Automobiles, III A—160.

(§ I B—5)—MAXIM RES IPSA LOQUITUR—INFERENCE ON FACTS ESTABLISHED—CAUSE OF ACCIDENT UNKNOWN—PROOF REQUIRED.

In cases in which the maxim res ipsa loquitur applies the facts established make the inference of negligence clear, and the defendant is liable if he does not produce sufficient evidence to counteract the inference. In cases where the cause of the accident is unknown the court is left to decide upon such facts as are available, whether negligence on the part of the defendant is the more reasonable inference or not.

Belway v. Serota, 47 D.L.R. 621, 12 S. L.R. 349, [1919] 2 W.W.R. 904.

PROPERTY LEFT IN CONDITION THAT MAY BE DANGEROUS—INTERVENING ACT OF THIRD PARTY CAUSING INJURY—LIABILITY OF OWNER.

A person who, in neglect of ordinary care, places or leaves his property in a condition which may be dangerous to another, is answerable for the resulting injury, even though but for the intervening act of a third party the injury would not have occurred, if such act is one which, in the circumstances, he should reasonably be called upon to anticipate, where the intervention of a third party is the direct cause of the accident. The test applied is whether the party guilty of the primary negligence had cast upon him the duty of anticipating such intervention. [Geall v. Dominion Creosoting Co., 39 D.L.R. 242, 55 Can. S.C.R. 587; Cooke v. Midland Great Western, [1909] A. C. 229, applied.]

Toronto Hydro-Electric Commission v. Toronto R. Co., 48 D.L.R. 103, 45 O.L.R. 470.

RAILWAY TRACK—HABITUAL USER BY PUBLIC—STATUTORY PROHIBITION—TRESPASSER—DUTY OF COMPANY.

Section 264, c. 99, R.S.N.S. 1900, enacts that every person not connected with the railway or employed by the company who walks along the track thereof, except where the same is laid across or along a highway, is liable on summary conviction to a penalty

not exceeding $10. Held, that a doctor returning along the track after making a professional call, was a trespasser and the company owed him no duty except not to run him down knowingly or recklessly. This the jury found had not been done and the company was not liable. Mere passiveness of the company in allowing the public to walk along the track, did not make them licensees, for injury to whom the company would be liable. [G.T.R. Co. v. Anderson, 28 Can. S.C.R. 541, followed; Lowery v. Walker [1911], A.C. 10, distinguished.]

Herdman v. Maritime Coal Co., 49 D.L.R. 90, reversing 40 D.L.R. 96, 52 N.S.R. 185.

STATUTORY AUTHORITY TO LAY GAS PIPES—HOW LIMITED.

Statutory authority given a defendant company to locate and construct gas pipes in a municipality with a provision against thereby endangering the public health or safety is not pleadable by the defendant company in an action against it for damages for failure to control the dangerous substance where the company has violated such provision. [Purmal v. Medicine Hat, 1 A.L.R. 209, distinguished.]

Raffan v. Canadian Western Natural Gas Co., 18 D.L.R. 13, 29 W.L.R. 161, 7 A.L.R. 459, 6 W.W.R. 1295.

SCHOOL—EXAMINATION—DANGEROUS EQUIPMENT.

A School Board which conducts a technical school for instruction in the manual arts, and permits the Department of Education to use its equipment on an examination, the examination being entirely under the direction of the Department of Education, is not liable in damages for injuries to a student taking the examination, if the equipment supplied was reasonably safe and suitable for the work for which it was being used.

Smiles v. Edmonton School District, 43 D.L.R. 171, [1918] 3 W.W.R. 673, 14 Alta. L.R. 351, reversing 41 D.L.R. 400, [1918] 2 W.W.R. 586.

RAILWAYS—CONTRACTOR—SAND DEPOSITS—EXPROPRIATION.

Damages suffered by a landowner from sand deposits in the course of construction of a Crown railway are only recoverable as against the contractors; the injury not having resulted from any expropriation of land is not actionable against the Crown under the Expropriation Act, and having happened 10 acres away from the railway, was not "on a public work" within the meaning of s. 20 of the Exchequer Court Act, and therefore not actionable against the Crown under the latter statute.

Theberge v. The King, 41 D.L.R. 282, 17 Can. Ex. 381.

RAILWAY—DEFECTIVE BRIDGE—BODY FOUND IN RIVER—EVIDENCE—SUFFICIENCY.

In an action for damages for the benefit of the wife and children of a passenger on the defendant's railway whose death was alleged to have resulted from the negligence of the defendant's servants, it appeared that, owing to a defective bridge, the passengers on the train on which the deceased was travelling were obliged to walk across part of the bridge and board another train. When the train arrived at the bridge the deceased was intoxicated and asleep. The conductor of the train was aware of the deceased's condition and, apparently thinking that he could not be got conveniently across the bridge, decided to leave him in the train so that he would be taken back on it, and proceeded eastward. The train in which the deceased had been left did not start back for some time afterwards, and while, before it did so, he had been noticed by passengers to be on it and asleep, he could not be found when it left. While the train was standing, one of the passengers had heard a splash of a heavy body of some kind falling into the water below the bridge. Three weeks afterwards the deceased's body was discovered in the river a point about twelve miles below the bridge. The face bore a severe bruise which, according to the testimony of the coroner and the undertaker, must have been made before death, but there was no other mark of violence upon the body. At the trial a motion for a nonsuit was allowed, and the trial judgment was affirmed on appeal. On an appeal to the Supreme Court of Canada, held, that there was evidence from which it would be open to a jury to find that the deceased came to his death as a result of the defendant's negligence, and the case was remitted for a new trial.

Beck v. C.N.R., 13 A.L.R. 177.

BOARD OF HEALTH—INFECTIOUS DISEASE.

An action under the Fatal Accidents Act for damages for the death of an infant suffering from a communicable disease will be dismissed where there is no evidence to show that the death was caused by the negligence of the authorities in charge, despite the verdict of a jury in favor of the plaintiff.

Simpson v. Local Board of Health of Belleville, 39 D.L.R. 442, 40 O.L.R. 406, affirming 12 O.W.N. 241.

HIGHWAY — FIRE — STEAM ENGINES — PRESUMPTION.

One who uses vehicles and steam rollers for macadamizing a public road, without providing appliances protecting against fire, is responsible for the loss of buildings destroyed as the result of a fire started by sparks coming from such machines. Where an inhabited house and outbuildings built in an isolated place along a public road are burned ten minutes after the passage of a steam engine, from which sparks escaped, the accident, if no other cause is established, will be attributed to such sparks.

Pelletier v. Stack, 54 Que. S.C. 148.

PRESUMPTION AS TO NEGLIGENCE.

There is no presumption of negligence against an industrial company of not using a mode of preventing accidents which has

not yet been proved to be of sufficient capacity and which can in certain cases even increase the danger.

Quebec R., L.H. & P. Co. v. Vandry, 24 Que. K.B. 214. [Reversed on another point 29 D.L.R. 530, 53 Can. S.C.R. 72.]

CARRIERS—WAGGON ON WHARF—INJURY TO CHILDREN.

Carriers are guilty of negligence in placing a crated waggon on a public wharf in too perpendicular a position, so that children lawfully on the wharf pull it over and are injured. The selection by the wharfinger of the place of deposit does not make him liable for the negligence of the carriers' servants.

Clement v. Northern Navigation Co., 43 D.L.R. 433, 43 O.L.R. 127, reversing 13 O.W.N. 22.

STEAM-PLOW—FIRES—NEGLIGENCE OF SERVANT OR INDEPENDENT CONTRACTOR — MEASURE OF DAMAGES.

Johnston v. Mills, 37 D.L.R. 767, [1917] 3 W.W.R. 742.

INJURY TO PERSON BY EXPLOSION OF GAS—SUBSEQUENT DEATH FROM PNEUMONIA—PROXIMATE CAUSE OF DEATH—FINDINGS OF JURY—NONSUIT.

Hawley v. Ottawa Gas Co., 15 O.W.N. 454. [Affirmed 16 O.W.N. 106.]

(§ I B—6)—GUN.

A person who, on his own land, fires a gun for a lawful purpose, namely, to kill game, is not guilty of fault nor liable in damages to another driving by, whose horse is frightened by the report and runs away, breaks a trace, upsets the carriage, throwing the driver out and injuring him.

Bourgault v. Ferland, 42 Que. S.C. 543.

SALE OF AIR-GUN TO MINOR—INJURY TO PERSON—UNLAWFUL ACT.

Fowell v. Grafton, 22 O.L.R. 550, 17 O.W.R. 949.

(§ I B—9)—EXPLOSIVES LEFT LYING IN STREET AND FOUND BY CHILD—INJURY TO CHILD—ACTION FOR DAMAGES—EVIDENCE—FAILURE TO CONNECT DEFENDANTS WITH NEGLIGENT ACT.

Renzoni v. Sault Ste. Marie, 6 O.W.N. 440.

(§ I B—10)—NEGLIGENCE—EXPLOSION IN BUILDING—INJURY TO PROPERTY OF PLAINTIFF—NO ALLEGATION OR PROOF OF NEGLIGENCE—EVIDENCE—NOT A CASE OF RES IPSA LOQUITUR—TRANSFER OF PREMISES OF DEFENDANTS.

Wright v. Mitchell, 17 O.W.N. 290.

(§ I B—15)—LIABILITY OF SELLER, MANUFACTURER OR OTHER THIRD PERSON.

The defence of volenti non fit injuria is not available in an action for injuries sustained through a breach of a statutory duty imposed by the Factories Act.

Everett v. Schaake, 4 D.L.R. 147, 17 B.C.R. 271, 21 W.L.R. 525, 2 W.W.R. 572.

SELLER OF APPARATUS TO BE INSTALLED—PERSONAL INJURY TO BUYER'S EMPLOYEE DURING WORK OF INSTALLATION.

A company installing a refrigerating plant for another is liable to an employee of the latter who is injured through the negligence of the installing company, which while still in charge of the plant, failed to put part of the plant in good order after being given notice of its defective condition, where such failure on their part resulted in injury to the purchaser's employee.

Nokes v. Kent Co., 9 D.L.R. 772, 4 O.W.N. 665, 23 O.W.R. 771.

LIABILITY OF MANUFACTURER—BOWLING ALLEYS—DRY ROT.

A manufacturer of bowling alleys who agrees to superintend their installation is liable in damages for neglect to provide sufficient ventilation to protect against dry rot.

Smith v. Brunswick Balke Collender Co., 38 D.L.R. 455, 25 B.C.R. 37, [1917] 3 W.W.R. 1071.

TIMBER—LIABILITY FOR CONTRACTOR'S ACTS.

The purchase of rights to cut the timber implies, for the purchaser, the right to use the ground for the purpose of operating the lumber business; but it includes also the consequent obligation of using it as a good "pater familias." The purchaser cannot divest himself of such obligation by asking contractors to run the business at a fixed price; owing to his personal obligation he remains responsible for depredations committed on the premises by such contractors in carrying out their contract.

Giguère v. Tobin Mfg. Co., 53 Que. S.C. 193.

DEFECTIVE MACHINE—LIABILITY OF OWNER.

The owner of defective machinery is responsible for damages caused by it to a workman who is engaged on it.

Montreal Ammunition Co. v. Parent, 27 Que. K.B. 558.

INJURY TO PERSON BY BREAKING OF BENCH IN PUBLIC PARK—DUTY OF OWNER OF BENCH TO PUBLIC RESORTING TO PARK—EVIDENCE—CONDITION OF BENCH—REASONABLE USER.

McPhee v. Toronto and Bulmer, 9 O.W.N. 150.

(§ I B—16)—DEFECTIVE CARTRIDGES—LIABILITY OF SELLER.

A retail vendor is not answerable for personal injury sustained by the purchaser of a sealed box of cartridges of a certain description and make, as the result of the box containing one cartridge of a different kind and of the explosion of the cartridge after it had missed fire because of its being the wrong size, where the plaintiff relied solely on his own judgment and not that of the vendor, in making the purchase. [The Moorcock, L.R. 14 P.D. 64, and Hamlyn v. Wood, [1891] 2 Q.B. 488, applied.]

Hill v. Rice Lewis, 12 D.L.R. 588, 28 O.L.R. 366.

(§ I B—23)—Steam waggon—Frightening horses.

The operating of moving machinery, such as steam waggons or steam rollers, emitting smoke and cinders on a street in close proximity to horses standing thereon and liable to frighten them, without precautions or warnings of their approach, is actionable negligence. [Kirk v. Toronto, 8 O.L.R. 730, followed; Jones v. Liverpool, 14 Q.B.D. 890, distinguished.]

Mack v. Lake Winnipeg Shipping Co., 24 D.L.R. 128, 25 Man. L.R. 364, 8 W.W.R. 523.

(§ I B—30)—Gasoline engines.

The seller of a gasoline engine who negligently installs it, and not the manufacturer thereof, is answerable to the purchaser for any damages resulting from its defective installation.

Tollington v. Jones, 4 D.L.R. 648, 21 W.L.R. 168, 4 A.L.R. 344, 2 W.W.R. 141.

C. Dangerous premises.

Dangerous premises causing injury to trespasser, see Crown, II—20.

Defective system, see Master and Servant.

Defective fire escape, licensee or invitee, see Landlord and Tenant, III C—65.

Negligence as of owner of building or employer, see Pleading, II D—185.

(§ I C—35)—Barber shop—Trap—Personal injuries to invitee—No warning of danger—Liability.

When a customer who is properly in a shop for the purpose of trading in it seeks to reach, for a proper purpose, what is apparently another part of the premises which the tradesman is bound by law to provide for him and is in constant use for that purpose by his customers, the tradesman is bound to warn him of any concealed dangers that there are on the road to it, and, if he fails to do so, he cannot shield himself from responsibility for harm that comes to the customer therefrom, by proving that the way and trap were under the control of someone else. [Dickson v. Scott, 30 T.L.R. 256, followed.]

McCallum v. Hemphill Trade Schools, 50 D.L.R. 311.

Merchant's store — Invitee — Impending danger from falling wall on adjacent premises—Neglect of duty to warn—Injury—Liability.

An invitee to a merchant's store is entitled to damages for injuries caused by the negligence of the merchant who, although he knew of impending danger threatened to his premises by the collapse of a nearby wall, failed to notify her, or advise her of the risk she was running in going into that part of the store in which she was injured by flying bricks and which was the part most surely to be affected by the fall, or to exclude her from that part of the building.

Mitchell v. Johnstone Walker, 47 D.L.R. 293, [1919] 3 W.W.R. 24.

Granary—Animals.

Where a granary is properly constructed at the time the grain is stored therein, but afterwards becomes injured without the knowledge of the owner of the granary, so that stray animals can obtain access to the grain, the owner does not "have or store on his premises grain accessible to stock" within the meaning of the Open Wells Act (R.S.S. c. 124), and is not liable for damage to such animals.

Hill v. Mallach, 37 D.L.R. 709, 10 S.L.R. 419, [1918] 1 W.W.R. 10.

Collapse of stairway — Injury to employee of subcontractor—Liability of contractor.

Building contractors who allow a temporary stairway to be used by persons working in the building under construction are properly held liable in negligence for personal injuries sustained by an employee of their subcontractor by the collapse of such stairway when he attempted to pass over it, if no warning had been given or barrier placed to give notice that the stairway was being moved to a different position by the contractor's workmen; the fact that the contractor's workmen had permitted another person to use the stairs just prior to the plaintiff's arrival was sufficient to put the plaintiff off his guard on seeing this and to justify him in assuming that the use of the stairway was permitted as being safe without putting upon the plaintiff the duty of investigating what was being done by the contractor's workmen then and there engaged at work.

Klukas v. Thompson, 24 D.L.R. 67, 8 W.W.R. 778, 31 W.L.R. 438, reversing 21 D.L.R. 312, 7 W.W.R. 1102.

Injury to shopper falling through trap door—Common fault.

There is common fault when a woman, being in a shop, falls through an open trap door in a corner and inflicts upon herself serious injuries. The fault of the plaintiff consists in not looking where she was going; that of the defendant in the fact that he should not have left the cellar door open in a part of his shop to which the public had access.

Vézina v. Laperle, 48 Que. S.C. 174.

Explosion of natural gas in cellar of dwelling house—Escape from underground pipes of gas company—Break in pipe—Cause of—Findings of jury—Liability of company.

Stables v. United Gas & Fuel Co., 8 O.W.N. 105.

Injury to road engine—Defective condition of private road — Findings of jury — New trial directed because negligence found not connected with injury—Connection found by jury at new trial — Question of negligence raised on appeal — Res adjudicata—Evidence.

Everton v. Kilgour, 8 O.W.N. 365.

DEFECT IN MACHINERY—KNOWLEDGE OF.

The plaintiff was killed by the fall of a boom of a derrick, the evidence shewed the machine to be of the best type, in good repair and operated by a competent man. The plaintiffs alleged that there was a defect in the machine, in that the dog did not fit properly in the cog-wheel and at times slipped. The only evidence of knowledge by the defendants of the alleged defect was that of two witnesses, one of them stating that the operator of the hoist told him, after the accident that the machine was defective and that he had notified the defendants of the defect prior to the accident, and that this statement was made by the operator 15 or 20 feet from the defendant W. (one of the members of the defendant firm), who did not contradict the statement. The other witness, who stood beside W. at the time the statement was made, testified that he heard what the operator said. The plaintiffs contended that when W. did not contradict the operator's statement, the evidence was admissible as an acquiescence by W. in the statement. The evidence was allowed in on the trial and the jury returned a verdict for the plaintiffs. Held, on appeal, reversing the judgment of the Trial Judge and setting aside the verdict of the jury, that the evidence that W. heard the statement was of the vaguest character; that the remark was not addressed to him; that the allegation was not that he, but the firm (of which he was a member), had been notified, as to which he may have had no knowledge, so that even if he heard what the operator said he may not have been in a position to contradict it. In view, therefore, of the loose character of all this evidence, it should not have been admitted, and without it the plaintiff should not succeed.

Watson v. Booker, 18 B.C.R. 538.

FACTORIES ACT—BREACH—GRAIN ELEVATOR—DEATH OF EMPLOYEE.

A drum around which coil the steel cables attached to a lift, and a hole between the drum and the side of the platform on top of which the lift is placed, are within subss. (a) and (e) of s. 19 of the Factories Act, R.S.S. 1909, c. 17, and are, therefore, things which should be guarded and protected; and where, because of the absence of such a guard, an employee of the proprietor of the factory wherein such lift is meets his death such proprietor is liable in damages to the dependents of the deceased.

Hilton v. Robin Hood Mills, 11 S.L.R. 370, [1918] 3 W.W.R. 168. [Affirmed 47 D.L.R. 282, 12 S.L.R. 245, [1919] 2 W.W.R. 134.]

SAW MILL—DAMAGES—POSSESSORY OR NEGATORY ACTION — OCCUPANT OF PUBLIC DOMAIN.

Although it may be true, in principle, that if a person establishes himself at a place where an industry is in operation, and that the owner of the latter uses all possible and necessary improvements to diminish the inconvenience of his proximity and the damages which he may cause, he must suffer them without being able to claim any compensation, it is otherwise if the industry has rendered itself guilty of negligence in the operation of its works. Accordingly, the owner of a saw mill is liable for damages caused to his neighbour by allowing the wind to carry over the latter's land bark and sawdust from works carried on in his mill, without taking any precautions to prevent them. The owner of the mill is, in fact, exercising a servitude upon the land of his neighbour, who may bring a negatory action against him. An occupant, by permission of the Crown, of beaches, of public domain, has a right to a possessory action of servitude, if he is disturbed by his neighbour.

Cimon v. Bouchard, 24 Rev. Leg. 449.

FACTORY—PRECAUTIONS.

When a manufacturer, in establishing his industry, takes all proper precautions not to cause damage to the neighbours, he can escape, in great measure, from the liability for damages which result from the operation of the industry. It is different when a manufacturer places machinery in a building not intended for it, nor so constructed as to prevent the vibrations being felt by the neighbours.

Vincent v. Paxton, 50 Que. S.C. 442.

MASTER AND SERVANT—INJURY FROM BREAKING OF WORN CABLE—FAILURE OF EMPLOYER TO EXAMINE CABLE—WORKMAN STRIKING HOPPER FROM BENEATH INSTEAD OF FROM SIDE — CUSTOMARY METHOD — NOT CONTRIBUTORY NEGLIGENCE.

Plaintiff, while in employ of defendant, who was erecting a building, was injured by the falling of a hopper due to the breaking of a steel cable, which passed through piping, which cable the court inferred from the circumstances had become worn and was not in fit condition for the use made of it. Held, that defendant was bound from time to time to examine and test the cable and that such examination would have disclosed its condition. The failure to do so and continued use of an unfit cable constituted negligence.

Weenk v. Smith, [1919] 3 W.W.R. 212.

DEATH OF MAN CAUSED BY FALLING INTO ELEVATOR-SHAFT IN STORE—ACTION UNDER FATAL ACCIDENTS ACT — NEGLIGENCE OF DECEASED—FINDINGS OF TRIAL JUDGE.

Kupnicki v. Noden et al., 13 O.W.N. 178.

ACTION TO RECOVER DAMAGES — INJURIES CAUSED BY ROLL OF LINOLEUM FALLING ON PLAINTIFF—DEFENDANT SET UP RELEASE FOR $50 SIGNED BY PLAINTIFF—IMPROVIDENT SETTLEMENT.

Gissing v. Eaton, 3 O.W.N. 219, 20 O.W.R. 324, reversing 2 O.W.N. 1021.

UNGUARDED HOLE IN SCHOOL FLOOR—ACTION FOR DAMAGES FOR INJURIES SUSTAINED—CONTRIBUTORY NEGLIGENCE.

Shaw v. St. Thomas Board of Education, 2 O.W.N. 1467, 19 O.W.R. 846.

(§ I C—37)—FALLING BUILDING OF PORTION THEREOF GENERALLY.

Where a person orders to be done on his premises a work, lawful in itself, but from which, in the natural course of things, injurious consequences to his neighbours must be expected to arise unless means are adopted by which such consequences may be prevented; and where he entrusts an independent contractor with the performance of such duty incumbent upon himself, and the contractor neglects its fulfilment, the liability for the resultant injury to the adjoining premises does not depend on the relation of master and servant; and the fact that he entrusted his own duty to another person (whether servant or independent contractor) who also neglected it, furnishes no excuse in law.

Cockshutt Plow Co. v. MacDonald, 8 D.L.R. 112, 5 A.L.R. 184, 22 W.L.R. 798, 3 W.W.R. 488.

DESTRUCTION OF BUILDING BY STORM—FAULTY CONSTRUCTION.

The owner of a building is responsible for the damage caused by the roof being lifted off by a storm, owing to a fault in construction. [Nordheimer v. Alexander, 19 Can. S.C. 259 followed.]

Lemieux v. Ruel, 45 Que. S.C. 390.

ICE FALLING FROM ROOF — REMEDY — DAMAGES—INJUNCTION.

There is a duty, apart from any obligation imposed by a municipal by-law, upon the owner or occupant of a building the roof of which is so constructed that from natural causes the snow or ice which falls or collects upon it will naturally and probably slide from the roof, to take all reasonable means to prevent the snow or ice from falling upon the adjoining property, or an adjoining highway, and causing damage to persons or property there; a failure to adopt such means of prevention will render him liable in damages for an injury caused thereby, but the case is not one for an injunction.

Meredith v. Peer, 35 D.L.R. 592, 39 O.L.R. 271.

COLLAPSE OF BUILDING DURING STRUCTURAL ALTERATIONS — INJURY TO PERSON IN NEIGHBOURING BUILDING—INDEPENDENT CONTRACTOR.

Earl v. Reid, 23 O.L.R. 453, 18 O.W.R. 562.

COLLAPSE OF BUILDING—INJURY TO NEIGHBOURING PREMISES—ACTING ON ADVICE OF COMPETENT EXPERTS.

McNerney v. Forrester, 19 W.L.R. 32.

ACCIDENT TO MINER CAUSED BY FALLING ROCK — DEFECT IN WORKS — ONTARIO MINING ACT (1908), S. 164, SUBSS. 17 AND 31—PENTICE.

Siven v. Temiskaming Mining Co., 19 O.W.R. 436, 2 O.W.N. 1245.

(§ I C—38)—FALL OF WALL—RES IPSA LOQUITUR.

The unexplained fall of a wall is prima facie evidence of negligence on the part of those responsible for its construction. Ordinary care is not determined by the wisdom gained by results; it is gauged by the situation and surrounding circumstances. In general it means such care as prudent and cautious men would use according to the exigency and as would be necessary to guard against probable danger.

Erdman v. Consolidated Mining & Smelting Co., 7 W.W.R. 1121.

(§ I C—40)—INSECURE ELECTRIC POLE—INJURY TO SERVANT OF INDEPENDENT CONTRACTOR—LIABILITY OF OWNER OF POLE, HOW LIMITED.

Where the poles intended for transmission wires of a power company had become insecure by the washing away of earth before the wires were strong, and the company gives to an independent contractor the work of first strengthening and securing the poles and then of stringing wires upon them, the power company is not responsible for personal injuries to the contractor's workman by reason of the falling of a pole which he had climbed for the purpose of stringing the wires before it had been strengthened and without knowing that it was unsafe; the workman is not entitled to claim against the power company as owners or occupants of the property that he was an invitee thereon to whom there was a holding out on their part that the premises were safe as it was a part of his master's undertaking to strengthen the poles tbefore stringing the wires, and it was the collateral negligence of his master, the contractor, in not notifying him that the poles were not safe that was the cause of the injury. [Marney v. Scott, [1899] 1 Q.B. 986; Indermaur v. Dames, L.R. 2 C.P. 311, and Lucy v. Bawden, [1914] 2 K.B. 318, distinguished.]

Western Canada Power Co. v. Velasky, 20 D.L.R. 92, 49 Can. S.C.R. 423, reversing 12 D.L.R. 774, 18 B.C.R. 407, 25 W.L.R. 59, 4 W.W.R. 1259.

(§ I C—44)—EXCAVATIONS—DUTY AS TO CARE—INDEPENDENT CONTRACTOR.

A man who orders a work to be executed from which, in the natural course of things, injurious consequences to his neighbour must be expected to arise unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing someone else, whether it be the contractor employed to do the work from which the damage arises or some independent person, to do what is nec-

essary to prevent the act he has ordered to be done from becoming wrongful. [Bower v. Peate, 1 Q.B.D. 321, followed.]

Bertam v. Builders' Assn. of North Winnipeg, 23 D.L.R. 534, 31 W.L.R. 430, 8 W. W.R. 814.

FALL OF FROZEN SURFACE OF GRAVEL PIT—CONTRACT—BREACH OF DUTY—CAUSE OF DEATH — CONTRIBUTORY NEGLIGENCE — FATAL ACCIDENTS ACT — PARENTS — DAMAGES.

The defendants employed a teamster to take gravel for them from a pit, at so much a load; they had agreed both with the owner of the pit and with the teamster to remove the surface earth and snow from the pit in order that the gravel might be reached and got out. The defendants failed to perform that duty properly, and the plaintiff's son, who was employed by the teamster, went into the pit, on a day in winter, to load and draw gravel from it, and was killed by a piece of the overhanging surface of frozen earth and snow falling upon him. On the previous day, a servant of the defendants, in or towards the performance of their duty to remove the surface, had exploded three charges of dynamite in the frozen surface soil so as to loosen it and remove it. No examination was, on that day or the next day, made to ascertain the full effect of the explosion; and yet the man who was killed was ordered, by the defendants' same servant, to load the gravel at the part of the pit where the explosion had taken place:—Held, that the defendants' failure to perform their duty was the cause of the man's death, and that they were liable in an action under the Fatal Accidents Act. In the circumstances, there was a duty upon the defendants toward every one there, as the man was employed in removing gravel for the defendants, to take reasonable care that the frozen surface was so removed that it should not be a needless danger to them when so employed. The defendants had committed a breach of duty, apart from contract. Held, also, that the defendants were liable upon another ground, viz., the neglect of their servant in regard to the explosion, that neglect having been the direct cause of the death. The deceased was not the author of his own injury, nor was he guilty of contributory negligence. The amount assessed as damages by the Trial Judge, $1,400, divided between the father and mother of the deceased, was not excessive in view of the evidence of reasonable expectation of pecuniary benefit from the prolongation of the life of their son.

Durant v. Ontario & Minnesota Power Co., 41 O.L.R. 130.

(§ I C—48)—WHARF—GANGWAY.

The lessee of a building on a wharf, occupied as a freight shed, is not responsible for an accident which happened to a labourer who was working in it, by the fall of a heavy gangway belonging to the lessee, which stood against a post in a slanting position and was knocked down by a carter unloading his cart; the fact that the lessee failed to have the gangway attached to the post so that it could not fall was not considered as negligence.

Cantillon v. C.P.R. Co., 53 Que. S.C. 179.

(§ I C—49) — DRAWBRIDGE — SITUATION DANGEROUS—FLIMSEY BARRIER ACROSS BRIDGE—LIABILITY OF CORPORATION FOR DAMAGES — NEGLIGENCE OF DRIVER OF MOTOR — PASSENGER NOT CHARGEABLE WITH DRIVER'S NEGLIGENCE.

A corporation which, by the situation of a drawbridge, the approach thereto, and a flimsy barrier across the bridge when open, makes such bridge a trap for the unwary and an invitation to accident, is liable for damages, due to a jitney breaking through the barrier and plunging into the river, notwithstanding that the highway was known to the driver, and that he was reckless and disregarded the danger. If the corporation has provided funds for defraying half the cost of constructing the bridge and has in fact exercised control over it, prima facie it is the duty of the corporation to take suitable measures for protecting the public against the dangers incidental to the working of the draw span, and it is incumbent upon the corporation if it desires to dispute this responsibility to prove that the officials who had in fact exercised control were exceeding their lawful powers.

Richmond v. Evans, 48 D.L.R. 209, [1919] 3 W.W.R. 339, affirming 43 D.L.R. 214, 26 B.C.R. 60, [1918] 3 W.W.R. 487.

CANAL—OPEN BRIDGE—AUTOMOBILE—RECKLESS DRIVING.

The suppliant, in the course of a joy ride, driving an automobile without a chauffeur's license, attempted to cross a Government canal bridge when the bridge was being opened and the gates down, after being signalled to that effect by the bridge-master, resulting in the machine and its occupants plunging into the canal. Held, under the circumstances and evidence, the suppliant has made out no case against the Crown, and that the accident was brought about by his own negligence.

Boyer v. The King, 42 D.L.R. 384, 18 Can. Ex. 154.

(§ I C—50)—LIABILITY TO LICENSEES OR TRESPASSERS.

In a negligence action under Lord Campbell's Act for personal injury resulting in death brought by the next of kin setting up that deceased was an employee, an invitee, a licensee, and a victim of a system, the only duty, in so far as the claim as to the deceased being a licensee is concerned, which an owner of premises owes such a person, is not to deceive him by means of a trap or to be guilty of any active negligence, and the licensee must otherwise take the premises as he finds them, and the fact that a gangway (across a steamboat belonging to the same owner leading to another of such

owner's boats moored side by side at the dock) was opened for the first time on the morning of the accident to carry lumber across it, and that the hatchway was open for the necessary ventilation and left unprotected other than by some boards which had covered the hatch being left on edge over it, is not evidence of neglect of duty by the owner.

King v. Northern Navigation Co., 6 D.L.R. 69, 27 O.L.R. 79, 22 O.W.R. 607.

Where the owner or occupier of a stable supplies stable accommodation and feed for horses at a fixed sum per day, but without giving the exclusive use of any part of the stable, he is under obligation to see that the stable is in a reasonably safe condition so far as the exercise of reasonable care and skill can make it so, and this obligation subsists notwithstanding that the horses were fed and cared for by their owner. [Francis v. Cockrell, L.R. 5 Q.B. 501, and Stewart v. Cobalt, 19 O.L.R. 667, applied; see also annotation to this case.]

Gunn v. C.P.R. Co., 1 D.L.R. 232, 20 W.L.R. 219, 22 Man. L.R. 32, 1 W.W.R. 804.

RAILWAY AND TRAFFIC BRIDGE — RAILWAY PART NOT FLOORED—TRESPASSER FALLING THROUGH—DEATH—DAMAGES.

The owner of a railway and traffic bridge, one portion of which is used for railway traffic only and is not floored, the other portion being fenced off from the railway portion and used for the passage of persons and vehicles only and for the use of which a small charge is made, is not liable in damages for the death of a person who, in a state of intoxication, and in order to avoid payment of the charge, attempts to cross on the railway portion of the bridge, falls through and is killed. Such person being a trespasser, the doctrine of implied invitation does not apply. [Stevens v. Jeacocke, 11 Q.B. 731, 116 E.R. 647; Gorris v. Scott, L.R. 9 Ex. 125; Walker v. Midland R. Co., 2 Times L.R. 450, followed.]

Walsh v. International Bridge & Terminal Co., 45 D.L.R. 701, 44 O.L.R. 117. [Appeal to Canada Supreme Court pending.]

TRESPASSER — INTELLIGENT BOY — DANGER SIGNALS AND SIGNS — DISREGARD OF — INJURY—ACTION FOR DAMAGES.

The negligence of an intelligent boy who is able to read, in disregarding danger signs and warnings put up at or near the place where he is injured, in a place where boys are not in the habit of frequenting disentitles him to damages for the injuries sustained. [Cooke v. Midland Great Western R. Co., [1909] A.C. 229, distinguished.]

Shilson v. Northern Ontario Light & Power Co., 48 D.L.R. 627, 45 O.L.R. 449.

CONTRACTOR'S LIABILITY TO LICENSEE OF ANOTHER—DEFECTIVE PLANK—ABSENCE OF CONTRACTUAL RELATIONSHIP—ABSENCE OF ALLUREMENT.

The contractor for the carpenter work of a building who erects scaffolding for his own purposes in the work is not liable for injuries occurring to the employee of the contractor for the outside painting work under contract with the same proprietor through the breaking of a board in the inside scaffolding by which the painter was proceeding to reach his work, where the defect was not known to the carpenter contractor or his workmen nor had the painter been invited by the latter to use the scaffolding to reach a window frame he was about to paint, where in the ordinary course of the work the outside painting would be done from the outside by means of ladders, which had been supplied to the painters for that purpose. [Indermaur v. Dames, L.R. 1 C.P. 274; Corby v. Hill, 4 C.B.N.S. 556, distinguished.

Bilton v. Mackenzie, 19 D.L.R. 633, 31 O.L.R. 585.

DANGEROUS PREMISES—BUILDING IN COURSE OF CONSTRUCTION—DUTY TO LICENSEE.

A person seeking employment on the construction work of a new building and entering on the works under the permission to be implied from a notice reading "labourers wanted," is a licensee while waiting for the arrival of the foreman in charge of the hiring of labourers; and is entitled as against the various contractors to reasonable protection from unseen dangerous conditions in the premises in course of construction; and the contractor whose foreman had supervised the placing of a boiler-plate in a dangerous position leaning against a pillar of the building and projecting over a cartway so that it fell over and killed such licensee is properly held liable in damages for the death, where the boiler-plate remained in such contractor's care up to the time of the accident.

McGuire v. Bridger, 20 D.L.R. 45, 49 Can. S.C.R. 632, affirming 13 D.L.R. 49.

OPEN WELL—DUTY OF OWNER—TRESPASSING ANIMALS — DEFENDANT'S KNOWLEDGE — OPEN WELLS ACT (SASK.) — RURAL MUNICIPALITIES ACT (SASK.)—ASSUMPTION OF RISK.

The Open Wells Act, R.S.S., c. 124, imposes on the occupant of lands, duties in respect of trespassing animals above the liability at common law; but where a horse fell into an open well on defendant's farm while trespassing there, and its owner knew of the well and that it was dangerous for stock, yet turned his horses at large, knowing that they would probably stray to where the well was, and thereby contravened a municipal by-law passed under the Rural Municipalities Act (Sask.), making it unlawful to allow horses and cattle to run at large, he has thereby assumed the risk and the responsibility for the loss is to be attributed to his own negligence in disobeying the by-law. [Watkins v. Naval Colliery Co., [1912] A.C. 693, and Butler v. Fife Coal Co., [1912] A.C. 149, applied.]

Baldrey v. Fenton, 20 D.L.R. 677, 1 S.L.R. 203, 6 W.W.R. 1441.

DUTY TO INVITEE—VOLUNTARY ASSUMPTION OF RISK.

The owner or occupant of premises owes to an invitee a duty not to expose him to any unexpected danger without warning him of it; but where the danger is patent to everyone, and the invitee knows of it, he must be taken to have voluntarily assumed the risk. [Lucy v. Bawden, [1914] 2 K.B. 318, followed.]

Keech v. Sandwich, Windsor & Amherstburg R. Co., 22 D.L.R. 784, 8 O.W.N. 96.

LOGGING OPERATIONS — INJURIES TO TRESPASSERS.

There is no liability on the part of a company conducting logging operations for injuries to a trespasser thereby occasioned. [Lowery v. Walker, [1910] 1 K.B. 173, [1911] A.C. 10, followed.

Gilbert v. Southgate Logging Co., 24 D.L.R. 202, 22 B.C.R. 87, 32 W.L.R. 131, 8 W.W.R. 1304.

DUTY TO LICENSEE—BARBED WIRE FENCE.

A person using a trail over private property, and over which the public has acquired no right-of-way, is a bare licensee, and the only duty of the owner of the premises towards him is to give him warning of any concealed danger or trap of which the owner knows; the construction of a barbed wire fence along the boundary of the land is not in the nature of a trap.

Robinson v. Dodge, 39 D.L.R. 679, 28 Man. L.R. 533, [1918] 1 W.W.R. 812.

UNSAFE PREMISES—INVITEE.

If a defendant has not neglected some legal duty to a plaintiff, the latter cannot recover damages from him for any injury sustained.

Struthers v. Burrow, 37 D.L.R. 667, 40 O.L.R. 1, reversing 12 O.W.N. 19.

LIABILITY TO LICENSEE — PUBLIC WORK — TRAP DOOR.

Brebner v. The King, 14 D.L.R. 397, 14 Can. Ex. 242.

BOY INJURED IN GYMNASIUM—EXTENT OF DUTY OF PROPRIETOR—BOY A TRESPASSER OR LICENSEE.

In an action for damages for personal injuries sustained by a boy in the defendant's gymnasium, judgment was given against the defendant for the amount of doctor's fees and hospital charges. On appeal, held that, even on the assumption that the defendant had failed in any duty owed was no evidence that the defendant had failed in any duty owed by it to him. [Latham v. Johnson, [1913] 1 K.B. 398, 82 L.J. K.B. 258 applied.]

McLean v. Y.M.C.A., 14 A.L.R. 58, [1918] 3 W.W.R. 522.

INJURY TO TRESPASSER.

Grand Trunk R. Co. v. Barnett, 27 Times L.R. 359.

PRIVATE PROPERTY — BOAT —GANGWAY — ACCIDENT — NEGLIGENCE — DAMAGES —C.C., ART. 1053.

The owner of private property who allows the public to come in and to use it with no more hindrance than if it were public, is liable for all danger by the medium to which he furnishes access. Thus, if the master of a passenger boat allows a young girl under age, who is found on the wharf, to cross and to remain on the gangplank of the boat, and if the latter when taken away from the wharf or boat, upsets and throws the young girl in the water where she is drowned, the owner of the boat is responsible for damages to the father of the victim.

Desjardins v. Ottawa River Co., 25 Rev. Leg. 328.

DRAINAGE AND DAMMING OPERATIONS — TRESPASSER.

Where land alongside a river was occupied by a company which, by a special arrangement with the owner, has obtained the right to abut his dam to it and to construct upon it a revetment wall to retain the water, it has the same rights, obligations and responsibility, within the purview of the special arrangement, as the owner himself; and it is responsible for the damages caused by the crumbling of the ground and the fall of the revetment wall due to defective drainage and to the bad state of repairs of the wall. A person who, to watch and examine the surroundings of a dam and a watercourse, stands on a lot of ground adjoining the public road, which is not fenced nor separated by any mark from the road cannot be considered as trespasser.

Montreal Light, Heat & Power Co. v. Lowrie, 25 Que. K.B. 367.

(§ I C—55)—INJURIES TO CHILDREN—DANGEROUS ATTRACTIONS — TRESPASSERS—MUNICIPAL GROUNDS.

A child will still be a trespasser if he goes on private ground without leave or right, however natural it may have been for him to do so; but the presence in a frequented place of some object of attraction tempting the child to meddle where he ought to abstain may well constitute a trap, and, in the case of a child too young to be capable of contributory negligence, it may impose full liability on the owner or occupier, if he ought as a reasonable man to have anticipated the presence of the child and the attractiveness and peril of the object. A finding by the jury that previous to the accident whereby children playing in a municipally owned gravel pit were smothered, the municipal corporation had no knowledge, nor should it have reasonably known, that there was a likelihood of children being injured by the falling of earth, sand or gravel while playing in the pit where the case was not based upon the maintenance of a nuisance. [Cooke v. Midland, etc., Ry., [1909] A.C. 229, distinguished; Latham v. Johnson, [1913] 1 K.B. 398, approved.]

Robinson v. Havelock, 20 D.L.R. 537, 32 O.L.R. 25.

INJURIES TO CHILDREN—DANGEROUS ATTRACTIONS—NARROW FOOTBRIDGE.

A narrow footbridge built over water for the convenience of its owner is not such a dangerous attraction to children as will render the owner liable for the death of a child of tender years who fell therefrom into the water and was drowned where there was no license extended to children to go there and the bridge was ordinarily inaccessible by the withdrawal of a plank leading to it. [Cooke v. Midland G.W.R. Co., [1909] A.C. 229, distinguished.]

Pedlar v. Toronto Power Co., 15 D.L.R. 684, 29 O.L.R. 527.

INJURIES TO CHILDREN — DANGEROUS ATTRACTIONS — BUILDING MATERIALS ON SCHOOL PREMISES.

Where material not dangerous in itself is left in a safe but inconvenient position by a contractor on school premises where he was employed to do certain repairs, he will not be liable for damage which resulted to one of the scholars from its being moved by third parties to a dangerous position, which change the contractor could not have reasonably anticipated. [Makins v. Piggott, 29 Can. S.C.R. 188, distinguished.]

Vick v. Morin, 22 D.L.R. 29, 21 B.C.R. 8, 30 W.L.R. 412, 7 W.W.R. 1053.

ELECTRIC POWER—PIPE LINE ON TRESTLE—WIRE ABOVE PIPE — BARRIERS AROUND TRESTLE — WARNINGS POSTED — BOY CROSSING ON TRESTLE—INJURIES TO BOY —ACTION—DUTY OF POWER COMPANY.

A boy who is injured by an electric wire which crosses over a pipe line on a trestle cannot recover damages from the power company owning the wire, for children were not in the habit of crossing this trestle, and as the company had no reason to suppose that anyone would cross this trestle, it did not fail in any duty owing to the company.

Shilson v. Northern Ontario Light & Power Co., 50 D.L.R. 696, 59 Can. S.C.R. 443, affirming 48 D.L.R. 627, 45 O.L.R. 449.

D. ON HIGHWAYS OR WATERS.

See Shipping; Collision.

Negligence or wilful act of driver of motor vehicle, see Automobiles, III C—310; III B—200.

Negligence, scope of employment, see Master and Servant, III A—290.

(§ I D—70)—It is the duty of a driver of a vehicle on a public street to exercise prudence and care in order to avoid injuring pedestrians.

Baillargeon v. St. George's 4 D.L.R. 894, 22 Que. K.B. 6.

CRIMINAL CHARGE—CODE—AMENDMENT 9-10 EDW. VII. 1910, C. 13, S. 1.—REASONABLE USE OF HIGHWAY—RIGHTS OF PARTIES—CONVICTION AT TRIAL—APPEAL.

The rights of a driver of a motor vehicle and that of other vehicles (including bicycles) to use the highway are equal, and each is equally restricted by the rights of the other. Each is required to regulate his own use by the observance of ordinary care and caution; and when accidents happen as incidents to the reasonable use of the highway, the law affords no redress by criminal or civil proceedings.

The King v. Wilson, 50 D.L.R. 117, [1919] 3 W.W.R. 1087.

SNOW AND ICE ON SIDEWALK — FRONTAGE OWNERS RESPONSIBLE FOR REMOVAL — CITY POWER TO REMOVE AND CHARGE EXPENSE TO OWNERS—NEGLECT BY CITY TO REMOVE IN REASONABLE TIME—LIABILITY.

The plaintiff, in consequence of ice and snow on one of the principal streets of the defendant city, slipped and fell, suffering injuries for which he claimed damages. There was a city by-law which required the city to keep streets in repair. The trial judgment was in favour of the plaintiff. Drysdale and Mellish, J.J., following Maguire v. Liverpool, [1905] 1 K.B. 767, held that the appeal should be allowed and the action dismissed on the ground that there was no by-law requiring the city to remove snow and ice from the sidewalks, the obligation to do so was on the frontage owners, the city simply having possession to do so and charge the cost to the owners. Russell, J., and Ritchie E.J., were of opinion that the appeal should be dismissed on the ground that the failure to remove snow and ice from the sidewalks came within the definition "non-repair" and the city being charged by statute with the duty of keeping the streets in repair, failed in that duty, in allowing the slush to remain on the sidewalk, and as it had the means of removing it and failed to do so within a reasonable time it was guilty of negligence.

Slaney v. Sydney, 46 D.L.R. 164, 53 N.S. R. 37 at 42. [Affirmed 50 D.L.R. 351, 59 Can. S.C.R. 232.]

NEGLIGENT DRIVING — LIABILITY OF LIVERY STABLE KEEPER.

A livery stable keeper who engages to convey a passenger and supplies the driver as well as the horse and buggy will be liable in damages for the driver's failure to do what a reasonable and prudent driver would have done on approaching a traction engine on the road with knowledge that there was a strong probability of the horse becoming scared and with knowledge that the road at that point was a dangerous one on which to pass the engine, notwithstanding which the driver attempted to pass, with the result that the buggy was overturned and the passenger injured.

Golightly v. Banning, 22 D.L.R. 124.

NEGLIGENT DRIVING KILLING HIGHWAY WORKMAN—SUFFICIENCY OF EVIDENCE.

Deceased was killed by a motor car while on a bridge shortly after midnight. On the question of the identity of the car that struck deceased there was the evidence of the driver of a sleigh who saw the accident, he swearing that from the time he came on the south end of the bridge and reached the

scene of the accident, the only car to pass him (which was going south as he was) was the car that struck deceased, and the defendant admitted that, after coming on to the south end of the bridge and before he reached the spot where the accident occurred, he passed a sleigh. The evidence was corroborated by one of the deceased's fellow workmen, who swore that the only motor car that passed between three minutes to twelve and the time of the accident was the car that killed deceased. The jury found in favour of the plaintiffs. Held, on appeal, that there was evidence upon which the jury might reasonably return the verdict which they did. "Where there are probabilities that might be weighed by a jury, it is proper that such a case should go to the jury." [Grand Trunk Pac. R. Co. v. Griffiths, 45 Can. S.C.R. 380, followed.]

Longman v. Cottingham, 18 B.C.R. 184. [Affirmed 15 D.L.R. 296, 48 Can. S.C.R. 542, 26 W.L.R. 650, 5 W.W.R. 969.

"SAFETY ISLAND"—VEHICLES.

Where a person crossing a highway, having a double track of rails in the centre, there being a fifteen-foot fairway between the curb of the street and the outer rail on each side, within which vehicular traffic is supposed to keep, reaches the first track he may reasonably feel the security afforded by a "safety island," and if he is struck by the mudguard or some similarly projecting part of a rubber-tired motor "bus" which approaches him, having its right wheels on the inside rails, and so injured, he may recover in an action for negligence.

Jeffares v. Wolfenden, 31 W.L.R. 428, 21 B.C.R. 432.

PUBLIC THOROUGHFARE—SIDEWALK—REPAIR.

A part of a public thoroughfare which a municipality allows the public to use as a footpath, and which is shut off by a curb from that part which is used by vehicles, is a sidewalk. The municipality is liable in damages if through negligence it allows a hole to be left in such sidewalk which causes injuries to a pedestrian.

Doyle v. Westmount, 42 D.L.R. 273, 24 Rev. Leg. 401.

SLIPPERY SIDEWALK—FAILURE TO SAND OR HARROW.

Failure to sand or harrow a slippery sidewalk before 9 a.m. when the conditions requiring it only arose on that morning is not "gross negligence," for which a city is liable under the Ontario Municipal Institutions Act, R.S.O. 1914, c. 192, s. 460 (3).

German v. Ottawa, 39 D.L.R. 669, 56 Can. S.C.R. 80, affirming 34 D.L.R. 632, 39 O.L.R. 176, which reversed 11 O.W.N. 331.

AUTO TRUCK SKIDDING—OILED STREET—DANGER AVOIDABLE — CONCLUSIVENESS OF VERDICT.

On an appeal from the dismissal by Murphy, J., after a trial, without a jury, of an action for damages resulting from the skidding of a motor truck upon an oiled roadway, held that it could not be said that the Trial Judge was clearly wrong in finding that the driver of the truck might, had he exercised ordinary care and driven in a certain way, have avoided the danger.

Albion Motor Express Co. v. New Westminster, 25 B.C.R. 379, [1918] 3 W.W.R. 19, affirming [1918] 1 W.W.R. 493.

COLLISION BETWEEN AUTOMOBILE AND STREET CAR—NEGLIGENCE OF STREET RAILWAY COMPANY—EVIDENCE—EXCESSIVE SPEED —FAILURE TO SOUND BELL OR WHISTLE — CONTRIBUTORY NEGLIGENCE — ULTIMATE NEGLIGENCE.

Moore v. Niagara, St. Catharines & Toronto R. Co., 14 O.W.N. 113.

COLLISION UPON HIGHWAY OF AUTOMOBILE AND ELECTRIC STREET CAR—INJURY TO AUTOMOBILE AND DRIVER — ACTION BROUGHT BY DRIVER—ADDITION OF OWNER AS COPLAINTIFF—RULE 134 (2)—PLEADING—JUDGE'S CHARGE—FINDINGS OF JURY — OPERATION OF "BACKING" STREET CAR—CONTROL FROM FRONT—QUESTION FOR ONTARIO RAILWAY AND MUNICIPAL BOARD—ONTARIO RAILWAY AND MUNICIPAL BOARD ACT, R.S.O. 1914, C. 186—55 VICT. C. 99, SCHED., CL. 36—NEGLIGENCE OF CONDUCTOR—"MISJUDGING COURSE OF AUTOMOBILE" — FAILURE OF DRIVER OF AUTOMOBILE TO GIVE SIGNAL WHEN TURNING—REVERSAL OF JUDGMENT FOR PLAINTIFFS—GROUND FOR NEW TRIAL NOT SHEWN—EVIDENCE OF WHAT CONDUCTOR SAID IMMEDIATELY AFTER COLLISION—INADMISSIBILITY.

Action for damages for loss and injury to O. by his automobile colliding with an electric street-car of the defendant, which was backing, the conductor standing on the back platform, which was thus in front, and the motorman operating the car at the other end. O. was going north, and turned to go west, thus meeting the backing street car. The plaintiff, in his pleading, assigned, as negligence on the part of the defendants, want of warning and failure to stop in time owing to the defendants' servants not being "sufficiently attentive to duty." In the charge to the jury they were told that the negligence which the plaintiff complained of was that the defendants' servant might have stopped, but did not stop, the street car when the vehicle driven by O. was in a position from which he had no power to escape. The jury found negligence, which, they said, "consisted in having the car controlled from the wrong end and in the conductor misjudging the course of the plaintiff's automobile." They negatived contributory negligence. O. and the conductor gave evidence at the trial. O. said that the conductor, when he saw that his car was going to run into O.'s vehicle, signalled the motorman by bell, "but the car kept coming;" and that the conductor told him (O.), immediately after the accident, that he (the conductor) had given the motorman the signal in plenty of time to stop, but the

motorman "did not take it." This the conductor denied. O. did not pretend that he gave any warning of his intention to turn west—the local municipal by-law required a "visible and audible warning:"—Held, that there was no evidence of negligence proper to be submitted to the jury—there was nothing more than "a mere surmise that there may have been negligence," [Toomey v. London, Brighton & South Coast R. Co., 3 C.B.N.S. 146, 150] and the action should be dismissed. (2) The jury had gone beyond their province in finding that the street car should have been controlled from the rear—that matter was under the control and direction of the Ontario Railway and Municipal Board: Ontario Railway and Municipal Board Act, R.S.O. 1914, c. 186; see also cl. 36 of the schedule to the defendants' Act of Incorporation, 55 Vict. c. 99. (3) There was no ground for directing a new trial: the accident was due to O.'s own fault or an unexpected failure of the engine of his automobile. (4) Semble, that what the motorman said to O. immediately after the accident was not admissible in evidence. [Wilson v. Botsford-Jenks Co., 1 O.W.R. 101.] (5) O.'s mother, who owned the automobile, was properly added as a plaintiff at the trial before the jury were charged, upon her consent in writing under r. 134 (2).

O'Dell v. Toronto R. Co., 44 O.L.R. 350.

COLLISION OF STREET CAR WITH AUTOMOBILE.

In an action for damages for negligence in the operation of a street car colliding with plaintiff's automobile, where it is found that the plaintiff was himself negligent and his negligence was concurrent with the negligence of the defendant which, e.g., excessive speed, was both primary and ultimate, the plaintiff cannot recover. [Rice v. Toronto R. Co., 20 O.L.R. 446, followed.]

United Motor Co. v. Regina, 10 S.L.R. 373, [1917] 3 W.W.R. 509.

COLLISION WITH AUTOMOBILE.

Where a municipal by-law provides that persons in charge of animals should proceed on the right side of the street, and should not pass the centre line, one who places his horse and carriage across the street, beyond the centre, is in fault and has no remedy if his horse is struck by an automobile which, without negligence, passes along the street on the right and within the centre line.

Girard v. Wayagamack Pulp & Paper Co., 51 Que. S.C. 317.

INJURY TO PERSON WAITING FOR CAR—CARTER.

When a person is injured while waiting at a place where passengers generally board a street car, by the horse of a carter, the carter and the contractor who employed him are both responsible for the injury. The carter having greater facility of choice where to place his cart and move his horse, his obligation was to let the foot-passenger have the right-of-way. He was negligent in driving forward without having made sure that the space where the foot-passenger would board the car was clear.

Gest v. Berghauser, 25 Que. K.B. 200.

COLLISION OF VEHICLES IN HIGHWAY — INJURY TO PLAINTIFF DRIVING HORSE AND WAGGON BY DEFENDANT DRIVING AUTOMOBILE — EVIDENCE — ONUS — PRESUMPTION — MOTOR VEHICLES ACT, S. 23 — VERDICT OF JURY — APPEAL — TESTIMONY OF WITNESS AT PREVIOUS TRIAL OF DEFENDANT FOR CRIMINAL NEGLIGENCE — DECEASE OF WITNESS — INADMISSIBILITY OF TRANSCRIPT OF EVIDENCE — PREVIOUS PROCEEDING NOT BETWEEN SAME PARTIES OR PRIVIES — NO OPPORTUNITY FOR CROSS-EXAMINATION BY PLAINTIFF — QUANTUM OF DAMAGES.

Cottrell v. Gallagher, 16 O.W.N. 76.

COLLISION OF VEHICLES IN HIGHWAY — FINDING OF JURY — NEGLIGENCE OF DEFENDANT "TO A SLIGHT EXTENT" — SMALL AMOUNT OF DAMAGES AWARDED —COSTS.

Misner v. Anderson, 16 O.W.N. 71.

HIGHWAY — NONREPAIR — SNOW AND ICE UPON CROSSING — INJURY TO PEDESTRIAN — DANGEROUS CONDITION — NOTICE — INADEQUATE ATTEMPT TO REMEDY — LIABILITY OF MUNICIPAL CORPORATION — MUNICIPAL ACT, S. 460 (3) — "GROSS NEGLIGENCE."

Pierce v. Toronto, 16 O.W.N. 48.

COLLISION OF VEHICLES ON HIGHWAY — EXCESSIVE AND ILLEGAL SPEED — FAILURE TO SLOW DOWN AT INTERSECTION OF HIGHWAYS — CONTRIBUTORY NEGLIGENCE — ULTIMATE NEGLIGENCE—DAMAGES.

Kerr v. Townsend; Thompson v. Townsend, 12 O.W.N. 166.

(§ I D—71)—LAW OF THE ROAD.

Driving in the dark on the wrong side of the road and so causing a collision the danger of which neither driver could foresee in time to avoid it, is actionable negligence.

Compton v. Allward, 1 D.L.R. 107, 22 Man. L.R. 92, 19 W.L.R. 783, 1 W.W.R. 452.

PUBLIC ROAD — TRAFFIC — BY-LAWS—COLLISION — DAMAGES — C.C. QUE. 1053.

One who, without absolute necessity, drives an automobile upon the left side of a public road instead of on the right side, transgresses by-laws made for the safety of traffic, and assumes all risks resulting therefrom. The principle by virtue of which one claims damages ought to deduct from his claim the amount which he should receive under an insurance policy, does not apply to the case of a collision between automobiles.

McGarr v. Carreau, 46 Que. S.C. 448.

AUTOMOBILE — RULE OF ROAD — COLLISION.

Although by law the driver of a horse on a public road which is followed by an automobile, should "as soon as he can go to the right in order to leave a free passage on the

left," nevertheless, if he does not leave the automobile sufficient space, and the chauffeur attempts to pass the carriage, he does so at his own risk and is liable in case of collision.

Ménard v. Lussier, 50 Que. S.C. 416.

TUG AND TOW—NEGLIGENCE IN NAVIGATION—CONTRIBUTORY NEGLIGENCE—APPORTIONMENT OF DAMAGES.

It is negligence on the part of a tug towing for hire a raft of logs to fail to navigate so as to prevent the logs from drifting against a shoal; and it is contributory negligence from those having charge of the raft to neglect to have the rear end of the tow lighted, and to withdraw to the front of it and leave the rear end uncared for. The damages were equally divided.

Kearney v. Dansereau, 24 Que. K.B. 401.

COLLISION OF VEHICLES ON HIGHWAY—INJURY TO TRAVELER IN HIRED VEHICLE DRIVEN BY SERVANT OF OWNER—LIABILITY—CAUSE OF COLLISION—RULE OF ROAD—HIGHWAY TRAVEL ACT, R.S.O. 1914, C. 206, SS. 3 (1), 5 (1)—REASONABLE CARE.

Bloch v. Moyer, 7 O.W.N. 389, 830.

COLLISION OF MOTOR VEHICLES ON HIGHWAY—MUNICIPAL BY-LAW—RULE OF ROAD—ULTIMATE NEGLIGENCE—NO REASONABLE EVIDENCE TO GO TO JURY.

Kidd v. Lea, 10 O.W.N. 216.

HIGHWAY—COLLISION OF VEHICLES.

Parkinson v. Dolsen, 16 W.L.R. 383.

WORKMEN PAVING STREET INJURED BY PASSING RIG—JUDGE'S VERDICT AND ASSESSMENT.

Wright v. Radcliffe, 19 O.W.R. 439, 2 O.W.N. 1241.

NEGLIGENCE—COLLISION OF RAFTS IN RIVER.

Niel v. Day, 19 W.L.R. 227.

(§ I D—73)—DAMAGE TO ELEVATOR—FREIGHT STEAMER UNLOADING—ACCIDENT SUDDEN AND NOT ANTICIPATED.

Where a vessel at a dock in a harbour unloading grain into an elevator with which it is coupled is moored safely against ordinary strains and to the satisfaction of the elevator owner, and an approaching vessel entering the harbour proceeds to turn around near the unloading vessel, thereby surging the water and unmooring the latter vessel, and causing injury to the elevator, the unloading vessel is not liable when the surging was a sudden occurrence due to the unavoidable and accidental breaking of a cable being used by the incoming boat to assist in turning, and the danger was not and could not have been anticipated or observed or appreciated by the unloading vessel in time to avert it.

Playfair v. Meaford Elevator Co., Meaford Elevator Co. v. Montreal Transportation Co., 13 D.L.R. 763, 24 O.W.R. 946, reversing in part 2 D.L.R. 577, 3 O.W.N. 525.

II. Contributory.

A. GENERALLY.

See Street Railways, III C.

(§ II A—75)—STATUTORY DUTY IMPOSED ON RAILWAY COMPANY—FAILURE TO COMPLY WITH—DUTY OF TRAVELER APPROACHING TRACK—LIABILITY FOR DAMAGES.

Where a statutory duty is imposed on a railway company to sound the whistle and ring the bell of the engine when a train is approaching a highway at level rail, a traveler has a right to expect this to be done, and is not required to look to see if a train is approaching. The omission to carry out the statutory duty imposed amounts to negligence and renders the company liable for resulting injury. [G.T.R. Co. v. McAlpine, 13 D.L.R. 618; Smith v. South Eastern R. Co., [1896] 1 Q.B. 178, followed.]

Doyle v. C.N.R. Co., 46 D.L.R. 135, [1919] 2 W.W.R. 184, 24 Can. Ry. Cas. 319, affirming, [1919] 1 W.W.R. 21.

One driving upon city streets knowing that there are crossings where street cars are passing but owing to the darkness is ignorant as to where the crossings exactly are, is bound to keep a good lookout and to be on guard as to conveyances coming his way, and his failure so to do and his blindly trusting to those driving ahead of him constitutes contributory negligence precluding him from recovering for injuries caused by collision with a street car even though those in charge of the car were negligent in its management.

Balke v. Edmonton, 1 D.L.R. 876, 4 A.L.R. 406, 21 W.L.R. 22, 2 W.W.R. 8.

BREACH OF STATUTORY DUTY.

In order that a railway company may be held responsible in damages for its negligent omission to perform a statutory duty, it must appear that the injury was the result of such omission and not of the folly or recklessness of the injured person; but the fact that the negligence of the plaintiff contributed to or formed a material part of the cause of his injury, will not preclude him from recovering damages if the consequences of his contributory negligence could have been avoided by the exercise of ordinary care and caution on the part of the defendant.

G.T.R. Co. v. McAlpine, 13 D.L.R. 618, [1913] A.C. 838, 13 E.L.R. 187, 49 C.L.J. 665.

APPORTIONMENT OF DAMAGES.

Under Quebec law, an injured person will have his damages reduced if his negligence was contributory only; he can recover nothing if his negligence was the cause of the accident and the defendant's negligence was merely contributory; it is not the law that where there is common

fault both parties must bear a share of the damages.

Montreal Tramways Co. v. McAllister, 34 D.L.R. 565, 26 Que. K.B. 174. [Affirmed by Privy Council 51 D.L.R. 429.]

VOLENS.

If a person with full knowledge and appreciation of the risk and danger attending a certain act, voluntarily does that act, it will be assumed that he voluntarily incurred the attendant risk and danger, and the maxim volenti non fit injuria directly applies.

C.P.R. v. Frechette, 22 D.L.R. 356, [1915] A.C. 871, 24 Que. K.B. 459, 31 W. L.R. 872, 18 Can. Ry. Cas. 251, reversing 23 Que. K.B. 203.

STREET RAILWAY—CROSSING—HILL.

The driver of a loaded vehicle climbing a steep hill has no special right-of-way over a street car track and must use reasonable care in crossing. Blindly crossing the track without looking to see whether a tram car is approaching or not is negligence which disentitles him to damages for injuries sustained.

Davie v. N.S. Tramways & Power Co., 41 D.L.R. 350, 52 N.S.R. 316. [Affirmed 52 D.L.R. 681, 59 Can. S.C.R. 648.]

QUESTIONS FOR THE JURY.

In an action for damages for personal injury caused by a car of the defendants, the jury found that defendants' negligence was the cause of the accident, but also that the plaintiff might, by the exercise of reasonable care, have avoided the accident. There was evidence sufficient to justify both these findings. The Trial Judge dismissed the action, following London Street R. Co. v. Brown (1901), 31 Can. S.C.R. 642. On appeal, the court ordered a new trial on the ground that the jury's finding that the plaintiff might have avoided the accident by the exercise of reasonable care was not sufficient without their saying in what respect he failed to exercise reasonable care, as the court was unable to determine from the jury's finding whether the plaintiff was in law guilty of contributory negligence or not. The court suggested that the proper course for the Trial Judge to take in such a case would be to submit to the jury two questions such as, 1. Was the plaintiff guilty of negligence? 2. If yes, what was this act of negligence? and that it would probably be well to add a third question: Whose negligence really caused the accident?

Shondra v. Winnipeg Electric R. Co., 21 Man. L.R. 622.

Plaintiff held disentitled to recover for injury through collision between his automobile which he was driving and defendant's tram car because the accident occurred at a dangerous point where plaintiff should have looked to see if a car were coming and if he looked he would have seen it, and either the failure to look, or, if he looked, the crossing in front of the car, was reckless conduct constituting contributory negligence on his part, which was the causa causans of the accident.

Fraser v. B.C.R. Co., [1919] 2 W.W.R. 513, affirming Gregory, J.

(§ II A—76)—WHEN CONTRIBUTORY NEGLIGENCE A DEFENCE—EFFICIENT CAUSE.

Negligence or want of ordinary care or caution on the plaintiff's part as constituting contributory negligence may disentitle him to recover where it is such that otherwise the injury could not have happened. In an action for negligence causing death in which a defence of contributory negligence is raised, if a negligent act on the part of the deceased is established which was the efficient cause of the fatal injury the question of the deceased's view of the possibilities of his act is immaterial, and whether the possibility of injury was or was not foreseen by him all the consequences which are the direct and natural outcome of his negligent act are attributable to same in bar of the action.

Cook v. G.T. Ry. Co., 19 D.L.R. 600, 31 O.L.R. 183, 15 Can. Ry. Cas. 150.

WHEN CONTRIBUTORY NEGLIGENCE A DEFENCE—DEGREE OF CARE.

In actions for damages for injuries under the Workmen's Compensation for Injuries Act, R.S.O. 1897, c. 160, the plaintiff cannot be proved guilty of contributory negligence by proving only that he could have avoided the accident; it must be shewn that he could have avoided it by the exercise of such care as persons acting in the like capacity and under similar circumstances ordinarily would have exercised.

Scott v. University of Toronto, 10 D.L.R. 154, 49 C.L.J. 335, 24 O.W.R. 325.

In order to disentitle a plaintiff to recover upon the ground of contributory negligence, it must be found distinctly that the accident was attributable to his failure in the duty imposed upon him.

Dart v. Toronto R. Co., 8 D.L.R. 121, 4 O.W.N. 315, 23 O.W.R. 380.

TRIAL — APPEAL — JURY — VERDICT FOR PLAINTIFF—JUDGMENT FOR DAMAGES—REVERSED ON APPEAL—FUNCTIONS OF JUDGE AND JURY—CASE ONE FOR WITHDRAWAL FROM JURY.

Plaintiff sued defendant for damages for personal injuries from a fall while alighting from a street car operated by defendant, alleging negligent condition of car, and recovered judgment at trial on verdict of negligence by a jury. On appeal this judgment was reversed and the action dismissed with costs; on the ground that, in addition to the incredibility of plaintiff's story and its inconsistency with the other evidence, there was evidence of an admission by the plaintiff that the accident was caused by her heel coming off her boot, and which evidence was not denied by the plaintiff. The case should have been with-

drawn from the jury at the close of the evidence and a dismissal of the action directed.

It is for the judge to say whether any facts have been established by evidence from which negligence may be reasonably inferred. The jurors have to say whether from these facts, when submitted to them, negligence ought to be inferred. [Metropolitan R. v. Jackson, 3 App. Cas. 193, per Lord Cairns at 197, followed.]

The question for the judge (subject to review) is, not whether there is literally no evidence, but whether there is none that ought reasonably to satisfy the jury that the fact sought to be proved is established. Where there is proved, as part of the plaintiff's case, or proved in the defendant's case and admitted by the plaintiff, an act of the plaintiff which per se amounts to negligence, and when it appears that such act caused or directly contributed to the injury, the defendant is entitled to have the case withdrawn from the jury.

Harris v. Winnipeg Electric R. Co., [1919] 1 W.W.R. 453, 29 Man. L.R. 306.

(§ II A—78)—What constitutes contributory negligence generally acting in emergency.

Where the negligence of a railway company, operating a passenger train, forced a passenger into an emergency as to getting off the train at his destination, the fact that the means or method of exit which he, in such emergency, adopts, is not the wisest possible under the circumstances, does not necessarily imply contributory negligence on his part.

McDougall v. G.T.R. Co., 8 D.L.R. 271, 27 O.L.R. 369, 23 O.W.R. 364.

Of defendant—Personal injuries of plaintiff due to his own acts—Damages.

A plaintiff whose own acts placed him in obvious danger cannot succeed in an action for damages against the defendant, even though the latter is found negligent, unless the plaintiff can shew that the defendant's negligence placed a third party in danger; and that he acted as a reasonable and prudent man would.

McDonald v. Burr, 49 D.L.R. 396, [1919] 3 W.W.R. 825.

Sudden emergency from supervening negligence of employer.

Where the operator of an elevator in an office building is ascending with passengers and suddenly finds himself unable with the motor mechanism at hand to control or stop the elevator, the emergency will relieve him from being charged with contributory negligence in respect of the course taken by him to meet the emergency by calling down the person in charge of the electric switches awaiting his signal and for overlooking the immediate danger to himself in projecting his head over the side of the elevator in so doing, where a person of ordinary prudence might be expected to take a similar risk in an effort to avert the contemplated danger to the passengers and himself.

Jackson v. C.P. Ry. Co., 16 D.L.R. 138, 27 W.L.R. 135, 5 W.W.R. 1314.

Board of education — Liability — Unguarded hole — Contributory negligence.

Shaw v. Board of Education of St. Thomas, 19 O.W.R. 846.

(§ II A—79)—Intervention to rescue—Probable death or serious injury.

A person is justified in law in intervening to save from apparent probable death or serious injury a third person independently of any contractural or natural relationship between the person in danger and the intervenor; unless his intervention was unnecessary, reckless or rash under the circumstances in the judgment of prudent persons and in considering his conduct he should not be charged with errors of judgment resulting from the excitement and confusion occasioned by the emergency and that if the intervener is injured he can recover on the ground either of negligence against the person in danger or of negligence against himself occurring after his intervention began.

Haigh v. G.T.P.R. Co., 8 A.L.R. 153, 7 W.W.R. 806.

(§ II A—81)—Refusing medical treatment.

The author of a délit or a quasi délit is only answerable for the damages which are the immediate and necessary result of it. Thus, where the victim of an accident aggravates the consequences of it by refusing treatment which should cure it, he cannot hold the author of the accident liable for a permanent infirmity which might have been avoided.

Noel v. Quebec R., L. H. & P. Co., 48 Que. S.C. 130.

B. Of persons under disability.

(§ II B—85)—Contributory negligence—Of Children.

Young children who have attained the age at which criminal responsibility begins (7 years) may be held responsible for contributory negligence debarring them from recovering damages in actions for personal injuries through the negligence of others, if such children fail to exercise that standard of care which may reasonably be expected of children of their age and situation.

Moran v. Burroughs, 10 D.L.R. 181, 27 O.L.R. 539, reversing 3 D.L.R. 392.

(§ II B—86)—Attempt to cross street car track.

A person who attempts to cross a street car track, when a car is too close to him to make it practicable for the motorman

to stop the car or avoid striking him, cannot recover damages against the company.

Montreal Tramways Co. v. Hamilton, 43 D.L.R. 243, 27 Que. K.B. 575.

(§ II B—87)—Negligence of parents.

A municipal corporation is not liable for injury to a child five years of age caused by falling into the excavation in the evening after dark when all reasonable means have been used to protect the public. The negligence in such case is that of the parents who allow their children to play on the street in proximity to danger at such a time.

Scott v. Quebec, 44 Que. S.C. 184.

(§ II B—88)—Children.

The doctrine of contributory negligence does not apply to an infant of tender years.

Vick v. Morin, 22 D.L.R. 29, 21 B.C.R. 8, 30 W.L.R. 412, 7 W.W.R. 1053.

Injury caused by automobile—Contributory negligence of children.

Contributory negligence may be attributed to a boy 11 years of age who, while he is playing on a public street, is injured by suddenly turning and running in front of an automobile through his failure to look out for approaching vehicles.

Hargrave v. Hart, 9 D.L.R. 521, 22 Man. L.R. 467.

Street car—Presumed juvenile discretion.

A boy of 8½ years, possessing the ordinary intelligence of a child of that age, will be presumed to know enough to get out of the way of a moving street car if he saw it coming.

Schwartz v. Winnipeg Electric R. Co., 12 D.L.R. 56, 23 Man. L.R. 483, 24 W.L.R. 5, 4 W.W.R. 319.

Infant imbecile child—Setting out fire—Liability of parent.

Thibodeau v. Cheff, 24 O.L.R. 214, 19 O. W.R. 679.

C. On highways.

(§ II C—95)—Duty to look.

Anyone who attempts to drive across the track of an electric street railway, where he knows that cars are constantly passing, without looking to see whether a car is approaching, is guilty of contributory negligence barring recovery for injuries caused by a car colliding with the buggy in which he was driving. [Danger v. London Street Ry., 30 O.R. 493; O'Hearn v. Port Arthur, 4 O.L.R. 209, followed.]

Carleton v. Regina, 1 D.L.R. 778, 20 W. L.R. 395, 5 S.L.R. 90, 1 W.W.R. 953.

Railway crossing—Reasonable care.

A person about to cross a track in front of an engine or car running on rails must exercise reasonable care. What is reasonable care depends on the circumstances of each case and is a matter to be determined by the jury.

Orth v. Hamilton, Grimsby & Beamsville Electric R. Co., 43 D.L.R. 544, 23 Can. Ry. Cas. 344, 43 O.L.R. 137.

Public work — Railway — Collision — Stalled automobile.

The collision of a train with an automobile stalled on a level crossing of the Intercolonial Railway, occasioned by the delay of the engine driver to apply his brakes the moment he became aware of the presence of the motor upon the track, is an accident "on a public work" and caused by the "negligence of an officer or servant of the Crown while acting within the scope of his duties or employment upon, in or about the construction, maintenance or operation of the Intercolonial Railway," within the meaning of s. 20 of the Exchequer Court Act.

Dunnett v. The King, 41 D.L.R. 405, 17 Can. Ex. 357.

Work on road—Expiry of license.

A city corporation is not liable for negligence in the performance of work after the expiry of a license it has given therefor.

Tessier v. Ottawa, 40 D.L.R. 12, 41 O.L.R. 205.

Injury to automobile by collision with street car—Findings of jury—Contributory negligence — Ultimate negligence.

Nesbitt v. Ottawa Electric R. Co., 14 O.W.N. 319.

Automobile on street contrary to by-law—Collision.

The fact that a carter leaves his horse and waggon standing obliquely across a street in such a way as to block up more than half of its width, in violation of a municipal by-law, does not exonerate from all liability an automobile driver who imprudently causes a collision by passing at any risk rather than stopping and requesting room to pass. In such case it is contributory negligence.

Wayagamack Pulp & Paper Co. v. Girard, 27 Que. K.B. 101.

Deviation from regular route to avoid danger.

One who, to avoid a danger, deviates from his route and puts himself in a more dangerous position, cannot be accused of fault, even if he commits an error in judgment, if he merely acts on a sudden impulse created by the imminence of the danger.

Coaticook v. Laroche, 24 Que. K.B. 339.

Collision of motor vehicles in highway—Negligence of defendants—Contributory negligence of plaintiff — Dismissal of action — Findings of trial judge — Appeal — Costs.

Shaw v. Clarkson-Jones, 15 O.W.N. 374.

COLLISION OF VEHICLES IN HIGHWAY—CONTRIBUTORY NEGLIGENCE.

Adams v. Wilson, 10 O.W.N. 138.

MOTOR VEHICLES — PLAINTIFF BOARDING STREET CAR—STRUCK BY DEFENDANT'S AUTOMOBILE — CONTRIBUTORY NEGLIGENCE—THIRD PERSON CAUSA CAUSANS OF ACCIDENT.

Plaintiff was injured while attempting to board a street car at a crossing by being struck by defendant's automobile. Another automobile passed at an excessive rate of speed to the right of defendant between him and the curb as defendant reached the crossing (thus, as the court assumed, preventing plaintiff and defendant from seeing each other) and the plaintiff had passed in front of this other automobile before being struck by that of defendant. The court was not satisfied on the evidence that defendant was traveling at other than a reasonable speed or that he was committing any breach of the provision of the Motor Vehicles Act and concluded that the plaintiff failed to exercise ordinary caution and discretion in passing in front of a speedily moving automobile without first ascertaining whether the street was clear beyond it and that she was therefore guilty of contributory negligence. Apart from the question of negligence the court was inclined to the view that the conduct of the driver of the other automobile was the causa causans of the accident.

Jackson v. Hatell, [1919] 3 W.W.R. 66.

(§ II C—96)—SPEED.

Where bricks are piled upon a street by a contractor in the course of erecting a building, and the obstruction so created is insufficiently protected at night, both as to the number of lights thereon and as to the location or position of such lights, the contractor is liable in damages to one who drives into such obstruction at night without seeing it, where such driving cannot be said to be reckless or unusually fast, in an action of negligence based upon the failure to warn travelers by protecting lights, apart from any right or permit which the contractor may have had to pile the bricks on the street.

Turnbull v. Corbett, O'Brien v. Corbett, 8 D.L.R. 343, 41 N.B.R. 284, 11 East. L.R. 67.

(§ II C—97)—MOTOR VEHICLES—AUTOMOBILES DRIVING ON WRONG SIDE OF ROAD—VACILLATING COURSE — BOTH PARTIES CONTRIBUTING TO ACCIDENT.

Two parties were driving their automobiles at night in opposite directions but on the wrong side of the road when they collided and both sustained damages. The evidence disclosed that just prior to the collision each party endeavoured to get on to the right side of the road, but that the defendant fearing that the plaintiff would strike him broadside again turned to the left, the collision following. The plaintiff sued and defendant counterclaimed. Held, that the accident was caused by the fault of both parties, and that neither party could recover against the others.

Gunderson v. Duncan, 12 S.L.R. 81, [1919] 1 W.W.R. 99.

(§ II C—98)—MARRIED WOMAN—PASSENGER IN HUSBAND'S MOTOR CAR—COLLISION — CONTRIBUTORY NEGLIGENCE OF HUSBAND—RIGHT OF WIFE TO RECOVER IN ACTION FOR DAMAGES.

A wife who is injured in a collision while riding in a motor car driven by her husband may, under the Married Woman's Property Act (R.S.B.C. 1911, c. 152), maintain an action in her own name and for her own benefit in respect of the injury sustained.

Contributory negligence on the part of the husband will not prevent her succeeding in the action, on the ground that he is not her servant and she is not responsible for his negligence. [The "Bernia," 13 App. Cas. 1, applied.]

Brooks v. B.C. Electric R. Co., 48 D.L.R. 90, [1919] 3 W.W.R. 109.

KNOWLEDGE OF CONDITION OF ICY SIDEWALK.

Touhey v. City of Medicine Hat, 10 D.L.R. 691, 5 A.L.R. 116, affirming 7 D.L.R. 759.

PERSONS RIDING IN AUTOMOBILE OF THIRD PERSON TO DIRECT DRIVER—LIMITATION OF OBLIGATION—NEGLIGENCE OF DRIVER—INJURY—RIGHT TO RECOVER DAMAGES.

The obligation of a person who rides in the automobile of a third party, on the invitation of the owner, in order that he may shew the driver the way is limited prima facie to directing him along what streets he should proceed and what turnings he should take he is not under obligation to point out obstacles or dangers on the route which would be apparent to any careful driver, and his failure to do so is not negligence.

Hunter v. Saskatoon, 48 D.L.R. 68, 12 S.L.R. 354, [1919] 2 W.W.R. 872.

PUBLIC WORK—ICE ON APPROACH—INJURY TO PERSON—LIABILITY.

Suppliant was injured by falling on the footpath on the approach to a bridge, at a place under the control of the Dominion Government; and the superintendent of the canal and his assistants were charged with the duty of maintaining the footpath in good order. The accident happened at about midnight. The footpath was slippery, owing to ice. A witness gave evidence that at 4 p. m. of the day before the accident he had spread ashes on the spot where the suppliant fell; and that he visited the footpath at 2 p. m. on the day of the accident, and that the ashes were still there and that no more were required for safety:—Held, that as it was not shewn that the footpath in question had been allowed to remain an unreasonable time in an unsafe condition, no negligence was attributable to the superintendent of the canal or his assistants, and that the suppliant could not recover.

Harrison v. The King, 14 Can. Ex. 395.

CONTRIBUTORY NEGLIGENCE—LICENSEE.

Perdue v. C.P.R. Co., 12 Can. Ry. Cas. 216.

CONTRIBUTORY NEGLIGENCE — FIRES CAUSED BY SPARKS FROM LOCOMOTIVE.

Winnipeg Oil Co. v. Canadian Northern R. Co., 21 Man. L.R. 274, 18 W.L.R. 424.

JOINT FAULT AND NEGLIGENCE.

Vallee v. Shedden Forwarding Co., 40 Que. S.C. 454.

D. OTHER CASES.

(§ II D—104)—DRIVING HORSE ON HIGHWAY — DEFECTIVE LINES — FINAL, DISTINCT FROM EFFECTIVE, CAUSE.

Where the plaintiff's horses shied on the highway at a telephone pole negligently left there by the defendant, and at the same time broke the reins, there is not contributory negligence where the reins had been well taken care of, and, so far as the plaintiff was aware, were fit for all purposes, although the fact might be that, while they were sufficiently strong for all ordinary purposes, they were not fit to drive with, where an unusual strain was placed upon them.

Smith v. Berwick, 15 D.L.R. 91, 6 S.L.R. 1279, 26 W.L.R. 155, 5 W.W.R. 661.

E. IMPUTED.

(§ II E—110)—PIT UNGUARDED UNDER ELEVATOR—LICENSEE—KNOWLEDGE OF DANGER—CONTRIBUTORY NEGLIGENCE.

The plaintiff, an employee of a milk vendor, in the course of his duties, carried milk up and down an unguarded freight elevator in the defendant company's quarters, used for the storing and pasteurizing of milk. The floor of the elevator, when down, was used in conjunction with the other floor space where it stood, in going from one side to the other, there being a pit below the elevator floor about 15 feet deep, of which the plaintiff claimed to have no knowledge. The plaintiff had been at the building, in the usual course of his business, about ten times previous to the evening of the accident. When he entered the building about eight o'clock, there were no lights. In crossing the floor space where the elevator shaft was (the elevator being at an upper storey), he fell in the pit and was injured:—Held, affirming the judgment of the Trial Judge taking the case from the jury and dismissing the action, that the plaintiff had knowledge of the locus in quo, and he was guilty of contributory negligence in attempting to cross the elevator floor without knowing whether the elevator was down or not. [Indermaur v. Dames (1867), 36 L.J.C.P. 181, followed.]

Despointes v. Almond, 18 B.C.R. 578.

F. INJURY AVOIDABLE NOTWITHSTANDING CONTRIBUTORY NEGLIGENCE; LAST CLEAR CHANCE.

(§ II F—120)—CARELESSNESS OF PERSON INJURED—RECKLESS CONDUCT OF MOTORMAN.

The carelessness of the plaintiffs in driving across the tracks of a tramway was, in this case, excused by the reckless conduct of the defendant's motorman in failing to use proper precautions to avoid the consequences of their negligence after he had become aware of it.

Calgary v. Harnovis, 15 D.L.R. 411, 48 Can. S.C.R. 494, 26 W.L.R. 565, 5 W.W.R. 869, affirming 11 D.L.R. 3, 6 A.L.R. 1, 23 W.L.R. 847, 4 W.W.R. 263.

LAST CLEAR CHANCE — ACCIDENT PRIOR THERETO.

The doctrine of the "last clear chance" applies only where there has been a breach of duty on the part of the defendant arising after the danger to the plaintiff became or should have become apparent to the defendant and he fails to do, for the purpose of avoiding the accident, that which a reasonably careful man would have done, and hence where the accident has happened before the defendant became aware of the danger to the plaintiff, it is not error to refuse to submit to the jury the question of whether the defendant could by the exercise of reasonable care have avoided the accident.

Pratt v. Lovelace, 11 D.L.R. 385, 6 S.L.R. 310, 23 W.L.R. 925, 4 W.W.R. 496.

ULTIMATE NEGLIGENCE.

Even if the deceased who was killed while crossing the railway was guilty of contributory negligence in not looking for approaching trains damages will be awarded against the railway if there was such ultimate negligence on the part of its employees operating the train that the collision might have been avoided after they became aware of the danger had the watchman stationed at the rear of the train moving reversely shouted a warning (on seeing the horses and load of lumber), to the driver walking on the far side and not visible to him, instead of jumping off and attempting only to warn the other train hands.

O'Callaghan v. Great Northern R. Co., 20 D.L.R. 145, 18 Can. Ry. Cas. 156.

LAST CLEAR CHANCE—ULTIMATE RESPONSIBILITY.

In a negligence action for damages resulting from the collision of two automobiles where it appears that the defendant was guilty of primary negligence and by the exercise of reasonable care could in the circumstances eventually have avoided the result of his own primary negligence as well as that of the plaintiff (assuming the plaintiff to have also been guilty of primary negligence), the ultimate responsibility for the collision, rests upon the defendant.

B. & R. Co. v. McLeod, 18 D.L.R. 245, 7 A.L.R. 349, 28 W.L.R. 778, 6 W.W.R. 1299, reversing 7 D.L.R. 579, 5 A.L.R. 176, 22 W.L.R. 274, 2 W.W.R. 1093.

ULTIMATE NEGLIGENCE.

Negligence of a defendant incapacitating him from taking due care to avoid the consequences of the plaintiff's negligence may, though anterior in point of time to the plaintiff's negligence, constitute ultimate

negligence, rendering the defendant liable, notwithstanding the contributory negligence of the plaintiff. [Scott v. Dublin & Wicklow R. Co., 11 Ir. C.L.R. 377, 394, followed.]

B.C. Electric R. Co. v. Loach, 23 D.L.R. 4, 32 W.L.R. 169, 113 L.T. 946, affirming 16 D.L.R. 245, 19 B.C.R. 177, 17 Can. Ry. Cas. 21, 27 W.L.R. 407, 6 W.W.R. 322.

FINDINGS OF JURY.

Stepan v. National Elevator Co., 22 D. L.R. 914.

ULTIMATE NEGLIGENCE.

Where the general effect of the verdict when read with the evidence and the charge of the Trial Judge is that notwithstanding the negligence of the deceased who had been struck by a street car while attempting to cross the track, the motorman might have avoided the accident by the exercise of reasonable prudence, the verdict should not be set aside.

Long v. Toronto R. Co., 20 D.L.R. 369, 49 Can. S.C.R. 224, 18 Can. Ry. Cas. 92, reversing 10 D.L.R. 300, 15 Can. Ry. Cas. 35, 24 O.W.R. 39.

In an action for damages for injuries sustained, where contributory negligence is alleged, a new trial will be ordered if the attention of the jury has not been directed to the question whether, but for the negligence of the defendant the accident might have been avoided, notwithstanding the negligence of the plaintiff, and their finding is not conclusive on this point. [Loach v. B.C. Electric R. Co., 23 D.L.R. 4, [1916] 1 A.C. 719, followed.]

Ontario Hughes-Owens v. Ottawa Electric R. Co., 39 D.L.R. 49, 40 O.L.R. 614, 23 Can. Ry. Cas. 252. [See 15 O.W.N. 413.]

COLLISION WITH STREET CAR.

A plaintiff cannot recover damages for injuries received where the responsibility for the accident has been placed upon both the plaintiff and the defendant, and the defendant could not, by the exercise of reasonable care after he became aware of the danger to the plaintiff, have avoided the accident.

Smith v. Regina, 42 D.L.R. 647, 11 S.L. R. 291, [1918] 2 W.W.R. 1010, affirming 34 D.L.R. 238, 21 Can. Ry. Cas. 270, 10 S. L.R. 72, [1917] 1 W.W.R. 1444.

COLLISION BETWEEN TRAIN AND AUTOMOBILE.

In an action for damages because of the destruction of the plaintiff's motor car by a train, the Trial Judge after consideration of the findings of the jury, held the effect of them to be a finding that the decisive negligence was that of the brakeman, and, therefore, gave judgment for the plaintiff.

Gavin v. Kettle Valley R. Co., [1918] 1 W.W.R. 251. New trial ordered 43 D.L.R. 47, [1918] 3 W.W.R. 385. See also 47 D. L.R. 65, 58 Can. S.C.R. 501, [1919] 2 W. W.R. 611.

NEGOTIABLE INSTRUMENTS.

See Bills and Notes; Cheques.

NEWSPAPER.

Libellous publications, see Libel and Slander.

PROVISIONS OF NEWSPAPER ACT—BENEFITS OF LIBEL ACT—R.S.M. 1913, c. 113.

Noncompliance with any of the provisions of the Newspaper Act R.S.M. 1913, c. 143, disentitles such newspaper from the benefits conferred by the Libel Act, R.S.M. 1913, c. 113.

Skryha v. Telegram Printing Co., 20 D.L. R. 692, 24 Man. L.R. 725, 29 W.L.R. 505, 7 W.W.R. 167.

NEW TRIAL.

I. IN GENERAL; AS MATTER OF RIGHT.
II. FOR ERRORS OF THE COURT.
III. FOR MATTERS PERTAINING TO JURY OR VERDICT.
A. In general.
B. Erroneous verdict.
C. Selection and qualification of, or influence upon, jurors.
D. Misconduct or separation of jurors; compromise verdict.
IV. NEW EVIDENCE; SURPRISE.
V. PRACTICE.

Annotation.

Judge's charge: instruction to jury in criminal case; misdirection as a "substantial wrong;" Cr. Code, s. 1019: 1 D.L.R. 103.

I. In general; as matter of right.

(§ I—1)—TRIAL—IMPROPER CONDUCT OF COUNSEL INFLUENCING VERDICT.

If it appears that counsel for the plaintiff throughout the trial had systematically sought in various ways to inflame the minds of the jury against the defendant, in a slander action, and this has resulted in an excessive verdict against the latter, a new trial will be ordered on appeal.

Hal'ren v. Holden, 12 D.L.R. 570, 18 B. C.R. 310, 24 W.L.R. 951, 4 W.W.R. 1330. [Affirmed by Supreme Court of Canada.]

ACTION FOR NEGLIGENCE—INSUFFICIENT EVIDENCE.

Where the evidence of negligence is not convincing and so intimated by the Trial Judge, or where the jury's finding inferentially negative the existence of negligence, the court will not grant a new trial. [Coban v. C.P.R. Co., 23 A.R. (Ont.) 115; G.T.R. Co. v. McKay, 34 Can. S.C.R. 81, 85; Andreas v. C.P.R. Co., 7 Terr. L.R. 327, 37 Can. S.C.R. 1, applied.]

Schell v. Regina, 24 D.L.R. 755, 8 S.L.R. 275, 31 W.L.R. 834.

CONCLUSIVENESS OF VERDICT.

Where all questions of substance have been passed upon by a jury a new trial should not be granted.

Pruett v. G.T.R. Co., [1917] 2 W.W.R. 662.

(§ I—2)—Unfair remark of counsel.

Unfair and inflammatory language employed by counsel in the present action of a case for the plaintiff in an action against a street railway for injuries to a woman passenger, unless objected to by counsel or stopped by the Trial Judge, is not of itself ground for a new trial.

Dale v. Toronto R. Co., 24 D.L.R. 413, 34 O.L.R. 104.

Remarks of attorney.

Where counsel for the plaintiff improperly refers in his opening to the jury to the fact that money has been paid into court, and counsel for the defendant objects, a new trial will be ordered, though counsel for the plaintiff apologizes for his statement aand withdraws it, and counsel for the defendant does not ask to have the jury discharged.

Dickinson v. "The World," 5 D.L.R. 148, 17 B.C.R. 401, 21 W.L.R. 529, 2 W.W.R. 533.

(§ I—4)—Terms.

Nokes v. Kent, 6 D.L.R. 877, 4 O.W.N. 252.

II. For errors of the court.

In conviction for sedition, repetition of seditious words, see Sedition, I—5.

(§ II—5)—Dismissal of action—Unreliability of testimony—Balancing of probabilities.

On appeal from the dismissal of the action by the Trial Judge on the ground that the witnesses on both sides were unworthy of credence, the Appellate Court may grant a new trial if it appears that the Trial Judge made no attempt to weigh the evidence and to balance the probabilities of the case in connection with its attendant circumstances.

McCawley v. Albert, 15 D.L.R. 497, 48 N.S.R. 32.

Railway—Death of person—Negligence—Evidence for jury—New trial.

Brewer v. G.T.R. Co., 2 D.L.R. 919, 3 O.W.N. 572.

A new trial will be granted where, before any evidence was heard, an action was dismissed on an objection, that was not pleaded by the defendant, that the shares of stock on which the plaintiff based his action, had been assigned by him.

Daniel v. Birkbeck Loan Co., 4 D.L.R. 767, 22 O.W.R. 147.

Evidence—Negligence—Burden of proof—Misdirection—Motor Vehicle Act, 1918, 8-9 Geo. V. (N.S.) c. 12, s. 50.

A judge in his charge to the jury must be careful in expressing his opinion upon the facts to bring out all points in both parties' favour. And further, in his charge as regards negligence where the burden of proof has been changed by statute, he should state upon whom the burden is placed. [Bray v. Ford, [1896] A.C. 44; McLeod v. Holland, 14 D.L.R. 634, 47 N.S.R. 427; Jefferson v. Paskell, [1916] 1 K.B. 57, applied.]

England v. Colburne, 50 D.L.R. 379.

Failure to take down evidence in writing—Division Courts Act (Ont.).

Where in a Division Court action for the recovery of a sum exceeding $100, the Division Court Judge has not complied with 10 Edw. VII. (Ont.) c. 32, s. 106, by taking down the evidence in writing, a letter from the judge setting out the facts which, in his view, were proved at the trial, will not be looked at by an Appellate Court, and a defendant appealing is entitled to a new trial, he not being responsible for the irregularity.

Smith v. Boothman, 9 D.L.R. 450, 24 O.W.R. 106.

Irrelevant evidence—Remarks by counsel—Alien enemy.

The admission of evidence irrelevant to the issue, calculated to prejudice the jury, is prima facie a "substantial wrong or miscarriage," and the onus of proving that it is not is on the party on whose behalf the evidence is given. [Comments upon the improper admission of evidence of the plaintiff's nationality.]

Gage v. Reid, 34 D.L.R. 46, 38 O.L.R. 514. [See also 39 O.L.R. 52.]

As to evidence—"Substantial wrong."

The improper admission of evidence in criminal proceedings as to which it cannot be said that substantial wrong or miscarriage of justice was not thereby occasioned is ground for a new trial under s. 1019 Cr. Code.

R. v. Baugh, 31 D.L.R. 66, 36 O.L.R. 436, 27 Can. Cr. Cas. 373.

Cross-examination of memorandum to refresh memory—"Substantial injustice."

There exists a well established right to cross-examine the memorandum used by a witness to refresh his memory, the denial of which constitutes a substantial injustice, particularly in view of the inconsistencies and mistakes of the testimony of the witness the evidence of whom is the very essence of the case, and is ground for a new trial. [Sinclair v. Stevenson, 1 Car. & P. 582, applied.]

McLean v. Merchants Bank, 27 D.L.R. 156, 9 A.L.R. 471, 34 W.L.R. 81, 10 W.W.R. 191.

As to plea of justification—Probable cause.

In an action against a police constable for false arrest without warrant, in which the defendant was not permitted to set up reasonable and probable cause in justification for making the arrest without a warrant a new trial will be granted.

Altman v. Majury, 31 D.L.R. 759, 37 O.L.R. 608, 27 Can. Cr. Cas. 398.

As to verdict—Appellate judgment on merits.

Where a Trial Judge directs a judgment against the verdict of the jury, the Appellate Court in setting the judgment aside

will not order a new trial, but will direct a judgment to be entered in accordance with the verdict.

Gray v. Wabash R. Co., 28 D.L.R. 244, 35 O.L.R. 510, 20 Can. Ry. Cas. 391.

CIVIL ACTION — ACQUITTAL ON CRIMINAL CHARGE.

If a perusal of the judgment of a District Court Judge convinces the Court of Appeal that he has been influenced in his judgment in a civil action by the fact that the plaintiff had been acquitted on a criminal charge, a new trial will be ordered.

Goldston v. Alameda Farmers Elevator & Trading Co., 43 D.L.R. 607.

CHARGE TO JURY—CRIMINAL TRIAL—SUBSTANTIAL WRONG.

Although some of the expressions used by the Trial Judge in his charge to the jury may be open to criticism, a new trial will not be granted under the Cr. Code if there has been no substantial misdirection, and the court is satisfied that there has been no miscarriage of justice.

R. v. Letain, 29 Can. Cr. Cas. 389, 28 Man. L.R. 386, [1918] 1 W.W.R. 505.

MISDIRECTION — DEFENCES — MISREPRESENTATION—INSANITY.

A judge's charge to a jury must be read as a whole, and a misdirection therein must be a substantial one or contain an element tending to mislead or confuse before it can be a ground for a new trial. [Blue v. Red Mountain R. Co., [1909] A.C. 361, at p. 368; White v. Victoria Lumber, etc., Co., [1910] A.C. 606, at p. 611, followed]. In an action against executors for the amount of calls upon shares in a company in which the testator was a shareholder, the defendants set up the defence of mental incompetency to contract and misrepresentation. In charging the jury the judge said: "One or either of these defences may be true, but they cannot both be true. If he were mentally incompetent, then the question of misrepresentation would not arise at all, but in order that a misrepresentation could be made to him and be effective to enable his executors to get out of the contract, you must first start with the proposition that he was capable of making a contract." The jury gave a general verdict for the plaintiff. The defendant upon appeal complained of misdirection. Held, that reading the charge as a whole, no ground had been shown why the verdict should be set aside and a new trial ordered.

Canadian Financiers Trust Co. v. Ashwell, 25 B.C.R. 97.

COMMENT BY COUNSEL—RAILWAYS—NON-PRODUCTION OF CONFIDENTIAL REPORTS.

Counsel commented on the refusal of a railway company to produce a confidential report and the Trial Judge refused to direct the jury that they were not entitled to draw an unfavourable inference against the company so refusing production. Held, that there should be a new trial.

Errico v. B.C. Electric Ry. Co., [1917] 2 W.W.R. 238.

NEGLIGENCE—COUNSEL FOR DEFENDANT ABSENT AT TRIAL—VERDICT SET ASIDE.

Sheahen v. Toronto R. Co., 19 O.W.R. 946.

(§ II—6)—NONSUIT—WEIGHT OF EVIDENCE—ADMISSIONS.

Where counsel for one party to an action places in evidence an admission made by the opposite party, containing some statements in favour of and some adverse to the interest of his client, it is not necessary to give equal credence or weight to the several statements. A new trial will be ordered, therefore, where the Trial Judge has withdrawn the action from the jury on the ground that the whole admission must be accepted as truthful, and if so, negatives negligence.

Huck v. C.P.R. Co., 29 D.L.R. 571, 9 S. L.R. 288, 34 W.L.R. 1177, 10 W.W.R. 1342.

FOR ERRORS OF THE COURT—IN REFUSING CONTINUANCE.

The refusal of the Trial Judge to grant the plaintiff an adjournment of the trial to identify an exhibit produced, may be ground for ordering a new trial, on appeal from the dismissal of the action, where the plaintiff was taken by surprise in respect of such lack of evidence, and leave to bring a new action had not been reserved to the plaintiff, but terms as to costs would properly be imposed upon him.

Stephenson v. Sanitaris, 16 D.L.R. 695, 30 O.L.R. 60.

TO DEFENDANT ON REVERSING NONSUIT.

While a defendant moving for a nonsuit at the close of the plaintiff's case takes the risk of having the case disposed of on appeal without evidence for the defence, the Appellate Court may grant him a new trial on reversing the nonsuit, if it be shewn that he was prepared at the trial to adduce evidence in answer had the nonsuit not been granted, particularly if it appears that the risk of taking the nonsuit was not brought to the attention of defendant's counsel.

Mars v. Drury, 9 D.L.R. 638, 23 W.L.R. 538, 6 S.L.R. 185, 3 W.W.R. 1143.

WHEN JUDGMENT FOR NOMINAL DAMAGE SHOULD HAVE BEEN ENTERED—ENTRY BY APPELLATE COURT.

On appeal from a judgment nonsuiting the plaintiff when he should have been awarded nominal damages a new trial will not be granted, but the Appellate Court may direct judgment to be entered for a nominal sum. [Simonds v. Chesley, 20 Can. S.C.R. 174; Scammell v. Clarke, 23 Can. S.C.R. 307; and Milligan v. Jamieson 4 O.L.R. 650, applied.]

Day v. Horton, 14 D.L.R. 763, 23 Man. L.R. 623, 26 W.L.R. 72, 5 W.W.R. 751.

(§ II—7)—Permitting one party to shew mistake in written contract and refusing opposite party same privilege.

When one party to an action is permitted to give oral evidence in his own favour to shew a mistake in a written contract and the same right is refused the opposite party, a new trial will be granted.

Edmonton Securities v. Lepage, 14 D.L.R. 66, 25 W.L.R. 532, 6 A.L.R. 282, 5 W.W.R. 188.

Admission of evidence—Matters read to jury.

Where a statute provides, "that only three expert witnesses may be called by either side, without the leave of the judge or other person presiding, to be applied for before the examination of any such witnesses," a refusal of the judge to obey the statute constitutes a mistrial, and a new trial will be granted.

Rice v. Sockett, 8 D.L.R. 84, 27 O.L.R. 410, 23 O.W.R. 602.

That the conviction of one of two defendants tried jointly for burglary and theft was against the weight of evidence is no reason for granting a new trial to both under s. 1021, Cr. Code; but the rule is otherwise if the defendants have been jointly convicted of conspiracy, or if a new trial will tend to the administration of justice. [R. v. Fellowes, 19 U.C.Q.B 48, distinguished.]

R. v. Murray, 8 D.L.R. 208, 20 Can. Cr. Cas. 197, 27 O.L.R. 382, 23 O.W.R. 492.

Under s. 376 of c. 111 of the Supreme Court Act, C.S.N.B., 1903, that court will not grant a new trial of an action appealed from the County Court in which but a trifling amount is in dispute, on the ground of misdirection or improper admission or rejection of evidence, unless substantial wrong or miscarriage was thereby occasioned.

Westell v. McLaughlin, 5 D.L.R. 201, 41 N.B.R. 193, 10 E.L.R. 397.

Where, in an issue as to lunacy under s. 7 of the Lunacy Act, 9 Edw. VII. (Ont.) c. 37, a Divisional Court has, of its own motion and against the protest of one of the parties to the issue, improperly called for and heard fresh evidence, and itself examined the alleged lunatic, and, upon the original evidence and the further facts thus ascertained, has determined the issue and reversed the decision of the Trial Judge, and it appears that much of the fresh evidence so obtained may be material and important, the proper course is, not to determine the issue upon the record as it stood when the appeal came before the Divisional Court, but to direct a new trial.

Re Fraser; Fraser v. Robertson; McCormick v. Fraser, 8 D.L.R. 955, 26 O.L.R. 508, 22 O.W.R. 353.

Rejecting evidence—Review on appeal.

Improper exclusion of evidence may be ground for a new trial, but the nature of the evidence excluded should be stated to the Appeal Court in order that it might arrive at a conclusion whether such improper exclusion is ground for a new trial.

Kimball Lumber Co. v. Anderson, 27 D.L.R. 555.

Damages — Employers' liability insurance.

Where nothing was brought out during the course of the trial of an employee's personal injury action from which the jury could reasonably infer that an insurance company was the real defendant in interest, a new trial will not be granted because of references made during the course of the trial that a physician called for the defence had examined the plaintiff on behalf of a certain casualty insurance company if his cross-examination by the plaintiff's counsel in this respect went no further than to attempt to shew that the physician was not disinterested by reason of his employment by the insurance company and his possible bias on account thereof. [Loughead v. Collingwood Shipbuilding Co., 16 O.L.R. 64, distinguished.]

Mitchell v. Heintzman, 9 D.L.R. 20, 23 O.W.R. 763.

Prejudicial remarks—Alien enemy.

A new trial will be ordered where a jury has been prejudicially influenced by counsel's improper comment that the defendant was of enemy and the plaintiff of friendly nationality by birth.

D. v. B., 38 D.L.R. 243, 40 O.L.R. 112.

Irrelevant evidence—Libel—Fair comment.

The admission of evidence in a libel action, of facts not set out in the particulars of the plea of fair comment, is ground for a new trial.

Augustine Automatic Rotary Eng. Co. v. Saturday Night, 34 D.L.R. 439, 38 O.L.R. 609.

Improper evidence—Author of libel.

An improper admission of evidence disclosing the authorship of a libelous letter in a newspaper, which is corrected by the Trial Judge in his charge to the jury, is no ground for a new trial.

Culligan v. The Graphic, 37 D.L.R. 134, 44 N.B.R. 481.

Improper admission of evidence—Preventing proof of defence.

A defendant is entitled to a new trial on the ground that he was prevented from attempting to prove his defence on cross-examination of the plaintiff's witnesses; and on the ground of the improper reception of evidence of correspondence and conversations after the trusteeship had ceased.

Jones v. Burgess, 43 N.B.R. 126. [Appeal allowed in part by Canada Supreme Court, not reported.]

Statement of witness in former trial read in charge to jury.

Only a very clear case of wrong or mis-

carriage would justify an order for a third trial, where the amount involved is small in proportion to the costs incurred. Where a Trial Judge, in the course of his charge, gives to the jury a statement from his own notes of a former trial of the evidence given by a witness, and a protest from counsel is dealt in a way calculated to impress upon the jury still more emphatically an alleged incompatibility between the evidence of the witness and the statement supposed to have been made formerly by him, a new trial should be directed.

Hearn v. Nelson, 8 W.W.R. 99.

(§ II—8)—Misdirection.

An isolated misstatement of law in a judge's charge to a jury is not misdirection, as grounds for a new trial, if in its entirety the charge fairly states the law bearing upon the case from its different aspects.

Duffy v. Reid, 34 D.L.R. 289, 44 N.B.R. 407.

When the facts are such that in order to guide the jury properly there should be a direction of law given, the omission to give such direction of law is a ground for a new trial. [Prudential Ass'ce Co. v. Edmonds, 2 A.C. 487.]

Guimond v. Fidelity Phœnix Fire Ins. Co., 2 D.L.R. 654, 41 N.B.R. 145, 10 E.L.R. 562. [Affirmed, 9 D.L.R. 463, 12 E.L.R. 350.]

Where, upon the second trial of an action with a jury, the charge of the Trial Judge is such that it may have prejudiced the defendant as to the amount of damages, and larger damages have been awarded than at the former trial, a new trial may be refused, upon the plaintiff consenting to a reduction of the damages to the amount awarded at the former trial.

Connors v. Reid, 3 D.L.R. 636, 3 O.W.N. 1137.

Where on a trial for shooting with intent to murder the jury returned a verdict of acquittal after an erroneous ruling by the Trial Judge that the jury could not be directed, on such indictment, to bring in a verdict for the lesser offence of shooting with intent to maim or to do grievous bodily harm, if they found such lesser offence proved, a new trial will not necessarily be granted by the appellate court on reversing such erroneous ruling on an appeal by the prosecution, but the court will exercise its discretion in refusing a new trial if it considers that the evidence does not warrant it.

R. v. Kerr, 3 D.L.R. 720, 20 Can. Cr. Cas. 70, 22 Man. L.R. 353, 21 W.L.R. 652.

Criminal case—Misdirection as to law.

Where the Trial Judge erred in his charge to the jury as to the validity of a seed grain mortgage in question on a false pretence charge, a new trial should be ordered by the Appellate Court if it considers that the jury may have been influenced to convict by that portion of the charge.

R. v. Holderman, 19 D.L.R. 748, 23 Can. Cr. Cas. 369, 7 S.L.R. 279, 30 W.L.R. 82, 7 W.W.R. 729.

Criminal case—Misdirection as to reasonable doubt.

A new trial will be ordered in a criminal case on the ground that the instruction to the jury may have misled them on the question of reasonable doubt and so have led them to apply the rule as to the balancing of mere probabilities as in civil cases.

R. v. Schurman, 19 D.L.R. 800, 23 Can. Cr. Cas. 365, 7 S.L.R. 269, 30 W.L.R. 56, 7 W.W.R. 680.

Misdirection — Action for slander — Charge of Trial Judge to jury—Appeal—New trial ordered.

A judge's charge to a jury must be clear and concise, not misleading in any way, nor ambiguous, otherwise misdirection may be found, and a new trial ordered.

Rhodenizer v. Rhodenizer, 50 D.L.R. 344, 53 N.S.R. 234.

Malicious prosecution—Error of judge in instructing jury as to malice.

Error on the part of the Trial Judge in instructing the jury as to the elements necessary to constitute a cause of action founded on malicious prosecution so that jury may have found for the plaintiff without in fact finding any malice whatever, is ground for a new trial.

Bolster v. Cleland, 45 D.L.R. 574, 14 A.L.R. 341, [1919] 1 W.W.R. 1020.

Upon an appeal in a criminal case, the Court of Appeal should not grant a new trial merely because a portion of the judge's charge was objectionable if of opinion that, irrespective of the charge, the jury could not have done otherwise than convict the accused and consequently that the misdirection could not have occasioned any "substantial wrong" to the accused within the terms of the Cr. Code, s. 1019. [See also Tremeer's Criminal Code, 2nd ed., 1908, pp. 806-808.]

The King v. Lew, 1 D.L.R. 99, 19 Can. Cr. Cas. 281, 17 B.C.R. 77, 19 W.L.R. 853.

A new trial of a criminal case in which the jury returned a verdict of not guilty will be ordered at the instance of the Crown where the Trial Judge, upon being asked by the jury after they had been out a while whether he had told them that it was not necessary to have before them evidence corroborative of that of the accused's accomplice, replied that he had not, and then went on to say, among other things, that the law did not require such corroborative evidence to be given though it was usual for judges to advise the jury that they should not convict on the uncorroborated evidence of an accomplice, and where the judge, after the jury had retired again, refused to request of the counsel for the Crown further to instruct the jury that if they saw fit to believe the evidence of the accomplice and to find a verdict against

the accused upon it, they might do so, and such a verdict would be a lawful one, especially where the Trial Judge also said to the jury just after his statement above set forth that "of course the jury is generally supposed to pay some attention to what the judge says upon a legal point."

R. v. Betchell, 5 D.L.R. 497, 19 Can. Cr. Cas. 423, 4 A.L.R. 402, 21 W.L.R. 665, 2 W.W.R. 624.

It is not misdirection for the judge to tell the jury his opinion upon a question at issue before them, if he expressly leaves that question to them to settle. A new trial is not granted on the ground of misdirection, unless, in the opinion of the court, some substantial wrong or miscarriage has been thereby occasioned.

Markey v. Sloat, 6 D.L.R. 827, 41 N.B.R. 234, 11 E.L.R. 295.

NEGLIGENCE OF DEFENDANTS — CONTRIBUTORY NEGLIGENCE OF PLAINTIFF—INSUFFICIENT INSTRUCTIONS TO JURY.

The jury having found negligence on the part of the defendants' employees and of the plaintiff's wife, who was driving his automobile, in answer to two further questions found that after the employees of the defendants became aware, or ought to have become aware, that the automobile was in danger of being injured, they could have prevented the injury in the exercise of reasonable care by the speedy application of brakes. On these findings the Trial Judge entered judgment for the plaintiff. The court held that the Court of Appeal was justified in ordering a new trial on the ground that the jury should have been instructed that it was the duty of the driver of the motor car as well as that of the railway employees to have taken all reasonable care to avoid the collision, when the danger of it should have been apparent, and that questions as to her conduct at that stage of the occurrence similar to those with regard to the conduct of the railway employees should have been submitted to the jury.

Gavin v. Kettle Valley R. Co., 47 D.L.R. 65, 58 Can. S.C.R. 501, [1919] 2 W.W.R. 611, varying, as to costs, 43 D.L.R. 47, 26 B.C.R. 30 at 38, 23 Can. Ry. Cas. 379, [1918] 3 W.W.R. 385.

PARTIAL MISDIRECTION AS TO CONSTITUENTS OF CRIME.

Where a charge of murder is based first, upon unlawful acts of the accused which the prosecution alleges were the cause of the deceased doing an act that resulted in his inflicting upon himself a gunshot wound from which he died, and secondly, upon alleged brutal treatment accelerating the death of the deceased after the gunshotwound, and both aspects of the case were presented to the jury upon the evidence, misdirection as to the essential constituents of the crime of murder upon either aspect of the case will entitle the accused to a new trial, although the case may have been properly presented upon the other aspect, as it is impossible to know upon which of the grounds the verdict was based or whether upon both. Where a charge of murder is based upon a fatal gunshot wound inflicted while the gun was in the hands of the deceased, being used by him as a club to strike one of the accused with the stock, and upon the allegation that the acts of the accused which had led to the deceased clubbing his gun and striking therewith were done with an unlawful object, the jury must be instructed that before convicting of murder they must find not merely that the conduct of the accused had, in fact, led to such act of the deceased, but also that the accused knew or ought to have known that their acts were likely to cause death; and failure to so instruct is a substantial wrong or miscarriage entitling the accused to a new trial after conviction.

Graves v. The King, 9 D.L.R. 589, 21 Can. Cr. Cas. 44, 47 Can. S.C.R. 568, 12 E.L.R. 332, reversing 9 D.L.R. 175, 20 Can. Cr. Cas. 438.

INSTRUCTIONS — READING CHARGE AS A WHOLE—MISDIRECTION.

The judge's charge to the jury is to be read as a whole, and if in view of its general meaning and effect, the jury were not left under any erroneous impression as to the real nature of the issues to be determined or as to the law applicable, misdirection cannot be predicated upon an isolated portion of the charge when read apart from the other portions, so as to constitute a ground for ordering a new trial.

Jones v. C.P.R. Co., 13 D.L.R. 900, 30 O.L.R. 331, reversing 5 D.L.R. 332, 3 O.W.N. 1404.

FOR ERRORS OF THE COURT—AS TO INSTRUCTIONS—ACTION FOR ASSAULT.

A new trial will be granted where the Trial Judge, in an action for an assault, instructed the jury, by whom a verdict for the plaintiff was rendered for only nominal damages, that the assault was of a trifling character, that the plaintiff had not received any physical injury, and that the action was one which should have been settled in the police court, where, as a matter of fact, the defendant's treatment of the plaintiff by shaking his fist in the latter's face, violently shaking his person, and applying extremely abusive and opprobrious language to him, was a brutal and high-handed proceeding entitling the plaintiff to exemplary and not merely compensatory damages, and the effect of the judge's charge taken as a whole was to withdraw from the jury any question of exemplary damages.

McLeod v. Holland, 14 D.L.R. 634, 47 N.S.R. 427, 13 E.L.R. 509.

MISDIRECTION.

A mis-statement of evidence by a Trial Judge, however trivial, to the jury, and his

refusal to correct it, is good ground for a new trial.

R. v. Kleparczuk, 39 D.L.R. 171, 13 A.L.R. 212, 29 Can. Cr. Cas. 336, [1918] 1 W.W.R. 695.

DAMAGES—FATAL INJURIES ACT—MISDIRECTION.

In an action for damages under the Fatal Injuries Act (R.S.N.S. 1900, c. 178), it is misdirection for the Trial Judge to instruct the jury to do what they consider fair and reasonable without explaining to them the limitations of the Act, and the principles upon which the amount is to be calculated.

O'Hendley v. Cape Breton Electric Light Co., 39 D.L.R. 412, 52 N.S.R. 25.

AUTOMOBILES — COLLISION — DEATH — DAMAGES — NEGLIGENCE — INSTRUCTIONS.

A person injured by more than one wrong-doer may maintain an action for the whole damages done to him against any of them. In an action for damages under the Fatal Accidents Act for the death of a person killed in a collision between a motor truck and a motorcycle, in the side car of which deceased was a passenger, the jury should be distinctly told that unless the deceased was guilty of some default on his part amounting to contributory negligence, he was not affected by the fact that the driver of the motorcycle was guilty of negligence that caused the accident; and should be further instructed that they might find defendants guilty of negligence if the driver of the truck was guilty of any negligence that contributed to the accident, notwithstanding the fact that they found the driver of the motorcycle also guilty of negligence.

Coop v. Simpson, 42 D.L.R. 626, 42 O.L.R. 488.

MISDIRECTION — SUBSTANTIAL WRONG OR MISCARRIAGE.

Under some circumstances non-direction to a jury may be substantially and in effect misdirection and therefore may be misdirection absolutely and consequently involve a question of law within the meaning of s. 1014 Cr. Code. A failure to direct the jury that statements made by one of the accused not in the presence of the other accused are only evidence against him who made them is a misdirection entitling that other accused to a new trial where there has been substantial wrong or miscarriage. A conviction can be set aside in Alberta only where there has been a miscarriage of justice by reason of a wrong decision of law; in England it may be set aside if there has been a miscarriage due to that or any other reason.

R. v. Murray, 38 D.L.R. 395, 11 A.L.R. 502, 28 Can. Cr. Cas. 247, [1917] 2 W.W.R. 805. [See also 33 D.L.R. 702, 27 Can. Cr. Cas. 247, 10 A.L.R. 275, [1917] 1 W.W.R. 404,; 28 D.L.R. 372, 25 Can. Cr. Cas. 214, 9 A.L.R. 319, 33 W.L.R. 148, 9 W.W.R. 804.

IMPROPER REMARKS BY JUDGE.

The making of remarks by the Trial Judge during the progress of a trial and in his charge to the jury calculated to prejudice a fair trial of the action is ground for a new trial.

Lucas v. Ministerial Assn., 31 D.L.R. 200.

MISDIRECTION AS TO INQUEST EVIDENCE—HOMICIDE—"SUBSTANTIAL WRONG OR MISCARRIAGE."

R. v. Duckworth, 31 D.L.R. 570, 26 Can. Cr. Cas. 314, 37 O.L.R. 197.

WHEN REFUSED—FAILURE TO OBJECT.

No new trial will be granted if no objections are taken to the nondirection of the judge or to the forms of questions asked, or that further or other questions should be submitted. [Nevill v. Fine Arts, etc., Co., [1897] A.C. 68, 75, followed; Olver v. Winnipeg, 16 D.L.R. 310, 24 Man. L.R. 25, applied.]

Hile v. G.T.P.R. Co., 24 D.L.R. 9, 8 W.W.R. 403.

WHEN REFUSED—FAILURE TO BRING TO COURT'S ATTENTION.

A new trial will not be granted on the ground of nondirection where counsel was afforded an opportunity at the trial to call the judge's attention to a more specific direction and failed to do so.

Phillips v. Montgomery, 25 D.L.R. 499, 43 N.B.R. 229.

WHEN REFUSED—MISDIRECTION.

The court is not warranted under O. 39, r. 6, in granting a new trial on the ground of misdirection in a case where, if the verdict had been for the opposite party on a proper direction, it would be set aside.

Simpson v. Malcolm, 43 N.B.R. 79.

AS TO INSTRUCTIONS.

In an action for assault the judge misdirected the jury in favour of the plaintiff on matters which might affect the question of damages, and a verdict was rendered for the plaintiff for $135. On appeal upon the ground of misdirection and excessive damages. Held, that although the damages were not excessive, yet the misdirection caused a substantial wrong or miscarriage entitling defendant to a new trial, inasmuch as the jury might have been influenced by it in assessing damages.

Edmondson v. Allen, 40 N.B.R. 299.

MISDIRECTION — REFERENCE TO MATTERS NOT IN EVIDENCE.

In an action by a solicitor for payment of a bill of costs incurred in an action conducted by himself on behalf of the defendant, the Trial Judge (who sat on the former case) in his charge to the jury referred to matters within his own knowledge that took place at the former trial but was not in evidence on this trial. Held, that

there was misdirection and there should be a new trial.

Woodworth v. Gold, 21 B.C.R. 333.

ABANDONMENT OF PLEA AT TRIAL—CHARGE TO JURY—MISDIRECTION—NEW TRIAL.

Slater v. Watts, 16 B.C.R. 36.

(§ II—9)—MASTER AND SERVANT—DEFECTIVE APPLIANCES—INSUFFICIENCY OF ISSUES.

A new trial will be ordered in an action for damages for injuries sustained by reason of defective appliances, where the question as to whether the Master did all that should be expected from a reasonably careful and prudent employer of labor to avoid the danger, or to discover and remedy it were not fully and adequately placed before the jury, although the judge's charge to the jury was not objected to at the trial.

Goodwin v. Taylor, 43 D.L.R. 610, 43 O.L.R. 141.

DAMAGE ACTION—QUESTIONS SUBMITTED TO JURY—FURTHER QUESTIONS REQUIRED BY COUNSEL — REFUSED BY JUDGE — NEW TRIAL—JUDICATURE ACT, 9-10 GEO. V., 1919 (N.S.) c. 32, s. 42 (6).

Counsel in a damage action may require the judge to direct the jury to answer certain questions raised by the issues, and the refusal of the judge to so direct the jury may be used as a ground for a new trial. [Des Barres v. Bell, 20 N.S.R. 482, distinguished.]

Myers v. Nova Scotia Tramways & Power Co., 50 D.L.R. 484.

STREET RAILWAY—PERSON KILLED BETWEEN TRACKS AND PLATFORM — WHETHER TRESPASSER OR LICENSEE—QUESTION FOR JURY.

Carruthers v. Toronto & York Radial R. Co., 19 O.W.R. 983.

PLAINTIFFS' INADVERTENCE IN INTRODUCING DISSERVING DEPOSITIONS.

Where the plaintiffs' case is dismissed at the trial on the defendant's motion at the close of the plaintiffs' case, and where, on appeal from such dismissal, it appears that the motion was given effect simply because the plaintiffs inadvertently and disservingly introduced the entire examination on discovery of the defendant, containing categorical denials, and that but for the introduction of such denials the defence must have met the plaintiffs' case, and it further appears to the Appellate Court that the matters in issue should properly be placed before the Trial Court in a more satisfactory form than that adopted by the plaintiffs, a new trial may be granted to them upon terms.

Imperial Roofing Co. v. Dick, 10 D.L.R. 484, 5 A.L.R. 470, 23 W.L.R. 821, 4 W.W.R. 100.

(§ II—9a)—DAMAGE ACTION—DEFENDANTS INDEMNIFIED AGAINST LOSS—EVIDENCE—WRONGFUL ADMISSION OF.

In an action for damages for injuries sustained through the negligence of the defendant's servants, the plaintiff has no right whatever to prove that the defendants are indemnified against any verdict that might be given in favour of the plaintiff by an indemnity company. Such evidence puts the real defendant in a position of manifest and incurable disadvantage, and if the Trial Judge does not warn the jury against allowing their conclusion to be effected by such evidence, a new trial will be granted, unless the plaintiff consents to a reduction of damages—where the court considers they have been assessed too high, owing to the admission of such evidence.

Gregg v. Grant, 44 D.L.R. 359, 46 N.B.R. 138.

EVIDENCE — ADMISSION OF IRRELEVANT — TRIAL JUDGE POSSIBLY INFLUENCED BY.

The admission of irrelevant evidence which may have adversely influenced the opinion of the trial judge, is sufficient, unless he has disclaimed its having influenced his mind, to justify the granting of a new trial.

Larson v. Boyd, 46 D.L.R. 126, 58 Can. S.C.R. 275, [1919] 1 W.W.R. 808, affirming 42 D.L.R. 516, 11 S.L.R. 325, [1918] 2 W.W.R. 1069.

FOR ERRORS OF COURT — INSUFFICIENCY OF ISSUES SUBMITTED — NEGLIGENCE.

In an action for damages for injuries sustained by the plaintiff by being struck by the defendant's street car while the plaintiff on foot was crossing the track, if upon the facts (a) the plaintiff's conduct may not have been negligent, and (b) the defendant may have been guilty of negligence which occasioned the accident, the omission at the trial to pass in a satisfactory way upon these issues is ground for a new trial.

Myers v. Toronto R. Co., 18 D.L.R. 335, 30 O.L.R. 263, at 266, reversing 10 D.L.R. 754, 30 O.L.R. 263, 24 O.W.R. 452.

MISTRIAL — OMISSION TO AMEND PLEADING — EMPLOYERS' LIABILITY ACT, B.C. — CONFUSION OF ISSUES SUBMITTED TO JURY — TERMS.

Where an employee sued his employer for damages for personal injuries arising from alleged negligence and the claim was submitted to the jury not only at common law but under the Employers' Liability Act (B.C.), but the verdict went in his favour only upon the statutory liability, the result is a mistrial where the plaintiff pleaded only at common law and declined to apply to amend when given an opportunity at the trial; and on the plaintiff appealing from the trial judge's refusal to enter judgment on the verdict he may be ordered to pay defendant's costs of the former trial as a condition of obtaining a new trial.

Airey v. Empire Stevedoring Co., 18 D.L.R. 469, 20 B.C.R. 130, 28 W.L.R. 956, 6 W.W.R. 1465, varying 16 D.L.R. 734, 27 W.L.R. 712, 6 W.W.R. 938.

IMPROPER ADMISSION OF EVIDENCE — LETTERS — PROOF OF SIGNATURE.

Proof that a letter produced by a witness was written by the defendant company involves two elements, viz., the signature of the person who signed and his authority, and, where objection was taken to the letter being given in evidence for failure to adduce such proof, a new trial may be ordered where the letter was admitted, and the question of its proof was, in effect, withdrawn from the jury, whose verdict depended on the effect to be given to such letter.

Cochlin v. Massey-Harris Co., 23 D.L.R. 397, 8 A.L.R. 392, 30 W.L.R. 922, 8 W.W.R. 286.

IMPROPER ADMISSION OF EVIDENCE — EXTRACT OF MINING REPORTS.

It is a ground for a new trial in an action for injury at a mine through alleged breach of statutory rules, that the trial judge gave credence to extracts from the mining company's report to the government, although the report itself was not put in evidence, the plaintiff not wishing to be bound by all of the statements made therein, and the defendant company objecting that the entire report must go in or none of it.

Stanoszek v. Canadian Collieries, 22 D.L.R. 691, 21 B.C.R. 470, 9 W.W.R. 710.

IRRELEVANT EVIDENCE — SUBSTANTIAL WRONG.

A verdict will not be set aside on account of the improper admission of irrelevant evidence where it has not occasioned any substantial wrong or miscarriage of justice.

Farnell v. Conway, 41 D.L.R. 649, 45 N.B.R. 343.

DOCTOR — MALPRACTICE — EXHIBITION OF WOUND TO JURY.

In an action against a doctor for malpractice, a new trial will be granted, on the ground of improper admission of evidence, where the plaintiff was allowed to exhibit to the jury a wound caused by an operation performed by another doctor, without defendant's consent or knowledge, and the jury were not warned that they were not to draw conclusions from its appearance.

Richardson v. Nugent, 40 D.L.R. 700, 45 N.B.R. 331.

AGREEMENT FOR SALE OF LAND AND BUILDING — REFUSAL OF TRIAL JUDGE TO ALLOW CERTAIN EVIDENCE — ERRORS.

Goose Lake Grain & Lumber Co. v. Wilson, 42 D.L.R. 776, 11 S.L.R. 274, [1918] 2 W.W.R. 1018. [See 40 D.L.R. 271, 11 S.L.R. 163, [1918] 2 W.W.R. 311.

NEW TRIAL — DISCRETION OF COURT TO ORDER — COSTS — NEGLIGENCE — COMPANY SUPPLYING ELECTRIC LIGHT — INJURIES ALLEGED DUE TO UNSAFE CONDITION OF WIRES.

In an action against defendant, a company operating an electric street railway and supplying electric light and power, for damages for injuries sustained as alleged in consequence of the unsafe condition of the defendant's wires, the court, in the exercise of its discretion, without setting aside the findings of the jury on the trial, may order a new trial where the case as it stands is not very satisfactory, and the actual cause of the injury for which plaintiff seeks damages is not sufficiently shown.

Miller v. Nova Scotia Tramways & Power Co., 52 N.S.R. 448.

WHEN REFUSED — ISSUES FAIRLY SUBMITTED.

A new trial will not be granted on the ground of misdirection if the charge, taken as a whole, fully and fairly leaves the facts to the jury, notwithstanding it contains objectionable isolated expressions or statements, nor on the ground that the trial judge failed to refer particularly to material evidence if counsel fails to call attention to the omission.

Porter v. O'Connell, 43 N.B.R. 458.

IMPROPER ADMISSION OF EVIDENCE — NEW TRIAL — SUBSTANTIAL WRONG OR MISCARRIAGE.

Allen v. The King, 44 Can. S.C.R. 331, 18 Can. Cr. Cas. 1.

MOTION FOR NEW TRIAL — JUDGMENT BY DEFAULT — GROUNDS AVAILABLE BEFORE JUDGMENT.

Sanford Mfg. Co. v. Stockton, 10 E.L.R. 230.

III. For matters pertaining to jury or verdict.

A. In general.

(§ III A—10)—JURY — NONDIRECTION AS GROUND FOR.

The failure of the Trial Judge to direct the jury clearly as to the distinction between misfeasance and nonfeasance will not serve as a ground for a new trial where the verdict given is entirely in accordance with the evidence, nondirection being a ground for a new trial only where it produces a verdict against the evidence.

Tobin v. Halifax, 16 D.L.R. 367, 47 N.S.R. 498.

B. Erroneous verdict.

Excessive verdict, reasonableness, see Libel and Slander, III A—95.

Verdict influenced by mistake, see Discovery, IV—20.

(§ III B—15)—Where the jury, in answer to the question whether the defendant could, by the exercise of reasonable care, have avoided the accident, answer, "Yes, to a certain extent," and further state that his want of reasonable care consisted in "lack of judgment," these answers do not amount to a definite finding of contributory negligence, but the proper course is to send the case back for a new trial.

Dart v. Toronto R. Co., 8 D.L.R. 121, 4 O.W.N. 315, 23 O.W.R. 380.

VERDICT AGAINST EVIDENCE—AGREEMENT—RELEASE—RETURN OF COLLATERAL—POLICIES.

Kane v. Brock, 36 D.L.R. 387.

VAGUE FINDINGS—PROXIMATE CAUSE.

A general affirmative finding by a jury on a question as to whether the unsafe condition of an elevator was the cause or one of the causes of an accident, without specifying the particular cause, is too vague on which to enter up judgment and ground for a new trial. [See 18 D. L. R. 786.]

Pescovitch v. Western Canada Flour Mills, 23 D.L.R. 310, 25 Man. L.R. 575, 31 W.L.R. 921, 8 W.W.R. 1146.

ACTION BY HUSBAND AND WIFE—INDEFINITENESS AS TO PLAINTIFFS.

The verdict in a negligence action must be certain in that it must show in whose favour it was given where two plaintiffs, husband and wife, sue for separate causes of action, one by the wife and one by the husband; a new trial must be ordered if the verdict is brought in "for the plaintiff" in a fixed sum of damages where there is nothing to show for which plaintiff the verdict was given in an action by the wife for damages for her injuries in falling from a street car, and an action by the husband for medical expenses and the loss of his wife's society and services.

Earley v. Winnipeg Electric R. Co., 22 D.L.R. 765, 25 Man. L.R. 443, 31 W.L.R. 365, 8 W.W.R. 850.

FINDINGS AGAINST WEIGHT OF EVIDENCE—DOCUMENTARY EVIDENCE.

It is a ground for ordering a new trial that on one essential portion of the case the successful party in the court below is found by the appellate court to be contradicted by the overwhelming mass of testimony, particularly where the documentary evidence support such contradiction.

McDonald v. Campbell, 22 D.L.R. 748, 48 N.S.R. 520.

VERDICT AGAINST WEIGHT OF EVIDENCE—REASONABLENESS.

Where the verdict arrived at by the jury upon evidence properly submitted to them upon questions of fact is one that reasonable men might reach, the verdict will not be disturbed as being against the weight of evidence. [Commrs. of Railways v. Brown, 13 A.C. 133; Windsor Hotel Co. v. Odell, 39 Can. S.C.R. 336, followed.]

Fraser v. Pictou County Electric Co., 28 D.L.R. 251, 50 N.S.R. 30, 20 Can. Ry. Cas. 400.

FINDINGS INFLUENCED BY WRONG WITNESS.

The court's finding in an action contesting the validity of an election on account of personal bribery, influenced by the testimony of a witness who has not been subpœnaed, but attended in place of another witness of a similar name who has been subpœnaed, is ground for a new trial.

Hamm v. Bashford, 26 D.L.R. 573, 9 S.L.R. 68, 33 W.L.R. 473, 9 W.W.R. 1044, reversing 8 W.W.R. 793.

NOMINAL DAMAGES.

A new trial will not be granted to enable a party to an action to recover nominal damages only.

Dunham v. Marsden, 38 D.L.R. 24, 45 N.B.R. 279.

FOR MATTERS PERTAINING TO VERDICT—ERRONEOUS VERDICT—LIBEL.

Where the words complained of in a libel action as to the plaintiff's business are not susceptible of any but a defamatory meaning unless they can be justified as true, and no plea of justification is raised, a verdict for the defendant will be set aside and a new trial ordered. [Sydney Post Publishing Co. v. Kendall, 43 Can. S.C.R. 461, followed.]

Lumsden v. Spectator Printing Co., 14 D. L.R. 470, 29 O.L.R. 293.

JURY FINDINGS—UNCERTAINTY—CURING OF CONTRADICTORY WRITTEN ANSWERS, BY VERBAL CORRECTION IN OPEN COURT.

Where a jury's original written findings of answers to questions submitted are inconsistent, and, in an answer to an enquiry by the trial judge, the jury orally explains and harmonizes the various answers in open court, the result from this course is, that the earlier written findings are displaced pro tanto by the final verbal findings, and the inconsistency of the findings may thereby be cured.

Herron v. Toronto R. Co., 11 D.L.R. 697, 28 O.L.R. 59, reversing 6 D.L.R. 215.

CONFLICTING FINDINGS—NEGLIGENCE.

The findings of a jury in an action for personal injuries sustained by a locomotive fireman by reason of the escape of steam from a valve in the engine, that the injuries were caused by the negligence of the defendant in not seeing the valve properly closed, and that the plaintiff by the exercise of reasonable care in examining the valve could have avoided the accident, are conflicting and ground for a new trial under r. 501(1) (Ont.). [St. Denis v. Baxter, 13 O. R. 41, 15 A.R. (Ont.) 387; Australasian Steam, etc., Co. v. Smith, 14 App. Cas. 321, followed; Kerry v. England, [1898] A.C. 742, distinguished.]

Ball v. Wabash R. Co., 26 D.L.R. 569, 35 O.L.R. 84, 20 Can. Ry. Cas. 329.

The findings of the jury were set aside and a new trial ordered where the findings were at variance with the preponderance of the evidence, and the plaintiff's conduct so inconsistent with his claim that a reasonable jury, correctly apprehending the effect of the evidence, could not have come to the conclusions at which they arrived.

Densmore v. Hill, 45 N.S.R. 312.

The jury at the trial of an action has nothing to do with costs, and if they bring in a verdict clearly stated to be for damages and costs, which is accepted and acted upon by the judge, the judgment should be set aside and a new trial ordered. [Poole v. Whitcomb, 12 C.B.N.S.

770, and Kelly v. Sherlock, L.R. 1 Q.B. 691, followed.] Costs are now entirely in the discretion of the trial judge, no matter what is the amount of the verdict for the plaintiff. [Shillinglaw v. Whillier, 19 M.R. 149, followed.]

Davis v. Wright, 21 Man. L.R. 716.

VERDICT CONTRARY TO EVIDENCE—NEW TRIAL —REFUSAL.

Where a verdict is set aside as contrary to evidence, the practice is not to send the case back for a new trial when, if another verdict was given to the same effect, it would be set aside as unsupported by the evidence.

Suarez v. Eisenhauer, 47 N.S.R. 418.

SETTLEMENT—EVIDENCE NOT PRODUCED.

When in an action for damages the defendant has filed a document stating a settlement of the claim, and the document and the fact of payment as complete compensation were not submitted to the jury, who gave a verdict upon the merits of the case, the Court of Review may remit the record to the Superior Court for a new trial.

Pilotte v. Canada Cement Co., 52 Que. S.C. 193.

PREJUDICE—COMMON FAULTS.

An error causing prejudice does not result when the judge presiding at a jury trial presents in his charge to the jury a cause of liability, even if erroneous, if the verdict rests upon some other cause. In a jury trial, even when the evidence upon the question of common fault is contradictory and far from producing an absolute conviction that the accident was caused by the fault of the defendant alone, the court cannot order a new trial for this reason when the verdict is not clearly opposed to the evidence. The decision as to common fault is within the province of the jury.

Montreal Street R. v. Normandin, 26 Que. K.B. 467. [See also 33 D.L.R. 195, [1917] A.C. 170.]

(§ III B—16)—VERDICT AGAINST EVIDENCE —APPELLATE JUDGMENT ON MERITS.

An appellate court will not, where the verdict appears against the evidence, remit the case for a new trial where no jury could properly find a verdict otherwise than in accordance with the inference of fact drawn by the Court of Appeal, but will direct a judgment on the merits as appearing by the evidence. [Suarez v. Eisenhauer, 47 N.S.R. 418, followed.]

Landry v. Kirk, 28 D.L.R. 49, 50 N. S. R. 33.

INSUFFICIENCY OF EVIDENCE TO SUSTAIN.

Where a verdict is clearly against the weight of evidence, a new trial shall be ordered.

Alexe v. Canadian Western Lumber Co., 8 D.L.R. 1, 22 W.L.R. 559, 3 W.W.R. 267.

VERDICT — ULTIMATE NEGLIGENCE — SUFFICIENCY OF FINDINGS TO SUSTAIN.

In a personal injury action arising from a street car colliding with a rig where the findings of the jury were in effect that the negligence of the defendants' motorman and that of the plaintiff were concurrent and simultaneous negligence of similar character by both parties and that there was not any new negligent act by the defendant in addition to its first act of negligence, verdict was properly for the defendant and will not in that respect be disturbed.

Herron v. Toronto R. Co., 11 D.L.R. 697, 28 O.L.R. 59, reversing 6 D.L.R. 215.

ERRONEOUS VERDICT—FINDINGS OF JURY ON QUESTION SUBMITTED—NEGLIGENCE ACTION.

Where the jury's answers to the questions submitted in a negligence action were all in the defendant's favour, but the answer as to contributory negligence of the plaintiff was not supported by any evidence whatever, the appellate court may, if of opinion that the jury must have been influenced by some improper consideration upon that finding, direct a new trial although the answers to the other questions would, if taken alone, be sufficient to support the verdict for defendant; in such case the court may reasonably assume that the same vice affected the other findings.

Reiffenstein v. Dey, 13 D.L.R. 76, 28 O. L.R. 491, affirming 7 D.L.R. 94, 4 O.W.N. 78.

ERRONEOUS VERDICT — INSUFFICIENCY OF EVIDENCE TO SUSTAIN.

Sutcliffe v. Bennett, 16 D.L.R. 884, 47 N.S.R. 474.

TIMBER LIMIT—INSTRUCTIONS AS TO RUNNING BOUNDARY—APPROVAL—INSUFFICIENCY OF EVIDENCE AS TO APPROVAL OF DEPUTY MINISTER.

In a case involving a question whether the boundary of a timber limit had been run according to the authorized instructions of the administrative authority and if it was approved by the Deputy Minister of Lands and Forests as required by regulation No. 24 of the Quebec Wood and Forests Regulations, the court held that a new trial should be had to determine whether the Deputy Minister had, by placing his initials with the letters "app." on a report made by the Chief Superintendent of Surveys, in explanation of modifications made by him in the survey, meant to give his approval to the survey operations as required by regulation 24, or had merely meant to approve of the explanations made by the Superintendent of Surveys. [See also Shives Lumber Co. v. Price Bros. & Co., 44 D.L.R. 390.]

Shives Lumber Co. v. Price, 47 D.L.R. 418, 58 Can. S.C.R. 142.

JURY—VERDICT AGAINST THE WEIGHT OF EVIDENCE.

O'Leary v. Smith, 40 D.L.R. 744, 45 N. B.R. 424.

A new trial will not be granted under Cr. Code s. 1021 on the ground that the finding by the Judge trying the case without a jury was against the weight of evidence, if the case is one merely of con-

dict of testimony upon which the judge gave credence to the Crown witnesses rather than to those of the defence. When the accused applies by leave of the trial judge to the Court of Appeal under Cr. Code s. 1021 for a new trial on the ground that the verdict against him was against the weight of evidence, the onus is upon him to show that the verdict is against the weight of evidence, and consequently he has to establish affirmatively his contention of innocence to displace the presumption against him on account of the verdict; nor can the verdict be said to be against the weight of evidence when there was no evidence tending to a contrary result; recourse should be had to ss. 1014 and 1015 if it be claimed, notwithstanding the lack of evidence of innocence, that a case had not been made out by the Crown.

R. v. O'Neil, 25 Can. Cr. Cas. 323, 9 A.L.R. 365.

The verdict of a jury will be set aside and a new trial ordered where the findings are against evidence and are such as reasonable men should not have found, also where the questions submitted are misleading.

Kane v. Brock, 49 N.S.R. 362.

VERDICT AGAINST WEIGHT OF EVIDENCE.

A new trial may be directed where a jury gives a verdict which is against the weight of evidence and such that the jury reviewing the whole of the evidence reasonably could not properly find. Where a jury is not able to answer the questions submitted to them by a unanimous decision and so state, but nevertheless undertake coincidentally with such statement to render a general verdict in favour of plaintiff, this verdict cannot be supported.

Mackenzie v. B. C. Electric R. Co., 21 B.C.R. 375, 8 W.W.R. 956.

INDEFINITE FINDINGS AS TO NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE.

An action for damages occasioned by an explosion in the course of mining operations was dismissed upon a finding of the jury of contributory negligence. Upon appeal to the Court of Appeal for British Columbia, it was held, that there was no evidence to sustain this finding; but, because of uncertainty as to which of 2 distinct grounds of negligence charged had been found against the defendants, a new trial was directed. The defendants then appealed to the Supreme Court of Canada, contending that there was no evidence of negligence on their part on either charge, and that there was evidence to support the finding of negligence on the part of the plaintiff. Held, that the finding of negligence and also that of contributory negligence were indefinite, and that there ought to be a new trial.

Lilja v. Granby, 9 W.W.R. 662.

NEGLIGENCE—CHILD ON TRACK—EVIDENCE—FINDING OF JURY—BASED UPON THEORY.

Ewing v. Toronto Ry. Co., 20 O.W.R. 432.

NEGLIGENCE—ACTION FOR DAMAGES—PLAINTIFF'S FOOT TAKEN OFF AT ANKLE AT PUBLIC CROSSING—INDEFINITE CONDITION OF EVIDENCE—NEW TRIAL ORDERED.]

Stevens v. C. P. R. Co., 20 O.W.R. 331.

NEGLIGENCE—WORKMAN INJURED—WHILE WORKING IN TRENCH—STRUCK ON HEAD BY POLE FALLING INTO TRENCH—EVIDENCE—NOT SATISFACTORY.

Magnussen v. L'Abbe, 3 O.W.N. 301.

(§ III B—17)—EXCESSIVE VERDICT—DAMAGES—TEST.

An appeal by the defendant for a new trial on the ground of excessive damages will be dismissed by an appellate court although the damages are "larger perhaps than a judge or another jury might give," but yet are not so large as to be considered excessive or such as twelve reasonable men could not honestly award to the plaintiff.

Story v. Stratford Mill Bldg. Co., 18 D.L.R. 309, 30 O.L.R. 271.

VERDICT—EXCESSIVE DAMAGES.

A new trial may be granted by an appellate court where the jury in assessing damages for pollution of a stream on plaintiff's land by reason of material used in the construction of defendant's railway fixed such damages at a sum which in the opinion of such appellate court had not been satisfactorily proved.

Ball v. Sydney & Louisburg R. Co., 9 D.L.R. 148, 46 N.S.R. 507.

DAMAGES—BREACH OF CONTRACT—SALE—MOTION TO INCREASE VERDICT.

In an action for damages for breach of contract for failing to deliver a quantity of pulpwood purchased by the plaintiff from the defendant, the weight of the evidence was greatly in favour of the alleged breach. The jury found a general verdict for the plaintiff for $75, an amount paid on account of the purchase price. Held, on an application to increase the verdict to the amount of damages claimed, or for a new trial, that the plaintiff was entitled to substantial damages and the verdict was against the weight of evidence, but as, under the evidence, the jury might have assessed the damages at an amount less than that claimed by the plaintiff, the court refused to order a verdict for the amount claimed and ordered a new trial on the question of damages only.

Morin v. Tardif, 45 N.B.R. 272.

EXCESSIVE VERDICT—FAILURE TO REDUCE AMOUNT—DISCRETION OF COURT IN GRANTING.

In an action for damages, if it appear that the jury, in fixing the amount of damages, has not taken into account important evidence tending to reduce damages, the court may require the plaintiff to accept, within such time as it fixes, a judgment for a reduced sum, and may or-

der, that, in default of his doing so, there be a new trial.

C. P. R. Co. v. Frechette, 23 Que. K.B. 203.

NEGLIGENCE — ACTION — UNSATISFACTORY FINDING OF JURY—NEW TRIAL GRANTED ON TERMS.

Smith v. Hamilton Street R. Co., 18 O.W.R. 729.

(§ III B—18)—JUDGMENT IN UNDEFENDED ACTION.

A new trial will be granted, in the interests of justice, where the merits of a defence are shewn, and it appears that the action was undefended because of someone's mistake, misapprehension, or perhaps neglect, upon the payment of the costs of such undefended trial, and the costs of opposing the motion for the new trial, and on giving satisfactory security for the amount of any judgment that may be recovered against the defendant on a new trial. [Dickenson v. Fisher, 3 T.L.R. 459; and Holden v. Holden, 102 L.T. 398, followed.] Ordinarily a new trial will not be granted upon a judgment pronounced in an action not defended at the hearing merely on the ground of an inadvertent mistake or misunderstanding, through which the defendant did not attend and was not represented by counsel thereat.

Ferguson v. Swedish Canadian Lumber Co., 2 D.L.R. 557, 41 N.B.R. 217, 10 E.L.R. 386.

(§ III B—19)—FAILURE OF JURY TO FOLLOW INSTRUCTIONS.

Where an action for an alleged breach of the Factories Act and the Employers' Liability Act (B.C.) as well, was improperly submitted to the jury on the theory of a common law liability arising from an alleged breach of the former act, upon the jury returning a verdict of $2,880 for the plaintiff, and being asked what damages they would award if they were to decide the case under the Employers' Liability Act, they answered $2,880, a new trial will be granted if the jury have failed to answer questions submitted to them on the question of voluntary assumption of risk which would be material to the question of liability under the latter act.

Everett v. Schaake, 4 D.L.R. 147, 17 B.C.R. 271, 21 W.L.R. 525, 2 W.W.R. 572.

FAILURE OF JURY TO ANSWER QUESTIONS.

A new trial will be ordered where the jury has failed to answer a question of fact submitted to them, the answer to which is necessary to the proper determination of the case.

Gibbs v. Northern Construction Co. (B.C.), 43 D.L.R. 276, [1918] 3 W.W.R. 396.

C. SELECTION AND QUALIFICATION OF, OR INFLUENCE UPON, JURORS.

See Jury, III-75.

(§ III C—20)—DEFECTIVE PANEL—RELATIONSHIP OF JUROR.

The omission of a statutory duty to revise the jury list when constituting the panel, not amounting to packing, or the remote relationship to the plaintiff of a juror, who was in fact impartial, which facts were not challenged at the trial, and resulted in no prejudice to the defendant, are not grounds for setting the verdict aside or for a new trial.

Montreal Street R. v. Normandin, 33 D.L.R. 195, [1917] A.C. 170, 116 L.T. 162, affirming 48 Que. S.C. 21. [See also 26 Que. K.B. 467; 23 Que. K.B. 48.]

Disqualification of a juror because of affinity with the plaintiff, known to the defendant before the trial and not challanged, does not affect the verdict, and is no ground for a new trial.

Duffy v. Reid, 34 D.L.R. 289, 44 N.B.R. 407.

(§ III C—23)—JUROR INFLUENCED BY IMPROPER MOTIVES—DUTY OF JUDGE AND COUNCIL.

Whenever and as soon as it becomes known to a trial judge that a juror is actuated by improper motives, it is the duty of the judge, of his own motion, to protect the litigants from the results of such a scandal by then and there discharging the jury and summoning another, as would have to be done in the case where a juror is discovered to be insane or to have accepted a bribe. Where such course is not taken there should be a new trial. It is the duty of a trial judge, in negligence cases particularly, to submit questions to be answered by the jury, where the judge can properly do so. It is therefore the duty of counsel engaged in such a case to allow the questions to be put and the answers to be made, and they should not interfere with the judge in the exercise of that duty by pointing out or suggesting to the judge that the jury is not obliged to answer the questions. [Armishaw v. B.C. Elec. R. Co., 18 B.C.R. 152, 14 D.L.R. 393, followed.]

Howard v. B.C. Electric R. Co., [1918] 3 W.W.R. 409.

D. MISCONDUCT OR SEPARATION OF JURORS: COMPROMISE VERDICT.

(§ III D—26)—JUROR VISITING SCENE OF ACCIDENT.

Visiting the scene of the accident by a juror, during the course of trial, which does not influence nor bias his verdict is no ground for a new trial.

Atkinson v. C.P.R. Co., 25 D.L.R. 48, 8 S.L.R. 440, 33 W.L.R. 49, 9 W.W.R. 600.

DEFECTIVE PANEL — MISCONDUCT — REQUETE CIVILE.

In a trial by jury the irregularity in the panel cannot be objected to after the verdict and cannot form a ground for a requete civile when it is not proved that the party complaining has suffered prejudice. Nor can a new trial be abandoned

by requete civile for an act of misconduct on the part of a juror, nor for want of notice of action as the law requires.

Normandin v. Montreal Tramways Co., 48 Que. S.C. 21. [Affirmed, 33 D.L.R. 195, [1917] A. C. 170.]

JURY'S FINDINGS INCONSISTENT AND INSENSIBLE—MISTRIAL.

Miller v. Kaufman, 19 O.W.R. 881.

IV. New evidence; surprise.

Newly discovered evidence, see Sale, I B—5.

(§ IV—30)—TO IMPEACH WITNESS — EFFECT.

The discovery of new evidence to impeach the testimony of a witness examined on the former jury trial is not sufficient ground to grant a new trial.

Hagemeir v. C. P. R. Co., 20 D.L.R. 29, 25 Man. L.R. 1, 29 W.L.R. 743, 7 W.W.R. 406.

POWER OF JUDGE.

The power of a District Court judge to order a new trial is subject to the same limitations as those imposed upon a County Court judge in England. An order by a District Court judge for a new trial on the ground of the discovery of fresh evidence set aside, because it was not shewn that the new evidence proposed to be adduced would be conclusive and because the party seeking the new trial had not shewn reasonable diligence in endeavoring to secure the evidence.

Sklar v. Borys, 10 S.L.R. 359, [1917] 5 W.W.R. 188.

PETITION TO OPEN UP JUDGMENT — KING'S BENCH ACT, R. 664 —DISCOVERY OF FRESH EVIDENCE.

The discovery by a plaintiff, whose action has been dismissed at the trial, of further evidence by which he could only make out a stronger case and weaken the defense, if another trial were allowed, is not a sufficient ground even for ordering a new trial, much less for opening up the judgment upon petition under r. 664 of the King's Bench Act after the time for applying for a new trial has expired.

Lorne v. Arnold, 25 Man. L.R. 60. [See also 16 D.L.R. 882, 27 W.L.R. 744.]

PROCEEDING UPON INSUFFICIENT EVIDENCE — GROUNDS FOR GRANTING.

Where a party takes his chance of proceeding with the trial upon insufficient evidence, the court will be disinclined to grant a new trial, and will not exercise its discretion to re-open the judgment unless the justice of the case requires such course, the onus being upon the person applying for the new trial to shew that there is a substantial case to try.

Cline v. Goodhew, 7 W.W.R. 561.

(§ IV—31)—NEWLY DISCOVERED EVIDENCE —PROBABILITY OF DIFFERENT VERDICT, GOVERNING PRINCIPLE.

A new trial will not be granted in a damage action on the discovery of new evidence unless the proposed fresh evidence is such that there is a reasonable probability that, if brought before a jury, a different verdict to that in the former trial would be given. [Anderson v. Titmas, 36 L.T. 711, applied.]

Hagemeir v. C. P. R. Co., 20 D.L.R. 29, 25 Man. L.R. 1, 29 W.L.R. 743, 7 W.W.R. 406.

ACTION FOR BREACH OF PROMISE — PLAINTIFF'S MARRIAGE PENDING APPEAL.

The fact that the plaintiff in an action for breach of promise and seduction has married another since the trial, is not a ground for granting the defendant a new trial.

Collard v. Armstrong, 12 D.L.R. 368, 24 W.L.R. 742, 6 A.L.R. 187, 4 W.W.R. 879.

A new trial will not be granted on the ground of newly discovered evidence where it appears to the court that due diligence was not used, otherwise the evidence would have been discovered in time for use on the former trial. A new trial asked on the ground of newly discovered evidence will be refused where the court is of the opinion that, if such evidence were used on another trial, there is no reasonable probability that the result would be different.

McDonald v. McKay, 8 D.L.R. 78, 46 N.S.R. 448, 11 E.L.R. 590.

When new facts of an essential nature have been discovered by the defence in a criminal trial before verdict rendered, even after the judge has charged the jury and the jury has retired to deliberate, the jury should be recalled to hear this additional evidence, and a new trial will be granted where the jury has not been allowed to hear such additional evidence.

R. v. Manconi, 3 D.L.R. 112, 20 Can. Cr. Cas. 81.

A new trial will not be ordered where the new evidence proposed to be adduced might have been produced at the former trial.

Conrad v. Halifax Lumber Co., 41 D.L.R 218, 52 N.S.R. 250.

The discovery, after the trial, of new evidence which satisfies the court that if the party had had it at the trial he must have had a verdict, is sufficient ground for a new trial in order to do justice between the parties. The discovery of witnesses who can contradict those produced on the trial is no ground for a new trial.

Gibbons v. Hatfield, 43 D.L.R. 346, 46 N. B.R. 96.

An application for a new trial, on the ground of newly discovered evidence, will be refused where the applicant fails to shew that reasonable diligence had been exercised in searching for the evidence before the trial. [Young v. Kershaw, 81 L.T. 531, followed; Robinson v. Smith, [1915] 1 K.B. 711, distinguished.]

Riverside Lumber Co. v. Calgary Water Power Co., 28 D.L.R. 565, 34 W.L.R. 859, 10 W.W.R. 980, affirming 25 D.L.R. 818, 10 A.L.R. 128, 32 W.L.R. 858, 9 W.W.R. 471.

LEAVE TO ADDUCE NEW EVIDENCE.

Greer v. Armstrong, 24 O.W.R. 960.

WHEN REFUSED ON NEWLY DISCOVERED EVIDENCE.

The court will not grant a new trial on newly discovered evidence when such evidence is simply additional and cumulative to evidence already given.

Hanson v. Ross, 42 N.B.R. 650.

WHEN GRANTED—EVIDENCE OF PROBABLE CAUSE—AMENDMENT—COSTS.

Cromwell v. Rioux, 9 O.W.N. 210.

In this action plaintiff had succeeded in the court below, and the defendants had appealed, which appeal was dismissed, whereupon an appeal was taken to the Supreme Court of Canada. While this appeal was standing for hearing the defendants applied to the court en banc for a new trial on the grounds (a) that one of the defendants' solicitors on the record was financially interested with the plaintiff in the action, without defendants' knowledge, and (b) discovery of new evidence. It was held, by s. 25 of the Judicature Act, the court en banc has power to hear application for new trial, etc., provided that the judgment or order complained of has not been made as the judgment or decision of the court en banc, and the judgment in question having been affirmed by the court en banc has become the judgment of that court, which now had no jurisdiction to make any further order. That so far as this court was concerned the matter was res judicata and the defendants' only remedy, apart from the appeal pending, was by way of a new action on the ground that the first judgment was obtained by fraud.

Willoughby v. Saskatchewan Valley & Manitoba Land Co., 4 S.L.R. 454.

A petition in revocation of judgment will be received if plaintiff, who is suing on assumpsit, alleges that he has since discovered a witness who was with defendant's wife when she brought the goods sued for.

Menard v. Thibault, 14 Que. P.R. 384.

(§ IV—32)—SURPRISE.

A new trial will not be granted on the ground of surprise in that the principal witness for the defence had departed from the statements made to the defendant's solicitor before the trial as to the nature of his testimony, if the affidavits do not disclose the difference between the two statements, nor specify in detail what the witness had represented before the trial.

Yackman v. Johnston, 3 D.L.R. 191, 3 O.W.N. 624, 21 O.W.R. 86.

COMMITTAL ON PRELIMINARY ENQUIRY—CONVEYING TO GAOL IN ANOTHER DISTRICT—ORDER FOR NEW TRIAL.

The King v. Tetreault, 17 Can. Cr. Cas. 259.

NEW TRIAL—DISCOVERY OF NEW EVIDENCE—UNDERTAKING OF COUNSEL AT TRIAL NOT TO APPEAL—ABSENCE OF AUTHORITY.

Caswell v. Toronto R. Co., 24 O.L.R. 339, 19 O.W.R. 785.

DISCOVERY OF NEW EVIDENCE — NOT IN KNOWLEDGE OF PARTY AT TRIAL.

Hall v. Schiell, 19 O.W.R. 315.

V. Practise.

(§ V—36)—WAIVER OR LOSS OF RIGHTS TO NEW TRIAL.

Where there is even meagre evidence to support a finding of fact drawn by a jury in favour of the plaintiff, and that evidence is not contradicted, a new trial should not be directed if the defendants were not taken by surprise by its introduction, and could easily have met it if untrue, although the point was raised only in a general way by the pleadings.

Graham v. G.T.R. Co., 1 D.L.R. 554, 25 O. L.R. 429, 13 Can. Ry. Cas. 232, 20 O.W.R. 965.

(§ V—40)—MOTION BELOW BEFORE APPEAL—EXCESSIVE VERDICT.

An application under s. 86 of the County Court Act (R.S.N.S. 1900, c. 156), for a new trial or to set aside a jury's findings, must be made to the County Court Judge, and cannot in the first instance be made to the Supreme Court; it cannot be made, by way of appeal, concurrently with the motion below, and as long as the motion is pending there is no appeal. The principle, that an Appellant Court will grant a new trial where the verdict appears excessive and is not reduced by consent of the parties, has therefore no application. [Watt v. Watt, [1905] A.C. 115, distinguished.]

Waugh v. Shaw, 29 D.L.R. 742; Morrissey v. Halifax E.T. Co., 29 D.L.R. 755, 50 N. S.R. 176.

MOTIONS FOR, ON APPEAL—RELIEF AGAINST DEFAULT JUDGMENT—INSUFFICIENCY OF PROOF OF CLAIM.

Colleran v. Greer, 30 D.L.R. 519, 36 O.L. R. 267.

MOTION—JURISDICTION ON EX PARTE APPLICATION.

Wallace v. Lindsay, 13 D.L.R. 8, 23 Man. L.R. 553, 24 W.L.R. 698, 4 W.W.R. 979, reversing 9 D.L.R. 625, 23 Man. L.R. 553, 23 W.L.R. 165, 3 W.W.R. 829.

DIVISION COURTS—TRIAL OF PLAINT WITH JURY—MOTION FOR NONSUIT—POWER OF JUDGE TO ORDER NEW TRIAL WITHOUT APPLICATION THEREFOR — MANDAMUS.

Re Barr Registers v. Neal, 7 O.W.N. 726.

(§ V—45)—AFFIDAVIT OF WITNESS—MISTAKING TESTIMONY.

A new trial will not be granted on the affidavit of a witness merely that he made a mistake in his evidence on a material point and would correct it on another trial.

Hanson v. Ross, 42 N.B.R. 650.

(§ V—50)—Interference with jury.

On a motion for a new trial in an action of trespass involving the location of a line, the court will hear affidavits of jurors in answer to affidavits stating that one of the parties interfered with the jury while viewing the locus in quo.

Hanson v. Ross, 42 N.B.R. 650.

(§ V—60)—Granting new trial of some issues.

Where, in an action for several alleged slanders some of them should not have been submitted to the jury, and damages in the plaintiff's favour were not separately assessed, a new trial will be granted with reference to the remaining charges.

Holland v. Hall, 3 D.L.R. 722, 22 O.W.R. 209.

NONRESIDENT.

Jurisdiction over, see Courts; Aliens.

Security for costs, see Costs.

Service on, generally, see Writ and Process.

Attachment against, see Attachment; Garnishment.

Foreign corporations, see Companies.

Testimony of nonresidents, see Depositions; Discovery.

NOTARY.

Execution of deed.

Under the Quebec law a notary duly qualified to practise his profession is an official competent to give to his acts the seal of authenticity, but, in order to effect that, it is necessary: that the contracting parties appear before the notary; that they state in his presence what they wish inserted in the deed; that the deed containing the agreements and declarations of the parties should be read to them, and they should testify thereto in the presence of the notary by their signatures to such deed; that the notary after all these formalities have been complied with should place his own signature to the deed to testify that the agreements and declarations of the parties are properly stated therein.

Gagnon v. Hurtubise, 18 Que. P.R. 459.

As officers—Notice of action—Prescription.

Articles 3383-3389, R.S.Q. 1909, like those of the Imperial statute of 1750 (24 Geo. II. c. 44, ss. 7, 8), from which they are reproduced, have never had any other object than to protect magistrates, justices of the peace and officers of justice charged with the execution of the criminal laws against vexatious actions. Before C.V.P. 1867, no other than these officers had a right to one month's notice of action brought against him for damages by reason of acts done in the exercise of his public functions; the provisions were then extended to all public officers without discrimination. But the 6 months' prescription of the action provided by art. 3387, R.S.Q. 1909, remains as before, particularly with respect to magistrates, justices of the peace and officers of justice charged with the enforcement of the criminal law. Notaries have never been aimed at by the above mentioned provisions, which apply only to officers having judicial powers. Although notaries are, in the Province of Quebec, as in France, "public officers" (art. 4574, R.S.Q. 1909; art. ler L. 25 Ventôse an. IX), they can neither be considered as public functionaries nor as depositaries nor citizens charged with a public duty, nor as forming any other part of the public administration; their functions relate only to private interests and not to those of the state.

Chaput v. Crépeau, 52 Que. S.C. 443.

Compensation—Quantum meruit.

Contract between an owner of land and a notary, by which the owner promises to pay him a commission if he procure a loan for him, cannot be proved by oral testimony. In an action by a notary upon an account for professional services, the court, in the absence of proof of quantum meruit or custom, cannot award any other remuneration than that given by the tariff in force.

Lavimodière v. Gariépy, 51 Que. S.C. 471.

Liability — Hypothec — Payment — Good faith.

A notary, who holds a receipt for the payment of a hypothec signed in advance by the hypothecary creditor, becomes the agent of the latter to receive the amount due by the debtor, whether in money or by cheque to his order therefore another notary, who in good faith advised the debtor to pay the hypothecary debt by cheque to the order of such agent, commits no fault and is not liable if the notary runs off with the money and speculates with it.

Pepin v. Mousseau, 24 Rev. Leg. 176.

Notary in British Columbia—Affidavits for the province of Quebec.

A notary public in British Columbia has no authority to take the affidavits of a commissioner and clerk acting in a rogatory commission issued in the province of Quebec.

Lariviere v. Royal Trust Co., 12 Que. P.R. 404.

NOTES.

See Bills and Notes.

NOTICE.

Of trial, see Trial.

Of appeal, see Appeal.

Of nonpayment of note, see Bills and Notes.

Of personal injuries or damage to property; see Municipal Corporations; Highways.

Notice to maker of lien note on resale of goods.

Where the maker of a lien note, upon the retaking of the goods or chattels for which it was given, had actual notice of the resale thereof within the time required

by statute, personal service of notice thereof is unnecessary.

Braithwaite v. Bayham, 4 D.L.R. 498, 21 W.L.R. 859, 2 W.W.R. 778.

NOTICE OF SALE BY SHERIFF.

Legal notices of the sale of immovables at sheriff's sale should be posted up at the door of the parish church recognized by the civil law for this purpose, and failure so to do is a fatal irregularity.

Savoie-Guay Co. v. DesLauriers Rose v. Savoie-Guay Co., 7 D.L.R. 205, 14 Que. K.B. 560.

WHEN KNOWLEDGE ACQUIRED.

Even when a power of sale of property pledged is so framed as to relieve a purchaser from obligation to make inquiries, yet, if the circumstances which put in question the propriety of the sale are brought to his knowledge he thereby becomes charged with notice.

Bartram v. Grice, 4 D.L.R. 682, 3 O.W.N. 1296, 22 O.W.R. 191.

OF OFFICER OR AGENT OF CORPORATION.

A municipality is bound to take every reasonable means, through its overseeing officers and otherwise, to learn the actual conditions of the streets which, by statute, it is under a duty to repair, and cannot successfully set up want of knowledge as an excuse for nonrepair if the knowledge might have been obtained by the exercise of reasonable precautionary measures.

Vancouver v. Cummings, 2 D.L.R. 253, 22 W.L.R. 164, 46 Can. S.C.R. 457, 2 W.W.R. 66.

NOTICE TO BANK OR LOAN COMPANY.

Defendant A.B. purchased land under an agreement for sale. Being financially involved, and executions having been issued against him, he decided to raise a loan upon the land, and for that purpose procured the conveyance of the land from the vendor to his wife, defendant J.B. It did not appear that there was any consideration given by J.B. therefor. Defendants then applied for a loan, and executed a mortgage to the plaintiff. After the execution of the mortgage the sheriff seized the goods of defendant A.B., and to secure the withdrawal of the seizure defendants gave the sheriff an order on the proceeds of the loan from plaintiff company, which the sheriff accepted and withdrew from possession. This order the company paid, and the money so paid constituted the only money advanced on the mortgage. The same day the order was given the defendants attempted to revoke it by notice given to the company's solicitors, who had then reported the loan and completed their duties in connection therewith. This notice was given before the money was paid over. In an action for foreclosure, defendants alleged (1) that the company had paid the money in question after notice revoking the order, and (2) that the defendant J.B. executed the mortgage for her husband's debt and without independent advice. It was held, that even if the defendants could have revoked the order given, their notice intended to have that effect was insufficient, in that the solicitors upon whom the notice was served had completed their duties and were no longer agents of the company for the purpose of the loan. (2) That under the circumstances of the case the court should not interfere on the ground that the wife had executed the mortgage without independent advice.

Great West Permanent Loan Co. v. Badenoch, 4 S.L.R. 241.

CONVEYANCE BY TRUSTEE—ONUS OF PROOF AS TO CONSIDERATION — LIABILITY OF TRANSFEREE TO CESTUI QUE TRUST.

Coventry v. Annable, 4 S.L.R. 175, 17 W.L.R. 577.

NOVATION.

PERSONAL OBLIGATION OF COMPANY'S AGENT FOR COMPANY'S DEBT.

When an agent, acting on behalf of a company, guarantees a contract made on behalf of such company and gives his own promissory notes to accommodate the third party with whom the contract is made, such giving of notes does not constitute novation, whereby a new debt and a new debtor would be substituted to a previous debt and a previous debtor.

French Gas Saving Co. v. Desbrats Advertising Agency, 1 D.L.R. 136.

WHAT CONSTITUTES — WHEN INFERRED — TAKING OBLIGATION OF THIRD PERSON—AGREEMENT TO SUBROGATE ON PAYMENT OF DEBT.

Where the defendant who purchased property from the plaintiff's grantee, on it being attached by the plaintiff because sold by the former in violation of his agreement, indemnified the plaintiff to the extent of his claim against his grantee, the former agreeing to subrogate the defendant to his claim against his grantee on the payment of such indebtedness, and the defendant failed to make such payment, the transaction between the plaintiff and the defendant did not amount to a novation so as to release the plaintiff's grantee from liability, since the facts did not shew an intention to effect a novation.

Berman v. Gertler, 13 D.L.R. 778, 44 Que. S.C. 368.

WHAT AMOUNTS TO—PAYMENT OF NOTE PART IN CASH AND RENEWAL NOTE FOR BALANCE.

The payment of a note partly by cash and partly by a renewal note for the balance does not operate novation of the original note, and, in the event of nonpayment of the renewal note, suit is properly brought on the original note.

Hall v. Lockwell, 9 D.L.R. 144.

LOAN—NEW DEBTOR—ACCEPTANCE.

In order to establish novation as affecting the liability on a loan, the evidence must shew acceptance of the liability by the third party, and that the latter had been accepted

by the creditor as his debtor in lieu of the actual borrower.

Churgin v. Guttman, 27 D.L.R. 107, 34 W.L.R. 253, 11 A.L.R. 267, 10 W.W.R. 239.

DELEGATION—EXTENSION AND DISCHARGE.

When a delegatee accepts the delegate in the place and stead of the delegator, in such a way as to discharge the latter from the obligation, there is novation, but the double intention of the delegatee to accept the delegate and to liberate the delegator must be manifest. This manifestation may, moreover, either be expressed or tacit, but, if tacit, there must be no room for doubt.

Reeves v. Piche, 46 Que. S.C. 189.

SUBPURCHASER.

When, in a contract of sale, the purchaser covenants to carry out an existing agreement between the seller and a third party, and to defend at his own expense any suit that may be taken by the latter for damages for breach of contract, or to enforce specific performance, the relation of debtor and creditor arises between such purchaser and third party. The latter has the right to bring, directly against the former, any action he might bring against the seller, his original obligor.

Dawes v. Ward, 43 Que. S.C. 456.

RENEWAL NOTE.

The mere acceptance of a renewal note is but a conditional payment and is not a novation of the original note, especially so when the holder retains such original note. A cancellation made unintentionally or under a mistake or without the authority of the holder is inoperative. The holder has the option to proceed either on the original note and tendering the renewal note, or on the renewal note itself.

Bank of B.N.A. v. Hart, 18 Rev. de Jur. 334.

RIGHT OF UNPAID VENDOR TO REVENDICATE—ACCEPTANCE OF NOTES FOR PRICE BY THE VENDOR.

Tremblay v. Quinn, 39 Que. S.C. 215.

SUBSTITUTION OF CONTRACTUAL FOR DELICTUAL OBLIGATION.

McKinstry v. Irvine, 39 Que. S.C. 426.

SETTLEMENT BETWEEN CREDITOR AND DEBTOR BY PART PAYMENT AND BY NOTES.

Sabbath v. Baker, 41 Que. S.C. 75.

DRAFT—ASSIGNMENT BY ACCEPTOR—PAYMENT OF DIVIDEND.

Saint Arnaud v. Guilbault, 39 Que. S.C. 481.

NUISANCE.

I. WHAT ARE NUISANCES.
II. REMEDIES.
III. CRIMINAL LIABILITY.

Noise and odours from factory, see Landlord and Tenant, III A—40.

Illegal execution of work under statutory power, highway, see Expropriation, III E—186.

Defective electric light system, use of highways, see Municipal Corporations, II G—195.

Annotation.

Unreasonable user of highway as nuisance: 31 D.L.R. 370.

I. What are nuisances.

(§ I—1)—STONECUTTING YARD.

In determining whether the business of a stone cutter is a nuisance or not the court should take into consideration the character of the neighbourhood to ascertain the degree of comfort to be expected and whether the premises are being reasonably used or not.

Oakley v. Webb, 33 D.L.R. 35, 38 O.L.R. 151.

VAPOUR AND DUST FROM SMELTER—SPECIAL INJURY TO PLAINTIFF—LOSS OF ANIMAL.

Cairns v. Canada Refining & Smelting Co. 5 O.W.N. 423.

BLACKSMITH SHOP — INJURY TO NEIGHBOUR'S PROPERTY — LOCAL STANDARD OF NEIGHBOURHOOD — EVIDENCE — INJUNCTION — DAMAGES — COUNTERCLAIM — "BOYCOTTING."

Beamish v. Glenn, 9 O.W.N. 199.

SMELTER — EMISSION OF NOXIOUS VAPOURS — DESTRUCTION OF BEES IN NEIGHBOURHOOD — EVIDENCE — FAILURE TO CONNECT ALLEGED CAUSE WITH EFFECT — ONUS — ELEMENTS OF DOUBT.

Newhouse v. Coniagas Reduction Co., 12 O.W.N. 136.

INJURY TO CROPS AND SOIL BY VAPOURS FROM SMELTING WORKS — EVIDENCE — DAMAGES IN LIEU OF INJUNCTION — JUDICATURE ACT, R.S.O. 1897, c. 51, s. 58 (10) — ASSESSMENT OF DAMAGES — COSTS.

Black v. Canadian Copper Co., 12 O.W.N. 243. [See 13 O.W.N. 255.]

SMOKE AND ODOUR — INJUNCTION AND DAMAGES — OPPORTUNITY TO ABATE NUISANCE.

Stevenson v. Colvin, 13 O.W.N. 426.

(§ I—2)—NUISANCE — OF MUNICIPALITY — NOISE AND VIBRATION FROM OPERATION OF PUMPS BY ELECTRIC POWER — INJURY TO ENJOYMENT OF NEIGHBOURING PROPERTY — STATUTORY AUTHORITY — INJUNCTION — DAMAGES.

The defendant corporation was empowered by 35 Vict. c. 79 and 41 Vict. c. 41 to operate a pumping plant and machinery for its waterworks. The machinery was at first operated by steam power, but afterwards electrical power was substituted:—Held, upon the evidence, that the noise and vibration occasioned in the operation of the pumps by electrical power constituted a nuisance, and seriously interfered with the comfort of the plaintiffs in the enjoyment of their house situate close to the pumping station. And:—held, that, as it was not shewn that the machinery could not be operated unless driven by electrical power, and as the use of electrically-driven ma-

chinery was not expressly authorized by the statutes, the nuisance was not justified by statutory authority. Semble, that, if it had been shewn that the machinery could not be operated unless driven by electrical power, that mode of operation would be regarded as authorized by the statutes; and quære, whether the same result would not follow if it were commercially impracticable to use any other power. [Jones v. Festiniog R. Co., L.R. 3 Q.B. 733; and West v. Bristol Tramways Co., [1908] 2 K.B. 14, applied.]:—Held, also, a proper case for awarding damages in lieu of an injunction; but the damages should be limited to the injury suffered by the use of electrically-driven machinery beyond that which would have been sustained if steam power had been used. Judgment of Middleton, J., varied.

Chadwick v. Toronto, 32 O.L.R. 111.

(§ I—6)—Munition works — Injunction — Temporary suspension — Damages.

Cotton v. Ontario Motor Co., 11 O.W.N. 100.

Noise and noxious vapours — Damages — Injunction — Reference—Costs.

Lauzon v. Dominion Stamping Co., 8 O.W.N. 329.

Odour from tobacco factory—Interference with enjoyment of neighbouring premises—Reasonable user.

Appleby v. Erie Tobacco Co., 22 O.L.R. 533, 17 O.W.R. 931.

Public convenience — City corporation — Action — Offensive odours — Absence of special or substantial injury.

British Canadian Securities v. Victoria, 19 W.L.R. 242, 16 B.C.R. 441.

(§ I—9)—Vapour and dust from smelter — Poisonous deposit — Special injury to plaintiff — Bringing injurious substance on land — Right of action — Damages — Evidence — Injunction.

Cairns v. Canada Refining & Smelting Co., 6 O.W.N. 562.

Injury to hotel property by operation of pulp mill in same neighbourhood — Discharge of vapours — Rumbling of machinery and other noise from mill — Noise and smoke from shunting trains — Depreciation in value of hotel property — Cause of — Onus of proof — Failure to discharge — Deposit of soot and carbon from mill on hotel property — Trespass — Invasion of rights — — Damages — Costs.

Young v. Fort Frances Pulp & Paper Co., 17 O.W.N. 6.

(§ I—13)—Hospital or pest-house.

Where it appeared that the defendant municipality established and maintained within its limits a hospital for the treatment of contagious diseases and especially small-pox patients; that the premises are unsuited for such a purpose and their establishment and maintenance are in contravention of law, and that it was in close proximity to dwelling-houses of plaintiff, access to which was interfered with, if not prevented, by barriers erected across the road and put up by the hospital, such hospital is a nuisance and its further use for the purposes indicated should be enjoined. [Crawford v. Protestant Hospital for the Insane, M.L.R. 7 Q.B. 57, distinguished.] Where, in an action for an injunction against a municipality for the further use and maintenance of a building as a small-pox hospital or for contagious diseases, it is claimed by the city that the said building is an emergency hospital, but the weight of evidence is that it was intended for and was to be used as a permanent hospital for emergency cases, the said building must be established in conformity to s. 43 of the rules of the Board of Health of the Province of Quebec, and the facts that the said Board approved of the hospital has no bearing where the provision of s. 43 as to a space of 40 feet between the pavilions of the patients and the fence or border of the ground has not been complied with, the Board having no right to dispense with compliance with s. 43.

MacIntosh v. Westmount, 8 D.L.R. 820.

(§ I—15)—Dwelling in industrial district — Reciprocal obligations.

Bricault v. Masson, 40 Que. S.C. 346.

(§ I—20)—Lease of part of building — Annoyance from machinery in other part of building — Noise and vibration — Locality of premises.

Lyon v. Borland, 20 O.W.R. 321.

(§ I—22a)—Unprotected well or pit.

The owner of property let to a tenant without any retention of control or right of entry by the owner or any undertaking by him to keep the premises in repair is not responsible for the loss of a horse from falling into an unprotected well on the premises while being pastured under an agreement between the tenant and the owner of the horse. [Cavalier v. Pope, [1906] A.C. 428, and Lane v. Cox, [1897] 1 Q.B. 415, applied.]

Love v. Machray, 1 D.L.R. 674, 20 W.L.R. 505, 22 Man. L.R. 52, 1 W.W.R. 925.

(§ I—24)—Blasting in quarry — Reckless use of explosives — Limited injunction — Acts of servants.

Etobicoke v. Ontario Brick Paving Co., 25 O.W.R. 327.

II. Remedies.

(§ II—30)—Injunction — Issue directed to be tried.

Toronto Local Board of Health v. Swift Canadian Co., 11 O.W.N. 318.

Peculiar damage — Abatement since trial of action — Damages — Costs.

Reynolds v. Windsor, 9 O.W.N. 6.

(§ II—31)—Obstruction of street — Peculiar damage to occupant of shop — Loss of business — Assessment of damages.

Lord v. Sandwich, Windsor & Amherstburg R. Co., 8 O.W.N. 194.

(§ II—35)—Dumping refuse near vacant land in city — Liability of city corporation — Opportunity to abate nuisance — Delay of judgment.

Reynolds v. Windsor, 8 O.W.N. 234.

(§ II—40)—Indictments for public nuisance.

The effect of s. 223 Cr. Code is to leave indictment as a method of procedure for trying the general question whether a common nuisance to the detriment of the property or comfort of the public generally, though not affecting life, safety or health, has been committed; but where life, safety or health is not involved (s. 222) the conviction on such indictment is not for a crime but for a civil wrong only, and the consequential proceedings to which s. 223 refers are not for the punishment of the person convicted but for the abatement or remedy of the mischief done.

Toronto R. Co. v. The King, 38 D.L.R. 557, 23 Can. Ry. Cas. 183, [1917] A.C. 630, 29 Can. Cr. Cas. 29, reversing 25 D.L.R. 586, 25 Can. Cr. Cas. 183, 34 O.L.R. 589.

Noise and vibration from operation of electric pumps — Evidence — Depreciation in value of neighbouring house — Acts authorizing municipal corporation to construct waterworks not a justification of nuisance — Necessity for pumping water for municipal purposes — Damages in lieu of injunction.

Chadwick v. Toronto, 6 O.W.N. 167.

Obstruction of lane — Injunction — Stay of operation to enable defendants to abate nuisance — Damages — Costs.

Fitzgerald v. Chapman, 5 O.W.N. 888.

Noise and vibration — Damages — Injunction — Judicature Act, s. 18 — Stay of operation of injunction — Opportunity to abate nuisance.

Bornett v. Ostler File Co., 7 O.W.N. 474.

Factory — Noise and vibration from use of steam-hammers — Interference with enjoyment of neighbouring dwelling-houses — Injunction — Restriction — Stay of operation to permit of abatement of nuisance — Damages — 14 separate actions — R. 66 — Costs.

Gagnon v. Dominion Stamping Co., 7 O.W.N. 530.

Limestone, dust, smoke, etc., escaping — Nuisance — Injunction.

Montreuil v. Ontario Asphalt Block Paving Co., 19 O.W.R. 942.

(§ II—41)—Mining tailings — Abatement — Notice.

The washing down of tailings of mining property on another's lands constitutes a nuisance by commission and also of emergency, which justifies the aggrieved party to trespass upon the wrongdoer's land, without any previous notice or request, for the purpose of abating it. [Lemmon v. Webb, [1895] A.C. 1, 64 L.J. Ch. 205; Raikes v. Townsend, 2 Smith 9, followed; McCurdy v. Norrie, 6 D.L.R. 134, applied.]

Sutties v. Cantin, 24 D.L.R. 1, 32 W.L.R. 101, 22 B.C.R. 139, 8 W.W.R. 1293.

(§ II—43)—Blacksmith shop — Odours and noise — Injunction.

Permission by the municipal authority to erect a blacksmith shop does not authorize the owner to commit a nuisance therewith. He may be enjoined from operating it in such a manner as to cause a nuisance, by reason of noise and offensive odours, to the occupant of an adjoining dwelling-house.

Beamish v. Glenn, 28 D.L.R. 702, 36 O.L.R. 10.

Anticipated or threatened nuisance.

A public convenience is not per se a nuisance, and in any event it could not be considered so to the occupants of a building not yet erected, and therefore, the action was premature. An application at the trial to add the Attorney-General was refused as having been made too late, without his consent, and without its being shewn that the public interest would otherwise suffer.

British Canadian Securities v. Victoria, 16 B.C.R. 441, 19 W.L.R. 242.

(§ II—44)—Abatement of — Provincial Board of Health Act (Ont.) — Jurisdiction of judge — Evidence — Procedure.

The Provincial Board of Health having determined, as authorized under s. 6 of the Public Health Act, R.S.O. (1914, c. 218) that a nuisance exists, and recommended the removal or abatement of the nuisance the local board may apply to a judge under s. 81, subs. 2, for an order for the removal or abatement of the nuisance. On the application the judge may admit further evidence for the purpose of determining whether under all the circumstances an order for abatement should issue and if so on what terms; but this provision does not mean that he may, on further evidence, set aside the finding of the Provincial Board. Affidavits in support of the finding of the Board are not admissible, and the judge is not justified in attaching any weight to affidavits challenging the correctness of the finding of the Board of the nuisance.

Re Waterloo Local Board of Health; Campbell's Case, 46 D.L.R. 387, 44 O.L.R. 338.

OFFENSIVE ODOURS — EVIDENCE — PROOF OF EXISTENCE OF NUISANCE — ACTION FOR INJUNCTION AND DAMAGES — DEFENCES — PRESCRIPTION — VACANT LAND — IMPLIED GRANT OF EASEMENT — RIGHT TO OPERATE FACTORY WITH RENDERING PLANT — REGISTRY LAWS — QUANTUM OF DAMAGES — APPEAL — LEAVE TO ADDUCE FURTHER EVIDENCE — TERMS.

Danforth Glebe Estates v. Harris, 16 O.W.N. 41, affirming 12 O.W.N. 189.

(§ II—48)—BY A PRIVATE INDIVIDUAL.

The law only justifies the abatement of a nuisance by a private individual where the right can be exercised without disturbing the public peace; and, in an action, where the plaintiff, a riparian owner, with teams and men in force, enters the lands of a neighbour (the defendant), and proceeds to cut down and remove a wing-dam thereon, on the ground that it constitutes a nuisance causing damage to the plaintiff's lands; and where the defendant, while resisting this action, was assaulted and beaten severely by the plaintiff, it appearing that, while the defendant did commit the first assault in defence of the wing-dam, the plaintiff and his associates retaliated, throwing him down and otherwise maltreating him; there is no justification for the excessive beating, and the plaintiff is liable in damages.

Lorraine v. Norrie, 6 D.L.R. 122, 46 N.S.R. 177.

(§ II—51)—PRESCRIPTION.

The plaintiff's fences enclosed part of the highway abutting on his land. The defendant tore down the fences, although his right of passage along the highway was not really interfered with. Held, that the plaintiff was in possession, and could maintain trespass; and the defendant, as a private individual, had no right to abate the nuisance caused by the obstruction of the highway. Injunction and damages awarded.

Waddell v. Richardson, 17 B.C.R. 19.

BUILDING BY-LAW — DANGEROUS CONSTRUCTIONS — ABATEMENT OF NUISANCE — CONDITION PRECEDENT — NOTICE — ORDER TO REPAIR — DEMOLITION OF STRUCTURE.

Riopelle v. Montreal, 44 Can. S.C.R. 579.

III. Criminal liability.

ENDANGERING PUBLIC COMFORT — OVERCROWDED STREET CARS.

The franchise granted to a street railway company by agreement between it and a municipality, confirmed by the provincial legislature, to operate street cars on the public streets, does not make the overcrowding of the street cars a public nuisance within Cr. Code s. 223, where the lives, safety or health of the public are not endangered, and where no injury is occasioned to the person of any individual (s. 222); and a demurrer to an indictment in so far as it charged same should have been allowed.

Toronto R. Co. v. The King, 38 D.L.R. 537, [1917] A.C. 630, 29 Can. Cr. Cas. 29, 23 Can. Ry. Cas. 183, reversing 25 D.L.R. 586, 25 Can. Cr. Cas. 183, 34 O.L.R. 589.

INDICTMENT FOR COMMON NUISANCE — FENDERS, GUARDS, AND APPLIANCES — OVERCROWDING CARS — DUTY TO PASSENGERS.

R. v. Toronto R. Co., 23 O.L.R. 186, 18 Can. Cr. Cas. 417, 18 O.W.R. 104.

CARRYING EXPLOSIVES WITHOUT PROPER CARE — RAILWAY CARRYING DYNAMITE — COMMON NUISANCE.

The King v. Michigan Central R. Co., 17 Can. Cr. Cas. 483.

NULLUM TEMPUS ACT.

See Adverse Possession, II—60.

OATH.

See also Affidavits; Perjury.

Annotation.

Authority to administer extra-judicial oath: 28 D.L.R. 122.

(§ I—1)—ADMINISTERING TO WITNESS — BEFORE COURT — CLERK OF COURT — IRREGULAR APPOINTMENT.

As every court or judge has power, under s. 13 of the Evidence Act, R.S.C. 1906, c. 145, to administer oaths, the question of the regularity of the appointment of the person acting as clerk as affecting his power to administer the oath in open court to a witness in a proceeding in court before a judge, is immaterial, as in such case the oath may be said to have been administered by the court itself.

R. v. Wilson, 15 D.L.R. 168, 6 S.L.R. 348, 26 W.L.R. 148, 5 W.W.R. 620.

SWEARING WITHOUT KISSING THE BOOK, LEGALITY OF — JUDICIAL DISCRETION — LACK OF FORMAL REQUISITES.

The swearing of an affidavit without touching or kissing the Book but by the uplifted hand is sufficient if the witness considers the latter form binding on his conscience; and, semble, there is a judicial discretion under the Evidence Act (Man.) s. 56, to receive an affidavit notwithstanding the lack of formal requisites.

Re Lakeside Provincial Election; Tidsbury v. Garland, 20 D.L.R. 286, 29 W.L.R. 628, 7 W.W.R. 340.

AUTHORITY OF NOTARY TO TAKE.

A notary public of the State of New York may, under art. 30 C.C.P., administer oaths to depositions taken under a commission rogatoire for use in the Province of Quebec. [Shwob v. Baker, 5 Que. P.R. 441, followed.]

Lehr v. Peterson, 5 D.L.R. 182.

CRIMINAL LAW — MAGISTRATES — EVIDENCE — SWEARING CHILD OF TENDER YEARS — DISCRETION IN MAGISTRATE.

It is for the magistrate to decide whether or not a child of tender years sufficiently understands the nature of an oath to permit of the evidence being given under oath. It is wise and customary for the magistrate to satisfy himself by questioning the witness.

R. v. Harris, [1919] 3 W.W.R. 820.

COMMISSIONER TO TAKE AFFIDAVITS.

Dionne v. Gilbert, 39 Que. S.C. 374.

(§ I—2)—FORM OF SWEARING HINDOO — INTERPRETER.

Where a Hindoo witness in a criminal case is sworn through an interpreter by solemnly promising with uplifted hand to tell the truth, the whole truth, and nothing but the truth, and he assents to such ceremony as the appropriate and usual one in swearing men of his nationality and class with intent that his evidence should be received and acted upon as evidence given under oath, and thereupon answers affirmatively an interrogation whether the "oath" he had taken was binding upon his conscience, he must be taken to have invoked his deity by such ceremony even though it does not appear that express words of invocation were uttered in connection with his solemn promise to tell the truth, and such witness is properly convicted of perjury if his testimony proves false.

Shajoo Ram v. The King, 26 D.L.R. 267, 25 Can. Cr. Cas. 69, 51 Can. S.C.R. 392, 8 W.W.R. 613, affirming 19 D.L.R. 313, 23 Can. Cr. Cas. 334, 20 B.C.R. 581, 30 W.L.R. 65.

AFFIDAVIT — IRREGULARITY.

Jubinville v. Kee Foo, 39 Que. S.C. 478.

(§ I—3)—AFFIDAVIT — COMMISSIONER'S AUTHORITY — OATH EX JURIS — COMMISSIONER OUTSIDE OF JURISDICTION.

An affidavit taken outside of Saskatchewan for use in that province is defective where it appears that the affidavit was taken by "a commissioner," but fails to shew that the commissioner was authorized to take oaths outside of Saskatchewan for use in Saskatchewan, under Evidence Act, R.S.S. 1909, c. 60, s. 40. A commissioner for taking affidavits for use in Ontario is not an official for taking affidavits for use in the courts of Saskatchewan, he not being one of the functionaries designated in the Evidence Act, R.S.S. 1909, c. 60, s. 40, in view of which Sask. practice r. 413 is to be interpreted when construing the phrase "person lawfully authorized to administer oaths in such country, etc.," contained therein.

O'Neil v. O'Neil, 11 D.L.R. 440, 24 W.L.R. 84, 4 W.W.R. 478.

POWER OF COMMISSIONERS.

Where by the terms of the Municipal Elections Act (B.C.) the declaration of qualification of voters is to be made before a "commissioner for taking affidavits in the Supreme Court," a declaration of qualification made before a commissioner appointed under the provisions of the Provincial Elections Act (B.C.) is of no legal effect; the powers of the commissioners last referred to being restricted to those conferred upon him by the Act under which he was appointed.

Re Municipal Elections Act, 2 D.L.R. 349, 19 W.L.R. 830, 17 B.C.R. 31, 1 W.W.R. 531.

(§ I—5)—STATUTORY DECLARATIONS.

Where the law makes the taking of a statutory declaration or other solemn declaration a condition to the recovery of a demand or to the exercise of a legal right, the declaration so taken is one "required by law" within Cr. Code, s. 175 (false extra-judicial declarations).

R. v. Nier, 28 D.L.R. 373, 25 Can. Cr. Cas. 241, 9 A.L.R. 353, 33 W.L.R. 180, 9 W.W.R. 838.

SOLEMN DECLARATION — BELIEF.

A witness who declares that he has no belief in future reward and punishment will not be allowed to substitute for an oath a solemn declaration under the Evidence Act (Can.).

Corbeil v. Maigret, 18 Que. P.R. 430.

OBSCENITY.

Arrest for uttering obscene language, see Arrest.

Depositing obscene matter in Postoffice, see Postoffice.

By-law punishing use of obscene language, see Municipal Corporations.

Question for jury as to, see Trial.

OFFENCE — CIRCULATING OBSCENE PRINTED MATTER — SUBSERVIENCE OF PUBLIC WELFARE — EXCESS IN STATEMENT.

Even if the circulation among the clergymen of a city of printed matter containing grossly disgusting details of an obscene character, describing a theatrical performance, was to serve the public good by arousing public sentiment leading to the suppression of performances of such character, the person who circulates it will be liable to prosecution under the Cr. Code for any excess in the publication beyond what the public welfare demanded. No public good, sufficient to absolve a person from liability under s. 207 of the Code, as amended, for circulating obscene printed matter tending to corrupt public morals, is shewn from the facts that the purpose of the circulation among the clergymen of a city of printed matter containing grossly disgusting details of an obscene character, describing a theatrical performance, was to arouse public sentiment leading to the suppression of performances of such character.

R. v. St. Clair, 12 D.L.R. 710, 28 O.L.R. 271, 21 Can. Cr. Cas. 350.

SELLING OR EXPOSING FOR SALE OBSCENE BOOKS.

The proprietor of a book store cannot be convicted, under s. 207 of the Cr. Code, of knowingly selling or exposing for sale an obscene book when he had no knowledge of the contents of the books, a few copies of which had been, without his knowledge, purchased by a clerk and kept among stock in a cellar to which the public was not admitted. In order to warrant a conviction under s. 207, as amended by 8 & 9 Edw. VII. c. 9, for selling or exposing for sale an obscene book, it must be proved that the accused was aware of its obscene character and that it was sold or exposed for sale with his knowledge.

R. v. Britnell, 4 D.L.R. 56, 26 O.L.R. 136, 20 Can. Cr. Cas. 85, 21 O.W.R. 800.

OBSCENE LANGUAGE — MUNICIPAL BY-LAW PROHIBITING.

Obscenity of language is such indecency as tends to violation of law and to the corruption of morals; both of these elements are essential to a conviction under a municipal by-law for using obscene language.

R. v. Ballentine, 22 Can. Cr. Cas. 385.

OBSTRUCTING JUSTICE.

Annotation.

Summary proceedings for obstructing peace officer: 27 D.L.R. 46.

RESISTING OFFICER — REFUSING PERMISSION TO SEARCH PREMISES.

The refusal of permission to a liquor license inspector to search a house for liquor supposed to be kept in violation of law, although unaccompanied with threats or physical violence, is, under c. 22, s. 114 (2) of the Liquor License Act, C.S.N.B. 1903, an unlawful obstruction of an officer in the discharge of his duty.

The King v. Matheson, Ex parte Guimond, 12 D.L.R. 480, 21 Can. Cr. Cas. 312, 13 E.L.R. 58, 41 N.B.R. 581.

TAMPERING WITH WITNESSES — COMMISSIONER TAKING EVIDENCE.

To warrant a conviction under s. 180 of the Cr. Code, upon a charge that the accused did unlawfully attempt to dissuade certain witnesses from giving evidence before members of a Royal Commission appointed to investigate a certain charge, where the facts merely established an attempt to dissuade the witnesses from giving evidence before a special commissioner appointed by said Royal Commissioners to take such evidence, it must be shewn that the Royal Commissioners were acting within the scope of their commission in appointing such special commissioner.

R. v. Rosen, 33 D.L.R. 715, 27 Can. Cr. Cas. 259, 9 S.L.R. 401, [1917] 1 W.W.R. 582.

SUMMARY CONVICTION OR SUMMARY TRIAL — JURISDICTION.

The offence of obstructing a peace officer in the execution of his duty (Cr. Code, s. 169), is one which may be prosecuted under the "summary convictions" procedure of Part XV. of the Code, or under the "summary trials" procedure of Part XVI., if taken before a magistrate having jurisdiction under both procedures; if the procedure of Part XVI. is followed his jurisdiction will be subject to the consent provided for in Cr. Code, s. 778, in a province where consent is not dispensed with; but if the procedure of Part XV. (summary convictions), is followed throughout, the magistrate has jurisdiction to try the case and impose the punishment applicable to a "summary conviction," without asking the consent of the accused under s. 778. [R. v. Crossen, 3 Can. Cr. Cas. 152, R. v. Carmichael, 7 Can. Cr. Cas. 167, and R. v. Van Koolberger, 16 Can. Cr. Cas. 228, dissented from.

R. v. Folkins; Ex parte McAdam, 27 D.L.R. 32, 25 Can. Cr. Cas. 365, 43 N.B.R. 538.

PERSON EMPLOYED BY BAILIFF TO LEVY UNDER EXECUTION.

Where the officer charged with the execution of process of a civil court has power to employ a deputy or subordinate officer to act for him in making a seizure of goods, such deputy or subordinate officer is within the protection of Cr. Code s. 169, subs. (a), making it an offence to resist or wilfully obstruct him in the execution of his duty, the person so employed being within the statutory definition of "peace officer" given by s. 3, subs. (26), as well as a person acting "in the lawful execution of process" within s. 169, subs. (b).

R. v. Polsky, 31 D.L.R. 294, 27 Can. Cr. Cas. 319, 27 Man. L.R. 271, [1917] 1 W.W.R. 451.

SEIZURE—RESISTANCE—WARRANT.

A person in possession of property is not bound to relinquish it to one who assumes to act under legal process, but who has not clothed himself with proper and sufficient authority to rightfully take possession of the property in question. If the person in possession obstructs such officer in attempting a seizure of the property he is not thereby guilty of a breach of s. 169 Cr. Code.

R. v. La Vesque, 42 D.L.R. 120, 45 N.B. R. 522, 30 Can. Cr. Cas. 190.

SUMMARY CONVICTION OR SUMMARY TRIAL.

The methods of procedure by summary conviction (Part XV. Cr. Code) and by summary trials (Part XVI.) for the offence of obstructing a peace officer (s. 169) are alternative methods, and where a summary conviction is sought and the procedure of Part XV. followed, the defendant need not be asked for his consent to summary trial under s. 778 even where the magis-

trate is one having jurisdiction under s. 773.

R. v. West (No. 2) 25 Can. Cr. Cas. 145, 35 O.L.R. 95, affirming 24 Can. Cr. Cas. 249.

"WILFULLY OBSTRUCTING" POLICE CONSTABLE.

R. v. McDonald, 16 B.C.R. 191, 18 Can. Cr. Cas. 251.

OBSTRUCTING A PEACE OFFICER — SUMMARY CONVICTION — INDICTABLE OFFENCE — PRACTICE — HABEAS CORPUS — SUMMARY CONVICTIONS ACT, SS. 169, 713, 774 AND 778.

R. v. Tanner, 10 E.L.R. 264.

OFFER AND ACCEPTANCE.

See Contracts.

OFFICERS.

I. SELECTION; INCUMBENCY; REMOVAL.
- A. In general; eligibility.
- B. Appointment and election.
- C. Qualifying; induction; vacancy.
- D. Term; holding over.
- E. Resignation or deprivation of office.
- F. Contest of title.

II. RIGHTS; POWERS; DUTIES; LIABILITIES.
- A. Rights, powers and duties generally.
- B. Compensation and fees.
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III. OFFICERS DE FACTO.

City solicitor as officer, see Discovery, IV—31.

Disqualifications, owing taxes, see Elections, III—80.

Municipal liability for negligence of officers, see Municipal Corporations, II G—222.

Public Authorities Protection Act, security for costs, see Costs, I—14.

Liability of sheriff for negligence of deputies, see Sheriff, I—3.

I. Selection; incumbency; removal.

A. IN GENERAL; ELIGIBILITY.

(§ I A—5)—PUBLIC OFFICER — INSPECTOR OF BUTTER—NOTICE OF ACTION—C.C.P. 88.

An inspector of butter, named by the Dominion Government, is a public officer. He is entitled to one month's notice of action if he is sued for damages caused in the exercise of his duties.

Tousignant v. Bouchard, 15 Que. P.R. 327.

(§ I A—10) — ELIGIBILITY — MEMBER OF MUNICIPAL COUNCIL — DISQUALIFICATION — INTEREST IN CONTRACT WITH TOWN.

A candidate for member of a municipal council is disqualified under s. 80 of the Ontario Consolidated Municipal Act, 3 Edw. VII., c. 19, R.S.O. 1914, c. 192, if he or his partner as such, has an interest in any contract, express or implied, with or on behalf of the corporation, but the interest must be one of possible private gain.

R. ex rel. Fitzgerald v. Stapleford, 13 D.L.R. 859, 29 O.L.R. 133.

MUNICIPAL CANDIDATES—PROPERTY QUALIFICATION.

The value of the property qualification of a candidate for municipal councillor required by s. 52 of the Municipal Act (Man.) was held by a divided court to mean the actual, not the assessed value at the time of the election.

Spencer v. Farthing, 23 D.L.R. 620, 25 Man. L.R. 564, 31 W.L.R. 944, 8 W.W.R. 1186.

DISQUALIFICATIONS—INTEREST IN MUNICIPAL CONTRACTS — SHAREHOLDER—TAXES.

A contributor to the funds of an association interested in gas contracts with a municipality, to whom shares are allotted to the extent of the amount of his contribution out of the stock of the company formed out of the association, without his knowledge or approval, does not necessarily prove him a shareholder and hence a party interested in a contract with the municipality so as to disqualify him from the office of alderman, under s. 22 (1) of the Edmonton charter, 1913, c. 23. [Re Empire, etc., Somerville's Case, L.R. 6 Ch. 266, applied.] Section 22 (1) of the Edmonton charter, 1913, c. 23, disqualifying any person for the office of mayor or alderman if such person is indebted to the municipality, is intended to apply only to an ordinary indebtedness, but not to a debt for taxes, though declared to be a statutory debt by s. 369.

R. ex rel. La Fleche v. Sheppard, 24 D.L.R. 404, 9 A.L.R. 1, 8 W.W.R. 1020.

ELECTIONS ACT — PETITION — QUO WARRANTO.

Section 192 (b) of the Manitoba Municipal Elections Act refers not only to persons who are "disqualified" under ss. 53–57, but also to persons who lack the qualifications necessary under s. 52 to make them eligible for election. Where proceedings are taken after an election to unseat a municipal officer on the ground of want of qualification, such proceedings should be by way of petition and not of quo warranto.

The King ex rel. Dumas v. Leclair, 42 D.L.R. 643, 28 Man. L.R. 622, [1918] 2 W. W.R. 858.

MUNICIPAL COUNCILLORS — MAYOR — LITERACY.

It is not sufficient, in order to be nominated for or elected to the office of mayor or municipal councillor, or to be appointed to other municipal offices and occupy them, to know how to read print, or to sign his name, or even to be able to do both; it is necessary to be able to read and write fluently; and this law admits of no exception for municipalities peopled with settlers where those knowing how to read and write fluently are few in number.

Lacaille v. Desmanches, 24 Rev. Leg. 345.

MUNICIPAL COUNCILLORS—PROPERTY QUALIFICATION — VALUATION — PAROL EVIDENCE.

Although under the authority of arts. 228 and 670 of the old Mun. Code, as amended by 35 Vict. c. 8, s. 2, the real property qualification of a municipal councillor was not determined exclusively by the valuation roll, and parol evidence could be admitted as to the actual value of the property; it is not so under the new Mun. Code; and if the real property upon which the candidate desires to qualify is estimated at less than $400, evidence that it is actually worth more is not admissible. To establish such qualification, all charges or hypothecs encumbering the property must be deducted from the value shown on the roll, and not from the actual value.

Ouellette v. Boulay, 24 Rev. Leg. 170.

ALDERMAN — VALUATION ROLL — QUO WARRANTO.

Under art. 5364, R.S.Q. (Cities and Towns Act), it is the real property valuation, as it appears on the municipal valuation roll in force, which determines the electoral qualifications of aldermen. Such valuation cannot be contested nor questioned under the pretext that it does not represent the actual value of the real property, with a view of basing a defence to an application for a quo warranto.

Mercier v. Martin, 54 Que. S.C. 457.

DISQUALIFICATIONS—INTERESTS IN MUNICIPAL CONTRACTS.

Article 4215, R.S.Q. 1888, which prohibits any person having a contract or interest in a contract with a municipal corporation from being appointed a member of the council of such corporation, does not apply to sales of goods, made at different times by a municipal councillor in the course of his trade to the corporation which he represents.

Foster v. Currie, 48 Que. S.C. 103.

ELIGIBILITY GENERALLY—QUALIFICATIONS.

Where a candidate for mayor of the city of Sherbrooke was, at the time of his nomination and election, the owner of an undivided one-half of an immovable, the total value of which was $10,000, and against which undivided one-half no hypothecation or claim existed of record, such undivided ownership is a sufficient property qualification for said office under the charter of said city as "real estate" of the value of $1,000 or more, over and above any mortgage.

Demers v. Hebert, 8 D.L.R. 632, 42 Que. S.C. 314.

QUALIFICATIONS.

For the purpose of the qualification of a member of a municipal council the Mun. Code does not fix any delay for change of ownership of property. A councillor who sells the property on which he qualifies and on the same day purchases another does not lose his qualification thereby. A writ of quo warranto to prevent him taking his seat will be refused.

Landry v. Beauregard, 14 Que. P.R. 429.

MUNICIPAL COUNCILLOR—HIRE OF SERVICES BY CORPORATION — ELIGIBILITY — QUO WARRANTO.

A municipal councillor, who gives his services to a corporation for a salary, is not permanently disqualified under art. 205, Mun. Code, from exercising his office, but only during the time of his service or as long as he has an interest in the hiring contract in which he is engaged. Consequently, once the services are rendered, and the salary paid, recourse cannot be had by quo warranto proceedings to dispossess him of his office. [Houle v. Brodeur, 18 Que. S.C. 440 and Lewis v. Carr, 46 L.J. (N.S.) 319, followed.]

Arcand v. Paquet, 45 Que. S.C. 289.

ILLITERACY—VALUE OF REAL ESTATE OWNED.

The provision of the new Mun. Code, s. 227, which prescribes that "Whoever can neither read nor write fluently cannot exercise the functions of mayor or councillor" should in the case of members of a rural municipal council receive a liberal interpretation so as to avoid rendering the constitution of these councils difficult if not impossible. The qualification for the office of mayor or of councillor are (a) to be owner of real estate; (b) that such real estate be worth $400 after deduction of all charge; (c) that the real estate and its value should appear on the valuation roll. But when the real estate is burdened with charges and its actual value considerably more than that borne on the roll, it is necessary in order to determine the qualification to deduct the charges upon it from the amount of its actual value and not from that of the value on the roll.

Rivard v. Portelance, 52 Que. S.C. 90.

DISQUALIFICATION—SURETY FOR CITY.

No one is disqualified from occupying the position of mayor or of municipal councillor because he has become surety for the municipal corporation for the purposes of an appeal in a judicial proceeding. The security that art. 227, Mun. Code, declares to be a disqualification for these offices is that which secures an obligation in which the corporation is creditor.

Beaumier v. Baril, 52 Que. S.C. 101.

CITY CONTRACTS — LITERACY — QUO WARRANTO.

A municipal councillor selling stone to the municipality, and engaged in making and repairing its roads according to a scale of prices fixed by resolution of the council, is disqualified from acting as councillor: he comes within the terms of art. 205, Mun. Code, and may be removed from his office by quo warranto. It is not necessary that a municipal councillor should know how to read and write. An allegation to that effect in an order for a writ of quo

warranto may be struck out on an inscription en droit.

Dorris v. Guertin, 52 Que. S.C. 1.

DISQUALIFICATION — TAXES — QUO WARRANTO.

A candidate for the office of city alderman is not disqualified if he has before his nomination paid his municipal taxes by cheque, for which he was given a receipt for his taxes, even if the cheque was not presented for payment and the amount was not credited in the books of the town owing to the negligence of the latter's employees. On a petition for a writ of quo warranto based on the fact that the defendant at the time he was nominated for alderman owed some municipal taxes, the latter, having pleaded only a general denial, will be allowed to produce to the court his receipt for payment of these taxes. Municipal taxes are not due in the sense that their nonpayment makes a candidate for alderman ineligible so long as they are not exigible.

Soucisse v. Maybury, 52 Que. S.C. 123.

QUALIFICATIONS — RECORDER — EX OFFICIO POWERS.

The recorder of the city of Montreal is not bound to possess any property qualification, holding ex officio the powers of a justice of the peace as an adjunct to his office of recorder. Article 3335 R.S.Q. applies only to these justices of the peace who are associated by the government to the commission of the peace. Even if a recorder was bound to possess property and take the oath of allegiance, and that he had not, he would have the right to pronounce a conviction if he is a de facto judge.

Kastel Co. v. Recorder's Court, 15 Que. P.R. 139.

(§ I A—11)—ELIGIBILITY FOR ALDERMAN — RESIDENCE.

A person who has his residence in the city of Lachine and who for 5 months boards with his wife in an apartment at Montreal, in order to educate his children, all the time keeping his house in Lachine and going there at times and returning to live in it after the expiration of the 5 months, has not changed his ordinary residence in Lachine, and continues to be eligible in this respect for the position of alderman of that city.

Latour v. Lefebvre, 47 Que. S.C. 261.

(§ I A—14)—TIME OF DETERMINING DISQUALIFICATIONS.

The disqualification against the holding of office of mayor or alderman prescribed by s. 22 of the Edmonton charter, 1913, c. 23, are limited to the date of election and are not intended to apply to disqualifications from sittings.

R. ex rel. La Fleche v. Sheppard, 24 D.L.R. 404, 9 A.L.R. 1, 8 W.W.R. 1020.

(§ I A—16)—INCOMPATIBLE OFFICES GENERALLY.

Where there are two candidates for a municipal office under the Municipal Act, R.S.M., 1902, c. 116, the returning officer has no jurisdiction after the close of the nomination proceedings to deal with an objection that one of the nominees is disqualified, nor to declare the other candidate elected without the votes being polled on the ground of the disqualification of his opponent, although the disqualification alleged was that the candidate as the "Noxious Weed Inspector" of the same municipality was its paid officer.

Re St. Vital Municipal Election; Tod v. Mager, 3 D.L.R. 350, 21 W.L.R. 203, 2 W.W.R. 185, affirming on different grounds 1 D.L.R. 565, 22 Man. L.R. 136, 20 W.L.R. 537, 1 W.W.R. 929.

INCOMPATIBLE OFFICER — ALDERMAN EMPLOYED BY CONTRACTOR FOR MUNICIPAL WORKS—FORFEITURE OF OFFICE.

Where an alderman of a town corporation is employed by a contractor who had made a contract of hire of service with the town, the alderman does not incur the forfeiture of his position by staying in the employment, and in assuming the superintendence of the work undertaken by his employer. [Poulin v. Limoges, 7 Que. S.C., folowed.]

Jacques v. Gelinas, 45 Que. S.C. 3.

(§ I A—17)—DOMINION COMMISSIONER OF POLICE—PROVISIONAL DISTRICTS IN ONTARIO—"PERSON FULFILLING PUBLIC DUTY"—NOTICE OF ACTION.

Geller v. Loughrin, 24 O.L.R. 18, 19 O.W.R. 318.

B. APPOINTMENT AND ELECTION.

(§ I B—27)—ELECTION.

The three essential prerequisites of the occupation of a municipal office de jure under the Municipal Act (Ont.) 1903, are: (1) The actual possession of the necessary property qualification; (2) Election to office; and (3) The completion of the statutory declaration of qualification as required by statute.

R. ex rel. Morton v. Roberts; R. ex rel. Morton v. Rymal, 4 D.L.R. 278, 26 O.L.R. 263, 22 O.W.R. 50.

(§ I B—28)—APPOINTMENT OF PARISH OFFICERS — SESSIONS — QUALIFICATIONS —OATH.

A county council, under s. 52 of the Municipalities Act (N.B.), which provides that "meetings may be adjourned from day to day for 8 days in the whole and no longer," can only sit for 8 days, including Sunday and the first day of the session, and the appointment of parish officers on January 28, by a council which met in regular session on January 20, and adjourned from day to day, is illegal. Under s. 65 of the Act, the council must appoint parish officers at its first general meeting, and has no power to appoint such officers

at its semi-annual meeting in July. Under a special Act passed April 2, 1914, 4 Geo. V., c. 67, the councillors for the parish of Durham were authorized to appoint for that year the parish officers for that parish, and the parish clerk, when so appointed, was required, within 6 days after such appointment, to post up a list of the officers so appointed, who should qualify for their respective offices in 10 days after such posting, otherwise their office should be deemed vacant Held, the council had no right to declare vacant the office of officers properly appointed under the Act and performing the duties thereof on the ground that the offices had been vacated because no return of the officers having taken the oath of office had been filed with the secretary-treasurer of the county. Under s. 88 of the Act it will be assumed that persons properly appointed and acting as parish officers have taken the oath of office.

The King v. Restigouche; ex parte Murchie, 43 N.B.R. 115.

C. Qualifying; induction; vacancy.

(§ I C—30)—Ineligibility — Arrears in taxes.

The nomination is a part of the election under the Municipal Act, R.S.O. 1914, c. 192, s. 53, so as to render ineligible as a candidate for municipal councillor a person who was at the time of nomination in arrears for taxes to the municipality, although such arrears were paid before the date of polling.

R. ex rel. Mitchell v. McKenzie, 21 D.L.R. 438, 33 O.L.R. 196.

(§ I C—31)—Qualifying; oath.

The mere fact that a proper declaration of qualification for office required by the Municipal Act (Ont.), 1903, has not been made, does not, of itself, compel the court to declare the seat vacant, but the party elected may, if otherwise qualified, be given leave to make the declaration of qualification so as to complete his de jure right. [Reg. ex rel. Clancy v. Conway, 46 U.C.R. 85, followed.] A mortgagee who is assessed for freehold property of the value named in the statute may make a valid declaration of qualification for office under the Act. Refusal or neglect to make the declaration of qualification for office, even if caused by inability to make it, amounts to refusal of the office.

R. ex rel. Morton v. Roberts; R. ex rel. Morton v. Rymal, 4 D.L.R. 278, 26 O.L.R. 263, 22 O.W.R. 50.

Bailiffs—Qualifications—Oath.

The statutory provisions as to the oaths to be taken by a bailiff before entry upon his office are directory merely, and failure to take such oaths will not render invalid the acts of the bailiff.

Little v. Magle, 7 W.W.R. 224, 29 W.L.R. 596.

Delegate of Superintendent of Public Instruction—Oath.

One who is delegated by the superintendent of public instruction to hold an enquête under this Act is not a Royal Commissioner and is not obliged to be sworn. An action does not lie even under art. 50, C.C.P., to attack the legality of proceedings by officials who are subject to the department of the provincial secretary and who acted upon his instructions and with his authority.

Therrien v. Mercier, 24 Que. K.B. 352.

Auditor — Oath of office — Omission.

An auditor named by the council, under the authority of art. 642, Mun. Code, to make an audit of the books of the secretary-treasurer, is a municipal officer and, as such, is required to take the oath of office before fulfilling the duties of his office. The omission of an auditor to take such oath in the delay fixed by law implies a refusal to accept the office, and makes absolutely void all acts which he pretended to accomplish as the holder of such office.

Ross v. Ste. Anne de la Pointe au Père, 53 Que. S.C. 388.

Church constable — Oath of office — Notice of action.

A church constable is a public officer and, like any other public officer, he cannot exercise the functions of his office without having previously taken the oath of office. A public officer who omits to take the oath of office cannot claim the immunities attached to the office. In particular, he is not entitled to the notice of action prescribed by art. 88, C.C.P.

Thivierge v. Roberge, 53 Que. S.C. 537.

E. Resignation or deprivation of office.

(§ I E—45)—Resignation.

A resignation from the office of municipal councillor does not operate as a disclaimer under ss. 77, 78 of c. 70, the Mun. Ord. N.W.S. 1898 (Alta.), so as to vest the office in the peron who received the next highest number of votes at the election. The filing of an alleged disclaimer of office under s. 77, after the person elected has resigned, is ineffective to vest the office in the person who received the next highest number of votes at the election, as provided by s. 78, a disclaimer made at a time when the person was neither an officer de facto nor de jure not being within the purview of s. 78. A person elected to the office of municipal councillor after a poll of votes and not by acclamation may, at any time previous to the beginning of his term of office and before his election is complained of disclaim the office under s. 77, without the consent of the council, and such disclaimer has the effect of a resignation.

R. ex rel. Hogan v. Jollivette, 4 D.L.R. 697, 4 A.L.R. 233, 20 W.L.R. 364, 1 W.W.R. 829.

(§ I E—46)—Disqualification of mayor —Municipal contracts — Quo warranto.

A municipal councillor (mayor) who has received compensation for work done by him under a contract with the corporation, is disqualified under art. 205, Mun. Code, from holding his office, notwithstanding that the contract has been performed and payment received before the issue of the writ of quo warranto. [Bouchard v. Bélanger, 8 Que. S.C. 455; Martineau v. Debien, 20 Que. K.B. 512, applied.]

Robillard v. Sloan, 31 D.L.R. 12, 49 Que. S.C. 518, affirming 22 D.L.R. 538, 45 Que. S.C. 496.

Disqualification — Commissioners of Montreal.

Saint-Martin v. Lachapelle, 12 Que. P. R. 106.

(§ I E—51)—Recall — City commissioner in charge of police — Grounds for recall election — Interference with police prosecutions—N.B. Acts 1912, c. 42.

Recall proceedings for the removal from office of a city commissioner in control of the police force may be founded on grounds other than a breach of the specific duties and conditions attached to his office under the statute regulating his election. Such proceedings may be based upon an alleged interference by the commissioner with the proper discharge of their duties by the police by directing the discontinuance of certain prosecutions brought by them.

Ex parte Tobin, 31 Can. Cr. Cas. 68, 46 N.B.R. 338.

(§ I E—55)—Statutory medical officer of health, how removed from office.

A "medical officer of health" appointed under the Public Health Act, 2 Geo. V. (Ont.) c. 58, cannot be dismissed except for cause, and with the approval of the Provincial Board of Health.

Re Warren and Whitby, 10 D.L.R. 222, 4 O.W.N. 1029, 24 O.W.R. 317.

Removal or suspension.

In cases of high and important public offices where there is a power of motion for satisfactory cause the official must merely under ordinary grounds of general justice and fair dealing, be given notice and opportunity to answer. Where, however, the persons, whose right to vote upon the question of removal is attacked upon the ground of bias, are not judges so much as politicians, and not jurors deciding facts, but public men who have to give a mere general opinion upon the general efficiency of a public official, the court should be extremely slow to disqualify for mere bias of opinion aside from personal pecuniary interest. Aldermen are not disqualified from voting upon the question of the removal of a commissioner merely because of a certain bias upon the subject, especially where that bias has been disclosed after the commencement of a law suit against them and under the attack of opposing counsel. [Barnard v. Board of Education of Seattle, 40 L.R.A. 317, distinguished.]

Gallagher v. Armstrong, 3 A.L.R. 443.

Dismissal from office — Notice.

Under the Cities and Towns Act, a municipal council may, upon a vote of the absolute majority of the council, remove, when it thinks proper, a municipal officer it has appointed; it does not have to give notice of dismissal; and the dismissed officer has no recourse against the corporation for loss of salary or compensation

Roy v. Grand Mère, 53 Que. S. C. 119, affirmed in 54 Que. S. C. 21.

(§ I E—56)—Disqualification — Conviction for unlawful sale of liquor.

If it be intended to seek the disqualification of the accused as a member of a municipal council because of his illegal sale of intoxicating liquor in contravention of the Liquor License Act, C.S.N.B. 1903, c. 22, the accused must be both charged with and convicted of having committed the offense knowingly, such being an essential to the disqualification although not in all circumstances necessary to a conviction for the illegal sale.

Ex parte Murchie R. v. Gloucester, 24 Can. Cr. Cas. 228.

(§ I E—57)—Removal — Disqualification — Grounds of — Municipal council.

The provision of s. 22 of the Edmonton city charter disqualifying any member of the city council who either by himself or his partner has an interest in any contract with the city must be construed strictly and the seat will be vacated whether or not the contract appears (a) to have personally benefited the respondent or (b) to be even enforceable at law.

R. ex rel. Livingstone v. East, 18 D.L.R. 394, 29 W.L.R. 710.

Removal — Disqualification — Grounds of — Municipal council.

A member of a municipal council is disqualified from sitting where it appears that his judgment may be clouded by having a personal interest in a contract with the municipality, and the disqualifying provision of s. 22 of the Edmonton city charter affecting any member of the city council who has any such interest is construed strictly.

R. ex rel. Livingstone v. McNamara, 18 D.L.R. 392, 29 W.L.R. 707, 7 W.W.R. 324.

Dismissal of town solicitor — "Due cause" — Review.

Ss. 118, 120 of the Towns Incorporation Act (R.S.N.S. 1900, c. 71, as amended by 1910, c. 26) must be read together and a town solicitor holding office during good behaviour cannot be dismissed by the council unless due cause is alleged and shewn; by ss. 122-123 his dismissal is subject to review by a judge in a summary manner.

Chesley v. Lunenburg, 28 D.L.R. 571, 50 N.S.R. 85.

(§ I E—58)—Dismissal of tax assessor—Sufficiency of notice of hearing.

Notice of a council meeting to consider a recommendation for the dismissal of an assistant assessor must be served personally and not by merely leaving a copy of the notice with someone at the place of residence of the person to be served.

The King v. Halifax; Re Stevens, 25 D.L.R. 113, 49 N.S.R. 289.

Charges — Notice — Hearing.

S. 6 of title 3 of the charter of the city of Edmonton (Ord. 1904, c. 19) provides that "no person shall be disqualified from being elected a member of the council by reason of his being a shareholder in any incorporated company having dealings or contracts with the city or by his having a lease of any property from the city; but no such leaseholder shall vote in the council on any question affecting the company:"—Held in view of the statute as a whole, that the fact that certain aldermen are shareholders in companies having contracts with the city does not disqualify them from voting upon a motion for the dismissal of a commissioner of the city. The effect of the charter is to place the commissioners in a position considerably above that of ordinary employees. S. 3 of title 17 of the charter provides that "no person shall be appointed a commissioner except by a vote of not less than three-fourths of all the members of the council, and the appointed commissioners shall hold office during the pleasure of the council but shall not be dismissed except for cause satisfactory to the council and by a vote of not less than two-thirds of all the members of the council." Under this section the council cannot remove a commissioner from office unless it informs him of the grounds upon which it proposes to act and gives him a fair and reasonable opportunity to answer the charge made against him. [Osgood v. Nelson, L.R. 5 H.L. 636, 41 L.J.Q.B. 329, followed.]

Gallagher v. Armstrong, 3 A.L.R. 443.

A notary is a public officer (s. 4575, R.S.Q. 1909), and, as such, he has a right to the protection which our laws accord to public officers; and, under art. 88 C.C.P., a notary, as a public officer or person performing public functions or duties, cannot be prosecuted for damages resulting from anything done by him in the exercise of such functions, unless a written notice has been given him by the prosecutor at least 1 month before the commencement of the action; and this notice must state the grounds of the action and specify the name and office address of the attorney or representative of the prosecutor, and must be served on the defendant personally or at his domicile; and, in the absence of proof of bad faith or fraud, the notice required by art. 88 is absolutely necessary constituting a jurisdictional obligation of the prosecutor before he can issue a writ against the public officer in default; and the terms of art. 88 are formal and estop the prosecutor from any action unless he has complied with their provisions, his right of action being strictly subject thereto, and no public officer can be presumed to have waived the right granted him by this article unless he has expressly and knowingly waived it.

Authier v. Beaulieu, 18 Rev. de Jur. 393.

F. Contest of title.

(§ I F—65)—Rural municipalities — Contest of title to office — Councillor's length of term.

Section 71 of the Manitoba Municipal Act, R.S.M. 1902, c. 116, as amended 1909, c. 35, s. 15, relating to the drawing of lots in a new rural municipality by the councillors affected, to determine which councillors shall sit for two years and which for one year respectively on or before Jan. 31, is merely directory, and a drawing of lots on March 10, is a sufficient compliance with the sections referred to.

Breckman v. Coldwell, 15 D.L.R. 504, 26 W.L.R. 728, 24 Man. L.R. 1, 5 W.W.R. 1176.

Contest of title.

The right of a mayor, warden, reeve, alderman, county councillor or councillors to hold a seat may be attacked by an originating notice at the instance of an elector even though the latter does not claim the seat for any other person, and the notice may be amended at any time prior to the final disposition of the motion attacking it.

R. ex rel. Morton v. Roberts; R. ex rel. Morton v. Rymal, 4 D.L.R. 278, 26 O.L.R. 263, 22 O.W.R. 50.

II. Rights; powers; duties; liabilities.

A. Rights; powers and duties generally.

(§ II A—70)—Power of mayor — Right to instruct solicitor to defend action — Absence of interest.

The mayor of an incorporated town cannot of his own motion, and in opposition to a resolution of the town council, instruct a solicitor to enter an appearance in an action brought against the town, where the solicitor is not defending on behalf of the mayor, and the mayor has no interest in the subject matter otherwise than in common with the other ratepayers of the town.

Corning v. Yarmouth, 9 D.L.R. 275, 12 E.L.R.205.

The license commissioners for the city of Montreal are ministerial officers who exercise incidentally judicial functions as regards the confirmation of a license certificate whenever there is an opposition produced against this confirmation. Therefore, before they render judgment, they must submit to the essential formality of every judicial proceeding enunciated in art. 82 C.C.P. which forbids the adjudicating on any judicial demand unless the par-

ty against whom it is made has been heard or duly summoned.

Nurnberger v. Choquette, 13 Que. P.R. 270.

(§ II A—74)—Duties.

A land owner within a land registration district in Alberta is not entitled to demand from the registrar of the district an official certificate that the land in question is a homestead and as such exempt from a certain execution issued under a judgment against the applicant and registered under the Executions Ordinance, Revised Ord. 1911 (Alta.) c. 27, as it is not the duty of the registrar to determine whether or not the property is a homestead and as such exempt, that being a question for a competent court; the registrar for the purposes of his official certificates of his records must treat the execution as a charge upon the land with priority according to the date of its registration.

Love v. Bilodeau, 7 D.L.R. 175, 5 A.L.R. 348, 22 W.L.R. 689, 3 W.W.R. 81.

Account by municipal secretary-treasurer — Formal requirement — Verification — Waiver.

The obligation of the secretary-treasurer of a municipal corporation to render an account, created by a special Act, is a matter of private order, and the municipality can dispense with this account or with the formalities which should accompany it. Thus a municipal council, which for 5 years permits its secretary-treasurer to render his account without attesting it under oath, as required by the corporation's charter, thereby renounces the right, and the payment of the salary of the secretary-treasurer after his last account is rendered is an acquiescence in and an acceptance of it.

Pérodeau v. Richard, 48 Que. S.C. 165.

(§ II A—75)—Powers as to amendment—Rectification of errors.

The Crown side of the Court of King's Bench will permit the clerks and officers of the police magistrate of the city of Montreal to correct errors and deficiencies in commitment warrants.

Lafleur v. Vallee, 5 D.L.R. 57.

B. Compensation and fees.

(§ II B—80)—Failure to qualify affecting recovery.

Fence-viewers who have failed to take the oath of qualification explicity required of them under R.S.N.S. c. 70, s. 93, before entering upon their duties cannot recover moneys which would otherwise be coming to them as fence-viewers.

Hannigan v. McLeod, 21 D.L.R. 509, 48 N.S.R.340.

Salary — Payment and acceptance of a smaller amount — Effect — Estoppel, how negatived.

A public school inspector appointed prior to the Public School Consolidation Act, 1896, is entitled to remuneration at the rate of $5 for every teacher occupying a separate room with a separate register, and the fact that he has accepted a different rate of pay for many years, does not estop him from suing for his arrears of salary, his rate of pay being a fixed one, as well known to the council as to himself, and the council not prejudiced by reason of his conduct in the matter.

Carlyle v. Oxford, 18 D.L.R. 759, 30 O.L.R. 413.

Postmasters — Compensation and fees — Commission — Improper use of stamps — Liability — Procedure.

Where a postmaster receiving a commission from the government on the sale of postage stamps uses postage stamps in bulk to pay trade debts in contravention of the Post Office regulations, an action lies at the suit of the Postmaster-General for repayment to him of such commission.

Postmaster-General v. Millar, 19 D.L.R. 184.

(§ II B—82)—Compensation — Increase or reduction of — Agreement as to —Validity.

The Public School Consolidation Act, 1896, makes it obligatory on the county council to pay public school inspectors a fixed rate and no agreement with the inspector as to salary is necessary, nor would such an agreement be legal, if made for a smaller remuneration than the statute provides, as defeating its purposes.

Carlyle v. Oxford, 18 D.L.R. 759, 30 O.L.R. 413.

Increase or reduction — Salary of town clerk.

Re Town Clerk of Port Hood, 11 E.L.R. 544.

C. Liabilities.

(§ II C—85)—An "unlawful" act is one contrary to law, common or statutory, and a defense by statute that the defendant "lawfully acted by virtue of his office" is sustainable only where the act in question was done "lawfully" so far as the other party is concerned.

Markey v. Sloat, 6 D.L.R. 827, 41 N.B.R. 237, 11 E.L.R. 295.

(§ II C—86)—Misconduct — Scope of official duties — Immunity — Liquor licence inspector.

In an action against several defendants including a license inspector for an alleged conspiracy to defeat the plaintiff's rights on his application for a liquor license under the Liquor License Act, R.S.M. 1902, c. 101, the inspector enjoys no immunity by virtue of his official position as regards acts which were beyond the scope of his official duties.

Arenowsky v. Veitch, 14 D.L.R. 304, 23 Man. L.R. 755, 25 W.L.R. 658, 5 W.W.R. 260.

NEGLIGENCE OR MISCONDUCT GENERALLY — SEIZING LIQUOR INTENDED FOR ILLEGAL USE.

A provincial revenue officer is answerable to the Dominion Government as for a conversion for breaking into an Intercolonial Railway station and seizing a consignment of intoxicating liquor which he had reason to believe was intended to be sold by the consignee in violation of a provincial law, since the title to the property of such railway is vested in the Dominion Government and, being public property of the Dominion, is not subject to provincial legislation.

The King v. L'Heureux, 14 D.L.R. 604, 14 Can. Ex. 250.

NEGLIGENCE — CUSTOMS OFFICIALS — ANIMALS.

The liability for wrongful seizure and detention of animals by the Crown's Customs officials being one in tort is not actionable against the Crown.

Bonneau v. The King, 42 D.L.R. 490, 18 Can. Ex. 135.

NEGLIGENCE — PROTHONOTARY.

Bombardier v. Rivest, 40 Que S. C. 193.

(§ II C—87)—MONEY HAD AND RECEIVED —APPLICATION TO SET ASIDE DEFENCE REFUSED — APPEAL DISMISSED WITH COSTS.

In an action against the sheriff for money received by defendant to the use of plaintiff in connection with a foreclosure sale, to which a defense was pleaded, the judge in Chambers refused plaintiff's application to set aside the defense. On appeal, it appearing that plaintiff was not entitled to the claim sued for, and that in any event plaintiff could not succeed without amending his claim, the appeal was dismissed with costs.

Mortgage Corp. of Nova Scotia v. Ingraham, 52 N.S.R. 498.

(§ II C—88)—BARGAINING IN REFERENCE TO ADMINISTRATION OF OFFICE.

No judicial officer should make a bargain in regard to anything connected with the administration of his judicial office.

R. v. Woodroof, 6 D.L.R. 300, 20 Can. Cr. Cas. 17, 11 E.L.R. 373.

(§ II C—89)—CUSTODY OF OFFICIAL DOCUMENTS.

A local registrar cannot permit official documents to be taken from his office except under an order of the court.

Allin v. Ferguson, 5 D.L.R. 19, 5 S.L.R. 204, 21 W.L.R. 246, 2 W.W.R. 327.

III. Officers de facto.

(§ III—90)—PRESUMPTION OF REGULAR APPOINTMENT — CLERK OF COURT.

A presumption of regular appointment arises from a person acting as the clerk of a court.

R. v. Wilson, 15 D.L.R. 168, 6 S.L.R. 348, 26 W.L.R. 148, 5 W.W.R. 620.

(§ III—91)—DAMAGES — BAILIFF — PUBLIC OFFICER — NOTICE OF ACTION — LETTER OF ADVOCATE — PRESCRIPTION — C.C.P. ART. 88—R.S.Q. ART. 3387.

A bailiff is a public officer. In the exercise of his functions he carries out a public duty, and in that capacity he has a right to the notice of action required by s. 88 C.C.P., and he has the benefit of the prescription laid down by s. 3387 R.S.Q. 1909, hence a mere formal demand by a letter of an advocate to pay a stated amount of damages cannot take the place of the notice required by the Act.

Lapierre v. Gendron, 55 Que. S.C. 126.

(§ III—92)—DE FACTO—SCHOOL TRUSTEES.

The only remedy of a ratepayer in respect to any irregularities in the calling of or proceedings of the first meeting of school trustees is under s. 34 of the School Ordinance, and by s. 33, subs. 2, all such irregularities are cured by the publication, in the official gazette, of notice of the formation of the district. The election of school trustees may be attacked only as provided in s. 77, and, even if the trustees were irregularly elected, their acts are not void so long as they have held office and have been de facto trustees. [Lancaster & Carlisle R. Co. v. Heaton, 8 El. & Bl. 952, 27 L.J.Q.B. 195, 4 Jur. (N.S.) 707, followed.]

Muirhead v. Bullhead Butte, 4 A.L.R. 12.

(§ III—93)—RIGHT TO FEES.

An officer cannot recover fees or set up a right of property or right to recover money that accrues to him in virtue of his office, on the ground that he is an officer de facto unless he be also an officer de jure. [People v. Hopson, 1 Denio N. Y. 575, approved.]

Hannigan v. McLeod, 21 D.L.R. 509, 48 N.S.R. 340.

OPPOSITION.

To seizure, see Levy and Seizure.

To judgment, see Judgment Execution.

OPPOSITION TO SEIZURE — ORIGINAL NOT RETURNED — MOTION FOR PARTICULARS.

A motion asking for particulars on an opposition will be dismissed as premature if the original of the opposition has not yet been returned.

Frost & Wood Co. v. Thibeaudeau, 16 Que. P.R. 278.

REJECTION ON MOTION—FRAUD—CREDITOR.

An opposition can only be struck out on motion if "prima facie" it is frivolous, that is, if it is evidently made for the purpose of unjustly delaying the sale of the effects seized; if the facts on which it is based are openly false, or if the points of law on which it is based are indubitably ill-founded. Thus, an opposition raising the point whether the revocation of a deed on the ground of fraud or simulation is only for the benefit of the creditor applying for it, or whether all other creditors may claim it, cannot be struck out on mo-

tion. The best authorities are not unanimous.

Tremblay v. Monsour, 53 Que. S.C. 84.

SECURITY — TRANSFER — MOTION TO DISMISS.

An opposition to secure charges which alleges a transfer of the rents of the property as security for a claim, which transfer has been registered on the property, and asks that the property be sold burdened with that obligation, raises a serious question and cannot be dismissed on a mere motion.

Cuddy v. Brodeur, 20 Que. P.R. 123, 24 Rev. Leg. 39.

OPPOSITION FOR PAYMENT — MOTION TO EXAMINE — COSTS.

Art. 651, C.C.P., which allows the examination of the opposite party if his opposition seems frivolous, does not apply to an opposition for payment, which is subsequent to the sale. If such a motion is granted, and a useless examination takes place, the party that caused such proceedings should pay the costs.

Beaupre v. Gravel, 20 Que. P.R. 26.

OPPOSITION TO ANNUL — JUDGMENT — EXECUTION — SURETY.

When one of the defendants has failed to appear and is ordered to pay, he cannot, by opposition to annul, ask for the nullity of the execution taken under the judgment against him, for the reasons that his codefendant had filed a declinatory exception which had been upheld, and being the joint and several surety of his co-defendant he was not compelled to pay the debt as long as judgment was not given against the latter.

Julien v. Chevanelle, 20 Que. P.R. 6.

SEIZURE — TITLE TO GOODS — MOTION TO STRIKE.

An opposition, by which one declares his ownership of the goods seized "as having acquired them with his own money, in the ordinary course of business," will not be struck out on motion.

Cailloux v. Houde, 20 Que. P.R. 169.

SECOND OPPOSITION — JUDGMENT — AMBIGUITY — ORDER TO SUSPEND.

An order to suspend will not be granted on the filing of a second opposition based on grounds: (1) that the judgment dismissing the first opposition is ambiguous; (2) the date on which the judgment may be executed is not mentioned in the return (procès verbal); and (3) the creditor has proceeded immediately after the dismissal of the first opposition.

Prudhomme v. Decarie, 19 Que. P.R. 224.

EXCEPTION TO FORM — DELAY — NOTICE OF DEPOSIT — AFFIDAVIT — ADDRESS —DOCUMENTS.

An exception to the form against an opposition is too late if served 7 days after it is filed with the prothonotary. Such exception, as all preliminary exceptions, should be accompanied by a notice of deposit of the sum fixed by the Rules of Practice and by the certificate of the prothonotary attesting such deposit. The omission in the conclusions of an exception to the form of the words "sauf à ce pourvoir" without being in itself a ground for dismissing an exception that is well founded, is sufficient reason for contestation and may involve a condemnation to payment of costs against the party who makes such exception. The failure to file with an opposition the documents supporting it is not a ground for an exception to the form. Nor is the omission to state in the affidavit in support of an opposition the address of the opposant. This requirement applies only to one who has his usual residence in a town with numbered streets, whatever may be his actual residence at the time when he makes his deposition. To avoid any doubt an opposant will be allowed to amend without costs his opposition by adding the street and number of the actual and temporary residence of the deponent. The examination of the opposant will only be allowed if it is demanded by special motion. Documents in support of an opposition filed at the office of the prothonotary, after the sheriff has sent his return there, will not be struck out of the record as being filed too late or irregularly filed.

Tasse v. Rouillard, 18 Que. P.R. 222.

OPPOSITION—GROUNDS FOR DISMISSAL.

An opposition may be dismissed on mere motion on the ground that the contract for the title invoked by the opposant may be simulated, annulable or without effect in regard to the party suing to enforce its execution, or because the grounds invoked by the opposant are unfounded in law.

Evans v. Chopin, 18 Que. P.R. 380.

A motion for dismissal of an opposition cannot discuss or attack the merits but must be based on the ground that the reasons for the opposition are frivolous or futile on their face. The allegations in a motion to dismiss an opposition cannot form the subject of an enquête.

Barry v. Juneau, 18 Que. P.R. 434.

OPPOSITION A FIN D'ANNULER.

An apposition à fin d'annuler by the debtor personally condemned to pay the amount claimed, based upon an abandonment made by the co-defendant condemned to pay the hypothec, will not be dismissed on motion even if later the abandonment has been withdrawn.

Bohemier v. Leblanc, 18 Que. P. R. 221.

OPPOSITION TO JUDGMENT—SEIZURE—SALE BY BAILIFF.

Lamarche v. Archambault, 12 Que. P.R. 165.

OPPOSITION AFIN DE DISTRAIRE—MOTION TO DISMISS.

Boston Varnish Co. v. Trudel, 12 Que. P.R. 101.

OPPOSITION TO ANNUL—TWO SEIZURES AND TWO OPPOSITIONS — INSCRIPTION FOR JUDGMENT ON DISCONTINUATION BY PLAINTIFF.

Belanger v. McKinnan, 12 Que. P.R. 301.

OPTION.

See Sale, I B—5, III A—50; Executors and Administrators, II A—30.

Joint option, see Cotenancy, III—18.

ORAL EVIDENCE.

See Evidence, VI.

ORDERS.

See Judgment; Motions and Orders; upon foreclosure, see Mortgage; Vendor and Purchaser.

ORDINANCES.

See Municipal Corporations.

OVERHOLDING TENANT.

See Landlord and Tenant.

PARENT AND CHILD.

I. RELATION; RIGHTS AND LIABILITIES.
II. LEGITIMACY.
III. ADOPTION.
IV. RIGHT TO CUSTODY.

See Infants.

Proof of relationship, illegitimate child, see Master and Servant, V-340.

As to right to custody of child, see Infants, I C.

I. Relation; rights and obligations.

(§ I—1)—LIABILITY OF PARENT FOR AUTOMOBILE PURCHASED BY CHILD—AGENCY.

A person who sells an automobile to an infant under 21, and takes his agreement and lien notes for the price, has the onus cast upon him of proving the son's agency for the parent if he seeks to make the latter liable, and such is not conclusively shewn by the license having been taken in the parent's name.

Wheeler v. Chapman, 21 D.L.R. 660.

SUM OF MONEY HANDED BY FATHER TO DAUGHTER—LOAN OR GIFT—EVIDENCE.

Preston v. Barker, 14 O.W.N. 119.

Although the courts ought, as far as possible, to maintain the principle of paternal authority in its integrity, they can and should, on the other hand, in certain cases, exercise their control over paternal authority when the latter is not used in a judicious or just manner and especially when the welfare of the infant is being interfered with. A father cannot (for the simple gratification of seeing his son, a minor of 17 years, follow the former's calling) insist upon the son learning the father's trade, when the minor's inclination and aptness adapt him to a totally different calling in life, especially where the son continues to live with his father and in that way continues under the supervision of the father, and where to decide otherwise would be to compromise the future welfare of the child.

Bail v. Lemieux, 18 Rev. de Jur. 497.

(§ I—4)—LIABILITY FOR CHILD'S MAINTENANCE—AGREEMENT.

Where a parent arranges that his minor child shall reside with a relative, without charge, and give the relative his services free, the parent is liable to damages if he induces the child to leave the relative while yet a minor; the value of the child's keep while with the relative, above his value as a labourer, is the measure of the damages.

Latimer v. Hill, 30 D.L.R. 660, 36 O.L.R. 321, affirming, except as to damages, 26 D. L.R. 800, 35 O.L.R. 36.

SUPPORT.

A wife may recover from her husband's legatee whatever sums she has spent for the maintenance of a child born of the marriage, and which, in the opinion of the court, should have been paid by the father, although she has never sought to enforce against a decree for alimony.

Hill v. Johnson, 44 Que. S.C. 160.

JUDGMENT FOR CHILD'S SUPPORT—TERMINATION UPON DEATH OF PARENT.

An allowance for maintenance awarded to a natural child by judgment against its father ceases on the death of the latter, and is not a charge on the succession.

Filiatrault v. Meloche, 47 Que. S.C. 108.

MAINTENANCE — CHILDREN — WEAKNESS —INTOXICATING LIQUORS—C.C., ART. 166.

An old man 64 years old who is in need and who is incapable of obtaining the necessaries of life by his own labor, has the right to be maintained by his children who are able to do so. This is true even though his poverty is caused by the abuse of intoxicating liquor. Defendants ought to be held jointly and severally liable.

Payan v. Payan, 25 Rev. Leg. 340.

SUPPORT OF PARENTS AND INFANTS—OPTION TO SUPPORT INFANTS RATHER THAN FATHER-IN-LAW IN A CASE OF EXTREME POVERTY.

When the evidence shews that the plaintiff is no poorer than the defendant, but that, as a matter of fact, the position of the latter is more necessitous than that of his father-in-law, and that between the choice of supporting his children or his elderly parent there is nothing illegal in defendant's option to support his children rather than his father-in-law.

Lafortune v. Guimond, 25 Rev. de Jur. 252.

MAINTENANCE—NATURAL CHILD—RIGHTS OF MOTHER.

The mother of a natural child has a right to recover from the father the maintenance of the child and expenses of her confinement at the same time though she has not been appointed tutrix.

Chevrier v. Dupreuil, 20 Que. K.B. 284.

MOTION FOR PAYMENT OUT OF COURT FOR ADVANCEMENT — ADVANCEMENT WITHIN MEANING OF.

Brooke v. Brooke, 3 O.W.N. 52, 20 O.W.R. 27.

MONEY PAYABLE FOR PAST MAINTENANCE—DISCRETION OF COURT—ONLY ASSET OF THE ESTATE.

Re Hollis Estate, 19 O.W.R. 806, 2 O.W.N. 1447.

(§ I—7)—SON WORKING FOR FATHER ON FARM — WAGES — PRESUMPTION — REBUTTAL—CONTRACT—EVIDENCE.

Smith v. Smith, 8 O.W.N. 615, 9 O.W.N. 63.

(§ I—8)—LIABILITY OF PARENT FOR PERMITTING INFANT TO USE FIREARMS.

Moran v. Burroughs, 10 D.L.R. 181, 27 O.L.R. 539, reversing 3 D.L.R. 392.

LIABILITY OF FATHER FOR TORT OF CHILD—CHILD KICKING OTHER CHILDREN—SCIENTER.

A father is not, merely because of the relationship, liable for the torts of his minor child. The fact that a father may have had notice that his infant son had kicked the plaintiff's child will not render the parent liable for a similar assault committed several months afterwards, apart from knowledge and approval by the father of the offending child of a course of conduct on the latter's part involving assaults of that kind. That a father may have had knowledge of the propensity of his infant son to kick other children cannot be inferred from the former's admission to a third person that at one time he had intended settling the plaintiff's claim for such an assault. [Thomas v. Morgan, 2 C.M. & R. 496; Sayers v. Walsh, 12 Ir. L.R. 434; and Mason v. Morgan, 24 U.C.Q.B. 328, distinguished.]

Corby v. Foster, 13 D.L.R. 664, 29 O.L.R. 83.

TORT OF INFANT IMBECILE CHILD—SETTING OUT FIRE — KNOWLEDGE OF MISCHIEVOUS PROPENSITY—NEGLIGENCE OF PARENT.

Thibodeau v. Cheff, 24 O.L.R. 214, 19 O.W.R. 679.

LIABILITY FOR BREACH OF PROMISE.

A father is not liable for damages on account of a breach of promise of marriage by his son, a minor, when he proves that he could not have prevented it and has himself suffered from it.

Vachon v. Gagnon, 51 Que. S.C. 463.

PARENT'S LIABILITY FOR DAMAGE CAUSED BY CHILD—UNAUTHORIZED EMPLOYMENT.

A person who hires the services of a minor, without the father joining in the agreement, has no recourse against the father when the minor causes damage to his employer, even if the father was aware of the employment of his son.

Bergeron v. Dagenais, 47 Que. S.C. 492.

(§ I—9)—DAUGHTER—LOSS OF SERVICE—ENTICEMENT BY DEFENDANT—SERVICE DETERMINABLE AT WILL — ACTION — DAMAGES.

The fact that the contract of service between a father and daughter (over 16) is terminable at the will of either party is no bar to an action by the father, whose daughter has been enticed away and her service consequently lost.

Walters v. Moore, 50 D.L.R. 336, [1919] 3 W.W.R. 806.

FATHER'S LIABILITY FOR TORTS OF CHILD.

The presumption of liability, created by art. 1054, C.C. (Que.), of a father for damage caused by his minor children is only a prima facie presumption, and can be negatived by proof of justification, by the father, hires his service, and in the course as the minors are under the control and surveillance of their father at the time the reprehensible act was committed. If a minor son, without the knowledge of his father, hires his service, and in the course of his work causes damage to his Master, the father is not liable, the minor being at that time under the control and surveillance of his master and acting as his servant.

Bergeron v. Dagenais, 46 Que. S.C. 302.

II. Legitimacy.

(§ II—10)—LEGITIMACY — CORRECTION OF REGISTER.

The correction of registers of civil status as to the legitimacy of a recognized child can be made only through a principal action by calling into the case all the interested parties, including the child.

Crepeau v. Gareau, 19 Que. P.R. 323.

III. Adoption.

(§ III—15)—ADOPTION OF CHILD—COVENANT WITH MOTHER OF CHILD—MAINTENANCE—DEATH OF ADOPTING FATHER—ACTION AGAINST EXECUTORS—WILL—CONTINGENT GIFT TO CHILD—APPLICATION OF INCOME FOR MAINTENANCE—ENCROACHMENT ON CORPUS — INSURANCE—COSTS.

Hodgins v. Amos, 12 O.W.N. 348.

(§ III—19)—EFFECT ON STATUS OR RIGHTS.

Parentage by adoption is not recognized by the laws of Ontario. [Re Davis, 18 O.L.R. 384, followed.]

Fidelity Trust Co. v. Buchner, 5 D.L.R. 282, 22 O.W.R. 72, 26 O.L.R. 367.

IV. Right to custody.

(§ IV—40)—RIGHT OF PARENT TO CUSTODY OF CHILD—EFFECT ON WELFARE OF CHILD.

The Child's Protection Act (Ont.) 7 Edw. VII., c. 39, s. 30, directing that a Roman Catholic child shall not be placed in a foster home in a Protestant family does not compel a change of custody of a child of tender years so as to take it from its Protestant foster parent with whom it was placed by the Children's Aid Society

under the authority of the Children's Court Commissioner acting on the statement of the child's mother that she was a Protestant where the Commissioner had adjudicated that the mother who seemingly was in sole control and charge of the child, was unfit to have the child's future custody. [Re Faulds, 12 O.L.R. 245, followed.]

Re Kenna, 11 D.L.R. 772, 24 O.W.R. 600, 29 O.L.R. 590.

The courts of the Province of Alberta are not bound by that part of a decree divorcing persons married in the United States rendered by a court in one of the States at the suit of the husband, giving to him the custody of a minor child of the marriage who was born in Canada, and had remained in Canada during such divorce proceedings, and the child's father seeking the custody of the child upon a writ of habeas corpus is not aided by that decree. [R. v. Hamilton 17 Can. Cr. Cas. 410, distinguished.]

Re Mott, 5 D.L.R. 406, 5 A.L.R. 193, 20 W.L.R. 369, 1 W.W.R. 833.

CUSTODY OF—RIGHT OF FATHER.

Re Cameron, 10 D.L.R. 814, 24 O.W.R. 160.

RIGHT TO CUSTODY.

A widow, mother of children 6 and 8 years old, has a right to their custody and may proceed by habeas corpus to obtain possession of them from their grandmother and uncle who have taken them to their home and maintained them for some years.

Moquin v. Turgeon, 42 Que. S.C. 232.

In a matter of habeas corpus for the custody of a child under age the interest and well-being of the child is the first consideration for the judge. When it is a case of dispute between the parents as to the child's custody, and the latter is not capable of making an intelligent choice, the court should choose for him. In this case the child, 22 months old, instead of being placed in a charitable institution was placed in care of its mother.

Nault v. Nault, 13 Que. P.R. 221.

CUSTODY OF CHILDREN—TUTOR—HABEAS CORPUS—QUE. C.P. 1114.

When a father reclares that it is impossible for him to keep with him all his children, the court may place one of them at the grandfather's, who is a well-to-do-man, who is married and has 3 daughters, one of whom is a teacher. The contention of a third party claiming to have received the custody of the child will not be allowed.

Dalliere v. Bouchard, 16 Que. P.R. 68.

(§ IV—45)—DESERTED CHILD—CHILDREN'S PROTECTION ACT—RIGHT OF PARENT.

The parents being both in jail on criminal charges, their children were taken in charge under the Children's Protection Act (Alta.) as deserted children. After their release the parents applied for the return of the custody of the eldest child. This application was refused. A subsequent application for an order compelling the Superintendent of Neglected Children to inform them of the whereabouts of the then youngest children, and to keep them informed of any changes, was granted. The Superintendent of Neglected Children complied with the order as to the present whereabouts, but appealed from the order, objecting to be under the obligation in case of future changes. The court held, that a judge of the Supreme Court as persona designata had jurisdiction to make the order. There is nothing in the statute which has the effect of destroying the court's inherent power to control the guardian who has been substituted for the natural guardian. . . . There should be, however, a right reserved to the Superintendent to shew that for some special reason, arising out of very special and temporary circumstances, he ought to be alllowed to keep the whereabouts of the child, for a time, concealed from the parent. The intention of the Act is to leave the parents' rights and duties existing with respect to their neglected children unaffected, except in so far as the circumstances with respect to character and conduct on the part either of the parents or the child make it expedient, having regard only to the interest of the child, that the parents shall not be allowed to have the control of the child.

Re Triskow and Children's Protection Act, 43 D.L.R. 452, 14 A.L.R. 46, [1918] 3 W.W.R. 512.

PARLIAMENTARY LAW.

PAROL EVIDENCE.

Parol and extrinsic evidence concerning writings, see Evidence VI.

PARTICULARS.

See Pleadings, I.

PARTIES.

I. PLAINTIFFS.
  A. Persons who may or must sue; interested parties.
  B. Joinder.

II. DEFENDANTS.
  A. Proper and necessary parties.
  B. Joinder.

III. BRINGING IN; INTERVENTION; THIRD PARTY.

Annotations.

Irregular joinder of defendants; separate and alternative rights of action for repetition of slander: 1 D.L.R. 523.

Persons who may or must sue; criminal information; relator's status: 8 D.L.R. 571.

I. Plaintiffs.

A. PERSONS WHO MAY OR MUST SUE; INTERESTED PARTIES.

Interest of ratepayer attacking by-law, see Municipal Corporations, II C—60.

Assignee or assignor to sue when assignment not absolute, see Assignment, III—32.

In case of assignment of cause pending action, see Assignment, II—20.

Equitable assignee of note or chose in action suing in name of assignor, see Bills and Notes, V A—105.

Right of third party to sue, privity, see Contracts, VI A—410.

Right of member of association to sue in his own name, see copyright, I—8.

(§ I A—1)—Wife suing as—Husband's authorization, when essential — Quebec C.C.—Libel—"Simple administration," scope of.

An action for libel is not a matter of "simple administration" within the exception of art. 176, C.C. (Que.), and consequently a married woman separate as to property cannot maintain the action without the authorization of her husband.

Chiniquy v. Bégin, 20 D.L.R. 347, reversing 7 D.L.R. 65.

Sole proprietor suing in trade name.

The Ontario practice rules do not permit a person who carries on business alone under a firm name to sue in such firm name only without making himself a plaintiff under his individual name, although he is liable to be sued under the firm name.

Lumsden v. Spectator Printing Co., 14 D.L.R. 470, 29 O.L.R. 293.

Wrongful removal of corpse from burial lot—Action for—Title necessary to sustain.

One who has not the title to a cemetery plot cannot maintain an action for the wrongful removal of human remains therefrom.

O'Connor v. Victoria, 11 D.L.R. 577, 4 W.W.R. 4.

Action brought in name denoting partnership — Sole member of firm — Style of cause — Irregularity — Amendment—Con. rules 222, 231.

Lloyd v. Scully, 4 O.W.N. 1404, 24 O.W.R. 685.

In interdiction proceedings—Quebec.

When an order of interdiction for insanity has not been made by a judge, its revision can be sought only by the person interdicted or by any of his relatives, and then only upon petition to the court and not upon an incidental proceeding such as an exception to the form in a pending case.

Moffat v. Montgomery, 14 Que. P.R. 353.

Action by mortgagee on insurance policy —Owner.

Where an action upon a fire insurance policy is brought by the mortgagee of the insured premises, the owner, although mentioned as the insured, is not a necessary party, if his only interest in the insurance moneys is that the amount thereof paid discharges, in part, his mortgage, it being for a larger amount than that assured by the policy. [Brandt v. Dunlop Rubber Co., [1905] A.C. 454, followed.]

Pachal v. Germania Fire Ins. Co., [1918] 2 W.W.R. 502.

(§ I A—7)—Who may sue—Injury to riparian rights.

A riparian owner who is deprived of his reasonable and proper right of navigating a river and of obtaining clear access thereto, by reason of a lumber company unreasonably obstructing the stream in the course of their driving operations, has such a special interest, and sustains such special damages, as entitle him to maintain an action against the company where the river affords the only means of egress and ingress he and his family have between their residence and the outside world.

Ireson v. Holt Timber Co., 18 D.L.R. 604, 30 O.L.R. 209, affirmed 11 D.L.R. 44, 4 O.W.N. 1106.

(§ I A—9)—Municipality.

A declaration, in an action to have a contract declared void or annulled, in which are set forth obligations of performance arising from a municipal board and the settlement of a boundary involving the mutual surrendering of land, that would cease to be binding or to have effect, upon judgment rendered maintaining the action, sufficiently discloses the interest of the plaintiffs to sue, required by art. 77 C.C.P. The fact that the conclusions do not go beyond, nor ask for anything requiring execution, does not imply lack of interest, the judgment sought being one that, of itself, is executory and redresses a wrong complained of. A public corporation created to administer and manage public property (e.g. a harbour), with powers of alienation of its movable and immovable dependencies, is competent to bring suit in its own name, to have a contract made by it declared null, or to have it annulled. Such a case is not of the kind contemplated in art. 978 C.C.P., as requiring the action or intervention of the Attorney-General.

Harbour Commissioners of Montreal v. Record Foundry & Machine Co., 21 Que. K. B. 241.

(§ I A—11)—Cestui que trust.

The rule is well settled that a member of a society or church congregation may sue on behalf of himself and all other members of the congregation to prevent a breach of trust as to which they have a legal interest to intervene.

Heugli v. Pauli, 4 D.L.R. 319, 26 O.L.R. 94, 21 O.W.R. 776.

(§ I A—13)—Contract—Joint makers.

An action upon a contract entered into on the one side by 2 persons held to have been brought properly by one of them.

Smith v. Brunswick-Balke-Collender Co., 38 D.L.R. 455, 25 B.C.R. 37 at 41, [1917] 3 W.W.R. 1071.

Where the plaintiffs, as some of the joint heirs of an estate, proceed against the defendant, as a person wrongfully in possession of the joint property, without adding as coplaintiffs the other joint heirs, and where the plaintiffs in their action demand an accounting and a declaration of

their right to undivided shares in the estate, a dilatory objection by the defendant against the nonjoinder of the remaining joint heirs will not defeat the plaintiffs' action, when it clearly appears that the objection was taken too late, and that the remaining joint heirs will not be prejudiced by the declaration in favour of the joint heirs who are already parties in the action.

Houde v. Marchand, 8 D.L.R. 431.

JOINT OWNERS.

An action, taken by one of two persons seized of the naked ownership of an estate against the life usufructuary to have the usufruct ended by reason of wasteful administration, is not unfounded because the coproprietor has not been made a party, and that the action should be remitted to the Superior Court to have the coproprietor made a party, but costs of the appeal would not be granted to the plaintiff, as he ought to have summoned the coproprietor into the cause.

Guay v. Duval, 18 Rev. de Jur. 371.

(§ I A—15)—SALE—INTEREST OF VENDOR.

A vendor of real property, required by law to deliver such property, has a sufficient interest to take an action to make one who detains it illegally, give it up.

Beaucage v. Brunette, 54 Que. S.C. 383.

(§ I A—16)—BY TAXPAYER.

Where a city corporation is about to pass an ultra vires by-law, and an application for an injunction to restrain is made by a plaintiff (not in the name of the Attorney-General), such plaintiff comes within the prohibition of the well-settled rules that no person may institute proceedings with respect to wrongful acts which, if of a private nature, are not wrongs to himself, and if of a public nature do not specially affect himself.

Keay v. Regina, 6 D.L.R. 327, 5 S.L.R. 372, 22 W.L.R. 185, 2 W.W.R. 1072.

(§ I A—20)—RIGHT OF THIRD PERSON TO SUE ON CONTRACT.

A company has no right of action on a contract made before its incorporation between its promoters to transfer to it, on its subsequent formation, shares of stock of the companies amalgamating with it.

Goldfields v. Mason, 12 D.L.R. 244, 24 O.W.R. 878, 4 O.W.N. 1530.

THIRD PARTY NOTICE—MOTION TO SET ASIDE.

Wolseley Tool & Motor Co. v. Jackson, 6 O.W.N. 400.

(§ I A—22)—CONTRACT MADE BY AGENT IN HIS OWN NAME.

A contract made by an agent in his own name sufficiently satisfies the Statute of Frauds so as to permit the principal to maintain an action thereon, parol evidence being admissible to shew the relation of the parties.

Pulford v. Loyal Order of Moose, 14 D.L.R. 577, 23 Man. L.R. 641, 25 W.L.R. 868, 5 W.W.R. 452.

MOTION BY DEFENDANTS TO COMPEL THE ADDITION OF NEW PLAINTIFFS—CONTRACT — PRINCIPAL AND AGENT — COUNTERCLAIM.

Winnifrith v. Finkleman, 5 O.W.N. 781.

(§ I A—32)—PURCHASER UNDER FORECLOSURE—VACATING FINAL ORDER.

On vacating a final order of foreclosure, notwithstanding an alleged sale made thereafter by the mortgagee, the purchaser taking with notice of the foreclosure may be added as a party plaintiff where the mortgage accounts are reopened.

Hill v. Handy, 17 D.L.R. 87, 50 C.L.J. 505, 27 W.L.R. 266, 6 W.W.R. 244.

(§ I A—40)—EFFECT OF ASSIGNMENT.

If shewn on a trial that shares of stock on which an action was based had been assigned, the case should be directed to stand over in order to permit the plaintiff to obtain the assent of the assignee to become a coplaintiff, or, if not obtainable, to make him a defendant, where the plaintiff desires to prove that the assignment was as security only and that he still retained a beneficial interest in the shares.

Daniel v. Birkbeck Loan Co., 4 D.L.R. 767, 3 O.W.N. 1250, 22 O.W.R. 147.

INTEREST OF ASSIGNOR AS PARTY—LIEN NOTE —ENDORSEMENT — EQUITABLE ASSIGNMENT.

Canadian Bank of Commerce v. La Brasch, 39 D.L.R. 398, 10 S.L.R. 408, [1918] 1 W.W.R. 8.

Action to enforce a lien against land made in 1886, in favour of an English company known as the Canada North-West Land Co. In 1893 a Canadian company with the same name was formed to take over the assets of the English company, and it was stated in evidence in a general way that the Canadian company did take over such assets. The action did not shew which company was suing, merely alleging the claim upon a lien to the plaintiff company. Objection was raised that the Canadian company had sued, and could not maintain an action without alleging and proving an assignment. The company then applied for leave to amend. Held, 1. The lien, being dated before the organization of the Canadian company, must be taken to have been made in favour of the English company, and if so could not be sued upon by the former unless an assignment was alleged or proved. 2. On the circumstances of the case it would appear that the action was brought by the Canadian company. 3. That while there was evidence of a vague character pointing to the assignment of the lien to the Canadian company, such evidence was not such as could be left to a jury, the rule being that it must be determined, not whether there is literally no evidence, but whether there is any upon which a jury could properly proceed to find a verdict for the party producing it, upon whom the onus of proof is placed, and a judge sitting without a jury is bound by the same principle. 4.

There being, therefore, no sufficient evidence of assignment, the plaintiffs could not maintain this action, and as to allow an amendment would entail the setting up of an entirely new cause of action, such amendment should not be allowed.

Canada North-West Land Co. v. Irwin, 4 S.L.R. 394.

(§ I A—41)—Action on bills—Original indorsees.

Where, at the time of an action on bills of exchange, the plaintiff is not holder or indorsee of the bills, which are in fact held by a bank as the original indorsee, the latter must be added as a party plaintiff.

Canada Food Co. v. Stanford, 28 D.L.R. 689, 50 N.S.R. 252.

(§ I A—45)—Attorney-General—Municipality—Damages peculiar to private plaintiff.

A property owner who suffers a peculiar and specific injury from an obstruction of a road which prevents free egress and ingress to his property, may maintain an action in his own name against the wrongdoer to have the road declared a public highway and to obtain the removal of the obstruction without making the Attorney-General a party to the action.

O'Neil v. Harper, 13 D.L.R. 650, 28 O.L.R. 635, reversing 10 D.L.R. 433.

Action to question exercise of power by corporation—Right of municipality to maintain.

The Attorney-General should be made a party to a proceeding to question the power of an electric railway company to operate its road notwithstanding informalities in obtaining the municipal franchise, where, after due notice to the municipality, an authorization of certain crossings had been made by the Board of Railway Commissioners on the footing of the electric railway having the requisite franchise.

Burnaby v. B.C. Electric R. Co., 12 D.L.R. 321, 3 W.W.R. 628.

On matters of public rights—Absence of special damage—Local option.

A mere inhabitant of a license district has no status to maintain an action against a license commissioner, asking for an injunction restraining the commissioner from acting on a requisition presented to him for a poll to determine whether licenses should be granted for the sale of liquor under s. 121 of the Liquor License Ordinance, Con. Ord. 1898 (N.W.T.), c. 89, as amended by 2 & 3 Geo. V. (Alta.), c. 8, s. 26, there being no allegation in the statement of claim that any special damage might accrue to the plaintiff from the submission of the question to a vôte of the electors.

Gross v. Strong; Pinchebeck v. Strong, 10 D.L.R. 392, 5 A.L.R. 491, 23 W.L.R. 340 and 362, 3 W.W.R. 879.

(§ I A—46)—Interest in attacking by-law—Local improvements.

A ratepayer, who is not substantially prejudiced by the assessment for local improvements enacted by a special by-law, has no interest in attacking its validity.

Cradock Simpson v. Westmount, 27 D.L.R. 94, 49 Que. S.C. 341.

Right of ratepayer to compel collection of taxes.

Where a municipality has allowed a certain proportion of the taxes levied against a property to remain unpaid for a number of years, a ratepayer has no status to maintain an action against the municipality to compel it to collect such arrears.

Norfolk v. Roberts, 23 D.L.R. 547, 50 Can. S.C.R. 283, affirming 13 D.L.R. 463, 28 O.L.R. 593.

Action to annul illegal valuation roll.

A ratepayer, particularly one having a contract with the municipality by which the amounts of taxes he is obliged to pay are based upon a valuation roll, has a sufficient interest to maintain an action to set aside the whole of such valuation roll because of illegality.

La Cie d'Approvisionnement d'Eau v. Montmagny, 25 D.L.R. 202, 24 Que. K.B. 416.

Ratepayer's action—Attorney-General.

A ratepayer has the right on behalf of himself and the other ratepayers, without joining the Attorney-General as a party ex relatione to maintain an action against a municipal corporation to restrain acts which are ultra vires, where the Crown is not directly interested. [Brogdin v. Bank of Upper Canada, 13 Gr. 544; and Hoole v. G.W.R. Co., L.R. 3 Ch. 262, applied; Rogers v. Bathhurst School District, 1 N.B. Eq. 266, distinguished.]

Steeves v. Moncton, 17 D.L.R. 560, 42 N.B.R. 465.

Ratepayer's action.

Where a ratepayer of a city purports to be suing the corporation and the mayor and councilors on behalf of himself and all other ratepayers of the city he is in effect suing the individual defendants on behalf of themselves, they being ratepayers, and the form of action is, strictly speaking, objectionable; the individual defendants should be specifically excepted from those on whose behalf the plaintiff sues: [Morrow v. Connor, 11 Ont. P.R. 425] Moreover, the suit should be not only on behalf of all the ratepayers but also on behalf of all the inhabitants of the city. [McIlreith v. Hart, 39 Can. S.C.R. 657.] These technical objections to the style of cause may, however, be cured by amendment.

Gallagher v. Armstrong, 3 A.L.R. 443.

Interests of taxpayer—Right to attack municipal by-law.

The mere fact of being a taxpayer of a municipality does not give a right of action to quash a by-law which grants a privilege

(e.g., the right to carry on an auto-bus business in the streets of a town) if the plaintiff suffers no special injury.

Robertson v. Montreal, 23 Que. K.B. 338. [Affirmed, 26 D.L.R. 30, 52 Can. S.C.R. 30.]

(§ I A—47)—QUI TAM ACTION—STATUS OF PLAINTIFF.

An objection that the plaintiff has no legal status to sue cannot be raised on peremption proceedings, but only by exception to the form or on the merits. [Lamontagne v. Grosvenor Apartments, 20 Que. K.B. 221, approved.]

Mason v. Ledoux, 2 D.L.R. 50.

(§ I A—48)—RIGHT OF ATTORNEY-GENERAL TO SUE.

Only the Attorney-General has the right in the absence of any express statutory provision, to sue for an order restraining a municipal corporation from passing a by-law which while ultra vires does not specially affect any citizen or class of citizens.

Keay v. Regina, 6 D.L.R. 327, 22 W.L.R. 185, 5 S.L.R. 372, 2 W.W.R. 1072.

The Attorney-General, suing on the relation of a city and an officer thereof, if he has independent rights in the action, is not bound by the proceedings in a former action by the city against the same defendant in which similar issues were involved and the judgment was rendered against the city, upon the ground that such officer represents the Crown alone and could have sued without a relator as well, there being no difference except for the purpose of costs between an ex officio information and an information on the relation of a corporation or a private person. [Fonseca v. Att'y-Gen'l, 17 Can. S.C.R. 612 (reversing, on other grounds, Att'y-Gen'l v. Fonseca, 5 Man. L.R. 173), at p. 619, distinguished.]

Att'y-Gen'l v. Winnipeg Electric R. Co., 5 D.L.R. 823, 22 Man. L.R. 761, 21 W.L.R. 906, 2 W.W.R. 854.

NECESSITY OF JOINING ATTORNEY-GENERAL—TRESPASS—ENCROACHMENT ON LAND BY NAVIGABLE WATERS.

Volcanic Oil & Gas Co. v. Chaplin, 10 D.L.R. 200, affirming 6 D.L.R. 284. [Reversed 19 D.L.R. 442, 31 O.L.R. 364.

(§ I A—50)—IN REPRESENTIVE CAPACITY—ATTORNEY OR AGENT FOR BENEFICIARY, STATUS.

An action brought by an attorney or agent must be brought in the name of the person for whom he acts, and cannot be brought in the name of the person who holds the power of attorney, or the agency.

Luciani v. Toronto Construction Co., 10 D.L.R. 551, 4 O.W.N. 1073, 24 O.W.R. 381.

(§ I A—51)—BAND OF MUSICIANS—ACTION BY MANAGEMENT COMMITTEE—TRUSTEES FOR MEMBERS.

Demarchi v. Spartari, 15 D.L.R. 774, 27 W.L.R. 152, 5 W.W.R. 1336.

(§ I A—52)—EXECUTOR—SUING IN REPRESENTATIVE CAPACITY—NOTE TAKEN IN NAME OF TESTATOR FOR DEBT DUE ANOTHER ESTATE OF WHICH HE WAS EXECUTOR.

Where an executor in his life time sells property of an estate, taking a note therefor in his own name, his executor after his death may maintain an action thereon in his representative capacity.

Ayer v. Kelly, 11 D.L.R. 785, 41 N.B. R. 489, 12 E.L.R. 564. [Appeal to Can. S.C. dismissed; not reported.]

RECEIVERS.

A liquidator of a company appointed under the Winding-up Act, R.S.C. 1906, c. 144, sufficiently represents the creditors without joining one of the creditors generally, as a party in an action to contest as against an alleged chattel mortgagee of the company's goods the invalidity of the chattel mortgage as against creditors by reason of non-compliance with a statute requiring that chattel mortgages made without actual and continued change of possession shall be recorded, and declaring that otherwise they shall be void as against creditors of the chattel mortgagor.

National Trust Co. v. Trusts & Guarantee Co., 5 D.L.R. 459, 26 O.L.R. 279, 22 O.W.R. 933.

B. JOINDER.

(§ I B—55)— NONJOINDER, EFFECT OF, REMEDIES FOR—JOINT LESSORS.

In an action ex contractu, a nonjoinder of plaintiffs is always, unless amended, a fatal error under the New Brunswick County Court practice; if the nonjoinder appear on the face of the pleadings, the mode of attack is demurrer; if only disclosed at the trial, the result is a nonsuit or adverse verdict. [Vassie v. Chesley, 33 N.B.R. 192, distinguished.]

Where 2 lessors have a joint right to be paid a certain amount as rent, the neglect by the debtor to pay the amount gives the two lessors together a right of action, but such neglect is not an interference with any right possessed by either of them singly, and under the New Brunswick County Court practice neither can bring action without joining the other as coplaintiff.

Knowles v. McLaughlin, 11 D.L.R. 659, 41 N.B.R. 548, 12 E.L.R. 508.

JOINDER—ADDITION OF PLAINTIFF—PERSON INTERESTED IN COMMISSION CLAIMED BY PLAINTIFF — DISCOVERY — BETTER AFFIDAVITS OF DOCUMENTS.

Imrie v. Wilson, 2 D.L.R. 883, 3 O.W.N. 895.

ADDITION OF PLAINTIFF — ASSIGNMENT — JOINDER OF PARTIES AND CAUSES OF ACTION.

Clarke v. Bartram, 1 D.L.R. 907, 3 O.W. N. 691.

While the nonjoinder of parties having

a joint interest as co-owner with the plaintiff is, under Ont. C.R. 206 (1897), no longer a ground for the absolute dismissal of the action, the court will direct, on the defendant's exception raised on an interlocutory motion, that the action do not come on for trial unless and until the other person interested has been joined as a party.

Hoodless v. Smith, 7 D.L.R. 280, 4 O.W.N. 190.

MISJOINDER AND NONJOINDER—SPECIFIC PERFORMANCE.

Where, in an action for specific performance an agreement for the exchange of property, the statement of claim discloses a cause of action along with another party, the nonjoinder of the latter as a coplaintiff is no ground for a dismissal of the action but the defect may be remedied by leave to add and amend under penalty of dismissal. The proper method by which a party to an action may raise the question of nonjoinder or misjoinder (r. 28, Alta.), is by an application, substantively, or on motion for directions, in Chambers, or summarily at the trial, to strike out or compel the opposite party to add, which is to be done at the earliest opportunity under the penalty of costs; raising the question in a defence as a point of law is not the proper method, except in the case when it appears on the facts alleged that the plaintiff or plaintiffs have no cause of action against the objecting defendant, which in realty is no objection on the ground of misjoinder, but merely that the facts alleged do not constitute a cause of action.

Smith v. Boyd, 27 D.L.R. 529, 9 A.L.R. 293, 34 W.L.R. 347, 10 W.W.R. 222.

"SERIES OF TRANSACTIONS"—RESCISSION—FRAUD.

Sales of shares, attacked for fraud by different purchasers, may be viewed, under r. 123 (Eng. O. 16, r. 1), as "arising out of the same transaction or series of transactions" warranting the joinder of the several plaintiffs into one action.

Allan v. McLennan, 31 D.L.R. 617, 23 B.C.R. 515, [1917] 1 W.W.R. 513, reversing 10 W.W.R. 941.

SAME TRANSACTION—SAME QUESTIONS.

Moneys due to several persons in their respective capacities, under a contract for work and labour done, upon the same construction, there being no common question of law or fact, are not "causes of action arising out of the same transaction or series of transactions," to enable the several plaintiffs to join into one action, nor within the rule "where if such persons brought separate actions any common question of law or fact would arise," within the rules of the Supreme Court of B.C.

Bourner v. Pauling, 35 D.L.R. 465, 24 B.C.R. 222, [1917] 2 W.W.R. 1129.

PARTNERS.

The shipment of goods to a person who is in fact trading as a partnership entitles him to sue in his own name, without joining a dormant partner, for damage to the goods in course of transit. A dormant partner is a necessary party plaintiff in an action for the benefit of the partnership.

Vipond v. Furness, 35 D.L.R. 278, 54 Can. S.C.R. 521, varying 31 D.L.R. 635, 25 Que. K.B. 325.

JOINDER OF ASSIGNOR—ACTION FOR TORT BY ASSIGNEE.

A mere right of litigation is not assignable; nor, in an action begun by an alleged assignee, will the assignor be added, unless it be necessary to terminate the real matter in dispute.

Henderson v. Pinto Creek, 33 D.L.R. 599, 10 S.L.R. 105, [1917] 2 W.W.R. 178.

WRITTEN CONSENT.

In order that a person be added in an action as a party plaintiff there must be a consent in writing signed by the party thus to be added. [Henderson v. Pinto Creek, 33 D.L.R. 599, 10 S.L.R. 105, followed.]

Gardiner v. Muir, 38 D.L.R. 115, 10 S.L.R. 388, [1917] 3 W.W.R. 1080.

ACTION TO SET ASIDE WILL—JOINDER OF BENEFICIARIES—ORDER FOR REPRESENTATION—PERSONS "HAVING SAME INTEREST"—COSTS.

In an action by one of the next of kin of a deceased testator to set aside bequests made in the will to the defendants, it appeared when the case came on for trial that, in the event of the plaintiff's success, the sums bequeathed to the defendants would necessarily be distributed amongst the next of kin of the deceased, and that there were other persons in the same relationship to the deceased as the plaintiff. Held, that all those who would be benefited by the success of the action should be made parties or be represented. The representation contemplated by r. 75 is a representation of a class "having the same interest" —i.e., interest in the result of the action. An order was made directing that the record and proceedings in the action be amended by striking out the name of A.D.M. as plaintiff and substituting therefore, "A.D. M., suing on behalf of himself and all other the next of kin of the late S.M. and of all those who would be benefited by the action succeeding," and providing that A.D.M. should in the action represent the said next of kin and persons who would be so benefited.

May v. Wheaton, 41 O.L.R. 369.

PERSONS CLAIMING FOR SERVICES—THRESHING.

Two persons employed together by the same person to thresh grain may be joined as plaintiffs in an action to recover their remuneration.

Dusbabek v. Bjornstad, [1918] 3 W.W.R. 79.

LIQUIDATOR—DIRECTORS' MISFEASANCE.

A creditor of a company which is being wound up cannot, without joining the liqui-

dator as a coplaintiff, sue the directors of the company to compel them to make good to the company losses alleged to have been caused by breaches of trust and acts of misfeasance committed by them as such directors and bringing about the insolvency of the company. [Wilson v. Lord Bury, 5 Q.B.D. 518, followed.]

London Guarantee v. Henderson, 26 Man. L.R. 568.

JOINDER OF PLAINTIFFS—MOTION TO COMPEL PLAINTIFFS TO ELECT WHICH WILL PROCEED — ENLARGEMENT TILL TRIAL — SPECIAL CIRCUMSTANCES.

Toronto and Gooderham and Worts v. National Iron Co. et al., 6 O.W.N. 377.

ADDITION OF COPLAINTIFF—CLASS SUIT—COMPANY—ALLEGED ESTOPPEL OF ORIGINAL PLAINTIFF—R. 134.

Crawford v. Bathurst Land & Development Co., 8 O.W.N. 325.

JOINDER OF PLAINTIFFS AND CAUSES OF ACTION—R. 66.

White v. Belleperche, 12 O.W.N. 165, 202.

Where a plaintiff sues jointly and severally the city of Montreal and a third party for damages on account of injuries caused by them, the city can compel the plaintiff to bring such third party into the case.

Duchesne v. Montreal, 14 Que. P.R. 86.

PRACTICE—JOINDER OF PLAINTIFFS HAVING SEPARATE AND DISTINCT CAUSES OF ACTION—COSTS—DEFENDANT NOT OBJECTING TO IRREGULARITY—NO COSTS GIVEN ON DISMISSAL OF ACTION.

An action in which a number of plaintiffs joined in suing defendant for various trespasses against various lands belonging to one or other of the plaintiffs was held not maintainable in that form and was dismissed (without prejudice to the right of any plaintiff to bring further action). There cannot be a joinder of plaintiffs having separate and distinct causes of action although there may be such joinder for damages arising from the one and same wrongful act of the defendant.

Jiggins v. Oliver, [1919] 1 W.W.R. 705.

JUDGMENTS—PLEADINGS—NUMBER OF EMPLOYEES SUING DEFENDANT IN ONE ACTION—SEPARATE CLAIMS FOR WORK—SINGLE JUDGMENT FOR TOTAL AMOUNT SET ASIDE—MISJOINDER OF PARTIES—R. 15—SAME "TRANSACTION OR OCCURRENCE."

In an action in which a number of employees sued defendant for various sums for work, a single judgment entered by default for the total amount thereof was set aside. A number of employees having distinct claims against a defendant for distinct work done by each of them as individuals, although contemporaneously and at the same workshop, cannot join in one action to recover their wages. The same "transaction or occurrence" within the meaning of r. 15 means some business negotiation or dealing with which several persons, though in different rights, may have been connected. On account of a previous winding-up order against defendant company the action was not dismissed for misjoinder of parties. In view of s. 22 of the Winding-up Act (Can.) the motion to dismiss was unnecessary. The question whether the action should go on in its present form was left to the master.

Risler v. Alberta Newspapers, [1919] 1 W.W.R. 740.

(§ I B—57)—ACTIONS AGAINST MUNICIPALITIES—JOINDER OF ATTORNEY-GENERAL.

The Attorney-General is a necessary party only when the public interest in the subject-matter of the action is province-wide in its extent, and not when that interest is confined to a community forming only a part of the province.

Livingstone v. Edmonton, 24 D.L.R. 191, 8 W.W.R. 976, 31 W.L.R. 609. [Varied as to costs in 25 D.L.R. 313, 9 A.L.R. 343, 33 W.L.R. 164, 9 W.W.R. 794.]

OF ATTORNEY-GENERAL.

Where a proceeding is defective because the Attorney-General was not added as a party plaintiff and no consent from the Attorney-General is forthcoming when the case comes on for final disposition, as upon a plaintiff's motion for judgment, a conditional amendment will not be granted subject to the plaintiff obtaining the Attorney-General's consent, but the action will be dismissed if the plaintiff has not the necessary status to maintain the action.

Keay v. Regina, 6 D.L.R. 327, 5 S.L.R. 372, 22 W.L.R. 185, 2 W.W.R. 1072.

PRIVATE ACTION AGAINST PUBLIC NUISANCE—ATTORNEY-GENERAL.

In an action to abate a nuisance against the public health, if the plaintiff shews that he has suffered some particular, direct and substantial damage over and above that sustained by the public at large, the Attorney-General is not then a necessary party. [Goldsmid v. Tunbridge Improvement Commissioners, L.R. 1 Ch. App. 349; Glossop v. Heston and Islesworth Local Board, 12 Ch. D. 102, applied.]

Clare v. Edmonton, 15 D.L.R. 514, 26 W.L.R. 678, 5 W.W.R. 1133.

OF ATTORNEY-GENERAL.

It is immaterial whether a wrong complained of is alleged to have been committed by a public body, e.g., a municipal corporation, or by a private individual, so far as respects the question whether the Attorney-General should be joined as a plaintiff. Where the ratepayers or some of the ratepayers of a municipality sue to restrain their municipal council from performing some act it is not necessary that the Attorney-General should be joined as a plaintiff, if the thing sought to be restrained touches in no way the interests of all the people outside that particular municipality. But if the municipal cor-

poration as a corporation is proposing to do something in excess of the powers given it by its charter it is in the interests of the public of the province that it be restrained and the Attorney-General is a proper party, whether or not a private interest be infringed. [Att'y-Gen'l v. Garner, [1907] 2 K.B. 480, 76 L.J.K.B. 965, 97 L.T. 486, 23 T.L.R. 563; and Prestney v. Colchester, 21 Ch. D. 111, 51 L.J. Ch. 805, followed: view of Sir John Romilly, M.R., in Evan v. Avon, 29 Beav. 144, 30 L.J. Ch. 165, not followed.] The council of a municipal corporation is not the corporation; the inhabitants are the corporation and the members of the council are their trustees. A city is the body of its inhabitants in their corporate form. In a suit against a municipal corporation and the mayor and councillors individually, wherein no charge of wrong doing is made against the corporation and no specific relief is asked against it, but wherein the relief sought is the restraining of the council from passing a certain resolution except under certain conditions and after the observance of certain formalities, the mere fact that the corporation is formally a defendant is no reason why it should be necessary to have the Crown or Attorney-General as a party plaintiff.

Gallagher v. Armstrong, 3 A.L.R. 443.

ADDING ATTORNEY-GENERAL OF ONTARIO AS PARTY PLAINTIFF—ACTION TO PREVENT A MUNICIPAL CORPORATION SELLING LAND.

Parsons v. London, 19 O.W.R. 998.

REVIVOR—DEATH OF PLAINTIFF—SURVIVAL OF CAUSE OF ACTION—DEPRIVING PLAINTIFF OF TIMBER LICENSES.

Wilson v. McClure, 17 W.L.R. 477.

ADDING PARTY AS PLAINTIFF—WHEN AMENDMENT WILL BE ALLOWED.

McNabb v. Toronto Construction Co., 19 O.W.R. 191.

APPLICATION TO APPOINT REPRESENTATIVES —TERMS—PROVISION THAT ORDER MAY BE VARIED.

Garthorne v. Wickerson, 19 O.W.R. 643.

II. Defendants.

A. PROPER AND NECESSARY PARTIES.

Joint debtors, see Moratorium.

(§ II A—65)—RIGHT OF ASSIGNEE TO SUE IN OWN NAME.

The Rules of Practice and Procedure of the Supreme Court of Ontario, including r. 85, having been confirmed by statute, have the force of a legislative enactment. There is nothing in the rule which conflicts with R.S.O. 1914, c. 109, s. 49, and both enactments may stand together; and now that fusion of law and equity has taken place, and the rules of equity, where they are in conflict with the rules of law, are to prevail, r. 85 now applies to an action in the Supreme Court of Ontario, and enables an equitable assignee to sue in his own name where the assignment is of the whole fund, leaving no beneficial interest in the assignor.

Graham v. Crouchman, 39 D.L.R. 284, 41 O.L.R. 22.

FOREIGN INSURANCE COMPANY — GENERAL AGENT — ACTION TO RESTRAIN FROM APPLYING FOR REGISTRATION — COMPANY A NECESSARY PARTY.

The general agent of a foreign insurance company whose capacity to sue and be sued on behalf of the company does not commence until it has become registered, is not its agent, in an action brought to restrain it from applying for registration under a provincial Insurance Act; the action is improperly constituted without such company being made a party thereto.

Matthew v. Guardian Ass'ce Co., 45 D.L.R. 32, 58 Can. S.C.R. 47, [1919] 1 W.W.R. 67, reversing 40 D.L.R. 455, [1918] 2 W.W.R. 405, sub nom. Guardian Ass'ce v. Garrett.

IGNORING SIGNATURES OF PERSONS NOT COMPETENT TO CONTRACT.

In an action upon a promissory note made by several parties some of whom are infants the plaintiff may overlook the privity of the infants and describe the contract as one made by the adult contractors only.

Park v. Pullishy, 3 A.L.R. 340.

MUNICIPAL OFFICER WHOSE STATUS IS IN QUESTION.

In a suit by a ratepayer on behalf of himself and the other ratepayers and inhabitants of a municipality against a mayor and council to restrain them from removing a commissioner from office, without first giving him notice of the charge against him and an opportunity to answer, it is not necessary to join the commissioner as a party.

Gallagher v. Armstrong, 3 A.L.R. 443.

ACTION IN WARRANTY — SIMPLE WARRANTY — ACTION AGAINST A THIRD PARTY BY THE PRINCIPAL DEFENDANT — C.C.P. 186.

Although it has been held that an action in simple warranty may be directed against a person who by his fault, has subjected another party to an action in law, it has never been held that such a person can be called in to take the fait et cause of the principal defendant.

Archambault v. Chausse, 15 Que. P.R. 431.

EXCEPTION TO THE FORM — DEFAULT OF DECISION — PREJUDICE — EXPENSES — — C.C.P. ART. 105, 113, 123, 174.

An exception to form produced by a "mis en cause" founded on the plea, that he has been an added party without any decision having been taken against him, will be maintained, but without costs if the latter suffers no prejudice.

Dorion v. Gervais & Chartrand, 25 Rev. Leg. 30.

MUNICIPAL LAW — RECISSION OF BY-LAW — IRREGULAR SESSION ADJOURNED — DECLARATION OF VACANCY — NOMINATION OF COUNCILOR — PARTIES TO ACTION — MUN. CODE, ART. 118, 430, 431 — C.C.P. ART. 521.

In an action to rescind a municipal by-law intended to declare a vacancy in the council, and to fill the vacancy by naming a new councilor, the plaintiff is not compelled to add the named councillor as a party.

Bergeron v. Notre-Dame-du-Bon-Conseil, 56 Que. S.C. 174.

(§ II A—66)—CREDITOR'S ACTION TO SET ASIDE FRAUDULENT CONVEYANCE — GRANTOR AS PARTY DEFENDANT.

Union Bank v. Mountain, 30 D.L.R. 284, 9 S.L.R. 214, 34 W.L.R. 101.

JUDGMENT CREDITOR — FRAUDULENT CONVEYANCE — ACTION TO SET ASIDE.

In an action by a judgment creditor to set aside as fraudulent a conveyance by the debtor, where no relief is asked against the debtor and no special circumstances appear making it desirable to have him before the court, the debtor is not a necessary party to the action. [McDonald v. Dunlop, 2 Terr. L.R. 177; Bank of Montreal v. Black, 9 Man. L.R. 439; Scott v. Burnham, 19 Gr. 234; Beattie v. Wenger, 24 A.R. (Ont.) 72; Gallagher v. Beale, 14 B.C.R. 247, followed; Belcher v. Hudsons, 1 S.L.R. 474, distinguished.]

Mills v. Harris, 21 D.L.R. 233, 8 S.L.R. 14, 8 W.W.R. 528.

ACTION BY CREDITOR TO SET ASIDE FRAUDULENT CONVEYANCE.

A judgment debtor is a proper, although not a necessary party to an action by a judgment creditor to set aside a conveyance by the debtor as fraudulent. [Gallagher v. Beale, 14 B.C.R. 247, not followed.]

Gibson v. Franklin, 21 B.C.R. 181.

ACTION TO SET ASIDE FRAUDULENT CONVEYANCE.

The grantor is a necessary party to an action by a simple contract debtor to set aside a fraudulent conveyance, and must be made so in the first instance.

Miller v. Kuss, 9 W.W.R. 763. [See also 25 D.L.R. 816, 32 W.L.R. 957.]

(§ II A—67)—NUMEROUS PARTIES.

Ont. Con. R. 200 as to class representation orders cannot be invoked by a plaintiff to have one member of a voluntary association appointed to represent all the other members, in an action for trespass and assault committed at the instance of that defendant on behalf of the association. Rule 201 as to class representation orders can only be invoked where the right of the class to be represented depends upon the construction of an instrument, and those rights are sought to be ascertained.

Scully v. Ontario Jockey Club, 8 D.L.R. 203, 4 O.W.N. 379, 23 O.W.R. 422.

MORTGAGE FORECLOSURE — NUMEROUS PARTIES — REPRESENTATIVE FOR NUMEROUS CLASS.

Practice r. 77 (Ont. rules of 1913) as to the appointment by the court of a person to represent unascertained classes of defendants, does not apply where the parties interested in an equity of redemption, although numerous, have separate and distinct interests in the incumbered land, and are entitled to indemnity and contribution differing according to their respective titles and the dates of their acquisition.

Home Building & Savings Ass'n v. Pringle, 14 D.L.R. 482, 5 O.W.N. 226, 25 O.W.R. 191.

NUMEROUS DEFENDANTS — REPRESENTATION BY COUNSEL AT TRIAL — POWERS OF COURT — CON. R. 200 — UNNECESSARY PARTY — MOTION TO DISMISS — ABSENCE OF CONSENT.

Howie v. Cowan, 2 D.L.R. 906, 3 O.W.N. 1156.

(§ II A—70)—ACTION RELATING TO LANDS — INTEREST OF THE CROWN — ADDITION OF ATTORNEY-GENERAL AS PARTY.

The Attorney-General is a necessary and proper party to any action relating to lands in which the Crown has an interest, and the rights of the public are involved.

E. & N. R. Co. v. Wilson; E. & N. R. Co. v. Dunlop, 50 D.L.R. 371, [1919] 3 W.W.R. 961, reversing 46 D.L.R. 541, [1919] 2 W.W.R. 147.

(§ II A—71)—ACTION AGAINST CROWN — ATTORNEY-GENERAL.

The nonexistence of any right to bring the Crown into court does not give the Crown immunity from all law, or authorize the interference by the Crown with private rights at its own mere will, and the practice in England in cases where no petition of right will lie is to sue the Crown by the Attorney-General under a declaratory order obtained.

Eastern Trust Co. v. Mackenzie-Mann & Co., 22 D.L.R. 410, [1915] A.C. 750, 113 L.T. 346, 31 W.L.R. 248, reversing Supreme Court of Canada, unreported, affirming sub nom. Irvine v. Hervey, 13 D.L.R. 868, 47 N.S.R. 310.

ACTION FOR TRESPASS — TRESPASSER CLAIMING UNDER PROVINCIAL LEASE — PRIOR GRANT TO DOMINION — ATTORNEY-GENERAL NOT NECESSARY AS A PARTY.

In an action for trespass, where the trespasser claims under a lease from the Crown as represented by the province, such lease being subsequent to a grant which if valid must prevail, the Attorney-General is not a necessary party.

Esquimalt & Nanaimo R. Co. v. McLellan, 44 D.L.R. 697, [1918] 3 W.W.R. 645, affirming 37 D.L.R. 803.

CROWN AS PARTY DEFENDANT — TRANSCONTINENTAL RAILWAY — ACTION FOR DAMAGES — JURISDICTION.

An action for damages against the Trans-

continental Railway (Eastern Division) must be taken against the Crown in the Exchequer Court and not against the commissioners of said railway who are acting as representatives and for the benefit of the government of Canada. [The King v. Jones, 44 Can. S.C.R. 495, followed.]

Fournier v. Commissioners of the Transcontinental Railway, 15 Que. P.R. 56.

(§ II A—85)—Company — Winding up — Judgment — Person privy in estate to party litigant.

A person cannot be affected, still less concluded, by any evidence, decree or judgment to which he was not actually or in consideration of law, privy. In order that a judgment may be conclusive against a person as privy in estate to a party litigant it is necessary to shew that he derives title under the latter by act or operation of law subsequent to the recovery of the judgment, or at least to the commencement of the proceedings, and that the judgment was one affecting the property to which title is derived.

Re Bailey Cobalt Mines; Bailey Cobalt Mines v. Benson, 45 D.L.R. 585, 44 O.L.R. 1.

(§ II A—86)—Partners.

As a rule there can be only one defendant in an action of slander, namely, the person who uttered the words complained of, and unless the plaintiff pleads that one defendant instructed the other to utter the slander sued on, a claim against 2 persons jointly, although alleged to be partners, will be struck out as embarrassing. [See annotation to this case.]

Messervey v. Simpson, 1 D.L.R. 532, 20 W.L.R. 531, 22 Man. L.R. 421, 1 W.W.R. 919.

(§ II A—87)—Corporation — Sale of shares.

In an action to enforce a sale of shares between a shareholder and a third person, the company may be joined as a proper though not necessary party, in order that the formalities requisite for the transfer may also be enforced.

Reardon v. Franklin, 35 D.L.R. 380, 51 N.S.R. 161. [Affirmed 39 D.L.R. 176, 55 Can. S.C.R. 613.]

(§ II A—95)—Assignment for benefit of creditors — Sale to inspector — Suit to avoid.

In an action to set aside a sale of the assets of a company made by its assignee for the benefit of creditors because one of the inspectors of the estate was interested in the purchase, any question as to his right to retain profits derived by him cannot be considered, if neither the company nor the inspector is a party to the action.

Shantz v. Clarkson, 11 D.L.R. 107, 4 O.W.N. 1393, 24 O.W.R. 596.

Action by settlor against trustees to set aside trust-deed — Application by trustees for addition as defendant of representative of unborn issue — R. 134 — Appointment of representative — R. 77.

Laing v. Toronto General Trusts Corp., 16 O.W.N. 193.

(§ II A—100)—Husband and wife.

While a claim for the custody of the children may be joined in an action by the wife against the husband for alimony, another person taking care of the children under the defendant's directions cannot be made a codefendant for the purposes of the relief sought as to the custody of the children.

Ney v. Ney, 1 D.L.R. 641, 3 O.W.N. 927, 21 O.W.R. 524.

Joinder of defendants — Husband and wife — Agreement — Specific performance — Declaration of trusteeship — Rr. 30, 32, 79.

Held, that, so far as the action was for specific performance the wife was a necessary and proper party, and the joinder of the 2 defendants was authorized by r. 32; and, apart from that rule, and before the Judicature Act, she would have been a proper party. The fact that the wife might not be interested in all the relief prayed for was not a proper matter of complaint: r. 30; and it would not be a ground for relief under r. 79. And a motion by the defendants for an order requiring the plaintiff to elect as to which of the defendants he would proceed against, and to dismiss the action as to the other, was refused.

Mutz v. Murr, 26 W.L.R. 711.

Husband and wife — Action to set aside fraudulent conveyance.

This was an action by a judgment creditor to set aside a conveyance of land by W. E. F. to his wife, A. S. F., as being fraudulent. Both the husband and wife were joined as defendants, and on February 8, 1915, the solicitor for W. E. F. made an application in Chambers before the Chief Justice of British Columbia for an order striking him out as being an unnecessary and improper party, and in making the application he relied on the authority of Gallagher v. Beale, 14 B.C.R. 247. The Chief Justice held that the husband was a proper, although not an unnecessary party, and dismissed the application with costs.

Gibson v. Franklin, 7 W.W.R. 1411.

(§ II A—105)—Cases as to real estate.

Where a mortgagee holds by a conveyance absolute in form, but which is in effect a mortgage only, he may be made a codefendant in a creditor's action for a sale in aid of execution against the owner of the equity without any offer by the plaintiff to redeem: and the plaintiff may, upon his debtor's interest being ascertained, elect either to redeem or to sell subject to the

mortgagee's claim. [Moore v. Hobson, 14 Grant 703, followed.]

Wallace v. Smart, 1 D.L.R. 70, 19 W.L.R. 787, 48 C.L.J. 110, 22 Man. L.R. 68.

ADDING IN MASTER'S OFFICE.

The Manitoba rules of practice as to adding parties in the Master's office are confined to cases where neither any accounting nor any direct relief is sought against the parties to be added and in which the question of relief to the added parties themselves (beyond what is claimed by the plaintiff) cannot arise.

Watson v. Cadwallader, 14 D.L.R. 526, 23 Man. L.R. 760, 26 W.L.R. 1, 5 W.W.R. 549.

HOLDING DEED TO BE MORTGAGE — TACKING.

On holding a deed absolute in form to be an equitable mortgage to the extent of the consideration therein stated, in an action by the widow and heirs of the grantor, the grantee will not be permitted to tack on an additional indebtedness from the grantor although it was the intention of the parties to the deed that it was to stand as security therefor, where all of the persons interested, including judgment creditors of the grantor, were not parties to the action.

Duffy v. Mathieson, 13 D.L.R. 588, 13 E.L.R. 73.

SPECIFIC PERFORMANCE — PERSON AGREEING WITH VENDOR TO CONVEY TO LATTER'S VENDEE.

A landowner who contracted to sell land to a purchaser, who, in turn, agreed to sell it to the plaintiff, is a proper party to an action for specific performance of the latter agreement, where, with full knowledge of such contract, he had agreed with his vendee to convey the land to the plaintiff in furtherance of the contract of resale.

Dixon v. Dunmore, 12 D.L.R. 549, 49 C.L.J. 551, 24 O.W.R. 774.

FORECLOSURE ACTION — ASSIGNEE OF PURCHASER.

An assignee of a purchaser to whom the purchaser's interest under the contract had been assigned is a necessary party defendant to an action for the foreclosure of the contract for the purchase of the land, and his nonjoinder will affect the judgment rendered in the action.

Gale v. Powley, 24 D.L.R. 450, 22 B.C.R. 18, 32 W.L.R. 65, 8 W.W.R. 1312.

SPECIFIC PERFORMANCE OF SALE OF LAND — PREDECESSOR IN TITLE.

The predecessor in title (remaining registered proprietor) of a vendor of land is not a proper party to an action for specific performance brought against the purchaser.

Gibbs v. Gibson, 9 W.W.R. 190.

JOINDER OF CODEFENDANT — NECESSARY PARTIES — ASSIGNEE OF AGREEMENT OF SALE OF LAND — CANCELLATION OF CONTRACT.

In an action for cancellation of an agreement of sale and to recover possession of the premises by the vendor, although the assignee of the agreement of sale is not a necessary party so far as the issues between the vendor and the purchaser are concerned, yet as the presence of the assignee will be necessary in order to enable the court to give the plaintiff the relief for which he asks, the assignee ought to be joined as a codefendant even although the plaintiff opposes such joinder.

Griese v. Loewen, 6 W.W.R. 698.

(§ II A—106)—FORECLOSURE OF LAND CONTRACT — UNKNOWN ASSIGNS OR SUBPURCHASERS.

The plaintiff in an action for foreclosure of an agreement for the sale or exchange of lands is under no obligation to make assignees or subpurchasers parties to the action or to the motion for rescission, where the defendant fails to disclose in the pleadings or otherwise actual facts relating to any subsale or any notice to the plaintiff of any such assignments. [M'Creight v. Foster, L.R. 5 Ch. App. 604, L.R. 5 H.L. 321, applied.]

Plainview Farming Co. v. Transcontinental Townsite Co., 25 D.L.R. 594, 25 Man. L.R. 677, 32 W.L.R. 499, 9 W.W.R. 247.

B. JOINDER.

(§ II B—115)—DEBTORS UNDER JOINT LIABILITY — JOINDER AS DEFENDANTS ESSENTIAL.

It is the right of persons jointly liable to pay a debt to insist upon being sued together, because otherwise one such debtor may through nonjoinder become severally liable for the whole debt. Where it appears on the trial of an action for breach of contract that the defendant is jointly liable with another person who was not made a party, but who ought to be made a party defendant, the court of its own motion or upon application of either party, may add such interested stranger, and the cause shall not be defeated by reason of the nonjoinder in any event, as the rights of the parties actually before the court may be dealt with apart from the rights of the stranger. [Rule 41 of Sask. Jud. Rules (1911) applied.]

Lamb v. Lasby, 10 D.L.R. 624, 6 S.L.R. 192, 23 W.L.R. 548, 3 W.W.R. 1139.

Under Ontario rr. 186, 192 (Con. Rules of 1897), an alleged agent may be joined in an action on a contract made by him, ostensibly on behalf of the principal, for the purpose of claiming against the alleged agent alternative relief in case it should be found that he made the contract on his own behalf. [Tate v. Natural Gas Co. 18 P.R. 82, followed; Andrews v. Forsythe, 7 O.L.R. 188, distinguished.]

Youngston v. Doty, 2 D.L.R. 839.

Under r. 86 of the Saskatchewan Supreme Court Rules (1911), it is proper to make an order ex parte to add as a party defendant in a foreclosure action a person who has, after order nisi for foreclosure and before final order, acquired the equity of

redemption in the mortgaged premises; r. 42 as to notice of motion does not apply in such a case.

Wasson v. Harker, 7 D.L.R. 495, 22 W.L.R. 298.

A motion to add a party defendant may be refused, when there appears to be a substantial question as to the application of the Statute of Limitations, which might be affected by the order, unless the applicant consents to a term that the Statute of Limitations shall apply for the benefit of the added defendant up to the date of the order and not merely to the date of the writ against the original defendant.

Broom v. Toronto Junction, 3 D.L.R. 699, 22 O.W.R. 14, affirming 3 O.W.N. 1158.

JOINDER — COVENANTS UNDER LEASE — SUBTENANTS — LANDLORD.

Where the plaintiff in the one action sues (a) his landlord for breach of covenant in a lease, and (b) his own subtenants to enjoin them against using certain water-closets on the demised premises; he thereby contravenes the Alberta rules against joining two causes of action of these distinct classes and will be put to his election and required to abandon the one to the other.

Allen v. Johnston, 13 D.L.R. 640, 25 W.L.R. 397, 5 W.W.R. 85.

DEFENDANTS — JOINDER — COMMON INTEREST.

Although the relief sought against several defendants may vary, they may be joined as codefendants in the same action, under the Manitoba King's Bench Act, R.S.M. 1902, c. 40, r. 219, provided there be a question of law or of fact in which they have some common interest. [Andrews v. Forsythe, 7 O.L.R. 188, and Chandler v. G.T.R. Co., 5 O.L.R. 589, distinguished.]

First National Bank v. Avitt, 15 D.L.R. 82, 26 W.L.R. 425, 24 Man. L.R. 588, 5 W.W.R. 842, varying 14 D.L.R. 629, 26 W.L.R. 37, 5 W.W.R. 660, 663.

IMPROPER JOINDER — UNDISCLOSED PRINCIPAL — ACTION AGAINST PRINCIPAL AND AGENT — NECESSITY OF ELECTION.

In an action against several defendants, one of whom, without disclosing the existence of his principal, acted as agent for the others in the transaction to which the action pertains, the plaintiff will be required to elect within a reasonable time whether he will treat principal or agent as the party with whom he dealt. [Smethurst v. Mitchell, 1 E. & E. 622, applied; Tate v. Natural Gas & Oil Co., 18 P.R. 82, distinguished.]

Phillips v. Lawson, 11 D.L.R. 453, 24 O.W.R. 655, 4 O.W.N. 1364.

JOINDER — DEFENDANT — BOTH PERSONAL AND REPRESENTATIVE CAPACITY.

Under K.B. r. 243 (Man.), a plaintiff may join claims against the defendant whether as executrix de son tort or as administratrix, and claims against the defendant personally.

National Drug & Chemical Co. v. Astrof, 20 D.L.R. 14, 25 Man. L.R. 44, 7 W.W.R. 546.

JOINDER OF DEFENDANTS — PRINCIPAL AND AGENT — LEAVE.

Currie v. Wreford, 27 D.L.R. 783, 9 S.L.R. 120, 34 W.L.R. 45, 10 W.W.R. 167.

DEFENDANTS — JOINDER OF — RELIEF, JOINT, SEVERAL OR IN ALTERNATIVE.

Where the plaintiff has 2 causes of action against certain of the defendants, arising out of the same relationship, and, in respect to one of such causes of action, certain others of the defendants are jointly liable with their codefendants, the entire issue may be tried in a single action under Rr. 196 and 197 of the King's Bench Act, R.S.M. 1913, c. 46, relating to relief whether joint, several or in the alternative, with proper protection against embarrassment or expense in any particular part of the trial in which some of the defendants may have no interest. [Stewart v. Teskee, 20 Man. L.R. 167, followed.]

Stephens v. Cairns, 17 D.L.R. 743, 24 Man. L.R. 434, 28 W.L.R. 337.

IMPROPER JOINDER — CONTRACTS — SERVICE OUT OF PROVINCE — DISCRETION.

British publishers of a reprint of English Law Reports issued a prospectus, prior to publication, estimating that each set would contain about 150 volumes of about 1,500 pages each. The sets were sold at a fixed price per volume. The plaintiffs, sellers of law books in the United States of America, made an agreement with the British publishers to take a certain number of sets, at a stipulated price per volume; and, as part of their plan for disposing of their sets, made an agreement with the defendants, doing business in Ontario, to sell them a certain number of sets, at a named price. This agreement was made on the faith of the prospectus. There was no contract between the publishers and the defendants. The publishers cut down the number of pages in the volumes, so that when 150 volumes had been issued, the reprint had not been completed, and it was expected that the sets would run to 200 volumes. When the volumes reached 150, the defendants refused to pay for the additional volumes; and, volumes 151-154 having been delivered, the plaintiffs sued the defendants for the price. The defendants pleaded that they had paid the full price, and asked for a declaration that they were entitled to the remaining volumes without further payment. An order was made, on the application of the plaintiffs, adding the British publishers as defendants, permitting service to be made upon them in Great Britain, and allowing the plaintiffs to amend their statement of claim by setting out the contracts and the contention of the defendants, and by claiming a declaration that, if the original defendants should succeed in their contention, the added defendants should be declared liable, for the reason that the

prospectus was theirs, and the default, if any, theirs. This order was set aside on appeal, it being held that (the 2 contracts being quite distinct and between different parties) the added defendants were not proper parties to the action brought against the original defendants (r. 25 (1) (g)), applying the criterion of r. 67, relating to the joinder of parties and of causes of action. [Oesterreichische Export A.G. v. British Indemnity Ins. Co., [1914] 2 K.B. 747, distinguished.] Held, also, that the right to allow service out of Ontario is one which must be exercised in accordance with a sound judicial discretion; r. 67 (2) enables the court to deal with the case if the joinder is deemed oppressive or unfair; and no sound principle could justify the bringing in Ontario of an action by foreigners against defendants in Great Britain, upon a contract neither made nor to be performed within Ontario.

Boston Law Book Co. v. Canada Law Book Co., 43 O.L.R. 13. [Affirmed in 43 O.L.R. 233. See 15 O.W.N. 294.]

JOINDER OF CITY CORPORATION AS DEFENDANT — LIABILITY FOR ACTS OF POLICE CONSTABLE — PLEADING.

McAvoy v. Rannie, 5 O.W.N. 688.

ORDER ADDING DEFENDANT — DISCHARGE OF ADDED DEFENDANT UPON PAYMENT INTO COURT OF MONEYS IN QUESTION IN ACTION.

Martens v. Asling, 12 O.W.N. 271.

ADDITION OF DEFENDANTS AFTER COMMENCEMENT OF ACTION — STATEMENT OF CLAIM — MATTERS OF COMPLAINT ARISING AFTER COMMENCEMENT OF ACTION — STRIKING OUT STATEMENT OF CLAIM AS AGAINST ADDED DEFENDANTS.

Stinson v. International Bridge & Terminal Co., 13 O.W.N. 227.

JOINDER.

If two defendants are jointly sued for the same debt, one personally and the other as tiers de tenteur of mortgaged land, the plaintiff cannot inscribe for judgment by default against the latter who has not pleaded when his codefendant has pleaded that the debt sued for is not yet exigible.

Therien v. Viau, 13 Que. P.R. 277.

ADDING PARTY DEFENDANT WITHOUT PLAINTIFF'S CONSENT — KING'S BENCH R. 220.

Hamelin v. Newton, [1918] 1 W.W.R. 107, reversing [1917] 3 W.W.R. 933. [Reversed, 39 D.L.R. 706, 28 Man. L.R. 458, [1918] 1 W.W.R. 804.]

PLEADING — COMPANIES — EMPLOYEES OF COMPANY JOINING IN ACTION TO ENFORCE STATUTORY LIABILITY OF DIRECTORS FOR WAGES.

Employees of a company having separate claims for wages against it are not improperly joined in bringing an action against the directors of the company to enforce the statutory liability for the wages of workmen. [Risler v. Alberta Newspapers, [1919] 1 W.W.R. 740, distinguished.]

Risler v. McTeer, [1919] 1 W.W.R. 746.

WANT OF PARTIES — EXCEPTION.

Failure to make interested persons parties to an action cannot be taken advantage of by exception to the form, but is a matter for dilatory exception only.

Pascal v. Bank of Montreal, 12 Que. P.R. 186.

ACTION AGAINST MUNICIPAL CORPORATION AND LANDOWNERS — UNITY OF MATTERS.

Crowther v. Cobourg, 19 O.W.R. 399.

(§ II B—118)—PERSONAL INJURIES.

Where one is injured by the fall of a building, and a writ is issued against the supposed owner, and it is then discovered that the building is registered in the name of his wife, and she is added as a defendant, the plaintiff cannot be compelled, under the Supreme Court Rules (B.C.), to elect against which defendant he will proceed. There is no distinction between actions of contract and actions of tort in respect of the interpretation of the rules as to joinder of parties defendant. [Bullock v. London General Omnibus Co., [1907] 1 K.B. 264, at p. 271, followed.]

North v. Rogers, 5 D.L.R. 377, 17 B.C.R. 87, 1 W.W.R. 836.

ACTION FOR NEGLIGENCE — ELECTRIC COMPANY AND MUNICIPALITY.

The statement of claim set up that the defendant city had, for the purposes of its line of electric trolley cars, fastened a guy wire to a telegraph pole of the C.N.R. Co. on which the defendant electric light company had a high power wire, and by so doing caused the insulation upon the latter wire to be rubbed off, in consequence of which the plaintiff, while working on the pole in the discharge of his duty, received the injury complained of. The plaintiff claimed also that the electric light company was liable to him for negligence in maintaining its high power wire void of insulation, thus causing the plaintiff's injury. The 2 defendants were not charged with any joint tort, nor were they charged separately with the same wrongful act, but each was charged with a separate and distinct act or omission:—Held, that the local judge at Brandon was right in dismissing an application of the defendant electric light company to compel the plaintiff to elect as to which defendant he would proceed against, and that, under rr. 196, 197 of the King's Bench Act, the plaintiff might have both his complaints tried in the same action. [Campania Sansinena v. Boulder, [1910] 2 K.B. 354; Gas Power Age v. Central Garage Co., 21 Man. L.R. 496, and Till v. Oakville, 25 O.W.R. 476, 31 O.L.R. 405, followed.]

Young v. Brandon, 25 Man. L.R. 189, 32 W.L.R. 231, 9 W.W.R. 62. [See also 25 D.L.R. 296, 25 Man. L.R. 810.]

PERSONAL INJURIES — DEATH — JOINDER OF DEFENDANTS — CAUSE OF ACTION — CONNECTED TRANSACTIONS — JOINT LIABILITY — DOUBT AS TO WHICH DEFENDANT RESPONSIBLE.

Till v. Oakville, 5 O.W.N. 443.

WORKMEN'S COMPENSATION ACT — CLAIM AGAINST SUBCONTRACTOR AND PRINCIPAL CONTRACTOR — JOINDER OF PARTIES.

Where a plaintiff suing for damages for personal injuries elects to proceed independently of the Workmen's Compensation Act, he cannot make any claim under the Act (except by virtue of s. 8); consequently when so proceeding against a subcontractor, his immediate employer, he cannot join a claim against the principal contractor under the Act. Both contractors may be sued in an action at common law, where such action arises out of a series of occurrences for which one or both are responsible and with which both are connected the plaintiff being uncertain which is liable. [Till v. Oakville, 25 O.W.R. 476, followed.]

Heath v. Oliver, 27 W.L.R. 517, 6 W.W.R. 305.

(§ II B—119)—ADDING PARTY DEFENDANT.

Ont. r. 134 as to adding a party defendant applies only in the case of a person who ought to have been joined or whose presence is necessary to enable the court effectually and completely to adjudicate upon the questions involved in the action.

Reuckwald v. Murphy, 28 D.L.R. 474, 32 O.L.R. 133.

DEFENDANTS — JOINDER — COMMON INTEREST — ADDING PARTIES DEFENDANT.

In an action to set aside certain conveyances and mortgages alleged to be fraudulent and void as against the creditors of the transferor, the transferees and mortgagees under the deeds which are challenged have a sufficiently common interest with the transferor to authorize their being joined with him as codefendants, the fraud, fraudulent conduct, and fraudulent intent to hinder, defeat or delay, being the underlying principle of the action as to all of them. [First National Bank v. Avitt, 14 D.L.R. 629, varied; Andrews v. Forsythe, 7 O.L.R. 188; Chandler v. Grand Trunk R. Co., 5 O.L.R. 589, distinguished.]

First National Bank v Avitt, 15 D.L.R. 82, 24 Man. L.R. 588, 26 W.L.R. 425, 5 W.W.R. 842.

ADDING PARTIES DEFENDANT — MECHANICS' LIEN.

After the expiration of the statutory period it is too late to commence an action to enforce a mechanics' lien to amend by adding as a party defendant a purchaser of the lands who became the registered owner after the registration of the lien, but before action thereon.

Abramovitch v. Vrondessi, 11 D.L.R. 352, 23 Man. L.R. 383, 24 W.L.R. 439.

ADDING AS PARTY DEFENDANT THE THIRD PARTY.

Under subs. (h) of s. 16 of the Judicature Act (Ont.) 1913, c. 19, R.S.O. 1914, c. 56, empowering the court to grant full equitable as well as legal remedies in any action pending before it to ensure a complete and final determination, the court may, at the trial, add as a substantive defendant, a person already before the court as a third party brought in by the defendant by a third party notice claiming indemnity or relief over, if the third party is substantially a defendant and the justice of the case requires that he should be added to enable complete relief to be awarded.

Strathy v. Stephens, 15 D.L.R. 125, 29 O.L.R. 383.

BRINGING IN PARTIES — JOINT AND SEVERAL NEGLIGENCE — ADDING PARTIES.

An owner who employs an architect to superintend the erection of a building on his land adjoining a public highway, and who through the agency of the architect employs land surveyors to survey and designate the site for the building, is not entitled, in defending the architect's suit for his fees, to counterclaim for damages on the ground that the building was erected so as to encroach upon the public highway owing to the negligence of the architect, the builder and the surveyor, or in the alternative from the negligence of some of them, and to bring them all in as parties defendant to the counterclaim unless he so counterclaims as to shew a contractual relationship or connection between the added defendants and the original plaintiff. [Treleaven v. Bray, 45 L.J. Ch. 113, 1 Ch. D. 176, applied: as to architect's duty to employers, see Annotation, 14 D.L.R. 402.]

Hopkins v. Brown, 17 D.L.R. 38, 7 A.L.R. 262, 28 W.L.R. 276, 6 W.W.R. 944, reversing in part 16 D.L.R. 75, 28 W.L.R. 276.

INJUNCTION — SUBPURCHASER AS NECESSARY PARTY — NEW TRIAL.

Upon the hearing of appeals by both parties from the judgment of Lennox, J. (34 D.L.R. 484, 38 O.L.R. 488), attention was called to the fact that the Dominion Sugar Co. was not a party to the action, although its contract with the defendants was attacked by the plaintiffs. After consideration, the court directed a new trial, with liberty to the plaintiffs to add the sugar company as a party defendant; and it was:—Held, that the action was not properly constituted; that the case came within r. 134, for, without the presence of the sugar company, it was impossible to say that the court could effectively and completely adjudicate upon the questions involved in the action, and if the sugar company was not added the court would be prevented from effectively doing justice. [Hartlepool Gas & Water Co. v. West Hartlepool Harbour & R. Co., 12 L.T.R. 366, followed.]

Union Natural Gas Co. v. Chatham Gas Co., 38 D.L.R. 753, 40 O.L.R. 148. [Reversed 40 D.L.R. 485, 56 Can. S.C.R. 253.]

ADDING MORTGAGEES AS DEFENDANTS.

Canadian Bank of Commerce v. Fitzgerald, 18 O.W.R. 908.

ACTION OF LIBEL, SLANDER AND CONSPIRACY — JOINDER OF DEFENDANTS — IMPROPER JOINDER OF CAUSES OF ACTION.

Devaney v. The World, 18 O.W.R. 919.

ADDITION OF DEFENDANTS — APPLICATION OF ORIGINAL DEFENDANTS — OPPOSITION BY PLAINTIFFS — ALTERNATIVE APPLICATION BY ADDED PARTIES.

R. v. Royal Bank of Canada, 17 W.L.R. 508.

JOINDER OF DEFENDANTS — JOINDER OF CAUSE OF ACTION ARISING OUT OF TORT WITH ONE ARISING OUT OF CONTRACT.

Gas Power Age v. Central Garage Co., 21 Man. L.R. 496.

HYPOTHECARY CREDITORS.

A purchaser who has ascertained that there are hypothecs upon the property that he has purchased cannot demand that his vendor shall be condemned to cause these hypothecs to be expunged from the registry without making the hypothecary creditors parties.

Dorion v. Jodoin, 47 Que. S.C. 414.

III. Bringing in; intervention; third party.

Third party procedure, see Contracts, IV B—330; as to matter set up by counterclaim, see Pleading, VI—355.

Joinder of Attorney-General, ratepayers, see Action, II B—45.

(§ III—120)—VENDOR AND PURCHASER — CROP AGREEMENT — TAX CLAIM.

A third party notice by the purchaser under a "crop agreement," claiming indemnity against his vendor in an action brought by a municipality for taxes, will not be struck out although the agreement is silent as to who shall pay the taxes.

Carmangay v. Snyder, 19 D.L.R. 765.

Where in an action by a ratepayer against a municipal corporation the submission of one of its by-laws was by a competent court declared a nullity and its operation was held not to prevent the submission of a similar by-law in the January following if the corporation should see fit to submit it, and where the decision of the court was by resolution of the council formally and duly acquiesced in by the council of the municipality, a motion by another ratepayer for leave to intervene and appeal will be refused. [Re Mace v. Frontenac, 42 U.C.Q.B. 70, distinguished.]

Stoddart v. Owen Sound, 7 D.L.R. 377, 4 O.W.N. 171.

ACTION BY TOWN SOLICITOR — RIGHT OF MAYOR TO INTERVENE — CONDITION AS TO COSTS.

In an action brought against an incorporated town by a firm of solicitors, of which the town solicitor is a member, in respect of a claim which a majority of the town council are in favour of paying, but which is resisted by the mayor as illegal and unauthorized, the fact that the town is inops consilii, by reason of the interest of the town solicitor, is a reason for admitting the mayor to intervene and defend the action on behalf of himself and other dissenting ratepayers, if any, subject to the penalty of payment of costs. The liability as a ratepayer to pay a proportion of the amount involved in a claim against a municipal corporation is such a special interest as to give the mayor a locus standi on the hearing of the application for leave to intervene and defend. [Hart v. Macllreith, 39 Can. S.C.R. 657, followed.]

Corning v. Yarmouth, 12 D.L.R. 683, 13 E.L.R. 78, affirming 9 D.L.R. 277.

ACTION AGAINST TOWN — REFUSAL OF COUNCIL TO DEFEND — INTERVENTION BY RATEPAYER.

The mayor, as such and as a ratepayer, may properly be given leave to intervene for the purpose of defending an action against a town where it is a reasonable assumption that the council's refusal to defend is not a bona fide exercise of discretion. [Macllreith v. Hart, 39 Can. S.C.R. 657, applied.]

Chipman v. Yarmouth, 12 D.L.R. 415, 47 N.S.R. 257.

THIRD PARTIES — RIGHT TO EXAMINE THIRD PARTY — DIRECTIONS AS CONDITION PRECEDENT — MANITOBA RULES.

Where a person, not a party to an action, served under the K.B. rr. 249, 249 (a) (R.S.M. 1902, c. 40, as amended by 10 Edw. VII. c. 17), defends as a third party pursuant to notice, the party giving such notice is not entitled to examine the third party for discovery unless and until, as a condition precedent, an application for directions has been made under those rules.

Warren v. Pettingell, 13 D.L.R. 801, 23 Man. L.R. 747, 25 W.L.R. 387, 5 W.W.R. 73.

BY AMENDMENT ON PRECIPE.

Additional parties defendant may be added by the plaintiff under Man. K.B. r. 327, by amendment on precipe of the plaintiff's statement of claim instituting the action.

First National Bank v. Avitt, 14 D.L.R. 629, 26 W.L.R. 37, 5 W.W.R. 660, 663. [Varied in 15 D.L.R. 82, 24 Man. L.R. 588, 26 W.L.R. 425, 5 W.W.R. 842.]

THIRD PARTIES — INTERVENTION.

Upon a motion for an injunction against a registrar of deeds to restrain him from registering a plan, the proponders of the plan may be heard by leave of the judge, guided by analogy under Ont. Con. Rr. 3, 1086, and if the motion fails may be entitled to costs as against the applicant.

Toronto v. Hill, 10 D.L.R. 639, 24 O.W.R. 388.

INTERVENTION — EXPROPRIATION PROCEEDINGS — INTEREST ACQUIRED PENDENTE LITE.

A person having an unregistered interest in land in Alberta within the knowledge of a railway company at the time of the service of the "notice to treat" in expropriation proceedings and registering his interest after such proceedings having been commenced must be treated as a purchaser pendente lite because of the provisions of the Land Titles Act (Alta.) 1906, c. 24, but may be allowed to intervene and be added as a party to the arbitration proceedings.

Re Edmonton, Dunvegan & B.C.R. Co., 15 D.L.R. 938, 16 Can. Ry. Cas. 396, 26 W.L.R. 767, 5 W.W.R. 1192. [Varied 18 D.L.R. 633, 28 W.L.R. 967, 7 W.W.R. 430.]

INTERVENTION — JUDICIAL PROCEEDING — JURISDICTION OF COURT DETERMINED BY AMOUNT IN CONTROVERSY ON INTERVENTION.

An intervention is a "judicial" proceeding within the meaning of s. 46 of the Supreme Court Act. The amount in controversy upon the intervention is the amount that governs the jurisdiction of the Supreme Court of Canada to hear an appeal. [King v. Dupuis, 28 Can. S.C.R. 388; Coté v. Richardson, 38 Can. S.C.R. 41, followed.]

Pulos v. Lazanis, 44 D.L.R. 523, 57 Can. S.C.R. 337.

BRINGING IN — QUEBEC PRACTICE — ACTION EN ARRIERE-GUARANTIE.

Archambault v. Chausse, 19 D.L.R. 884.

THIRD PARTY PROCEDURE — TRESPASS — AGREEMENT TO INDEMNIFY.

McIvor v. Coldwell, 34 D.L.R. 771, 10 S.L.R. 177, [1917] 2 W.W.R. 427.

CLAIM AGAINST FOR RELIEF OVER — NO CONNECTION WITH MAIN ACTION.

Dominion Belting Co. v. Jeffrey Co., 1 D.L.R. 910, 3 O.W.N. 771.

JUDGMENT — MOTION TO VARY MINUTES — COUNSEL APPEARING NOT ON RECORD — PARTIES INTERESTED — COSTS.

Upon an interested party appearing when not a party to the appeal, he must apply for and obtain a status on the record in order to recover costs if successful.

Re Dominion Trust Co., 26 B.C.R. 330, [1919] 2 W.W.R. 452.

THIRD PARTY NOTICE — LEAVE TO DEFEND.

An application by a third party for leave to defend, made several months after service of the notice on him, without any affidavit shewing a defence, and after the defendant has satisfied the plaintiff's judgment, should be refused, and an application by the defendant for the relief claimed in the third party notice should be granted.

Gomershall v. G.T.P. Development Co., 26 Man. L.R. 322, 34 W.L.R. 301.

BRINGING IN — INTERVENTION — BOND GUARANTEE.

In 1909, the proceeds derived from the sale of certain bonds of the A. & G.W.R. Co., guaranteed by the province, were deposited in certain banks in the name of the Provincial Treasurer, to be paid out, in a specified manner, upon construction of the railway. By statute of the provincial legislature, c. 9 of 1910, the railway company were declared to have made default and the moneys so held by the banks, of which $6,000,000 and interest were held by the defendant bank, were declared "to form part of the general revenue funds of the province of Alberta, free and clear of any claim thereon or thereto by the A. & G.W.R. Co., their successors and assigns," and directed to be paid over to the Provincial Treasurer. The defendants having refused to pay the money on demand, an action to recover it was brought in the name of His Majesty and the Provincial Treasurer. After having entered an appearance, but before delivering a defence, the defendant bank applied to have the railway company and the Canada West Construction Co. added as defendants. The application was heard by Beck, J., who, notwithstanding the opposition of counsel for the plaintiffs, ordered the parties named to be added as defendants by the plaintiffs, who were required to amend their statement of claim accordingly. The plaintiffs appealed from that order, and the added defendants applied direct to the court en banc for an order adding them as parties defendant and ordering the writ of summons and statement of claim to be amended accordingly:—Held, on the appeal that the order of Beck, J., adding the defendants should be affirmed with the omission therefrom of the direction to the plaintiffs to amend their writ and statement of claim and the substitution therefor of a direction to the added defendants to file within 6 days a defence shewing their respective interests and the facts upon which such interests were alleged to rest. In view of the fact that the added defendants had at one time a beneficial interest in the money sued for and the statement of their counsel that they still had a claim to all or a portion of such moneys and that the original defendant was only a trustee for them, they should be added as defendants under r. 33 and the order of Beck, J., should stand with the variation above referred to. Rule 35 did not furnish a proper ground for adding the defendants. Per Beck, J.:—The order appealed from was rightly made on proper reasons and those reasons apply with greater force to the present application. Held, also, that as the Crown neither gives nor accepts costs, there should be no costs of the appeal or of the application. [Johnson v. Reg. [1904], A.C. 817, 73 L.J.P.C. 113, followed.] On the application of the added defendants for an order adding them as parties:—Held, that for the reasons expressed on the appeal from the order of Beck, J., r. 35 was not intended for the protection of parties in the position of the applicants, but they should be added under r. 33; it

appearing that the fact that the defence was not disclosed might be disregarded in the present case and the plaintiffs would not be prejudiced by the order, there was no reason for amending the statement of claim. It is unnecessary to deal with the present application owing to the view taken by the majority of the court on the appeal.

R. and Provincial Treasurer of Alberta v. Royal Bank, 3 A.L.R. 480.

THIRD PARTY PROCEDURE — R. 165 — RIGHT TO CLAIM INDEMNITY AGAINST THIRD PARTIES — NOTICE SERVED BY ONE DEFENDANT ONLY — SERVICE OF NOTICE — ORIGINAL NOT EXHIBITED — APPEARANCE — WAIVER.

Flanagan v. France, 11 O.W.N. 50.

THIRD PARTY — ACTION BY COMPANY AGAINST EXECUTORS OF DECEASED DIRECTOR FOR BREACH OF TRUST — THIRD PARTY CLAIM AGAINST CODIRECTOR — CONTRIBUTION OR INDEMNITY — COMPANIES ACT, S. 108 — TRIAL OF ISSUES BETWEEN DEFENDANTS AND THIRD PARTY.

Guelph Carpet Mills Co. v. Trusts & Guarantee Co., 6 O.W.N. 311.

THIRD PARTY NOTICE — SERVICE OUT OF THE JURISDICTION ON ONE OF SEVERAL THIRD PARTIES — ORDER PERMITTING — R. 25 (G) — NECESSITY FOR PREVIOUS SERVICE ON THIRD PARTY IN JURISDICTION — CONDITIONAL APPEARANCE — LEAVE TO WITHDRAW — ORDER FOR SERVICE AND SERVICE SET ASIDE — ORDER ALLOWING RESERVICE AFTER SERVICE ON THIRD PARTY IN JURISDICTION.

Wolsely Tool & Motor Car Co. v. Jackson Potts, 6 O.W.N. 109.

The third party procedure, whereby a third party notice is served by the defendant on the insurance company in which he is insured against loss by reason of the liability imposed upon him by law for damages on account of injuries sustained by his employees, so that the company may if it wishes dispute the plaintiff's claim against the defendant and also dispute its liability to indemnify the defendant, may be invoked for the purpose of making the finding upon the issues as between the plaintiff and defendant binding upon the third party, notwithstanding that the contract between the defendant and the third party is so framed as to preclude the bringing of an action before the defendant has actually paid.

Pollington v. Cheeseman, 8 D.L.R. 142, 4 O.W.N. 410, 23 O.W.R. 639.

CLOSING PLEADINGS AGAINST THIRD PARTY—CON. R. 3 — PARTICULARS IN ACTION ON GUARANTY.

Niagara & Ontario Construction Co. v. Wyse, 6 D.L.R. 876, 4 O.W.N. 248.

ADDING ADDITIONAL THIRD PARTIES — APPLICATION BY PRESENT THIRD PARTIES — JOINT LIABILITY.

Fisher v. McLeod, 7 D.L.R. 804, 22 W.L.R. 178.

Ratepayers, or parties who are assessable in respect to the opening of a highway, may intervene in an action to set aside a procès-verbal for the opening thereof, notwithstanding the corporation of the county was a party to the action, since they had a special interest in the proceeding different from that in respect to which the municipal corporation represented them.

Breakey v. Bernard, 6 D.L.R. 312, 18 Rev. de Jur. 318.

COUNTERCLAIM—NEW DEFENDANTS BY COUNTERCLAIM—DIRECTORS—MISFEASANCE.

Polson Iron Works v. Main, 4 O.W.N. 648, 23 O.W.R. 786.

RATEPAYER INTERVENING.

Since a municipal corporation represents the common and general interest of all its ratepayers in litigation one of the latter has a right to intervene in an action against the corporation only in so far as he personally suffers a real prejudice by reason of having a special interest, distinct from that of the general body of ratepayers which interest is menaced or affected, compromised or capable of being compromised by the corporation's fault. This interest does not exist, nor the prejudice arise, from the fact that the corporation filed a declaration in the action submitting itself to the court if the intervenant does not attack the declaration as the result of fraud or collusion. In the absence of such allegation it will be presumed that the corporation, in making the declaration, acted with entire good faith in the interest of itself and all the ratepayers.

Duchaine v. Yamaska, 14 Que. P.R. 358.

PRACTICE—MUNICIPAL LAW—DAMAGES FOR OBSTRUCTION IN STREET — THIRD PARTY BROUGHT IN.

A municipality, sued for damages caused by an obstruction in one of its streets, which, according to a special law, forces the plaintiff to bring into the case the party whom it points out to him as being responsible for the fact complained of, must bear the costs both of the action to bring in the third party and of the defence to the action, when the judgment rejects the action as to the third party and declares that the latter has wrongly been pointed out as above described.

Craig v. Montreal, 45 Que. S.C. 475.

DILATORY EXCEPTION — ACTION IN WARRANTY — ACCIDENTS TO WORKMEN — THIRD PARTY IN WARRANTY—C.C.P. 182 —R.S.Q. s. 7334.

A defendant sued under the Workmen's Compensation Act (Que.) may, by way of a dilatory exception, call in warranty another party who is not in the case, without thereby causing any prejudice to the

plaintiff. The question is more difficult when the defendant, plaintiff in warranty, moves to unite the cases.

Tehennonsapohtha v. Dominion Bridge Co., 15 Que. P.R. 439.

TRUSTEES.

If trustees sued plead that the sum claimed from them does not belong to the plaintiff but to a third person, the court, before judgment, will order the plaintiff to add such person in the cause.

Campbell v. Nelles, 19 Que. P.R. 13.

SOLICITOR AND CLIENT—FEES—EXECUTION —INTERVENTION.

Whoever is interested in the process of a suit can intervene in order to protect his rights. So in a case where an execution was issued, and a seizure of movable property made by an advocate distraining for his costs, his client, defendant in the suit, can contest the opposition made to such seizure by a third party, seeing that it is to the interest of such contestant to see that his advocate is paid. The proper proceeding in the above case would be intervention, but the court will not reject the contestation for that reason considering that the contestant, being the defendant, is already a party in the suit.

Trahan v. Painchaud, 53 Que. S.C. 445.

INTERVENTION—ASSIGNEE—SAISIE-ARRÊT.

A party who intervenes in a saisie-arrêt after judgment, to demand the annulment of an assignment of a debt, may bring into the cause the assignee of the debt by serving on him, without permission of the judge, his intervention accompanied by a writ of summons. The stamps which should be placed on such writ of summons are those of an action of the amount of the claim of the intervenant. A party who becomes intervenant in a seizure after judgment, and demands by his conclusions that the transfer of the debt of the plaintiff be set aside, should bring the assignees into court by means of a writ of summons and not by a petition.

Porcheron v. Benoit, 18 Que. P.R. 238.

MOTION TO QUASH MUNICIPAL BY-LAW — SCHOOL BOARD—MONEY INTEREST UNDER BY-LAW—LEAVE TO INTERVENE.

Re Henderson and West Nissouri, 23 O.L.R. 651, 19 O.W.R. 292.

(§ III—122)—CROWN LICENSE—PRIOR PATENTEE—INTERVENTION BY ATTORNEY-GENERAL.

A plaintiff claiming under a patent from the Crown may maintain an action to recover from a defendant who claims part of the same land under a subsequent license of occupation from the Crown without making the Attorney-General a party, and such license may be set aside.

Bartlet v. Delaney, 11 D.L.R. 584, 27 O.L.R. 594.

INTERVENTION OF ATTORNEY-GENERAL — MUNICIPAL ACTIONS.

The Attorney-General is not a necessary party to an action in which the public outside of the municipality have no interest. [Gallagher v. Armstrong, 3 A.L.R. 443, followed.]

Livingstone v. Edmonton Industrial, 25 D.L.R. 313, 9 A.L.R. 343, 33 W.L.R. 164, 9 W.W.R. 794; varying as to costs, 24 D.L.R. 191, 31 W.L.R. 609, 8 W.W.R. 976.

INTERVENTION OF ATTORNEY-GENERAL—ATTACKING CONSTITUTIONALITY OF ORDER-IN-COUNCIL.

The Attorney-General is not a necessary party to an action involving an attack upon the constitutionality of an order-in-council.

Shives Lumber Co. v. Chaleur Bay Mills, 25 D.L.R. 262, 24 Que. K.B. 408.

INTERVENTION OF DOMINION ATTORNEY-GENERAL AS DEFENDANT—PROVINCIAL ACTION AGAINST DOMINION CONTRACTOR REMOVING SAND FROM NAVIGABLE RIVER —RIGHTS OF PROVINCE AND DOMINION.

Atty.-Gen'l for Ontario v. Cadwell Sand & Gravel Co., 31 D.L.R. 257, 36 O.L.R. 585.

(§ III—123)—FORECLOSURE—INTERVENTION OF CREDITORS TO CONTEST SECURITY.

In a foreclosure action to enforce the securities of bondholders against a company in liquidation, an unsecured creditor cannot, either under r. 28 or r. 40, be allowed to be added as a party defendant for the purpose of contesting the validity of the deed of trust.

Capital Trust Co. v. Yellowhead Pass Coal & Coke Co., 27 D.L.R. 25, 9 A.L.R. 463, 33 W.L.R. 873, 9 W.W.R. 1275.

CREDITORS.

In an action by a widow against the heirs of her husband, who had died insolvent, to recover the amount of a donation in contemplation of death made to her in their mariage contract, a creditor of the deceased, claiming under a lease for rent and other privileged debts, has no status to contest the conclusions of the plaintiff's declaration and his intervention for that purpose will be rejected.

Racine v. Meloche, 41 Que. S.C. 392.

(§ III—124)—INDEMNITY—RELIEF OVER—THIRD PARTY NOTICE BETWEEN DEFENDANTS.

The indemnity in respect of which a third party notice may be served by a defendant upon his codefendant must be against some liability imposed upon the defendant serving the notice in favour of the plaintiff and not one against a mere failure of the plaintiff to pay him any costs which might be ordered.

Melvin v. McNamara, 17 D.L.R. 18, 28 W.L.R. 223, 7 A.L.R. 368, varying 16 D.L.R. 65, 26 W.L.R. 825.

A third party notice cannot be supported as upon a contract of indemnity where the defendants are sued upon a promissory note given for the price of a stallion to the third party and seek to claim against

him a breach of warranty of the stallion; any damages to which the defendants may be entitled in that regard as against the warrantor are for breach of contract and not of a contract to indemnify. A third party notice against the payee of a promissory note will not be set aside in respect of a claim by the makers sued upon a promissory note by the endorsee thereof, that the note should not be used or negotiated by the payee unless and until the had obtained the signature of certain other parties as joint makers thereof.

Marshall v. Kinniburgh, 8 D.L.R. 70, 22 W.L.R. 272, 2 W.W.R. 1059.

The right to invoke the third party procedure exists whenever the plaintiff's claim against the defendant, if successful, will result in the defendant having a claim against the third party to recover from him the damages which he has been compelled to pay to the plaintiff. [Rule 209, Ont. Con. Rules of Practice (1897), construed.] A carrier sued for conversion of goods by the consignor in respect of an alleged neglect of duty on the part of the auctioneer employed by the carrier to sell the goods for unpaid charges, and for alleged failure to account for all of the goods sold, may properly bring in the auctioneer as a third party and claim indemnity and relief over against him under Ont. R. 209 (C.R. 1897).

Swale v. C.P.R. Co., 2 D.L.R. 84, 21 O.W.R. 225, 25 O.L.R. 492, reversing 1 D.L.R. 501, 3 O.W.N. 601.

A person brought into the action by a "third party notice" upon a claim of indemnity made by the principal defendant against him should obtain leave to enter a conditional appearance on defending such indemnity claim, otherwise he will be taken as waiving any right he may have to object to the local jurisdiction.

Grocers' Wholesale Co. v. Bostock, 4 D.L.R. 213, 3 O.W.N. 1588, 22 O.W.R. 786, affirming 22 O.L.R. 130.

BRINGING IN—INDEMNITY AND RELIEF OVER —THIRD PARTY AGAINST FOURTH PARTY.

A third party brought in by the defendant under a "third party notice" upon a claim for indemnity or relief over may in turn bring in a fourth party by a similar notice to answer a claim for indemnity or relief over made by the third party against him, by virtue of order 16, r. 54a of the English Practice Rules as amended July, 1911, made applicable in Alberta by the Alberta Judicature Ordinance and its amendments.

Royal Bank v. McPhee, 10 D.L.R. 801, 24 W.L.R. 166, 6 A.L.R. 69, 4 W.W.R. 571.

THIRD PARTY NOTICE—SUBSTANTIVE MOTION FOR—CONTRIBUTION AND INDEMNITY—COVENANTS RUNNING WITH LAND—AGREEMENT OF SALE—ASSIGNMENT—PRIORITY OF CONTRACT.

Wilson v. Mishler, 25 D.L.R. 822, 9 W. W.R. 125, 32 W.L.R. 400, 9 W.W.R. 125.

MOTION TO SET ASIDE THIRD PARTY NOTICE —TIME FOR MOVING—EMPLOYERS' LIABILITY INSURANCE—TERMS OF POLICY —ACTION FOR DAMAGES FOR DEATH OF EMPLOYEE.

Pollington v. Cheeseman, 5 D.L.R. 887, 4 O.W.N. 92, 23 O.W.R. 40.

CONTRIBUTION INDEMNITY—RELIEF OVER—BRINGING IN — INTERVENTION — THIRD PARTY—THIRD PARTY NOTICE—MOTION TO SET ASIDE—EX PARTE ORDER—LAPSE OF TIME—TIME FOR SERVICE—EXTENSION.

Hudson v. Smith's Falls Electric Power Co., 23 O.W.R. 641.

THIRD PARTIES—SERVICE OF THIRD PARTY NOTICE—EXTENSION OF TIME FOR—IRREGULARITY—CLAIM FOR CONTRIBUTION.

Dominion Bank v. Armstrong, 25 O.W.R. 97.

(§ III—124a) — INTERVENTION — RATEPAYER ATTACKING MUNICIPAL CONTRACTS.

Not merely the interest of a ratepayer but a special and distinct interest is required to entitle a person to demand that a contract awarded by a municipality be cancelled, unless it be established that the transaction at issue is fraudulent or ultra vires; the interest of an unsuccessful bidder, to whom the contract would not be awarded if set aside, is not sufficient as entitling him to intervene. [Robertson v. Autobus Co., 23 Que. K.B. 338, affirmed in 26 D.L.R. 228, 52 Can. S.C.R. 30, followed.]

Warner-Quinlan Asphalt Co. v. Montreal, 27 D.L.R. 540, 25 Que. K.B. 147.

THIRD PARTY — DEFENDANTS' CLAIM AGAINST, FOUNDED ON TORT.

Western Canada Flour Mills Co. v. C.P. R. Co., 20 Man. L.R. 422, 16 W.L.R. 420.

EXECUTOR AND BENEFICIARY UNDER WILL—DISPENSING WITH FURTHER REPRESENTATION.

Dawson v. Dawson, 23 O.L.R. 1, 18 O.W. R. 6.

IV. Substitution.

(§ IV—125)—SUBSTITUTION—STATUTE OF LIMITATIONS.

Where a plaintiff seeks to amend by substituting plaintiffs other than himself, it can only be done on terms that the action shall be deemed to be brought as of the date of the amendment, and time under any statute of limitations affecting the case shall be deemed to have run up to the date of the amendment.

Luciani v. Toronto Construction Co., 10 D.L.R. 551, 4 O.W.N. 1073, 24 O.W.R. 381.

A plaintiff's right of action is not barred by the Statute of Limitations, where he brings his action within the statutory period, though since the cause of action arose he has taken his son into partnership and mistakenly brought his action in the names of himself and his son as partners, the style of cause and record being subsequently amended to name him per-

sonally as plaintiff though such amendment was allowed after the statutory period. [Ferguson v. Bryans, 15 Man. L.R. 170, distinguished.]

Chisholm v. Wodlenger, 14 D.L.R. 805, 23 Man. L.R. 828, 26 W.L.R. 274, 5 W.W.R. 793.

CONSENT—PARTNERSHIP—"LIMITED."

An action was begun by the H. Co., Ltd., based on an agreement made with the H. Co., a partnership 2 days before the limited company began business. The District Court judge, assuming to act under Court R. 32, struck out the word "limited" and judgment was entered for the plaintiff in default of appearance. Held, that the course taken by the judge amounted to substituting a new plaintiff for the original one, which could not be done without the consent in writing of the new company.

Hansen Grain Co. v. Shillington, [1917] 2 W.W.R. 827.

ACTION LAUNCHED BY ATTORNEY IN FACT AFTER PLAINTIFF'S DEATH—SUBSEQUENT KNOWLEDGE OF HIS DECEASE—SUBSTITUTION OF EXECUTOR AS PLAINTIFF—ORDER 16, RR. 2, 11.

Bakha Ram v. Tinn, 16 B.C.R. 317, 19 W.L.R. 529.

PARTITION.

I. RIGHT TO; WHO MAY HAVE, AND IN WHAT.

II. PROCEDURE.

I. Right to; who may have, and in what.

(§ I—1)—SECOND ACTION.

A party to partition proceedings cannot bring a second action in partition as long as the nullity of the first proceedings has not been judicially established. The action to annul should be brought against all the copartitioners.

Maher v. Archambault, 42 D.L.R. 213, 56 Can. S.C.R. 488, affirming 25 Que. K.B. 436.

"COMMON"—RIGHT OF PASTURAGE AND FUEL—CO-OWNERSHIP—SERVITUDE.

Rights of pasturage and cutting fuel formerly granted by a seigneur to his serfs, in common upon a piece of land called "common," are rights of user or real servitude, but are not rights of undivided co-ownership; such rights are not sufficient to base thereon an action for partition of such common by the heir of the seigneur against the representatives of the original grantees.

Dutremblay v. Lanouette, 53 Que. S.C. 6.

WIDOW ENTITLED TO DOWER.

Rule 615 (Con. Rules, Ont.) applies only to persons who can compel partition, and until a widow decides to take under the Dower Act, and not under the Devolution of Estates Act, she is not such a person, and there is no power to make any order under this rule. A widow although entitled to dower out of the whole of her deceased husband's lands, has only a right of action to have her dower assigned to her (upon which her right of possession arises) and cannot "compel partition" under r. 615, this being limited to those who have a right to possession of their shares in lands.

Morrison v. Morrison, 34 D.L.R. 677, 39 O.L.R. 163, reversing 38 O.L.R. 362. [See 11 O.W.N. 359, 421.]

SCHEME PROPOSED BY REFEREE—SALE OF LANDS AND CHATTELS—PROMISSORY NOTES AND COMPANY-SHARES PLEDGED AS COLLATERAL—DIRECTION FOR SALE REVERSED—COLLECTION OF MONEY DUE UPON NOTES BY ACTION OR OTHERWISE—RECEIVER.

Morris v. Morris, 12 O.W.N. 80, 225.

NATURE OF ESTATE OF PARTIES INTERESTED IN LAND—TENANCY IN COMMON OR BY ENTIRETIES—BINDING EFFECT OF JUDICIAL DECISION.

Cline v. Cline, 12 O.W.N. 150.

(§ I—2)—RIGHT OF HEIR—LOSS OF USUFRUCT ESTATE BY SECOND MARRIAGE.

Notwithstanding a donation of the bare ownership made by a surviving consort, one of the heirs has the right of action to demand partition of the usufruct of the property during the wife's life which she has herself lost by her second marriage.

Labelle v. Labelle, 47 Que. S.C. 385.

ACTION BY UNIVERSAL LEGATEE—REFORMATION OF ACCOUNTS.

Action for partition, for an account or for reformation of accounts and partition, brought by a universal legatee against the colegatees, has as its ulterior object the payment to the plaintiff of the part which should come to her in the succession of the testator after the winding-up of the estate, and all the conclusions to this effect should and can be taken in one and the same action. It is immaterial that the conclusions demanding the liquidation are the main conclusions of the action, and that the condemnation to payment of the party in possession is a subsidiary conclusion or vice versa.

Laberge v. Laberge, 48 Que. S.C. 276.

VENDOR—REDEMPTION.

A vendor with a right to redeem cannot bring an action for partition so long as he has not exercised his right.

Benoit v. Benoit, 49 Que. S.C. 269.

DIVISION OF WATER LOT AMONG RIPARIAN OWNERS—DISPUTE AS TO PROPER SHARE OF ONE OWNER.

Blay v. Stahl, 10 O.W.N. 430.

II. Procedure.

(§ II—16)—PARTIES—EXECUTOR.

An executor cannot bring an action for partition and sale.

Villeneuve v. Morin, 15 Que. P.R. 331.

COMMUNITY—LIQUIDATION—PARTIES.

Although, generally speaking, a coheir cannot ask the division of assets belonging

to a community and attack the title of a third party in possession of an immovable property which has belonged to him, unless he has previously obtained the winding-up of that community, yet such winding-up is not necessary when the immovable property is the sole asset of the community. In an action for compulsory partition and licitation of an immovable property, which is the sole asset of a community, if the plaintiff is offered a sum equal to the value of his share as established by a report of experts, less his proportion of the debts, the action for licitation must be at his own expense.

Pérodeau v. Quéry, 27 Que. K.B. 524, affirming 52 Que. S.C. 532. [See also 49 Que. S.C. 139.]

(§ II—20)—QUESTION OF TITLE.

On a bill in equity for partition the plaintiff must prove title in himself to an undivided part of the property, but if his title is denied, the equity jurisdiction is not ousted merely because the title in dispute is a legal and not an equitable one.

Durant v. Huestis, 1 D.L.R. 786, 10 E. L.R. 423.

(§ II—25)—AGREEMENT AS TO LAND BY TENANTS IN COMMON—INTENTION TO SELL—JUDGMENT FOR PARTITION OR SALE—POSTPONEMENT OF PROCEEDINGS UNDER, UNTIL EXPIRY OF PERIOD MENTIONED IN AGREEMENT.

Morris v. Morris, 10 O.W.N. 287, 11 O. W.N. 37.

(§ II—30)—SALE BY AUCTION—SEQUESTRATION.

A sequestration will be ordered in an action for partition by auction sale to receive the revenues and profits of the immovable of which partition is demanded.

Present v. Sigal, 17 Que. P.R. 478.

SALE—THIRD PARTY.

Articles 746, 747, C.C. (Que.) apply only to a sale or other conveyance made to one of the co-owners or copartitioners and having as an object the cessation of the division between them, but not to a sale made to a third party. A sale by heirs of an undivided immovable to a third party, and the partition among them in equal shares of the price of the sale, is not equivalent to a partition of the immovable so as to discharge a hypothec taken by a third party upon the undivided quarter of one of them.

Banque St. Jean v. Nolin, 51 Que. S.C. 138.

PARTITION ACTION—INSCRIPTION IN LAW—SCARCITY OF MONEY—EXPERT'S REPORT—C.C.P. 191—1040, 1045—C.C. QUE. 689.

A defendant, sued for partition and sale, cannot ask for the dismissal of the action by alleging in his plea that, at the time, the market is very heavy and money very scarce; such allegations should be dismissed by an inscription in law. A motion to delay the partition may not be made until the report from the experts charged with visiting and valuing the properties is made, and establishes that such properties cannot advantageously be divided, in order to prevent the court from ordering such properties to be immediately sold by auction.

Greenford v. Stern, 16 Que. P.R. 169.

POSTPONEMENT OF SALE.

The fact that the condition of the financial and real estate market prevents undivided immovables from being sold at a proper price is not a sufficient reason for the court to postpone the sale.

Garber v. Lake, 18 Que. P.R. 464.

APPLICATION FOR ORDER FOR PARTITION OR SALE — ADMINISTRATION — RULES 612, 613—CAUTION—R.S.O. 1914, c. 119, s. 15 (D)—EXECUTORS—PAYMENT OF "OBLIGATIONS"—COSTS.

Steele v. Weir, 7 O.W.N. 99, affirming 6 O.W.N. 400.

PRIORITY—LIS PENDENS.

Larochelle v. Larochelle, 12 Que. P.R. 431.

RIGHT TO—SHARE OF APPLICANT CONVEYED AS COLLATERAL SECURITY.

Re McCully, McCully v. McCully, 2 O. W.N. 662, 18 O.W.R. 236.

PARTITION OR SALE OF MINING CLAIMS—PARTITION ACT (1865) (IMP.)—ORDER FOR SALE.

Barnes v. Brogglio, 17 W.L.R. 294.

PARTNERSHIP.

I. NATURE; CREATION; WHAT CONSTITUTES.
II. RIGHTS AND POWERS OF PARTNERS.
III. LIABILITY OF PARTNERS; RIGHTS OF CREDITORS.
IV. PARTNERSHIP REAL ESTATE.
V. RIGHTS OF MEMBERS AS TO EACH OTHER.
VI. DISSOLUTION; EFFECT OF.
VII. ACTIONS.

Annotation.

Effect of war on alien partnerships and firms: 23 D.L.R. 375, 378.

I. Nature; creation; what constitutes.

(§ I—1) — EXISTENCE — ALLEGED ADMISSIONS—PROFIT SHARING AGREEMENT BETWEEN EMPLOYER AND EMPLOYEE.

Whether or not a partnership should be declared to have been substituted by an alleged oral agreement for a prior profit-sharing agreement between an employer and employee made under ss. 3, 4 of the Master and Servant Act, R.S.B.C. 1911, c. 153, is to be determined on conflicting evidence, on the credit to be given the witnesses and from the surrounding circumstances and the conduct of the parties; and it is not conclusive evidence of the existence of a partnership that the defendant in a letter written to the plaintiff employee referred to their arrangement as a "partnership" and later served upon him concurrently with a notice of dismissal a "notice of dissolution of partnership;" it is still open to the court

to find that the word "partnership" as so used was not used in the legal technical sense where the evidence shews that the parties had not reached an agreement as to the contribution by each nor as to the disposal of the capital invested in the business to which the employee had contributed nothing.

Donkin v. Disher, 16 D.L.R. 610, 27 W.L.R. 428, 5 W.W.R. 870, 49 Can. S.C.R. 60, reversing 12 D.L.R. 405, 18 B.C.R. 230, 24 W.L.R. 955, 4 W.W.R. 1365.

PARTNERSHIP ARTICLES — CLAUSE PROVIDING AGAINST RESORT TO COURTS—PENALTY—VOID PROVISION—RIGHTS OF REPRESENTATIVES OF DECEASED PARTNER.

Re Hicks and Pringle, 12 O.W.N. 54.

AGENCY—CONTRACT OF EMPLOYMENT.

An agreement by which one party agrees to make a sale of certain animals, to give them care, and to be engaged also in the sale of milk and cream on a farm belonging to the other party, in consideration of the remuneration of a sum equal to half the net profits realized, is not a partnership but an agreement of mandate, or of lease and hire of work. If one so hired takes a part of the animals and appropriates them, he will be deemed a purchaser and must pay their value.

Béique v. Gaston, 54 Que. S.C. 162.

CONTRACT — DONATION INTER VIVOS — ACTIONS.

An agreement between the owner of an immovable and a third party with regard to a lot of land held to be a deed of gift inter vivos by the owner (which would, however, be void, having been made under private seal and not registered) rather than a partnership deed. Nevertheless, where the parties have treated it as a partnership, the court should consider it as such. A settlement of accounts of a dissolved partnership should, as a rule, be made by an action pro socio, when such accounts are uncertain and undetermined. In such case an action brought by one of the members for a fixed amount of damages will be dismissed.

Jasmin v. Jasmin, 24 Rev. Leg. 411.

CLUB PROPERTY—EXECUTION.

An association of persons who, for their personal amusement exclusively, bought a house in the country, calling it "The Dominion Fish & Game Club," does not constitute a partnership. Each owns his own individual share, which can only be seized by way of execution, not by garnishment.

Robertson v. Guilbault, 54 Que. S.C. 343.

CONTRACT FOR—FOX RANCH—AGREEMENT.

Gordon v. Hopgood, 13 E.L.R. 69.

(§ I—3)—AGREEMENT BETWEEN PHYSICIANS EMPLOYMENT FOLLOWED BY PARTNERSHIP.

Where an agreement between two physicians provided for the employment of one by the other for 2 years and that thereupon a partnership would be entered into upon a fixed basis for division of profits, and where, after the expiration of the 2 years, they continued to work together for 6 months, but without having agreed upon the partnership articles contemplated by the original agreement, in default of which there was to be a division of the practice and an arbitration to settle differences, it will be presumed that a partnership, at least at the will of the parties, existed for the period which had elapsed following the employment up to the time when the parties ceased to practise together.

Mader v. Harrison; Harrison v. Mader, 9 D.L.R. 385, 47 N.S.R. 1, 13 E.L.R. 101.

SHARING PROFITS—JOINT INTEREST.

An agreement, whereby the owner of land transfers an undivided interest therein, and in all the profits arising therefrom to another, who undertakes to provide funds for laying out the land into lots and for other incidental expenses preparatory to offering the lots for sale, and to devote a reasonable amount of his time to the affairs of the property, constitutes the parties partners in respect of the land. The sharing of gross returns does not, in itself, create a partnership, whether the persons sharing such returns have or have not a joint or common right or interest in any property from which or from the use of which the returns are derived.

Galbraith v. McDougall, 11 D.L.R. 133, 24 O.W.R. 233, 4 O.W.N. 919, varying 6 D.L.R. 232, 23 O.W.R. 928.

FAILURE TO CARRY OUT VERBAL UNDERTAKING.

A verbal undertaking given by a prospector who had made a discovery of a coal deposit, that he would stake out 2 mining claims in addition to one for himself and a verbal agreement that, after the staking of these three claims, they should be amalgamated and worked on a partnership basis, does not create a partnership between the prospector and the 2 parties with whom the verbal agreement was made, in respect of the single claim which the prospector staked for himself, where he failed to stake claims for the others; all that was created was an agreement for a future partnership on certain conditions which were never complied with.

MacKissock v. Brown, 10 D.L.R. 472, 23 W.L.R. 782, 23 Man. L.R. 348, 4 W.W.R. 60.

FARMING ON SHARES—PURCHASES.

The fact that the owner of a farm enters into an arrangement with another person whereby the latter is to work the farm on shares, the owner supplying the money needed to carry on the farming operations and the profits to be divided between the two parties, does not constitute the parties thereto partners so as to create a liability on the part of the owner for purchases made by the one working the farm on his own credit, though for the benefit of the joint enterprise.

Crown Lumber Co. v. Saulsberry, 11 D.

L.R. 18, 5 A.L.R. 476, 23 W.L.R. 877, 4 W. W.R. 168.

CREATION — WHAT CONSTITUTES — FAILURE TO BRING IN ANY CAPITAL—ABSENCE OF WRITTEN CONTRACT—DIVISION OF OPINION.

Hallverson v. Bowes, 5 D.L.R. 693, 21 W. L.R. 593, 2 W.W.R. 586.

The word "contracting," as used in the phrase "trading, manufacturing, contracting or mining," contained in the Partnership Act (Alta.) 1908, c. 5 as to registration of firm and company names, is to be interpreted in its popular sense as referring to what is usually known as a contracting business (e.g., building or railway contracting work) and does not include the making of contracts for the sale or purchase of real estate either on one's own account or as a broker or agent.

Lambert v. Munns, 7 D.L.R. 264, 4 A.L. R. 187, 1 W.W.R. 718.

MINING CLAIM.

Labine v. Labine, 16 D.L.R. 871, 6 O.W.N. 100.

FRAUD—FALSE ARREST—SALE OF BUSINESS —JUDGMENT—TERMS.

Webb v. Black, 2 D.L.R. 902, 3 O.W.N. 1153.

FAILURE TO ESTABLISH—ASSIGNMENT OF INTEREST IN BUSINESS—ATTACK BY CREDITORS — DISCLAIMER BY ASSIGNEE — JUDGMENT—COSTS.

Jamieson Meat Co. v. Stephenson, 2 D.L. R. 911, 3 O.W.N. 1196.

CREATION—CONDITION OF AMALGAMATION CONTRACT—PAYMENT OF PRIOR TRADE DEBTS AS OF A FIXED DATE.

Wild v. Kleker, 20 D.L.R. 980, 23 Que. K.B. 544.

SHARING PROFITS.

A contract whereby one person is to manage the store of another for a fixed amount weekly plus a quarter share of the net profits and the circumstance that the names of both were joined as a firm name in operating the store business, disclose a partnership.

Orchard v. Dykeman, 21 D.L.R. 106, 43 N.B.R. 181.

JOINT INTEREST IN CROP.

An agreement whereby one is to receive one-third of the grain for money advanced for raising the crop, does not create a partnership, but merely a joint ownership of the crop.

International Harvester Co. v. Jacobsen, 24 D.L.R. 632, 11 A.L.R. 122, 32 W.L.R. 332, 9 W.W.R. 87.

AGREEMENT CONSTITUTING.

A document providing, "The said A. Soucier engages to furnish the said Boyer with a stock of men's and women's boots and shoes to the amount of $4,000 to $5,000 according to the requirements of the trade; the said A.J. Boyer agrees to rent a shop in the city of Montreal and to carry on in it the shoe business with the stock furnished by the said A. Soucier; it is agreed that all expenses being paid the 2 parties will share the net profits realized by the said Boyer in the said business. Signed in duplicate at Montreal this 11th of September, 1911. This agreement is good for 7 months," constitutes a partnership between the parties.

Dupont v. Boyer, 47 Que. S.C. 503.

CONSTRUCTION — SCOPE — CONTEMPLATED PROFITS FROM OIL LEASES AND AGREEMENTS—"EXTENSION"—PROFITS FROM NATURAL GAS LEASES AND AGREEMENTS —"OIL AND ITS PRODUCTS"—FINDINGS OF FACT OF TRIAL JUDGE—APPEAL.

Hay v. Lacoste, 8 O.W.N. 196. [Affirmed by Canada Supreme Court, Feb. 1, 1916.]

CONTRIBUTION OF CAPITAL — CONSTRUCTION OF WRITTEN AGREEMENTS—EVIDENCE TO VARY.

Richman v. Brandon, 8 O.W.N. 467.

OPERATION OF THRESHER—INJURY TO PROPERTY OF PARTNER—RIGHT OF PARTNER AGAINST PARTNERSHIP AND COPARTNERS —CONTRIBUTION.

Bigelow v. Powers, 25 O.L.R. 28, 20 O. W.R. 245.

CREATION OF—FRAUD AND MISREPRESENTATION—PROMISSORY NOTES GIVEN FOR SHARE IN PARTNERSHIP—NEGOTIATIONS FOR PARTNERSHIP — UBERRIMA FIDES— PART INDUCEMENT BY FRAUDULENT MISREPRESENTATION — REPUDIATION — DELAY—EXCUSE.

Glaeser v. Klemmer, 7 O.W.N. 14, 26 O.W. R. 787.

ACTION TO ESTABLISH—EVIDENCE—COSTS.

Arbrick v. Ryan, 6 O.W.N. 706.

PARTNERSHIP — FAILURE TO ESTABLISH — LEASE OF BUILDING—CLAIM FOR INJURY TO FIXTURES—STATED ACCOUNT—COUNTERCLAIM—COSTS.

McKernan v. Kerby, 16 O.W.N. 367.

SUBSTITUTED AGREEMENT — FRAUD — EQUAL DIVISION OF APPELLATE COURT.

Taylor v. Morin, 10 O.W.N. 158, 293.

FORMATION — MISREPRESENTATION — REMEDY OF MEMBERS.

Ollier v. Hadley, 39 Que. S.C. 166.

ORAL AGREEMENT—STATUTE OF FRAUDS.

Garbutt v. Marshall, 17 W.L.R. 285.

ESSENTIALS—CONTRIBUTION—LIABILITY.

It is of the essence of a partnership that each member should contribute thereto whatever has been agreed upon. An agreement, by which several persons place a limit upon the conditions under which they are eventually to participate in the proposed enterprise, does not constitute a contract of partnership, if, by tacit understanding, the enterprise is abandoned before one of the partners has contributed his portion thereto. Therefore, as between the intended partners, there is no liability for accounting or for damages.

Martineau v. Stewart, 25 Que. K.B. 289.

FUTURE FORMAL AGREEMENT.

When parties hold negotiations for the

forming of a partnership and agree that the terms thereof shall be set out in a formal instrument, so long as the latter is not drawn up, colourable conduct or relations between them, if contradictory or inconsistent, cannot establish the existence of a completed contract.

Gabias v. Baigne, 22 Que. K.B. 326.

INTENTION—PARTNERSHIP AGREEMENT.

There is a partnership contract when all the essential elements of such a contract are found in the agreement between the parties, and when it appears that their intention was to form a partnership. Thus, all the elements of a partnership contract are contained in the words "I take back Mr. G. from now to July 1, 1907 to buy horses, upon condition of dividing the profit and of 40 cts. a day for board. And he shall not force me to return him the money previously deposited, unless trade should be bad or unless he should require the money for something else: Mr. G. must deposit $1,500 within 15 days from now, and I shall have to supply the money to buy horses of his choice." After the dissolution of a partnership, the partners cannot exercise their remedies against each other concerning the partnership business, otherwise than by way of an action pro socio and to render account. The party who fails must bear the costs, unless the court, for special reasons, orders otherwise, and if the Trial Court does not follow that general principle without giving in its judgment any reasons for doing so, such judgment will be reversed on appeal.

Guillemette v. Marien, 46 Que. S.C. 507.

II. Rights and powers of partners.

Authority as to endorsement of note, see Bills and Notes, III A—55.

(§ II—5)—AUTHORITY OF PARTNER—AS AGENT.

Under s. 7 of the Partnership Act (R.S.S. c. 143), a partner is an agent for the firm, for the purpose of the business of the partnership, but it is only his acts done for carrying on, in the usual way, the business of the kind carried on, that bind the firm and his partners.

Satallick v. Jarrett, 38 D.L.R. 63, 10 S.L.R. 432, [1918] 1 W.W.R. 91.

USUAL WAY OF BUSINESS—CHATTEL MORTGAGE — DOCUMENT UNNECESSARILY SEALED—IGNORANCE OF PARTNERSHIP—POWER TO PLEDGE ASSETS.

Defendants carried on partnership as hotel-keepers under the name of W. H. Murr, one of the defendants, who had entire management of the business. Murr gave a chattel mortgage under seal to R. & L. for $3,000 charged on the partnership property. Mutz though unaware of this knew that the borrowing of money was necessary. R. & L. were unaware that Mutz was a partner until after the dissolution:—Held, that the "usual way of carrying on business" is a question of fact. Held, that ignorance on the part of R. & L. that Mutz was a partned did not relieve him. Held, that power to borrow money implies power to pledge assets. Held, that though Murr had no power to bind Mutz by deed, a sealed chattel mortgage bound Mutz inasmuch as sealing was superfluous.

Western Commercial Co. v. Murr, 29 W.L.R. 945.

(§ II—6)—PARTNERS—IMPLIED AUTHORITY—BILLS AND NOTES—ABUSE OF TRUST—LIABILITY OF CO-PARTNER.

In an ordinary trading partnership a partner has implied authority to draw, accept, make and endorse bills of exchange and promissory notes in the name of the firm. Even though the partner exercising such power abuses his trust for his individual benefit, his co-partner will be bound unless the holder is chargeable with notice of the facts.

Larue v. Molsons Bank, 49 D.L.R. 455, 28 Que. K.B. 203, affirming 53 Que. S.C. 524.

AS TO BILLS, NOTES AND CHECKS.

A note given by one partner in the name of the firm for the payment of a private debt of his own due the payee, who took the same in good faith, cannot be enforced by the latter against the partnership unless he shews that it was in fact given with the authority of the other partners.

Tebb v. Baird; Tebb v. Hobberlin Bros. & Co.; Hobberlin Bros & Co. v. Tebb, 3 D.L.R. 161, 3 O.W.N. 952.

BILLS AND NOTES—LIABILITY OF CONTINUING PARTNER.

Thomson v. Denny, 22 B.C.R. 479, 34 W.L.R. 483.

CONTRACT — PROMISSORY NOTE — PARTNERSHIP—LIABILITY—FRAUD—FINDINGS OF FACT OF TRIAL JUDGE—APPEAL.

Stimson v. Baugh, 7 O.W.N. 426.

PROMISSORY NOTE SIGNED IN FIRM NAME—LIABILITY OF MEMBER OF FIRM—RECOGNITION BY ENDORSEMENT—SATISFACTION—LOST INSTRUMENT—SECURITY.

Stone v. National Coal Co., 11 O.W.N. 309; 12 O.W.N. 58.

(§ II—7)—RIGHTS AND POWERS OF PARTNERS—CONTRACTS.

The authority given by law to a member of a partnership is authority to do only such things as are necessary for carrying on the partnership.

Kay v. Chapman, 11 D.L.R. 726, 6 S.L.R. 69, 24 W.L.R. 80, 4 W.W.R. 448.

POWER TO BORROW—SCOPE OF FIRM'S BUSINESS.

The power to borrow money in the capacity of partner cannot be validly exercised where the transaction appears to be foreign to the firm's business.

Tai Sing v. Chim Cam, 27 D.L.R. 528, 23 B.C.R. 8.

AUTHORITY—PURCHASE OF PROPERTY—CANCELLATION — EXAGGERATION—C.C.QUE. ARTS. 992, 1506, 1522, 1727.

When persons having in view the formation of a partnership to acquire real estate for speculative purposes, send one of their number to look at the property, with instructions to make a report to them; if the report is substantially true and made in good faith it is sufficient to cover their liability; and errors of fact, exaggeration as to value, distance, or standing of the neighbourhood, are not grounds for an action to dissolve the partnership and cancel the deed of sale. These errors and exaggerations do not constitute a substantial error which in itself would be a cause for voiding the contracts.

Ruel v. Roy, 46 Que. S.C. 422.

CONTRACTS—SURETYSHIP — REPAYMENT OF DEBT TO INDIVIDUAL MEMBER.

An agreement between 2 partners by which, after the partition of the assets, a sum of $50,000, loaned by the partnership to a third party, is made payable to one of the partners, the other one guaranteeing that the sum would be paid within a certain time, with interest, is a contract of suretyship as between the surety and the debtor, but, as to both partners, the contract relates to a division of the partnership assets. A resolution of a board of directors acknowledging their indebtedness of a sum of money, payable at a certain date, to one member of a partnership, is not an undertaking to pay it to another partner to whom it was transferred.

Howard v. Findlay, 51 Que. S.C. 375.

(§ II—8)—REAL ESTATE—ORAL AGREEMENT — PERSONAL PROPERTY — STATUTE OF FRAUDS.

As between partners an oral agreement concerning an interest in real estate owned by the partnership is valid. The real estate becomes, for the purposes of the partnership, personal property and not being real estate nor deliverable goods and chattels neither s. 4 nor s. 17 of the Statute of Frauds applies. [Gray v. Smith, 43 Ch. D. 208, distinguished.]

Geffen v. Lavin, 49 D.L.R. 23, [1919] 3 W.W.R. 498.

DESTRUCTION OF PROPERTY OF—RIGHTS AND POWERS.

It is within the scope of a partner's authority to authorize the burning of partnership property which in his opinion is of no further value.

Kosolofski v. Goetz, 47 D.L.R. 275, [1919] 2 W.W.R. 805, 12 S.L.R. 315.

DISPOSAL OF PARTNERSHIP FUNDS AND PROPERTY.

An assignment of the book debts due a partnership by one of the 2 partners composing the firm in the absence of the other is valid as to the other partner, even though the partner executing the assignment was by agreement between him and the other member of the firm without power in that regard, if the assignee was without knowledge of the lack of authority on the part of the partner who executed the assignment.

Tebb v. Baird; Tebb v. Hobberlin Bros. & Co.; Hobberlin Bros. & Co. v. Tebb, 3 D.L.R. 161, 3 O.W.N. 952.

POWERS OF PARTNERS—SELLING PARTNERSHIP PROPERTY—PERSONAL SCHEME.

Where a partnership for a speculative purchase in block and sale in parcels of certain partnership lands rapidly rising in value subsists; and where one of the terms of the partnership agreement is that none of the land in question shall be sold without the consent of each of the partners; and where one of the partners, who holds the legal estate in trust for himself and his copartners, acting in collusion with another of his partners as a coadventurer in a transaction for their sole benefit to speculate in such partnership lands, effects a so-called sale without the unanimous consent of the partners, the transaction is illegal and wrongful from its inception. The provision of subs. 8 of s. 27 of the Partnership Act, R.S.B.C. 1911, c. 175, that any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners, is not applicable.

Gordon v. Holland; Holland v. Gordon, 10 D.L.R. 734, 23 W.L.R. 738, varying 2 D. L.R. 327, 20 W.L.R. 887, 2 W.W.R. 158.

DISPOSAL OF PARTNERSHIP PROPERTY—PURCHASER FROM ONE PARTNER—CONVERSION—INQUIRY.

A purchaser of a partnership business as a going concern, who makes the purchase from one of 2 partners either with knowledge that the vendor had no authority from the other partner to sell, or without making diligent inquiry as to the existence of such authority, is guilty of conversion of the interest of the other partner. A representation made to a prospective purchaser by one of 2 partners that he had a power of attorney from the other partner to sell the entire business of the partnership as a going concern, is not a sufficient enquiry into the authority of the vendor to sell, but the prospective purchaser should insist on the production of the power of attorney before making the purchase.

Kay v. Chapman, 11 D.L.R. 726, 6 S.L.R. 69, 24 W.L.R. 80, 4 W.W.R. 448.

Where one who desires to obtain a lease of land from a partnership firm is refused by 2 of those connected with the firm, on the ground that he intends to use the land for a saw-mill, and subsequently obtains a written lease from another partner by concealing his real intention and representing that he wants the land for a lumber yard, he will be restrained from erecting a

sawmill upon the land, even though the written lease be unconditional.

Audet v. Jolicoeur, 5 D.L.R. 68, 22 Que. K.B. 35.

RIGHTS AND POWERS OF PARTNERS—DISPOSAL OF PARTNERSHIP PROPERTY BY DECEASED PARTNER'S EXECUTOR—DIVISION OF PARTNERSHIP MADE BY EXECUTOR.

Gordon v. Gordon, 13 E.L.R. 379, affirming 13 E.L.R. 69.

(§ II—9)—AS TO INSOLVENCY.

The law does not provide for the appointment of a sequestrator in the case of a demand against a partnership for an assignment when such demand is opposed by one of the partners. To dispossess a party to the proceedings of his property by appointment of a sequestrator it is necessary to allege special and strong grounds therefor.

Wolfston v. Raymond, 14 Que. P.R. 87.

PARTNERSHIP FUNDS—THIRD PARTY—NEGOTIABLE INSTRUMENT.

Ross v. Chandler, 45 Can. S.C.R. 127.

III. Liability of partners; rights of creditors.

(§ III—10)—NEW FIRM TAKING OVER BUSINESS — MIXING NEW INDEBTEDNESS WITH OLD.

A novation by substituting the members of a new partnership as debtors instead of the former partnership the business of which the new firm took over, may be established from the conduct of the parties, in which regard the mixing of the indebtedness of the old and new firms and the making by the new firm of payments which must necessarily have included a portion of the old firm's debt is evidence tending to shew an assumption of the debt by the new firm.

Galt v. Cronsberry, 16 D.L.R. 105, 27 W.L.R. 44.

PURCHASE FOR THE PARTNERSHIP—RIGHTS OF INDIVIDUAL CREDITORS OF ONE PARTNER.

That goods were ordered by one partner in the name of the firm and were received by the other partner who accepted in the firm's name the drafts for the price, with full knowledge of what they were drawn for, is prima facie evidence of a sale to the firm, passing the property in the goods so as to be liable to seizure for the firm debts in priority to the judgment creditors of the ordering partner.

Maple Leaf Milling Co. v. Western Canada Flour Mills Co., 15 D.L.R. 525, 5 O.W.N. 699.

JOINT FARMING VENTURE—EXECUTION.

The relationship between persons engaged in a joint farming venture is that of partnership, the property whereof is not subject to execution for the individual debt of a partner, except as provided by s. 25 of the Partnership Ordinance (Alta.).

Witt v. Stocks, 33 D.L.R. 519, 10 A.L.R. 312, 11 A.L.R. 154, [1917] 1 W.W.R. 1451.

FORMATION INTO COMPANY.

A partnership is not relieved from any liability for the price of goods purchased in the firm name because of its formation into an incorporated company, if it appears that recourse for the price of goods was in point of fact sought from the partners and that s. 20 of the Joint Stock Companies Act (Man.), respecting the payment of stock, had not been complied with.

Nisbet v. Tappe, 2½ D.L.R. 290, 31 W.L.R. 449.

EFFECT OF INCORPORATION ON NOTES PREVIOUSLY MADE.

When a note is signed by the members of a partnership which is subsequently incorporated and the note is discounted at a bank, one of the makers cannot be discharged without the consent of the bank; and he is not discharged by the fact that the new corporation passed a resolution authorizing the bank to erase his name from the note, and that the bank manager erased his name and informed him that he was liberated from his liabilities towards the bank.

Gendreau v. Widder, 48 Que. S.C. 142.

ASSUMPTION OF FIRM'S DEBTS—SURETYSHIP—EXTENSIONS.

Where partners are indebted as principals, and it is afterwards agreed between them that as between themselves one of them shall assume the partnership debts, and this agreement is not made known to the creditors, the rule as to the discharge of a surety by giving time to the principal debtors does not apply.

Thomson v. Denny, 22 B.C.R. 479, 34 W.L.R. 483.

SOLICITORS—MISAPPROPRIATION BY SOLICITOR OF FUNDS OF CLIENT—LIABILITY OF NOMINAL PARTNER — HOLDING OUT — CLIENT NOT DEALING WITH OR RELYING UPON CREDIT OF OSTENSIBLE MEMBER OF FIRM—COSTS.

The defendant, a solicitor, was employed as a clerk by O., also a solicitor. At the suggestion of O., the defendant consented "to have his name in the firm," i.e., that the business of O. as a solicitor should be carried on under the firm name of O. & B., although B., the defendant, was not in fact a partner. The plaintiff was a client of O.; she entrusted moneys to him for investment; the relation continued after the defendant's name was used; but it appeared that the defendant had no control over the moneys received by O. from the plaintiff; that the moneys were not intended for any special investment, but were obtained by O. for such investment as he might decide upon; that the defendant did not hold himself out as a patrner otherwise than by allowing his name to be used; and that the plaintiff was not induced to act or part with her funds by reason of such holding out, and did not in fact suffer loss thereby: —Held, that the defendant was not liable for moneys of the plaintiff misappropriated

by O. [Blair v. Bromley (1846), 5 Hare 542, and Thompson v. Robinson (Ont.), 16 A.R. 175, distinguished.] The plaintiff sued the defendant for money alleged to have been collected or received by the firm of O. & B.; the action was dismissed, but without costs, because the fact that the defendant's name appeared in the firm justified the plaintiff in making an investigation as to his real position.

Johnston v. Brandon, 45 O.L.R. 369.

LIABILITY OF INCOMING PARTNER FOR DEBTS OF FORMER PARTNERSHIP—NOVATION—EVIDENCE—STATUTE OF FRAUDS.

The defendant L. on entering into partnership with his co-defendants, agreed that the new firm should take over the assets and assume the liabilities of the former partnership business carried on by his co-defendants. The new firm, with the knowledge and consent of L. communicated that fact to the plaintiffs, creditors of the former partnership, and the plaintiffs thereafter accepted the new firm as their debtor and discharged the former partnership from its liability:—Held, that there was a complete novation and that L. as well as his codefendants, was liable for the plaintiffs' claim. Held, also, that L's agreement to assume the liabilities of the old firm, although not in writing, might be proved by parol evidence or by conduct, and that the Statute of Frauds had no application to it, as the agreement was something in addition to the other terms of the partnership and not inconsistent with them. [Rolfe v. Flower, L.R. 1 P.C. 40, 44, followed.]

Mason v. Turnbull, 24 Man. L.R. 465.

ENDORSEMENT OF NOTES — PARTNERSHIP NAME.

A partner who allows his copartner to habitually endorse, with the partnership name, personal notes which he discounts, and the proceeds of which he applies indifferently to his personal business and to that of the partnership, is liable to the same extent as if the moneys obtained through such endorsements had benefitted the partnership business exclusively.

McKeen v. Molsons Bank, 53 Que. S.C. 524.

RELEASE BY ONE PARTNER WITHOUT OTHER'S CONSENT—LIABILITY—EVIDENCE.

A person who entered into a contract of partnership, and obtains a release therefrom by one partner without the other's consent, is liable to the latter for its non-performance. Merchant's books are evidence against them, but not in their favour.

Lynch v. Perron, 23 Que. K.B. 220.

THIRD PARTY—RESPONSIBILITY—RENUNCIATION—NOVATION—C.C. ART. 1160, 1171, 1174, 1897, 1900.

The dissolution of a commercial partnership has no effect against a third party, as long as it has not been made public by its registration. Persons who give a third party reason to believe that they are in partnership incur the same responsibility as if they were in fact partners. When it is declared that the dissolution of a partnership has been made in writing, oral evidence will not be admitted to prove it. The renunciation of a right is not presumed; it must be proved by him who alleges it. The acceptance of a note in payment in the course of business does not operate as a novation.

Webster v. Langlois, 56 Que. S.C. 345.

(§ III—11)—HOLDING OUT AS PARTNER—EVIDENCE OF HOLDING OUT TO OTHERS THAN PLAINTIFF SEEKING TO MAKE DEFENDANTS LIABLE BY ESTOPPEL—INADMISSIBILITY—EVIDENCE IMPEACHING DEFENDANTS' VERACITY—FAILURE TO ESTABLISH HOLDING OUT TO PLAINTIFF—INFANT—PARTIES.

Ray v. Gettas, 8 O.W.N. 318.

(§ III—13)—ASSIGNMENT FOR CREDITORS—FUNDS COLLECTED BY PARTNER.

The estate of a partnership, in an assignment for the benefit of creditors, is not liable for amounts collected by the active partner of the firm acting in his individual capacity as the local agent of an elevator company, though the partnership benefited by such agency.

Saskatchewan Elevator Co. v. Canadian Credit Men's Trust Assn., 27 D.L.R. 604, 9 S.L.R. 176, reversing 21 D.L.R. 658.

(§ III—14) — CORROBORATION — EVIDENCE ACT—QUESTION OF FACT—BURDEN OF PROOF.

A widow and executrix of her husband's estate, suing for the price of goods sold and delivered cannot succeed when the defendant company holds an assignment of her late husband's debts to his former partner, provided that partner can fully prove the partnership and consequent liability of the deceased to him.

Simpson v. Tasker-Simpson Grain Co., 49 D.L.R. 303, [1919] 3 W.W.R. 928.

LIABILITY OF PARTNERS—RIGHTS OF CREDITORS — AS BETWEEN INDIVIDUAL AND FIRM CREDITORS.

Section 26 of the Partnership Act, R.S. M., 1902, c. 129 prescribing the procedure against partnership property for a partner's separate judgment debt to be by way of summons, is broad enough to permit a hearing upon an application to a judge in chambers by way of notice of motion.

McInnes v. Nordquist, 13 D.L.R. 725, 23 Man. L.R. 815, 25 W.L.R. 422, 5 W.W.R. 95.

SAME OWNERS OF TWO PARTNERSHIPS—CREDITORS.

In the distribution of assets by the assignee of 2 partnership firms composed of the same individuals, where it appears that although 2 businesses were carried on under separate names and with separate books of account, separate bank books and separate letterheads, they were really one firm, a debt due from one business to the other need not be considered in the distri-

bution. [Banco de Portugal v. Waddell, 5 A.C. 161, applied.]

Re Gillespie, 9 D.L.R. 94, 23 Man. L.R. 5, 23 W.L.R. 45, 3 W.W.R. 791.

INDIVIDUAL AND FIRM CREDITORS.

The fact that a son is in partnership with his father does not, in the absence of positive evidence that it was in the scope of the partnership business, render the firm liable for accounts in connection with automobile rentals and supplies contracted by the son.

Western Motors v. Gilfoy, 25 D.L.R. 378, 9 W.W.R. 770.

INDIVIDUAL AND FIRM DEBTS—APPLICATION OF PAYMENTS.

If a partner is indebted on his own account to a person to whom the firm is also indebted, and that partner with the moneys of the firm makes a payment to the creditor without specifying the account to which it is to be paid, the payment must be taken to have been made on the partnership account and must be applied accordingly. [Thompson v. Brown, 1 M. & M. 40, applied.]

Kirk v. Ingraham, 22 D.L.R. 793, 48 N.S.R. 493.

LIABILITY OF FIRM FOR DEBT OF PARTNER—FRAUD — EVIDENCE — NOVATION — ASSIGNMENT BY ONE PARTNER IN FIRM'S NAME FOR BENEFIT OF CREDITORS—INVALIDITY—ASSIGNMENTS AND PREFERENCES ACT, S. 12—ESTOPPEL—DAMAGES—WINDING-UP OF PARTNERSHIP—COSTS—INJUNCTION.

Maize v. Gundry, 16 O.W.N. 349.

EXECUTION AGAINST PARTNER.

In an action by a commercial partnership, which is dismissed with costs, the attorneys for the defendant may, on execution for their bill of costs, seize the property of one of the partners without having first seized property of the partnership.

Dini v. Harris Construction Co., 49 Que. S.C. 193.

DISCHARGE OF RETIRING PARTNER BY AGREEMENT WITH CREDITOR—COURSE OF DEALING—PRESUMPTION.

Watson Mfg. Co. v. Bowser, 21 Man. L.R. 21, 18 W.L.R. 235.

EXECUTION AGAINST GOODS OF ONE PARTNER—PRIORITY AS BETWEEN VENDOR OF LAND SOLD ON CROP PAYMENTS AND EXECUTION CREDITOR OF PURCHASER.

Smith v. Thiesen, 20 Man. L.R. 120, 15 W.L.R. 709.

SYNDICATE DEALING IN LAND—ACCOUNT—PROFITS OF RESALE—COMMISSION ON SALE CHARGED BY ONE PARTNER.

Smith v. Corbett, 16 W.L.R. 257.

INSOLVENCY—SUBSEQUENT BILL OF SALE—EXECUTION CREDITOR — SEIZURE OF STOCK FOR RENT.

Pitts v. Campbell, 9 E.L.R. 10.

IV. Partnership real estate.

See Cotenancy.

Taxation of, sites, domicile, see Taxes, V C—193.

(§ IV—15)—LAND SYNDICATE—DUTIES OF MEMBERS—OPTION.

There is no duty on the part of the member of a land syndicate to exercise an option to lands he obtained at a lower price in favour of the syndicate. [Gluckstein v. Barnes, [1900] A.C. 240; Bentley v. Craven, 18 Beav. 75; Re Cape Breton, 29 Ch.D. 795, distinguished.]

Merriam v. Kenderdine Realty Co., 25 D.L.R. 369, 34 O.L.R. 556.

PARTNERSHIP REAL ESTATE — SALE CONTRACT—SUFFICIENCY OF WRITING.

Where 3 persons enter into a partnership dealing with lands, stipulating that the partnership lands should be sold for such price as the partners might from time to time agree upon and that should any disagreement arise in regard to the sale of other dealings whatsoever in such lands the mutual decision of any 2 must bind the 3 partners, with mutual covenants and agreements to effectually carry out the stipulation; a subsequent memorandum of agreement of sale of the land, signed by 2 of the partners, is good as to all of them notwithstanding the Statute of Frauds.

Ecroyd v. Rodgers, 11 D.L.R. 626, 23 Man. L.R. 633, 24 W.L.R. 318, 4 W.W.R. 601.

JOINT OWNERSHIP—RIGHTS OF PARTIES—REFUSAL TO SELL INTEREST.

Where plaintiff and defendant owned property jointly, the former was under no duty to the latter to sell in order that the latter might realize upon his interest.

Bureau v. Laurencelle, 11 D.L.R. 283, 24 W.L.R. 335.

PARTNERSHIP REAL ESTATE—ORAL AGREEMENT—STATUTE OF FRAUDS.

There may be an agreement of partnership by parol, notwithstanding that the partnership is entitled to deal with land, and to an action to enforce such agreement the plea of the Statute of Frauds will not avail.

Leslie v. Hill, 11 D.L.R. 506, 28 O.L.R. 48, affirming 25 O.L.R. 144.

TRANSACTIONS IN LAND—AGREEMENT TO "DIVIDE" PROFITS—EQUALITY.

An agreement that the profits are to be "divided" means that they are to be equally divided unless it is stipulated otherwise.

Bindon v. Gorman, 12 D.L.R. 240, 4 O.W.N. 1505, 24 O.W.R. 769, reversing on the facts, 10 D.L.R. 431, 4 O.W.N. 839.

PARTNERSHIP REAL ESTATE.

Where the plaintiff and the three defendants purchased land in partnership and the conveyance was made to one of the defendants who afterwards gave an option

of purchase to another defendant and the latter succeeded in securing a purchaser at a price and on terms to which all expressed assent, though the plaintiff refused his formal consent unless the defendant who secured the purchaser would make an affidavit, which he refused to do, that he was not receiving a secret profit, the defendants were not guilty of fraud or of a breach of duty to the plaintiff in completing the sale without his consent, if there was in fact no secret profit, particularly in view of the provisions of the Partnership Act, R.S.B.C. c. 175, s. 25, making the assent of the majority of a number of partners sufficient.

Gordon v. Holland, 2 D.L.R. 327, 20 W.L.R. 887, 2 W.W.R. 158. [Affirmed in part and varied in part 10 D.L.R. 734, 33 W.L.R. 738, 4 W.W.R. 419.]

IN REAL ESTATE—REFERENCE AND ACCOUNTING.

Shephard v. Bruner, 19 D.L.R. 869.

PARTNERSHIP REAL ESTATE—PROOF IN WRITING — ACKNOWLEDGMENT BY DEPOSITION.

There is commencement of proof in writing, which leads to the proof by witness, of a special partnership agreement for the purchase and resale of a piece of real estate with joint profits in the deposition of the contending party examined as a witness, and when the facts were that it was he himself who proposed the matter to the other party, that they visited the property together, that the transfer of the insurance was drawn up by him and was in their favour as partners, and that if the other had been present at the signing of the contract of sale they would both have appeared as purchasers.

Moreau v. Menard, 45 Que. S.C. 542.

(§ IV—16)—WHAT IS.

If a caveator succeeds in establishing his contention that a valid partnership which was not evidenced by any writing subsisted between him and the owners of the land in question, and that such land was an asset of that partnership and that he still retained his interest in it, he would be entitled to a declaration by the court to protect that interest by the recording of a caveat.

Re MacCullough and Graham, 5 D.L.R. 834, 5 A.L.R. 45, 21 W.L.R. 349, 2 W.W.R. 311.

The fact that the plaintiff, who claimed that the defendant was a trustee for him in respect to a one-half interest in property the latter purchased and in which the plaintiff was to have such an interest upon providing a large sum for the initial payment, advanced the defendant $500 as one-half of the sum the latter was to pay and did pay the owner of the property in order to obtain an option thereon, which was subsequently applied as a part of such initial payment, the balance being furnished by the defendant upon the plaintiff's failure to do so, does not make the defendant a trustee for the plaintiff, notwithstanding the $500 was not returned the plaintiff until 14 days after the defendant made such initial payment.

Stewart v. Saunders, 4 D.L.R. 312, 21 W.L.R. 499.

SUBDIVISION LANDS—JOINT UNDERTAKING.

Where persons acquired certain land in common with the intention of subdividing it into lots and selling them as a joint venture out of which each is to receive a portion of the profits, a partnership is created in respect to the contemplated transactions. [Manitoba Mortgage Co. v. Bank of Montreal, 17 Can. S.C.R. 692, followed.]

Dart v. Drury, 23 D.L.R. 399, 25 Man. L.R. 258, 8 W.W.R. 173, 30 W.L.R. 809.

PURCHASE OF PARTNER'S LAND FROM FIRM —PAYMENTS TO WHOM.

A purchaser who pays to a partnership in its firm name the price of an immovable that he acquired from it frees himself from obligation to each of the partners personally, although the immovable was at the time of the sale the individual property of the partners.

Furois v. Grace, 48 Que. S.C. 89.

(§ IV—17)—ON DEATH OF PARTNER.

Land acquired for the purpose of carrying on a partnership business and used for that purpose is to be considered as partnership property and not as real estate owned by each partner as joint-tenants or tenants in common. [Jackson v. Jackson, 9 Ves. 591; Crawshay v. Maule, 1 Swanst. 495, and Waterer v. Waterer, L.R. 15 Eq. 402, followed.]

Farquharson v. Stewart, 1 D.L.R. 581, 10 E.L.R. 408. [See also 18 D.L.R. 480.]

Where the executors of a deceased partner who carried on a business with a surviving partner, upon being ordered by a Michigan Court of Chancery after the latter's death, to wind up the business, became the purchasers of partnership lands situated in Ontario, the sale being confirmed by such court and the executors directed to make and execute conveyances thereof to themselves, they may convey title to such lands, and, where the beneficiaries of the estate have received the purchase money, it is unnecessary for an administrator who was appointed by the court of Ontario of the estate of the surviving partner, to join in such conveyance, therefore he will be denied leave to file a caution under s. 15 (1) (d) of the Devolution of Estates Act, 10 Edw. VII., c. 56, after the proper time for filing it had expired.

Re Mills, 3 D.L.R. 614, 3 O.W.N. 1036, 21 O.W.R. 887.

DEATH OF PARTNER—ACTION BY SURVIVING PARTNER IN NAME OF FIRM—RULE 100—AMENDMENT OF STYLE OF CAUSE—LAND CONVEYED TO PARTNERSHIP—TITLE—JOINT TENANCY—CONVEYANCING AND LAW OF PROPERTY ACT, R.S.O. 1914, C. 109, S. 13—LAND VESTING IN SURVIVING PARTNER—ACTION FOR POSSESSION—RIGHT TO REDEEM—ABILITY OF SURVIVING PARTNER TO RECONVEY.

Harris v. Wood, 7 O.W.N. 611.

(§ IV—18)—HYPOTHECATION OR MORTGAGE BY TRUSTEE PARTNER.

The hypothecation of a property for his own purposes by a person holding it in trust for himself and another jointly, may be tantamount to an alienation thereof, and this, under art. 1092 C.C. (Que.), would give such other person the right to demand the immediate return of money he had contributed in the joint venture if such hypothecation impairs his security.

Frank v. Forman, 2 D.L.R. 8, 41 Que. S.C. 511.

V. Rights of members as to each other.

(§ V—20)—DIVERTING PARTNERSHIP FUNDS TO PRIVATE INVESTMENTS.

Under the Partnership Act, R.S.M. 1902, c. 129, s. 24, unless the "contrary intention" appears, property bought with money belonging to a partnership firm is deemed to have been bought on account of the firm and in a business carried on by the plaintiffs and the defendant as builders' contractors and brick-makers in a partnership at will, where the defendant, without the consent of his copartners, from time to time during the partnership diverted certain moneys from the resources of the partnership firm and used such moneys in certain outside speculations and investments out of which certain profits were realized, the principle of s. 24 is applicable and the benefit of such speculations and investments accrues to the partnership firm.

Kelly v. Kelly, 10 D.L.R. 343, 23 W.L.R. 953, 3 W.W.R. 799, reversing 20 Man. L.R. 579.

ACCOUNT—ACTION FOR ACCOUNT OF PARTNERSHIP PROFITS—CONSTRUCTION OF AGREEMENT—PROVISION FOR ACCOUNT FROM TIME TO TIME—POSTPONEMENT OF TRIAL TO OBTAIN EVIDENCE ON COMMISSION—REVERSAL OF ORDER—EVIDENCE NOT NECESSARY AT TRIAL—REFERENCE—DISCRETION OF TRIAL JUDGE.

Becher v. Ryckman, 7 O.W.N. 149.

SALE BY PARTNER OF HIS "RIGHTS"—PROFITS REALIZED.

A sale by a partner to his copartners of "his rights in said business" does not include his share of the profits realized and deposited in a bank by the partnership.

Sophketes v. School, 23 Que. K.B. 255.

(§ V A—21)—ACCOUNTING — PARTNER'S PROFITS FROM INVESTMENT OF PARTNERSHIP FUNDS — "CONTRARY INTENTION" CONSTRUED.

Under s. 24 of the Partnership Act, R.S.M. 1902, c. 129, the "contrary intention" which may waive or defeat the right of the partnership firm to the beneficiary interest accruing from the outside speculations and investments of a partner diverting the resources of the firm to such speculations and investments, means a "contrary intention" concurred in by the other members of the partnership firm and not that of the speculating partner alone.

Kelly v. Kelly, 10 D.L.R. 343, 23 W.L.R. 953, 3 W.W.R. 799, reversing 20 Man. L.R. 579.

PROFITS FROM ADMITTING NEW MEMBERS—ACCOUNTING.

Moneys received by the members of a firm possessing a majority interest therein, in pursuance of an arrangement whereby third parties are admitted into the firm, cannot be retained by them as a consideration for their individual interests therein, but is in effect a realization for a share in the assets or goodwill of the partnership itself, and must be accounted for to the other partners.

Marwick v. Kerr, 29 D.L.R. 446, 53 Can. S.C.R. 1, affirming 25 D.L.R. 250, 24 Que. K.B. 321.

ACTION IN NAME OF PARTNERSHIP BY ONE MEMBER WITHOUT CONSENT OF OTHERS—VALIDITY—ACCOUNTING.

Black Hill Threshing Syndicate v. Cole, 42 D.L.R. 790.

ACCOUNTING—INCONSISTENT CLAIMS—ELECTION.

There is no inconsistency between a prayer for an accounting and a prayer for a declaration of ownership to a share of securities belonging to the firm, in an action for accounting between partners, and the defendant cannot by means of a dilatory exception demand the plaintiff to elect between the two.

Barnard v. De Sambor, 25 D.L.R. 344, 24 Que. K.B. 480.

ACCOUNTING—RIGHT OF PARTNER TO COMPENSATION.

A contract of partnership excludes any implied covenant for the payment of services rendered the firm by any of its members, and cannot be allowed as an item in an accounting between them; nor does a partner who occupies the position as manager, stand in any better position.

Merriam v. Kenderdine Realty Co., 25 D.L.R. 369, 34 O.L.R. 356.

ACCOUNTING—PROFITS REALIZED IN OTHER CAPACITIES.

When two brothers accept a donation from their father of a lot of land in common with a forge, and in compliance with his wish work the forge together for 30 years without any agreement and without divi-

sion, there is formed between them a special partnership for the purpose of the working of the forge. If, during the 30 years one of the associates has at the same time performed the duties of bailiff of the Superior Court and of secretary-treasurer of the municipality to the knowledge of his associates, for 27 years without opposition or claim on the other's part, the latter cannot demand from him an account of the profits that he has drawn from the exercise of these functions and claim to be paid half of them.

Ferland v. Ferland, 47 Que. S.C. 314.

PURCHASING SHARE OF OTHER PARTNER—RIGHT TO REIMBURSEMENT AFTER SETTLEMENT.

In a partnership composed of two members, if one of them purchases the share of the other, and the accounts between them are settled, without any claim on the part of the purchaser for the amounts withdrawn by the vendor, the purchaser cannot subsequently claim from his former partner reimbursement of part of this sum on the ground that he had not the right to take it.

Northwest Employment Agency v. Putnick, 24 Que. K.B. 285.

SECRET PROFITS AND COMMISSION—SALE OF LAND—DUTY OF ACCOUNTING.

Powell v. Maddock, 25 D.L.R. 748, 9 W.W.R. 353, 25 Man. L.R. 730, 32 W.L.R. 619.

ACCOUNT—ALLOWANCE FOR USE BY FIRM OF PLANT OF INDIVIDUAL PARTNER—JUDGMENT — CONSTRUCTION — REFERENCE—REPORT—EVIDENCE—APPEAL.

McGillivray v. O'Toole, 7 O.W.N. 784.

PROFITS—ACCOUNT.

Bennett v. Pearce, 8 O.W.N. 278.

ACCOUNTING—FRAUD AND MISFEASANCE.

Macdonald Bros. Engine Works v. Gordon, 33 W.L.R. 392.

ACCOUNTS—REFERENCE—APPEALS FROM REPORT.

Stirton v. Dyer, 10 O.W.N. 393, 11 O.W.N. 15.

(§ V—22)—LIABILITY OF PARTNER MAKING ADVANCE FOR BENEFIT OF FIRM.

A partner who has paid money for the benefit of a partnership cannot hold a co-partner for more than his proportionate share thereof, on the ground of the insolvency of other partners, without shewing such insolvency. A partner who has paid money for the benefit of the partnership cannot, on the ground that some of the partners have left the province, hold other partners liable for more than their proportionate shares thereof.

Lamb v. North, 3 D.L.R. 774, 22 Man. L.R. 360, 21 W.L.R. 422.

(§ V—23)—DEATH OF PARTNER—IMPLIED CONTINUANCE OF PARTNERSHIP WITH PERSONAL REPRESENTATIVES—LEASES.

Two lessees of several theatres entered into an agreement by which each gave to the other an undivided half interest in each lease held by him and in the profits and emoluments thereof, and it was provided that the agreement should remain in force till the expiration of these leases and of any and all renewals thereof. The agreement also contained a provision that it should be binding upon the "heirs, executors, or assigns" of the parties, as though they had been specially mentioned in it:—Held, that upon the death of one of the partners the partnership came to an end, and did not remain in force between the surviving partner and the representatives of the deceased partner till the termination of the leases. The provision that the agreement was to remain in force till the termination of the leases had no greater effect than if the date at which the leases expired had been stated in the agreement; and, therefore, the general rule that, in the absence of special provision, the death of a partner puts an end to a partnership, even though the term provided for has not expired, became applicable. The provision that the agreement should be binding upon the heirs, executors, or assigns of the parties was not equivalent to an agreement that the partnership should not be dissolved by death, but was merely a loose way of avoiding the necessity of repeating these words after the name of each contracting party whenever it occurred in the document.

Whitney v. Small, 31 O.L.R. 191, 6 O.W.N. 188, reversing 5 O.W.N. 160, 25 O.W.R. 121.

One partner has no right to devise his interest in the partnership property in such a manner as to clog his partner's interests in the partnership business, by imposing conditions as to making payments of sums alleged to be due to the testator by his partner. Where the devisee of a deceased partner in a mercantile copartnership to whom the business was devised as a going concern to be worked by the devisee and the surviving partner share and share alike, continues to carry on the business for his own benefit, using the stock and plant of the copartnership he must account to the surviving partner for any profits made. [Crawshay v. Collins, 15 Ves. 218; Featherstonhaugh v. Fenwick, 17 Ves. 298; Yates v. Finn, L.R. 13 Ch. D. 839, followed.]

Farquharson v. Stewart, 1 D.L.R. 581, 10 E.L.R. 408. [See also 18 D.L.R. 480.]

SECRET PROFIT BY BROKER—IMPLIED PARTNERSHIP—LIABILITY TO ACCOUNT—PURCHASER IN GOOD FAITH—DISCLOSURE OF SUSPICIOUS CIRCUMSTANCES.

Coy v. Pommerenke, 44 Can. S.C.R. 543.

VI. Dissolution; effect of.

See Companies, VI A—305.

(§ VI—25) — DISMISSAL OF PARTNER — "JUST AND REASONABLE CAUSE."

Intoxication forms a "just and reasonable cause" for the dismissal of a partner and the dissolution of the partnership within the meaning of such phrase in the articles of copartnership, and may be set up in justi-

fication to an action for wrongful dismissal.

Fitzsimons v. Stoller, 27 D.L.R. 174, 10 W.W.R. 463.

INSOLVENCY—POWER TO ACKNOWLEDGE DEBT BARRED BY LIMITATIONS.

A partner has no implied authority to acknowledge a debt barred by limitations after the dissolution of the partnership by insolvency proceedings.

Quaker Oats Co. v. Denis, 24 D.L.R. 226, 9 A.L.R. 62, 8 W.W.R. 877, 31 W.L.R. 579, affirming 19 D.L.R. 327, 8 A.L.R. 31.

LIABILITY OF RETIRING PARTNER—RELEASE.

One cannot be held on a partnership note after he ceased to be a member of the firm, with knowledge thereof by the holder, particularly where the liability was released by the taking of other securities.

Northern Crown Bank v. Elford, 34 D.L.R. 280, 10 S.L.R. 96, [1917] 2 W.W.R. 969.

DISSOLUTION—APPOINTMENT OF RECEIVER—SUBSEQUENT PAYMENT TO PARTNER.

A payment of money to a member of a partnership after the appointment of a receiver, the dissolution of the firm, and the restraining of such partner from receiving money owing the firm, of which the payer had notice, does not amount to a payment to the partnership so as to discharge the debt.

Irvine v. Hervey, 13 D.L.R. 868, 47 N.S.R. 310, 13 E.L.R. 297.

LEASE MADE DURING PARTNERSHIP TO COMMENCE AT ITS TERMINATION—SHARING BENEFITS.

A partner who, pending the existence of the partnership, takes a new lease in his own name of the business premises of which the firm was tenant, without the consent of his copartner, in order to continue the business there, from and after the dissolution of the partnership, is under a legal obligation to let such partner share in the benefit of the new lease.

Hyde v. Webster, 13 D.L.R. 388, 20 Rev. Leg. 45.

RECEIVER—LEASE.

A partnership at will is for all practical purposes dissolved when a receiver is appointed, and one partner has then a right to lease the partnership premises and hold it for his own personal benefit.

Mah Kong Doon v. Mah Cap Doon, 39 D.L.R. 234, [1918] 1 W.W.R. 610, affirming 37 D.L.R. 50, [1917] 3 W.W.R. 434.

ACCOUNT — REFERENCE — RECEIVER — SECURITY—RECEIVER TO CARRY ON OR SELL BUSINESS.

Howie v. Howie, 14 O.W.N. 120.

PREMATURE DISSOLUTION—DAMAGES.

No partner has a right, without cause, to dissolve the partnership before expiration of the time fixed in their agreement, under penalty of paying the damages which the other partner suffers. When it is a partnership for the purchase and sale of real property, where operatons would have been commenced at a time when the real property had a great speculative value, and the dissolution took effect at the moment when the market was affected by a crisis brought about by the war, the amount of damages suffered by the expelled partner should be estimated by taking into consideration the facts before, as well as after the action.

Howard v. Findlay, 27 Que. K.B. 375. [Reversed in 47 D.L.R. 441.]

ELECTION OF DOMICILE—PEREMPTION—SERVICE.

If a firm of attorneys, who had made an election of domicile, is dissolved and one of the members elects a domicile elsewhere, a motion for peremption should be served at the domicile elected by the latter, not at that elected by the partnership.

Belanger v. McDonnell, 20 Que. P.R. 48.

FRAUD AND MISREPRESENTATION INDUCING PLAINTIFF TO ENTER INTO—RESCISSION OF PARTNERSHIP AGREEMENT—REPAYMENT OF SUM PAID BY PLAINTIFF—LIEN ON ASSETS OF PARTNERSHIP—PAYMENTS MADE TO CREDITORS OF PARTNERSHIP—SUBROGATION — INDEMNITY — REFERENCE—COSTS.

Maize v. McFarlane, 16 O.W.N. 349.

ARBITRATION CLAUSES IN ARTICLES—INTERIM RECEIVER PENDING REFERENCE.

Davies v. Mack, 4 O.W.N. 357, 23 O.W.R. 407.

REFERENCE FOR ACCOUNTING AND SALE — SALE OF LAND OF PARTNERSHIP DEFERRED UNTIL AFTER ACCOUNTS TAKEN—POSSESSION—OCCUPATION-RENT.

Bailey v. Bailey, 13 O.W.N. 385.

APPOINTMENT OF RECEIVER.

When a partnership is dissolved there is formed among the former partners a community of undivided interest, in virtue of which each of the partners becomes owner of his proportionate share of the property rights and interest comprising the partnership's assets, and this co-ownership only ceases by the complete dissolution of the partnership. Upon the dissolution of a commercial partnership a sequestrator may be appointed pending the liquidation. When the administration of the business (pharmacy) calls for a special knowledge, the court, in appointing a sequestrator, may entrust the management of the business to a qualified person, one of the partners, who had charge before the dissolution, under the superintendence and responsibility of the sequestrator.

Bonneville v. Salvas, 49 Que. S.C. 253.

LIQUIDATOR—NOTICE—DOCUMENTS.

The court or a judge may appoint a liquidator to a partnership upon petition of a partner who has given notice of dissolution but cannot on such appointment inquire if the declaration of partnership filed, against which there has been no inscription en faux, is true or false.

Bithell v. Bithell, 17 Que. P.R. 440.

LIQUIDATOR—SEIZURE-GARNISHMENT BEFORE JUDGMENT—C.C. QUE. 1896a.

On the dissolution of a partnership, if any trouble arises between the partners, the best remedy, the only effective one to apply in such a case, is the appointment of a liquidator. When a voluntary liquidator has taken possession of the assets of a partnership, one partner cannot seize, by way of garnishment before judgment, assets which do not belong to his copartner, but to the partnership.

Bass v. Enderman, 46 Que. S.C. 412.

The member who wishes to retire from a business partnership for the termination of which no time is fixed, is not required to justify his action; it is sufficient that the notice by him not to longer continue a member of the firm is given in good faith and under circumstances which do not prejudice his partners. No form of notice is required and it need not be served by a bailiff.

Lardon v. Valade, 13 Que. P.R. 438.

GROUNDS—EFFECT OF WAR.

Errors in judgment, failure in matters of business, differences of opinion, discords and disagreements in respect to division of profits and to good faith, which do not seriously affect the interests of the partnership, are not reasons for dissolutions of the firm before the expiration of the term agreed upon. In any of these cases if these acts should become such as would justify a demand for dissolution, they cannot be set up by the one who by his actions and violence of his character has been the exclusive cause of the trouble. To establish the amount of damages suffered by a partner after an unwarranted dissolution of the partnership by the other member, the court should take into account the past history of the firm, the profits which had been made up to the time of the dissolution and those which should be attributed to the partnership, by taking into consideration not only the facts which existed at the time of the dissolution, but those which have happened since and which can be proved. The court, deemed to be aware of the existence of a state of war in which this country is engaged, will consider its general influence upon the affairs of the parties.

Howard v. Findlay, 51 Que. S.C. 385.

ASSUMPTION OF DEBTS BY PARTNER—NOVATION.

When a creditor of a partnership which has been dissolved goes to the office of one of the partners to receive payment of his debt and is informed by the partner that it is he who has assumed the payment of the debts, and the creditor is given a note for the amount, the other partner is not discharged, since novation cannot be presumed, and it should be evident that a note cannot effect novation and the representative of a creditor to consent to a novation should have authority.

Bremner Co. v. Langlois, 52 Que. S.C. 362.

DISCHARGE OF LIQUIDATOR.

The liquidator of a dissolved partnership may, in distributing according to the judge's order the moneys in his possession, obtain from him his final discharge.

Bissonnette v. Kubelik, 18 Que. P.R. 217.

(§ VI—26)—WHAT CONSTITUTES A DISSOLUTION.

Two members of a partnership may not dissolve the partnership without notice to the third member, even by the one buying out the other's interest.

Thomas v. McNaughton, 2 D.L.R. 211, 21 W.L.R. 267, 2 W.W.R. 381.

LIABILITY OF SURVIVING PARTNER—NOTICE OF DISSOLUTION—CONTINUING PARTNERSHIP SIGN.

Notice to creditors of the death of a partner is not necessary to protect his estate from liability for debts contracted in the carrying on of the business after his decease. The omission of a surviving partner to remove the partnership sign from the premises in which the partnership business was carried on is not in itself a holding out by him that the partnership is still in existence and carrying on the business or that he is continuing the business on his own account in the partnership name.

Imperial Oil Co. v. Duplessis, 9 A.L.R. 59.

WHAT CONSTITUTES A DISSOLUTION—NOTICE TO THIRD PARTY—EFFECT.

The notice of the change of the constitution of a partnership required by s. 38 of the Partnership Act (Sask.) enacting that where a person deals with a firm after a change in its constitution, he is entitled to treat all apparent members of the old firm as still being members of the firm until he has notice of the change, must be given after the dissolution and, that, therefore, a conversation prior to the dissolution of something that might occur in the future has no effect.

Woodside v. Grand and Keatley, 7 S.L.R. 330, 30 W.L.R. 77, 7 W.W.R. 727.

CONTRACT OF PARTNERSHIP—CONSTRUCTION — RESCISSION — DISSOLUTION—MANAGER ON SALES RECEIVING SHARE OF PROFITS—SUBSEQUENT AGREEMENT NOT REDUCED TO WRITING.

Deykin v. Northern Interior Amusement Co., 29 W.L.R. 241.

(§ VI—27)—RETIRING PARTNER IN SAME BUSINESS—TRADE SECRETS.

A partner who sells out his interest may engage in the same business as that of the firm and use the usual methods of doing that business, even though that involves the use of the knowledge acquired as a partner, providing he does not use the identical process or formula of the partnership.

Wodehouse v. Ideal Stock & Poultry Food Co., 35 D.L.R. 721, 39 O.L.R. 302, varying 11 O.W.N. 296.

RIGHTS IN FIRM NAME.

A law firm is a civil partnership, and when one partner retires from the firm

on his appointment to an official position his copartner may execute on a judgment in the name of the partnership, but only for his share, unless the retiring partner's interests have been properly transferred to him.

Bernard v. Pelissier, 8 D.L.R. 545.

GOODWILL—RIGHT OF SURVIVING PARTNER—VALUATION.

The right of a surviving partner to take over the interest of the deceased partner need not expressly appear on the face of the partnership agreement, but such intention may be inferred from its general terms. Upon valuation of the interest of the deceased partner the actual value of the assets should be determined in the ordinary way, and not by the accounts struck at the end of each year under the partnership articles; the goodwill of the business is also to be included in the assets.

Wood v. Gauld, 29 D.L.R. 246, 53 Can. S.C.R. 51, varying 24 D.L.R. 831, 34 O.L.R. 278.

GOODWILL OF FIRM—RIGHT OF SURVIVING PARTNER.

The goodwill of a firm forms a part of its ordinary assets, and in the absence of an express stipulation entitling the surviving partner to take over the interest of the deceased partner, no such right of pre-emption can be implied. [Hibben v. Collister, 30 Can. S.C.R. 459; Wedderburn v. Wedderburn, 22 Beav. 84 followed.]

Re Wood Vallance & Co., 24 D.L.R. 831, 34 O.L.R. 278.

ACTION IN NAME OF—AFTER DISSOLUTION—ABSENCE OF AUTHORITY OF ONE PARTNER TO USE PARTNERSHIP NAME—STAY OF PROCEEDINGS.

Widell v. Foley, 11 D.L.R. 767, 24 O.W.R. 742, varying 10 D.L.R. 855, 24 O.W.R. 636.

(§ VI—28)—COMPENSATION TO PARTNER CONTINUING BUSINESS.

A surviving partner who has carried on the business for the benefit of the partnership, pending proceedings being taken for its winding-up by the court, is not a trustee within the meaning of the Act, and therefore not entitled to the benefit of s. 40, c. 129, R.S.O. 1897, but if his claim is not based exclusively on this section and he asks generally to be allowed out of the partnership assets such sum as the court may deem fair and reasonable as compensation for his services, he should be allowed to apply to the court for such compensation as it, in its discretion, may see fit to grant. [Knox v. Gye, L.R. 5 H.L. 656, applied.]

Livingston v. Livingston, 26 D.L.R. 140, varying 20 D.L.R. 960, 32 O.L.R. 440, which varied 4 D.L.R. 345, 26 O.L.R. 246.

POWERS AND COMPENSATION OF SURVIVING PARTNER.

The surviving member of a foreign partnership, although an alien, may, if the countries are at peace, sell and convey partnership lands situated in another county without any representative of a deceased partner joining in the conveyance.

Re Mills, 3 D.L.R. 614, 3 O.W.N. 1036, 21 O.W.R. 887.

DEBTS OF OLD FIRM—LIABILITY OF RETIRING PARTNER—CREDITOR WITH KNOWLEDGE CONTINUING ACCOUNT WITH NEW FIRM—EFFECT.

Where creditors of the old firm, knowing of the change of partnership and that the new partners had taken over all the assets and had agreed to be subject to all the liabilities of the former firm, continued their dealings with the new firm as with the old and treated the new firm as their debtors in respect of the debt owing to them at the time of the creation of the new firm, the retiring partner will be discharged. [Rolfe v. Flower, L.R. 1 P.C. 27, followed.]

Georgeson & Co. v. DeLong, 19 D.L.R. 551.

(§ VI—29)—DISSOLUTION—ACCOUNTING.

Where the partnership business has been operated solely through a manager by whom the accounts were kept, such accounts should form the basis of the inquiry directed to be made by a referee under the usual reference for taking the partnership accounts in an action for the winding-up of the partnership affairs; and until some discrepancy appears in the manager's accounts as disclosed on the firm's balance sheet brought in and filed, the plaintiff should not be called upon to file accounts before the referee in like manner as if he were a sole trustee for the firm.

Haney v. Miller, 10 D.L.R. 212, 4 O.W.N. 992, 24 O.W.R. 354.

ACTION FOR DISSOLUTION — SUBSTITUTED AGREEMENT ON TERMINATION OF PARTNERSHIP.

An action brought in form for the dissolution of a partnership should not be dismissed merely because it appears that at the end of the term the parties substituted a new agreement for the adjustment of their partnership rights, whereby one of the partners was to enter the employment of the other; the court should, in the same action, give the plaintiff relief by declaring and enforcing the terms of the substituted agreement if set up in the defendant's pleading.

Town v. Kelly, 12 D.L.R. 490, 24 W.L.R. 541, reversing 5 D.L.R. 14, 21 W.L.R. 610.

SALE OF BUSINESS — ACCOUNTING — LIMITATIONS—TRUST.

Where a business has been carried on by husband and wife in equal shares as partners, the sale of the business terminates the partnership. The husband is not a trustee in the full sense of that word for the wife's share of the purchase price received by him so as to preclude the Statute of Limitations from applying. Any action for a partnership account must be brought within 6 years from such receipt. [Knox v. Gye, L.R. 5 H.L. 656, applied.]

Faye v. Roumegous, 42 D.L.R. 533, 42 O.L.R. 435, varying 13 O.W.N. 251.

PARTNERSHIP AT WILL—FORFEITURE—NON-PAYMENT OF DEBT TO FIRM—ACCOUNTING.

Where no time is fixed for the duration of a partnership, it is presumed to be one at will, terminable by any partner at any time, and though a partner's noncompliance with a demand by the other partners to pay a debt due by him to the firm is ground for a dissolution, they cannot, except by process of law or an agreement to that effect, forfeit and acquire his interest in the firm in satisfaction of the debt, and must account to him for his share in the assets and the profits, up to a reasonable time after notice of such demand, subject to the deduction of the amount of his indebtedness to the firm.

Allen v. Evans, 27 D.L.R. 242, 9 A.L.R. 298, 9 W.W.R. 1402.

DISSOLUTION AGREEMENT—FRAUDULENT REPRESENTATION.

Garvey v. Freer, 7 D.L.R. 932, 2 W.W.R. 720.

DISSOLUTION BY DEATH—ACCOUNTING.

Every person who administers property not belonging to him should render an account of his administration even when he believes that he is carrying on his own business. The communiste as well as the third-party holder in good faith is bound to render an account of his administration. The legatees or heirs who continue to administer the property of a partnership which existed in the lifetime of their auteur, are agents who should render an account of the administration to the surviving partner. The principle that one who demands an account must allege that he has himself rendered an account or that he is rendering an account, does not apply to an action of the nature of pro socio.

Ostigny v. Savignac, 47 Que. S.C. 376.

PURCHASE OF FARM BY SYNDICATE—PROFITS RECEIVED BY 2 MEMBERS—CONCEALMENT AND MISREPRESENTATION—LIEN—SALE OF PROPERTY—DISSOLUTION OF PARTNERSHIP — ACCOUNT — PARTIES—COSTS—FORFEITURE.

Bell v. Smith, 8 O.W.N. 49, 504.

DISSOLUTION BY DEATH OF PARTNER—ACCOUNT — REFERENCE — WINDING-UP — COSTS.

Rymal v. McGill, 7 O.W.N. 789.

PARTITION OF ASSETS—OFFER AND DEPOSIT IN COURT—C.C. QUE. 1898—C.C.P. 588.

In an action for the dissolution of a partnership and for partition of the assets, the defendant, copartner, cannot compel the plaintiff to give him his share of the assets of the partnership by making him offers and depositing them in court; each one being an owner, the division must be made as in the case of succession. But if, in the above case, the plaintiff withdraws the money deposited, without reservation, he agrees to the defendant's offer, and cannot continue his action for dissolution and partition.

Lauzon v. Lariche, 46 Que. S.C. 378.

DISSOLUTION BY DEATH — VALUATION OF SHARES BY ARBITRATORS—VOLUNTARY SUBMISSION—AWARD—ERROR.

Bell v. Smith, 8 E.L.R. 110.

TAKING PARTNERSHIP ACCOUNTS—GOODWILL — COMPOUND INTEREST — PROFIT AND LOSS ACCOUNT—DEPRECIATION OF PLANT AND MACHINERY.

Foster v. Mitchell, 3 O.W.N. 425, 20 O. W.R. 754.

ASSUMPTION OF LIABILITIES BY ONE PARTNER—RELEASE OF THE OTHER.

Watson Mfg. Co. v. Bowser, 16 W.L.R. 505.

VII. Actions.

Interest of dormant partner in action by firm, see Parties, 1 B—55.

(§ VII—30)—DISSOLUTION—ACTIONS BY CONTINUING PARTNER—JOINDER OF RETIRING PARTNER.

An action for the price of goods sold by a partnership is maintainable by the continuing partner after the dissolution of the firm, and it is not necessary to join as a plaintiff the retiring partner against whom the defendant has no claim and who has no beneficial interest in what is sought to be recovered.

Leeson v. Moses, 24 D.L.R. 158, 8 S.L.R. 222, 8 W.W.R. 1163, 31 W.L.R. 817.

EXPIRATION OF—RENEWAL OF LEASE BY ONE PARTNER — REPUDIATION — ACTION AGAINST COPARTNER—RIGHTS OF PARTIES.

Where a partnership would expire by effluxion of time some months before the expiration of its lease of premises occupied by the firm, one partner may repudiate on his own behalf and on behalf of the firm a renewal of the lease taken in the firm name by the other partner without his consent, and may, under Quebec law, maintain an action against his copartner, with the lessor brought in as mis-en-cause to hear judgment, for a declaration that the lease is null and void.

Hyde v. Webster, 20 D.L.R. 622, 50 Can. S.C.R. 295, 51 C.L.J. 36, reversing 13 D.L.R. 388, 23 Que. K.B. 1.

ACTION IN PARTNERSHIP NAME AFTER DISSOLUTION—OBJECTION BY ONE PARTNER—ADDITIONAL DEFENDANT.

On an objection of a nonresident copartner his name will be stricken as a party plaintiff from an action instituted by his copartner without his concurrence after the dissolution of the firm, but he may be added as party defendant so as to bind him by the litigation.

Widell v. Foley, 11 D.L.R. 767, 4 O.W.N. 1419, 24 O.W.R. 742, varying 10 D.L.R. 855.

VALUATION OF ASSETS—GOODWILL—INTEREST—ASSETS OF FORMER FIRM—RIGHT OF USER—COSTS.

Foster v. Mitchell, 3 D.L.R. 888, 3 O.W.N. 1509, 22 O.W.R. 571.

INJUNCTION—DISCONTINUANCE OF ACTION—DAMAGES.

In an action in a county court which brought up the question of the existence of a partnership, the plaintiff obtained an injunction and then discontinued the action. The defendant applied for an order directing an inquiry as to the damages resulting from the injunction and the judge ordered a reference to the registrar, not only to inquire and report as to damages, but also to decide whether a partnership existed. Held, that the appeal should be allowed.

John Hing Co. v. Sit Way, [1918] 1 W.W.R. 978, 25 B.C.R. 153.

ACTION TO RECOVER DEBTS OF PARTNERSHIP FROM ALLEGED PARTNER—CLASS ACTION—RULE 75—CREDITORS.

Silks v. Irons, 15 O.W.N. 267.

PENALTY CLAUSE IN CONTRACT OF FIRM.

An action against a commercial partnership, which obligated itself to pay a penalty if it contravened a specified clause of the contract, must be directed against the firm and not against one of the partners personally, especially where there is no allegation that the firm is dissolved or bankrupt.

Hill v. Ledoux, 14 Que. P.R. 319.

FOR SHARE OF PROFITS.

Although the action of a partner who quits a partnership, for his share of the profits made, by the latter is an action pro socio, nevertheless, an action against the other partner for a fixed sum of money may be taken when the contract stipulates that, in case one of the partners withdraws from the partnership, a special amount of money shall be paid to him at different periods for his share of the profits.

Kerr v. Karwick, 26 Que. K.B. 226.

(§ VII—31)—MONEYS ADVANCED BY ONE PARTNER FOR BENEFIT OF PARTNERSHIP—ACTION AGAINST OTHER PARTNER.

Where the amount that one partner has expended for the benefit of the partnership is ascertained, he may maintain an action therefor against his copartners, and recover from each their proportionate share thereof.

Lamb v. North, 3 D.L.R. 774, 22 Man. L.R. 360, 21 W.L.R. 422, 2 W.W.R. 463.

PARTY WALL.

See also Easements.

(§ I—1)—CREATION OF RIGHT.

On each of two adjoining lots is a building which entirely covers its whole area. A wall used as the northern wall of the plaintiff's building and the southern wall of the defendants' stood entirely on the plaintiff's lot. Held that while the wall is entirely the property of the plaintiff and is not a party wall, the defendants have an easement for the support of the joists of their building in the wall, it having been openly and uninterruptedly used for that purpose for more than 20 years; that a lost grant must be presumed to which this user would be referred.

McGaffigan v. Willett Fruit Co., 4 N.B. Eq. 353.

The owner of land who consents, by using it, to the construction of a party wall built by the adjoining owner on the dividing line between their lots, and formed a backing for their respective houses, cannot, when he had notice of its construction and went with his architect to visit the spot, examined the plans and specifications and allowed the work conforming thereto to be done, claim as damages the value of an excess of land, over and above the nine inches fixed by law, taken from eleven feet in depth for the foundation of the wall. He is considered as having given his tacit consent, and the ownership in common created between him and his neighbour deprives him of a right of action. An injunction will be refused.

Dubreuil v. Labelle, 42 Que. S.C. 353.

A neighbouring proprietor may acquire a party wall either by formally indicating his intention to do so, or by performing acts which constitute on his part a desire to make use of the wall. Where a building in Quebec is so constructed that the wall of the neighbouring building is used for all purposes of an exterior wall except support, one wall of the new building being such that, without the neighbouring wall, it would not stand the weather, or afford sufficient protection, or satisfy the building regulations, and, for further protection, the two walls are joined at the top by metal flashing, and it appears that the owner of the new building expected that, when it had settled into position, it would receive support also from the neighbouring wall, the owner of the neighbouring wall is entitled to compensation for the use of his wall as a party wall.

Morgan v. Avenue Realty Co., 6 D.L.R. 388, 46 Can. S.C.R. 589, 11 E.L.R. 391, reversing 20 Que. K.B. 526.

(§ I—2)—COST OF CONSTRUCTION—RIGHT TO CONTRIBUTION—WHEN.

An owner who builds a party wall can require his neighbour to contribute towards its construction, but only on condition of conforming strictly with the law or with the agreement between them. If the wall is defective, and in contravention of law, it should be rectified by the owner before demanding from the neighbour the payment of his share.

Laberge v. Fortin, 47 Que. S.C. 475.

(§ I—8)—DEFECTIVE CONSTRUCTION—DAMAGES.

One in possession of land under an agreement of sale may demand the demolition of a badly built party wall and damages, but he cannot claim the value of the land taken by his neighbour for the construction of the

wall over and above the number of inches agreed upon. When the heightening of a party wall is made in violation of municipal by-laws, upon a wall already badly built and in a defective and dangerous condition, the adjoining owner who has not exercised any control over the work can demand its demolition and claim damages.

Maccarone v. Zenga, 49 Que. S.C. 491.

(§ I—9)—Removal.

An action by one who has built a party wall to recover from the adjoining owner a part of the cost is, in its nature, a petitory action claiming a servitude and, therefore, a judgment maintaining it, though it condemns the defendant to pay a sum less than $500, is appealable. The adjoining owner, when the party wall, built in good faith, encroaches only a few inches, has no right to an action for its demolition either directly or indirectly by means of an action en bornage. A party wall built between two lots of land affords a ground of nonsuit to the action en bornage brought by one of the owners.

Boulanger v. Pelletier, 21 Que. K.B. 216.

(§ I—12)—Lateral support — Placing floor joists—Easement—Extent of right.

Home Bank v. Might Directories, 20 D.L.R. 977, 32 O.L.R. 340.

(§ I—13)—Right to use end for frontal facing of building.

The owners of a party wall, in the absence of special circumstances, are entitled to extend the frontal facing of their respective buildings to the middle line of the end of such wall.

Alberta Loan & Investment Co. v. Beveridge, 12 D.L.R. 292, 6 A.L.R. 212, 24 W.L.R. 736, 4 W.W.R. 995.

Agreement as to wall—Mistake of architect corrected.

Rosevear v. Holliday, 2 O.W.N. 1425.

Deed—"Rights and privileges as to party wall"—Right to build into.

Roche v. Allan, 23 O.L.R. 300, 18 O.W.R. 749.

PASSAGEWAY.

See Easements; Railways.

PASSING-OFF.

See Patents; Trademark; Copyright.

PATENTS.

I. In general.
II. Patentability of inventions.
III. Application; claims and specifications.
IV. Sale; license; assignment.
V. Infringement.

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Grants of public land, see Public Land; Mines and Minerals.

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Annotations.

Construction of patents; effect of publication: 25 D.L.R. 663.

Patents on dust collecting means; vacuum cleaners: 25 D.L.R. 716.

Prima facie presumption of novelty and utility: 28 D.L.R. 243.

Novelty and invention: 27 D.L.R. 450.

New and useful combinations; public use or sale before application for patent: 28 D.L.R. 636.

Essentials of utility and novelty; process patent: 35 D.L.R. 362.

Patentable invention; new devices. 38 D.L.R. 14, 43 D.L.R. 5.

Manufacture and importation under Patent Act: 38 D.L.R. 350.

Expunction or variation of registered trademark: 27 D.L.R. 471.

I. In general.

(§ I—1)—Place of manufacture—Assembling of parts—New invention.

A patented article made in the United States in detail in the sizes required in accordance with specific orders, the parts merely being joined together in Canada, is not manufactured or constructed in Canada within the meaning of the Patent Act, R.S.C. 1906, c. 69, s. 38.

The one feature of placing at right angles instead of diagonally, as in other grip treads patented, the chains connecting the side chains of the grip treads is not a new and useful improvement in grip treads for pneumatic tires.

Dominion Chain Co. v. McKinnon Chain Co., 45 D.L.R. 367, 58 Can. S.C.R. 121, affirming 38 D.L.R. 345, 17 Can. Ex. 255.

(§ I—2)—Duration—Termination—Non-manufacture—Illegal importation.

In the absence of special circumstances, the "life of a patent," within the meaning of an agreement not to engage in the manufacture or sale of disc talking-machines during the life of the letters patent thereof, is the "term limited for its duration" as provided by s. 23 of the Patent Act, R.S. 1906, c. 69, unless it comes to an end by a judgment in rem of a court of competent jurisdiction declaring the patent void; nor are illegal importation and non-manufacture of the invention circumstances terminating the life of the patent within the meaning of the agreement, particularly where in the case of prohibited importation the patent might still be in existence quoad any one but the importers under s. 38 (b) of the Act.

Berliner Gramaphone v. Pollock, 26 D.L.R. 628, 35 O.L.R. 137.

(§ I—3)—Mistake in application—Reissue.

An omission through mistake to make a claim in a patent application for one of the inventions disclosed in the specification is within the purview of s. 24 of the Patent Act, R.S.C. 1906, c. 69, as to reissue in

cases of "insufficient description or specification."

Re Leonard, 14 D.L.R. 364, 13 E.L.R. 280, 14 Can. Ex. 351.

(§ I—4)—CONSTRUCTION—WHOLE INSTRUMENT TO BE LOOKED AT.

The proper mode of construing a patent is the same as would be applied in the case of any other written instrument, and it is not in accordance with the true canons of construction to read the claim alone without the specification; the whole document must be looked at to see what the claim is. [Consolidated Car Heating Co. v. Came, [1903] A.C. 509, followed.]

Johnson v. Oxford Knitting Co., 25 D.L.R. 658, 15 Can. Ex. 340.

INVENTION OF SERVANT.

In the absence of a special contract, the invention of a servant, even though made in the master's time and with the use of the master's material and at the expense of the master, does not become the property of the master, so as to justify him in opposing the grant of a patent for the invention to the servant, who is the proper patentee. [Worthington Pumping Engine Co. v. Moore, 20 R.P.C. 41, distinguished.]

Imperial Supply Co. v. G.T.R. Co., 7 D.L.R. 504, 11 E.L.R. 340, 14 Can. Ex. 88.

PRIMA FACIE PRESUMPTION OF NOVELTY AND UTILITY.

Bitulithic & Contracting Co. v. Can. Mineral Rubber Co., 25 D.L.R. 827, 8 W.W.R. 207. [See 28 D.L.R. 243.]

PATENT FOR INVENTION—ELECTRIC SIGNS—KNOWN DEVICE—ACTION FOR INFRINGEMENT—FINDING OF FACT OF TRIAL JUDGE—APPEAL.

Flexlume Sign Co. v. Macey Sign Co., 12 O.W.N. 89, affirming 10 O.W.N. 305.

II. Patentability of inventions.

(§ II—15)—NEW AND USEFUL COMBINATIONS OF WELL-KNOWN MATERIALS—PUBLIC USE OR SALE BEFORE APPLICATION FOR PATENT—PURPOSES OF SIMILAR DEVICES IN DETERMINING QUESTION OF INFRINGEMENT.

Concrete Appliances Co. v. Rourke, et al., 28 D.L.R. 635, 8 W.W.R. 6.

NEW INVENTION—ADAPTATION OF OLD DEVICE—SEAM IN OVERALLS.

Clark v. Northern Shirt Co., 45 D.L.R. 737, 57 Can. S.C.R. 607, affirming 38 D.L.R. 1, 17 Can. Ex. 273.

COMBINATIONS.

Where the merit of an invention consists in an idea or principle, a machine based on the same idea or principle may be an infringement although the detailed means of carrying it into effect be different, but it is otherwise if the invention is merely of the particular means employed and consists of the combination of old parts to produce a new and useful result; the latter is properly the subject of a second patent.

United Injector v. James Morrison Brass Mfg. Co., 10 D.L.R. 619, 4 O.W.N. 1265, 24 O.W.R. 608.

NOVELTY — INVENTION — COMBINATION — PRIOR ART—COSTS.

Where the patentee has merely adopted in the manufacture of his patented article old contrivances of a nature similar to those found in other articles of the same kind, and producing similar results, there is no invention to support the patent. The court, taking into consideration the conduct of a defendant leading up to the action, has a discretion to deprive him of his full costs although he succeeds in the action.

Treo Co. v. Dominion Corset Co., 42 D.L.R. 605, 18 Can. Ex. 115.

OLD ELEMENTS—PATENTABLE INVENTION.

Bringing together old elements in such a way as to be useful and produce a combination which has the essentials requisite to a valid patent entitles an applicant to have patent issue, notwithstanding that each of such elements can be traced in previous patents.

Re Lavers' Heels Patent, 43 D.L.R. 1, 18 Can. Ex. 199.

PATENT FOR INVENTION—PATENTABLE COMBINATION—DEFINITE RESULT—VALIDITY—INFRINGEMENT — INJUNCTION — CLAIM FOR CONSPIRACY—RESTRAINT OF TRADE—COVENANT OF SERVANT NOT TO ENGAGE IN SPECIFIED BUSINESS FOR 5 YEARS AFTER TERMINATION OF EMPLOYMENT—PROHIBITION TOO WIDE AS TO TERRITORY—REFUSAL TO ENFORCE.

Canadian Steam Boiler Equipment Co. v. MacGilchrist, 16 O.W.N. 37.

(§ II—20)—ANTICIPATION—PRIOR KNOWLEDGE OF USE.

In order that a device be validly patentable it is not sufficient to take a well-known mechanical contrivance and apply it to a subject to which it has not been hitherto applied; the true test being whether an ordinary mechanic could have made it without other suggestion than his knowledge of his art. [Dominion Fence v. Clinton Wire Cloth Co., 39 Can. S.C.R. 535, distinguished; Harwood v. Great Northern R. Co., 11 H.L.C. 654, followed.]

Rolland v. Fournier, 4 D.L.R. 756.

PROCESS PATENT—IMPORTATION—ANTICIPATION—CLAIMS AND SPECIFICATIONS.

The importation of apparatus to carry out a process patent is not within the prohibition of the Canada Patent Act (R.S.C. 1906, c. 69, s. 38); an attack on a patent on the ground of illegal importation may be made by way of defence.

Alsop Process Co. v. Friesen & Son, 35 D.L.R. 353, 16 Can. Ex. 507. [Affirmed 45 D.L.R. 756, 57 Can. S.C.R. 606.]

ABSENCE OF NOVELTY AND USEFULNESS—ADAPTATION OF PRINCIPLE PREVIOUSLY DISCOVERED — EVIDENCE — INFRINGEMENT—COSTS.

Kohlmeyer v. Canadian Bartlett Automobile Co., 8 O.W.N. 457.

III. Application; claims and specifications.

(§ III—25)—Conflicting claims—Jurisdiction—Arbitration—Stay of proceedings.

The Exchequer Court has jurisdiction under s. 23 of the Exchequer Court Act (R.S.C. 1906, c. 140) to determine conflicting applications for patents notwithstanding the pending of a similar proceeding before the Commissioner of Patents, by way of arbitration, under s. 20 of the Patent Act (R.S.C. 1906, c. 69); where jurisdiction is assumed the other proceedings will be stayed.

Hutchins Car Roofing Co. v. Burnett, 16 Can. Ex. 391. [Motion to quash appeal to Supreme Court of Canada dismissed; 36 D.L.R. 45, 54 Can. S.C.R. 610.]

(§ III—27)—Claims and specifications.

In the manufacture of sofa-bed the addition of a woven wire mattress to the lower frame when such a device has been used for years in the upper frame is not a new and useful improvement which can be protected by patent. [Harwood v. Great Northern R. Co., 11 H.L.C. 654, 35 L.J. Q.B. 27, applied.]

Rolland v. Fournier, 4 D.L.R. 756.

Patentability of inventions—Invention disclosed but not claimed in prior application—Abandonment—Reissue.

Where the claim of patentability in a patent application is for the apparatus only although the specifications disclose also, as a new invention, the process in which the apparatus is to be used, the applicant cannot afterwards, except on an application for a reissue of the patent so obtained, obtain a patent of invention upon the method or process so as to cover any device or contrivance producing the same effect as his patented apparatus and thereby widen the claims of his original patent. [Hinks v. Safety Lighting Co., 4 Ch.D. 607, 612; and Miller v. Brass Co., 104 U.S.R. 350, followed; Barnett-McQueen Co. v. Canadian Stewart Co., 13 Can Ex. 186, distinguished.]

Re Leonard, 14 D.L.R. 364, 13 E.L.R. 280, 14 Can. Ex. 351.

IV. Sale; license; assignment.

Where a servant devises an invention in the time and at the expense of his master and with the use of the master's material, and, having obtained a patent for the invention, assents to its use by the master, the proper conclusion is that he has given the master an irrevocable license to use the invention.

Imperial Supply Co. v. G.T.R. Co., 7 D.L.R. 504, 11 E.L.R. 340, 14 Can. Ex. 88.

(§ IV—31)—Agreement for license

An agreement for a license to manufacture and sell a patented invention is equivalent to a license. [Walsh v. Lonsdale, 21 Ch.D. 9, 52 L.J. Ch. 2, 46 L.T. 858, followed.]

Duryea v. Kaufman, 2 D.L.R. 468, 3 O.W.N. 651, 21 O.W.R. 141.

(§ IV—35)—Sale—Obtaining new patent in another country—Injunction.

The seller of the rights in Canada to a patent and trademark is entitled as of course to apply outside of Canada for a similar patent and trademark; the consent of the buyer, though unnecessary, is binding upon him, and an injunction will be granted to restrain the buyer from interference with the seller's attempts to obtain such patents and trademarks outside of Canada. An injunction operates in personam to restrain wrongful acts in a foreign country by a resident here.

Warrell v. Railway Asbestos Packing Co., 32 D.L.R. 342, 22 Rev. Leg. 512.

(§ IV—45)—License and assignment—Conflicting claims—Jurisdiction.

Felt Gas Compressing Co. v. Felt, 14 D.L.R. 395, 14 Can. Ex. 311.

License assignment.

Where a form of license to use a patented invention was signed by the employee in whose favor the patent had been issued, to license the employers, a railway company, to use it for a nominal consideration of one dollar, without royalty or further payments being thereby provided, and the railway company objected to the inclusion of a clause in the license which purported to restrict the license so as to exclude the use of the invention by certain allied railway companies and gave notice of such objection to the proposed licensors, and the license was not executed by the company nor was anything done towards its acceptance further than the retention by the company of the copy forwarded to them, such retention without registration thereof will not be held to be an acceptance of the agreement binding upon the company, if it appears that the alleged invention was perfected in the course of the employee's work for the company and that the licensors knew that the company always demanded from employees who invented a device under such circumstances an absolute license without cost to the company for the use of the invention on their own and all allied lines.

Imperial Supply Co. v. G.T.R. Co., 1 D.L.R. 243, 10 E.L.R. 414, 13 Can. Ex. 507.

V. Infringement.

(§ V—50)—Sufficiency of proof as to infringement—Prima facie evidence of invention.

Batho v. Invincible Renovator Mfg. Co., 25 D.L.R. 716.

Infringement — Foreign vessels — Contract with builders—Lien—Security—Interpretation of contract—Vessels property of employer and true owner—Protection—Patent Act.

The title to vessels built in Canada for a foreign power, even though apparently re-

maining in the builders according to the terms of the contract as a guarantee for payment of moneys owing, and reverting to the foreign power upon final payment, really rests in the true owner from the beginning, and this owner is entitled to the protection afforded by the Patent Act. R.S.C. 1906, c. 69, s. 53.

Marconi Wireless Telegraph Co. v. Canadian Car & Foundry Co., 50 D.L.R. 702. [Affirmed by Canada Supreme Court, June 21, 1920.]

INFRINGEMENT.

A Canadian patent is void on the ground of noncompliance with the Patent Act. Where the invention so patented is in public use and on sale with the consent of the inventor thereof for more than one year previous to the application for the patent in Canada. The Patent Act, R.S.C. 1906, c. 69, s. 7. The words "in Canada" in s. 7 of the Act have reference to the application for the patent, and not to the sale of the machine to be patented. [Smith v. Goldie, 7 Ont. App. 628 (on appeal 9 S.C.R. 46), followed.] A Canadian patent is void on the ground of noncompliance with the Act, when the construction or manufacture of the invention so patented had not been commenced or carried on in Canada within two years from the date of the patent. (Section 38).

Lombard v. Dunbar Co., 4 N.B. Eq. 271.

(§ V—56)—INFRINGEMENT—ESSENTIAL ELEMENTS—PRIOR ART.

There is no infringement of a patent where the element specifically claimed by the patentee as an essential element is omitted from the defendant's machine (electric toaster); a claim is bad where every element is shown in the prior art in combination.

Moodie v. Canadian Westinghouse Co., 27 D.L.R. 444, 16 Can. Ex. 133.

COMBINATION — INFRINGEMENT — ESSENTIALITY OF ELEMENTS CLAIMED — EQUIVALENTS—DISCLOSURE OF INVENTION IN PLANS FOR CONSTRUCTION.

Barnett-McQueen Co. v. Canadian Stewart Co., 13 Can. Ex. 186.

PAVEMENTS.

See Highways.

PAYMENT.

I. MEDIUM OF; VALIDITY.
II. TIME.
III. PLACE.
IV. APPLICATON.
V. DEMAND.
VI. RECOVERY.

Statutory postponement of payments, see Moratorium.

Payment into court, legal tender, cheque, see Tender, I-12.

With draft, see Bills and Notes, IV D-104.

Under mistake of fact or law, see Mistake, III-20.

Conclusiveness as to, acknowledgment under seal, deed, see Estoppel II A-20.

Plea of payment, see Evidence, XIII A-1004.

Action to recover back payments, see Principal and Agent, III-30.

Annotation.

Postponement under moratorium, 22 D.L.R. 865.

I. Medium of; validity.

(§ I—1)—PAYMENT INTO COURT—MONEY FOUND DUE TO PLAINTIFF BY DEFENDANT—FINDING NOT SUBJECT TO APPEAL—APPEAL PENDING IN REGARD TO OTHER MATTERS—ORDER FOR PAYMENT INTO COURT—APPLICATION FOR PAYMENT OUT OF COURT.

Peppiatt v. Reeder, 15 O.W.N. 30.

(§ I—8)—BY NOTE.

The transfer of a note by a husband to his wife cannot be regarded as a giving in payment within the meaning or art. 1592, C.C. (Que.)

Nadeau v. Provost, 52 Que. S.C. 387.

BY NOTE—SALE OF GOODS—ACTION FOR PRICE—PAYMENT TO HOLDER OF PROMISSORY NOTES GIVEN FOR PRICE—COUNTERCLAIM—BREACH OF CONTRACT.

Krehm Bros. Fur Co. v. Bastedo, 24 O.W.R. 820.

BY NOTE.

When a debtor, in account current with his creditor, informs that he will be unable to meet a note about to mature, and the creditor obtains from a third party, indebted, or about to be indebted, to the debtor on a contract between them, a note of the same amount, and uses it to take up the maturing note, and it is paid in due course, the operation amounts to a payment made, if not by the debtor, for him and with his money, and the rule of art. 1161, Civil Code, that imputation of it should be made upon the oldest debt due, applies to it. Hence, if the indebtedness from the note taken up with the proceeds of the other is the oldest in the account, it is extinguished.

Craik et al. v. MacFarlane & Co., 21 Que. K.B. 10, 18 Rev. de Jur. 88.

(§ I—9)—DRAFT GIVEN "IN SETTLEMENT"—WITHDRAWAL—EFFECT OF NONPRESENTMENT—APPLICATION OF PAYMENTS—LIABILITY FOR PRICE.

Northern Commercial Co. v. Northern L.P. & C. Co. et al., 30 D.L.R. 567.

(§ I—11)—LEGAL TENDER—CHEQUE.

An unmarked cheque is not legal tender, and may be refused on that ground.

Ashkanase v. Darlymple, 38 D.L.R. 260, 24 Rev. de Jur. 26.

BY CHEQUE.

A creditor is not obliged to accept a cheque in payment of his debt, but in such case he should return it to his debtor and not keep it in his own possession.

Lavimodiere v. Gariepy, 51 Que. S.C. 471.

The acceptance of a cheque at one of the branches of the bank on which it is drawn but after the board of directors had passed

a resolution for suspension which was not, at the time, made known to the maker, discharges the latter and constitutes a payment by him to the payee.

Brunelli v. Ostigny, 21 Que. K.B. 302.

NATURE OF ACCEPTANCE.

In the absence of circumstances establishing the contrary, a cheque is always considered to be conditionally accepted, that is to say, subject to there being funds from which it may be paid.

Mailloux v. Beaudry, 48 Que. S.C. 9.

PAYMENT BY CHEQUE—DISHONOUR—SUBSEQUENT PAYMENT—DATE OF PAYMENT.

Where a cheque is taken as conditional payment and dishonoured, but is subsequently paid, the date of such payment does not revert to the time when the cheque was given but is the actual date of the payment of the debt.

Peck v. Parsons-Haddock Co., 7 W.W.R. 669.

(§ I—16)—TO WHOM.

Where a loan company notifies a borrower to make his payments direct to the company, and not to any agent, and the borrower nevertheless makes a payment to the agent, which is forwarded to the company, and the company sends it back to the agent, who does not return it to the borrower, the company having once received the money, is accountable for it, and must credit the borrower with the amount.

Colonial Investment Co. v. Borland, 6 D.L.R. 211, 5 A.L.R. 71, 22 W.L.R. 145, 2 W.W.R. 960.

II. Time.

(§ II—20) — PROVISIONAL ALLOWANCE — PAYMENT ORDERED DURING TRIAL—DISCONTINUANCE AFTER HEARING — QUE. C.P. 651.

If a defendant has been ordered to pay a provisional allowance "during the trial," he cannot discontinue paying it because the case was heard.

Caron v. Windsor Hotel Co., 16 Que. P.R. 180.

HIRING OF GOODS — FIRE — MATURITY — TERMS — PAYMENT OF RENT — C.C. QUE. ARTS. 1041, 1072, 1200, 1660.

When the balance of $3000 of the sale price of the stock in trade, goodwill and furniture of an hotel is made payable at the same time as the last instalment of rent on a long lease of the house where the stock in trade is, the destruction of the leased premises by fire renders the $3000 payable at once. The occupier of a house who, at the time of its total destruction by fire, has paid a part of the rent in advance, has the right to be reimbursed for what he has paid.

Perrault v. Parker, 56 Que. S.C. 160.

III. Place.

(§ III—25)—PLACE OF PAYMENT.

Where a contract for sale of land made by offer and acceptance is silent as to the place of payment of the purchase-money, the presumption is that the price is payable at the place where the party made the offer and was domiciled.

Pearson v. O'Brien, 11 D.L.R. 176, 22 W.L.R. 703, 4 W.W.R. 342, affirming 4 D.L.R. 413, 22 Man. L.R. 175, 20 W.L.R. 510, 1 W.W.R. 1026.

When a contract is silent as to the place of payment, the money will be payable at the residence of the contractor, although the work is done in another province. [Gullivan v. Cantelon, 16 Man. L.R. 644, followed.]

Empire Sash & Door Co. v. McGreevy; C.P.R. Co., 8 D.L.R. 27, 22 Man. L.R. 676, 22 W.L.R. 372, 3 W.W.R. 129.

Under art. 1152, C.C. (Que.), when the place of payment is not definitely designated by the contract, or otherwise prescribed, the payment must be made at the domicile of the debtor; and the domicile which determines the place of payment is his actual domicile at the time of payment, and not some different domicile which he had at the date of the contract; and the fact that the debtor may have paid certain instalments at the domicile of the creditor is not of itself of such a nature as to modify the law nor the rights of the parties in this respect, and the court will not hold that the defendant has, by virtue of any such payment at the domicile of the creditor, waived his right to pay the subsequent instalments at his own domicile; and where this provision is ignored the plaintiff will lose his right to the costs of his action by not demanding payment at the domicile of the defendant before commencing the suit, and tender and deposit duly made by the defendant under this doctrine will be deemed valid and sufficient.

Coutu v. Auclair, 18 Rev. de Jur. 435.

DUE PAYMENT—SALE—TERMS 30 DAYS NET —SUMMONS—PLACE OF JUDGMENT—REAL OFFERS—CHEQUE—C.C. (QUE.), ARTS. 1607, 1152, 1163, 1533.

A sale of goods subject to the agreement "terms 30 days net" is not a cash sale. In such a case, the place of payment is not determined by the place of delivery; and the sending by the vendor of a bill bearing the words "please remit" does not constitute a summons. The offer of a cheque accepted by a bank can take the place of an offer when it has been refused because the amount offered was considered insufficient but without objection as to the nature of the security offered.

Commonwealth Color & Chemical Co. v. Blais, 55 Que. S.C. 419.

OFFICE OF NOTARY.

The deposit by defendant in the office of the notary, near plaintiff's domicile and with due notification to plaintiff, of the amount claimed by the latter, was, under the circumstances of this case, valid and legal, although such amount was made payable at plaintiff's domicile under the terms

of the deed and mortgage mentioned in plaintiff's declaration.

Charlebois v. Charlebois, 24 Rev. de Jur. 575, 54 Que. S.C. 465.

DEMAND OF PAYMENT OF DEBT—PLACE OF PAYMENT.

The demand of payment, required by art. 1067, C.C. (Que.), to put the debtor in default, is necessary even if the debt is payable at a stipulated place and not to be demanded, as in the case of rent due under a lease in which it is stipulated that the rent shall be payable at the house of the tenant.

Bourgelas v. Morin, 46 Que. S.C. 334.

PAYMENT — INTEREST — LOAN— NOTARY —AUTHORITY—C.C., ARTS. 1144, 1152.

The indicating of a place of payment other than the domicile of the debtor has not the effect of conferring authority to receive this payment by a person whose domicile is indicated. Thus in a loan, the following clause: "Each payment must be made in the office of the undersigned notary at Montreal with the exception of the principal which is to be repaid at the domicile of the creditor," does not give any authority to the notary to receive the interest falling due and to give a recipt.

Picard v. Rugola, 56 Que. S.C. 472.

IV. Application.

(§ IV—30)—Where an indication of payment is made in a deed of sale to which the creditor is not a party by an insolvent trader who sells part of his assets a few days prior to his formal abandonment and the third party has not accepted the indication so as to transform it into a delegation of payment, such indication does not constitute a preferential payment to the detriment of the other creditors, and no action will lie against the third party who has not accepted it. An indication of payment in favour of a third party who does not intervene or appear in the deed of sale containing the indication of payment does not constitute a delegation of payment until it has been formally accepted by the creditor in whose favour it is made, and may be revoked by the parties to the deed at any time before such acceptance.

Turgeon v. Bourgeois, 4 D.L.R. 144.

Where upon the payment of a certain sum as damages for the pollution of a stream no suggestion was made that the payment was for the excess over and above a limited prescriptive right and no such claim was advanced, the claim should be rejected.

Hunter v. Richards, 5 D.L.R. 116, 26 O.L.R. 458, 22 O.W.R. 408.

PAYMENT BY THIRD PERSON—PLEA.

A debtor who is being proceeded against for the recovery of a judgment in the name of a person who has been paid by an undisclosed third party is entitled to establish before the court all the circumstances under which that payment was made, as he may have a substantial ground of opposition as to a third party paying the judgment and enforcing same in the name of the judgment creditor for the purpose of harassing the judgment debtor without giving notice of the transfer.

Coderre v. Cabana, 21 D.L.R. 436, 16 Que. P.R. 272.

DELEGATION OF PAYMENT — ACCEPTANCE — HYPOTHEC—NOVATION.

The delegation of payment not accepted does not effect novation. So long as a delegation of payment of a price of sale made in the same deed is not accepted, the vendor may grant a discharge of the privileges and hypothecs which exist in his favour upon the immovable sold. The privilege of the vendor belongs to himself only, and not to the creditor to whom the delegation is made who has not accepted it.

Economic Realty v. Montarville Land Co., 48 Que. S.C. 519.

APPLICATION—PRINCIPAL AND INTEREST.

In the absence of any appropriation by the purchaser, a vendor is not bound to apply payments in discharge of interest rather than of principal, if at the time the payments were made the manner of application was immaterial to both parties.

Phillips v. United Investors, 34 D.L.R. 283, 27 Man. L.R. 410, [1917] 1 W.W.R. 1348.

MONEY IN COURT—STOP-ORDER—PAYMENT OUT OF COURT—COSTS.

Hamer v. O'Brien, 13 O.W.N. 147. [See 12 O.W.N. 379.]

DESIGNATION—ACCEPTANCE—SUBROGATION.

The designation in a deed of sale of payment of part of the price does not constitute a contract of delegation but is a stipulation in favour of a third party which can be accepted so long as it is not revoked, and the action to recover the debt is a sufficient acceptance. The heirs of a vendor in favour of whom there are several successive designations of payment not accepted during the lifetime of the creditor but not revoked, may accept them, receive the payment from the first debtor and be subrogated to all their rights, privileges and hypothecs against the other persons liable to pay.

Gratton v. Lemay, 51 Que. S.C. 493.

DEMAND FOR—TELEPHONE.

Demand for payment of a debt must be made at the home of the debtor, and cannot be made by means of the telephone. But the fact that a debtor promises to go to the creditor's house and settle his debt excuses the latter from making a formal demand of payment.

Racine v. Raporte, 51 Que. S.C. 507.

MONEY IN COURT—PAYMENT OUT.

Re School Section 5, Tp. of Stephen and Hill, 7 O.W.N. 121.

APPLICATION—PARTNERSHIP.

The same person must be indebted to the same creditor for several distinct debts in

order that there may be an imputation of payment. When the debt of a partnership and that of a partner are actually payable, the partner must make a statement to his copartners of the payment he has received from the common debtor in proportion to the amount of the two debts, but if the partner has imputed it wholly upon the debt to the partnership, such imputation should under art. 1843 C.C. (Que.), be maintained.

Lafleur v. Sarrazin, 24 Rev. de Jur. 603.

IMPUTATION OF PAYMENT—PART PAYMENT NATURE OF PRIVILEGE.

Masse v. Germain, 18 Rev. de Jur. 91.

APPLICATION—FIRST IN DATE.

Instalments paid by a purchaser under several contracts, without any special imputation, must be applied to the first contracts by order of date.

Levitt v. Lacasse, 49 Que. S.C. 329.

(§ IV—31)—BETWEEN SECURED AND UNSECURED CLAIMS—INTENTION.

Payments credited in a running account are not necessarily to be credited on an earlier and secured part of the account so as to leave the balance unsecured; the appropriation of the payments is a question of intention, and the presumption in favour of appropriating the credits to the earlier debits may be rebutted by shewing a contrary intention. [Cory v. SS. "Mecca," [1897] A.C. 286, applied; Deeley v. Lloyds Bank, [1912] A.C. 756, distinguished.]

Thomson v. Stikeman, 17 D.L.R. 205, 30 O.L.R. 123, affirming 14 D.L.R. 97, 29 O.L.R. 146.

(§ IV—33)—OF PARTIAL PAYMENT.

Where the payment of the deposit is made with an application to an agent for the purchase of shares from the agent upon a condition that the consent of the principal, the owner of the shares, shall be obtained to the terms offered, and the principal declines the terms, the agent is not entitled to treat such deposit as the money of the principal but should place the same in medio so that it may be returned by the agent to the prospective purchaser on the offer being refused.

McPherson v. Fidelity Trust & Savings Co., 6 D.L.R. 530, 17 B.C.R. 182, 2 W.W.R. 109.

PURCHASE PRICE OF REAL ESTATE PAYABLE BY INSTALMENTS—OPTION TO RELEASE PART FROM MORTGAGE.

When, in a deed of sale of 200 lots of land, the whole purchase price of which is payable by instalments, there is an agreement that the purchaser may, at any time, release from the mortgage a stated number of lots by paying a specified sum, and, under the agreement, he makes a payment exceeding this sum, and obtains from the vendor a release of a proportionate number of lots, the payment should not be applied on the amount due at the time of such payment, but by taking into account the release of the lots, and in such a way as to make a proportionate reduction on the instalments of the purchase price not yet due.

Island City Realty Co. v. Malo, 46 Que. S.C. 128.

(§ IV—34)—EXCESS PAYMENTS—CURRENT ACCOUNT—APPLICATION.

On the trial of a mechanics' lien action involving materials supplied to building contractors for distinct buildings, payments by the contractors for materials in excess of the amount due when the payments were made, will be applied to other items of the contractors' general account, in the absence of special agreement that the surplus should be credited against future orders for the particular buildings.

Howlett v. Doran, 11 D.L.R. 372, 24 W.L.R. 401, 4 W.W.R. 674.

(§ IV—35)—IMPOUNDED GOODS—DAMAGE—PAYMENT TO SECURE RELEASE—INVOLUNTARY—RECOVERY BACK.

A payment made to release impounded goods under circumstances which shew that it was not voluntarily made may be recovered back as money had and received. [Fogde v. Parsenau, 37 D.L.R. 758, 10 S.L.R. 423, followed.]

Campbell v. Halverson, 49 D.L.R. 463, 12 S.L.R. 420, [1919] 3 W.W.R. 657, affirming 11 S.L.R. 58, [1918] 1 W.W.R. 462.

V. Demand.

(§ V—41)—SUFFICIENCY OF DEMAND—PRODUCTION OF BENEFIT CERTIFICATE TO SECRETARY-TREASURER OF SOCIETY—CONDITIONAL OFFER.

Cousins v. Moore, 6 D.L.R. 36, 42 Que. S.C. 156.

VI. Recovery.

See Mistake.

(§ VI—50)—LACK OF CONSIDERATION—ACTION TO RECOVER BACK.

A voluntary payment of money implies a legitimate cause, and in an action to recover it back for want of consideration the plaintiff should allege and prove such lack of consideration.

Northwest Employment Agency v. Putnick, 24 Que. K.B. 285.

VOLUNTARY PAYMENT OF DEBT OF ANOTHER—ABSENCE OF REQUEST—RIGHT TO RECOVER FROM DEBTOR—JUDGMENT—ADMISSIONS ON EXAMINATION FOR DISCOVERY—RULE 222—COSTS.

Levinson v. Gault, 9 O.W.N. 14.

MONEY PAID INTO COURT BY TWO DEFENDANTS — JUDGMENT AGAINST ONE — MONEY THE PROPERTY OF OTHER DEFENDANT.

C.N.R. Co. v. Peterson, 7 W.W.R. 741.

PAYMENT OF DISPUTED CLAIM UNDER PROTEST—POSSIBILITY OF EXECUTION.

Scott v. Hull, 39 Que. S.C. 207.

SUBROGATION—AGREEMENT BETWEEN CREDITORS.

Gagnon v. Bédard, 39 Que. S.C. 368.

Acceptance of payment in full—Presumption—Rebuttal—Interest.

The Paquet Co. v. Paquin, 39 Que. S.C. 58.

PEACE OFFICER.

Resisting, see Obstructing Justice.

PEDLERS.

Regulation of, see Municipal Corporations, II C; License.

Hawkers and Pedlers Act, 2 Geo. V., 1912, Sask., c. 37—Samples and patterns—Conviction—Appeal on stated case.

A salesman carrying goods which were neither "samples" nor "patterns" but merely to shew the class of work done by his firm, cannot be convicted for a breach of the Hawkers and Pedlers Act, 2 Geo. V. (Sask.) c. 37.

Goad v. Nelson, 50 D.L.R. 61, [1919] 3 W.W.R. 1127.

PENAL STATUTE.

Construction of, see Statutes.

Liability of master for servant's acts under, see Master and Servant, III; Internal Revenue.

PENALTY.

See Contracts; Vendor and Purchaser; Forfeiture.

Penalty or liquidated damages, see Contracts.

Annotation.

Penalties and liquidated damages; Distinction between: 45 D.L.R. 24.

(§ 1—4)—A corporation cannot sue for penalties as a common informer, unless expressly authorized to do so by the statute imposing the penalties. [Guardians of the Poor of St. Leonard's, Shoreditch v. Franklin, 3 C.P.D. 377, followed.]

Guy Major Co. v. Canadian Flaxhills, 3 D.L.R. 312, 3 O.W.N. 1058.

Under R.S.Q. 1909 an action for the penalty for failure by a trader to register a declaration as to his marriage status in accordance with art. 1834 C.C. (Que.) can only be brought by the Crown and does not lie in favour of any person or informer, as the statutes call for a special authorization by law or by municipal by-law before an individual can sue by way of qui tam action.

Cardinal v. Geoffroy, 4 D.L.R. 226, 21 Que. K.B. 528.

Statutory penalties.

The $200 penalty imposable for the criminal offence mentioned in s. 269 of Dominion Election Act, R.S.C., 1906, c. 6, is not recoverable until a court of competent criminal jurisdiction has adjudged the person in question guilty of the offence which forms the basis of the action for the penalty under said section.

Renouf v. Dubuc, 18 Rev. de Jur. 519.

The penal action against a member of a business firm for failing to register a declaration of his marriage within 60 days from the date on which it was celebrated is a qui tam action which can be brought by the plaintiff as well in his own name as in that of the King.

Lamontagne v. Galbraith, 13 Que. P.R. 397.

Art. 7538, R.S.Q., gives the right to a person to bring suit in his own name only when he is authorized by law or by a municipal by-law for the recovery of a fine or a penalty. A penal action against a defendant who is carrying business alone, for not having filed at the prothonotary's office or in the registry office a declaration as to whether he is common or separate as to property with his wife, can only be taken in the name of the King. [Lamontagne v. Galbraith, 13 Que. P.R. 397, 13 Que. P.R. 44, followed.]

Cardinal v. Geoffroy, 13 Que. P.R. 413.

(§ 1—5)—Breach of contract—Forfeiture of deposit accompanying tender—Liquidated damages.

A stipulation in an advertisement for tenders that a deposit accompanying a tender for the construction of a public building should be forfeited if the person making the lowest tender refused to enter into a contract, will be regarded as a provision for a penalty and not for liquidated damages.

Brandon Construction Co. v. Saskatoon School Board, 13 D.L.R. 379, 25 W.L.R. 6, 6 S.L.R. 273, reversing on other grounds 5 D.L.R. 754.

Breach of contract.

Where a deed of sale of a partnership business contains a clause stipulating a penalty in the event of the vendor carrying on business within certain limits to the prejudice of the buyer, the proof of a single act of sale by the vendor for a very small price (e.g. $3.63) does not constitute such a carrying on of business by the vendor as would entitle him to the stipulated penalty.

Ledoux v. Hill, 8 D.L.R. 894, 19 Rev. de Jur. 350.

Forfeitures — Breach of contract to convey—Remission.

Provision in an agreement to convey, for automatic forfeiture of the contract on mere default by the purchaser, will be relieved against as being in the nature of a penalty.

Massey v. Walker, 11 D.L.R. 278, 23 Man. L.R. 563, 24 W.L.R. 168.

Breach of contract.

When a contract for the sale and delivery of materials provides that a penalty of $25 a day shall be due and payable by the seller, as liquidated damages, in case of failure to make complete delivery within a specified time, if the buyer continues to take delivery thereafter, without protest, and to make payments amounting to the

sum he would be entitled to charge under the penal clause, he is presumed to have renounced the same and cannot set up a claim therefor by a cross-demand, in a suit brought against him.

Wighton v. Hitch, 44 Que. S.C. 128.

(§ 1—6)—Breach of contract.

An agreement between a municipal corporation and a resident ratepayer, that the question whether a hedge belonging to the latter and bordering on a highway, encroaches thereon and is a danger to the public, or not, be referred to a committee empowered to decide what shall be done, with a clause that the ratepayer shall pay a penalty of $100, if he refuses to carry out the decision of the committee, is lawful and binding and gives the power to the corporation, in case of refusal of the ratepayer to carry it out, not only to recover the penalty but to perform, itself, the work decided upon. Hence, if such work is the cutting away of a certain portion of the hedge that encroaches on the highway, the right of the corporation is not limited to the recovery of the penalty, or to a suit for specific performance, or for damages for breach of contract, but it may, itself, carry out the recommendation of the committee, and the ratepayer, in these circumstances, has no action to recover damages for trespass or for the cutting of his hedge.

McGowan v. Stanstead, 43 Que. S.C. 490.

Jurisdiction as to remission—Fines and Forfeitures Act.

The jurisdiction given by s. 6 of the Fines and Forfeitures Act, R.S.O. 1914, c. 99, to "the court or judge having cognizance of the proceedings for the recovery" of a fine, penalty, or forfeiture, to remit, "such fine, penalty, or forfeiture," cannot be exercised, where the action to recover the fine, penalty, or forfeiture, is brought in the Supreme Court of Ontario, by the Master in Chambers; but may be exercised by a judge, sitting in court, at any time after the commencement of the action.

Seagram v. Pneuma Tubes, 40 O.L.R. 301.

Action by informer — Failure of partners to file declaration — Partnership Registration Act, R.S.O. 1914, c. 139, s. 10—Reduction of penalties —Judicature Act, s. 19—Costs.

Shakell v. Harber, 12 O.W.N. 213.

Summary trial—Limit of penalty—Keeping disorderly house — "Fine not exceeding with costs $100."

The King v. Stark, 18 W.L.R. 419.

Evocation—Action for penalty—Breach of by-law granting a privilege for years.

Quebec & Levis Ferry Co. v. Bernier, 20 Que. K.B. 372.

Penal actions—Conclusions.

Wilson v. Hart, 12 Que. P.R. 409.

Penal actions—Qui tam.

Lamontagne v. Grosvenor Apartments, 20 Que. K.B. 221, affirming 37 Que. S.C. 274.

PEREMPTION (QUEBEC)

See also Dismissal and Discontinuance.

Generally.

An opposition to judgment, when entertained, is a plea to the action and its object is to have the judgment set aside. The defendant opposing has a right to ask for dismissal of the action if no effective steps have been taken within two years from the date when his opposition was filed.

Montreal Baseball & Amusement Co. v. Grant, 13 Que. P.R. 178.

As there can be no peremption against the Crown, it will be refused in a penal action although the plaintiff sues as well in his own name as in that of the Crown, the claim being indivisible. Semble, on the hearing of a motion for peremption of a qui tam action the defendant is not entitled to ask for dismissal of the action on the ground that the plaintiff could not sue jointly with the King.

Mason v. Ledoux, 13 Que. P.R. 386; Lamontagne v. Galbraith, 13 Que. P.R. 397.

Procedure — Peremption of instance — Registry—C.C.P., art. 279, 283.

As long as a cause inscribed for inquiry and hearing is not crossed off the role, there is no peremption of instance.

Sayer v. McDougall, 25 Rev. Leg. 334.

Under R.S.Q., 1888, the plaintiff in a qui tam action is the legal representative of the Crown suing for a penalty and therefore such action cannot be perempted (nonsuited) after two years have gone by without any steps being taken to bring the case on to trial, as peremption does not lie against the Crown.

Mason v. Ledoux, 2 D.L.R. 50.

As to qui tam action.

An action to recover a fine taken under the provisions of art. 7442, R.S.Q. 1909, whether in the name of the claimant or in that of the Crown, is not subject to péremption d'instance for discontinuance for 10 years.

Lamontagne v. Galbraith, 42 Que. S.C. 88.

Qui tam action—Action not divisible—C.P. 281.

Croysdill v. Copeland-Chatterson-Crain Co., 12 Que. P.R. 311.

A defendant who has filed an opposition to judgment is, notwithstanding, in a position to ask for the dismissal of the action.

Haensgen v. Demers, 13 Que. P.R. 189.

A motion for péremption d'instance will not be granted so long as a former motion for peremption is not disposed of.

Stuart v. Martel, 13 Que. P.R. 435.

Motion for.

A motion for peremption, presented to the court and adjudicated upon by being

put hors de délibéré, is a useful proceeding and covers peremption.

Tisi v. Filion, 50 Que. S.C. 472.

DELAY—CONSENT.

The filing of a plea long after its service, and even after the filing of the replication, is a useful proceeding which interrupts peremption, especially if the defendant has never complained of this delay and the parties seem to have given a reciprocal consent to the filing of their pleadings after the legal delay.

Clark v. Taylor, 18 Que. P.R. 290.

TIME—TRANSFER OF CAUSE.

Where a declinatory exception has been maintained and the record ordered transmitted to the district in which the judge has jurisdiction, the time limited for peremption of the cause is suspended and does not begin to run until the date of the receipt of the record at the office of the court of that district.

Provincial Fire Ins. Co. v. Carbray, 25 Que. K.B. 140.

WANT OF PROSECUTION—COPIES OF PLEADINGS.

The production of a copy of the declaration, for the use of the judge, is a useful and even necessary proceeding, which will cause a motion for peremption for not prosecuting the action for 2 years to be dismissed.

Cook v. Dubois, 18 Que. P.R. 131.

SETTLEMENT PENDING.

Negotiations for settlement between the parties legally proved to the satisfaction of the court will prevent a motion for peremption to prevail.

Myers v. Rideau Shoe, 18 Que. P.R. 133.

INCIDENTAL DEMAND — INTERRUPTION — INCUMBERING ROLL.

Vigeani v. Picatte, 12 Que. P.R. 343.

INSCRIPTION—ARTS. 279, 280—C.P.Q.

Peremption runs only from the time when a cause is placed on the roll for enquête and hearing on the merits.

Carriere v. Lindsay, 12 Que. P.R. 406.

CHANGE OF ATTORNEY—PRESCRIPTION—INTERRUPTION.

A motion for change of attorney made by the defendant to an action in consequence of a change in the personnel of the firm is a proceeding which interrupts the running of prescription.

Gorey v. C.P.R. Co., 12 Que. P.R. 230.

PEREMPTION OF SUIT — CROSS-DEMAND — COMPENSATION.

Carrier v. Easton, 12 Que. P.R. 277.

MOTION FOR—NOTICE—SERVICE—VACATION.

On a motion for peremption of an action, served July 5 and returnable September 10, the proceedings as they appeared on the record were: "Issue joined by reply to plea on June 29." Neither party had inscribed for proof and hearing within the 3 days following June 29, the date of the reply to the plea (C.C.P. art. 293), so that this reply was the last proceeding on the record. Held, since the 3 days to inscribe the case (art. 293) expired in vacation (art. 15) on July 2, the delay was forcibly extended to September 2, since June 30 was the only judicial day which could count in computing the delay. Not being compelled to proceed to trial between June 30 and September 1 (art. 10) the peremption was interrupted. It could only commence on September 3, and in consequence, the defendant's motion served July 5, should be refused as premature.

Richstone v. Right, 24 Rev. de Jur. 33, 19 Que. P.R. 266.

CASE INSCRIBED AND REFERRED.

If a case is referred to a judge, such reference is a useful proceeding which interrupts peremption.

Pinkerton v. Burns, 19 Que. P.R. 209.

LEAVE TO FILE DEFENCE—DELAY.

Permission to file a defence long overdue, and after an inscription for proof ex parte, implies the obligation, on the part of the defendant, of filing it the same day; if he does not do so, and the prothonotary, for this reason, refuses to receive a reply and an inscription, the defendant who filed his defence later, without the knowledge of the plaintiff, cannot, after 2 years have elapsed since such filing, apply for peremption of the action.

Marsil v. McDonald, 20 Que. P.R. 277.

CHANGE OF PARTIES.

If one suing in a certain capacity is removed and replaced, and the defendant has been notified of that fact, the latter cannot, after the expiration of two years from the service of such notice, ask that the action be perempted. His duty is to proceed against the new appointee and continue the action.

Hains v. Tooke, 20 Que. P.R. 167.

INSOLVENCY—EFFECT.

An abandonment of property by a defendant has not the effect of interrupting peremption of the action.

Robidoux v. Denis, 19 Que. P.R. 172.

VERBAL EVIDENCE—DATE OF SERVICE OF PROCEEDINGS—ANSWER ILLEGALLY FILED—C.C.P. 205, 299—C.C. QUE. 1233.

Verbal evidence is allowed to establish the priority of date between a demand for peremption and the servic of an act interrupting the peremption. Such a fact must be deemed to be in the class of those of which no written evidence could ever be obtained. An answer to a plea filed after the delays, and without the opposite party's consent or the judge's permission, is an illegal proceeding which does not prevent the peremption.

Canadian American Linotype Corp. v. C.P.R. Co., 15 Que. P.R. 369.

PEREMPTION OF ACTION—SUMMARY ACTION —PREMATURE — MOTION FOR PEREMPTION—QUE. C.C. 2240—CONFERENCES—QUE. C.P. 279, 280.

A motion for peremption served on March 20th, 1914, whilst the last proceeding on the record was the filing of the plea on March 18th, 1912, is premature, because the plaintiff might have inscribed the case on March 20th, 1912, the latter date not being included in the 2 years. Conferences of which there is no written proof cannot interrupt the course of peremption.

Leger v. Ledoux, 15 Que. P.R. 401.

(§ 1—6)—JURY TRIAL—CASE REFERRED TO FIX DATE OF TRIAL—QUE. C.P. 280.

If, on the day fixed for a jury trial, one of the parties cannot proceed, and if the record, referred to the chief justice to fix the date, has never been transmitted to him, there is a suspension of proceedings preventing the peremption of action.

Poirier v. Quebec & Lake St. John R. Co., 16 Que. P.R. 254.

MOTION FOR RULE NISI—C.P. 279.

A motion for rule nisi is not an "instance."

LeHuray v. Abrahamson, 13 Que. P.R. 68.

NOTICE TO ATTORNEY—JURISDICTION—PRACTICE—COSTS.

A motion for staying an action, served on each of the attorneys of the plaintiff formerly in partnership, at the office of the senior of these attorneys, is properly served. Such a motion may be presented for hearing before the Practice Court which has jurisdiction to decide it. If negotiations for settlement have taken place the delay for peremption begins to run anew from the date of the last letter exchanged. Failure to pay the costs of a prior motion for peremption which was refused cannot be set up against the presentation of a new motion for the same purpose.

Staszo v. Montreal Stockyards Co., 18 Que. P.R. 162.

SERVICE OF MOTION—FIRM OF ATTORNEYS.

If a firm of attorneys is dissolved a motion for peremption served on one only of its members will be dismissed.

Offord v. Wisintainer, 18 Que. P.R. 318.

PAYMENT.

If a claim has been paid there can be no order for peremption of the action brought to recover it even on the application of a defendant other than the one who made the payment.

Rosenthal v. Stober, 18 Que. P.R. 444.

INTERRUPTION — DATE OF SERVICE — PAROL EVIDENCE.

Peremption can only be declared by the court on a motion valid in form. The reinscription or the removal of the cause from the record interrupts the peremption. When a motion for peremption and a reinscription or removal of the cause from the roll have been served on the same day between 9 and 10 a.m., and there is nothing to shew which of the two was first served, the court should in case of doubt ascribe the priority to the one interrupting the peremption. On contestation of the truth of a procès-verbal of service in conformity with art. 236 C.C.P. oral evidence will be admitted for the purpose of establishing the priority of date between the service of the demand for peremption and the service of a proceeding interrupting peremption.

Chapman v. Russell Shale Bricks, 18 Que. P.R. 421.

INTERRUPTION—PARTICULARS.

The filing of particulars ordered by the court, although made a long time after the date fixed and without the consent of the opposite party, is a useful proceeding which interrupts the peremption.

Thompson v. Rennie, 18 Que. P.R. 214.

PERFORMANCE.

See Contracts; Specific Performance; Mechanics' Liens.

PERJURY.

See Oath.
I. IN GENERAL.
II. ELEMENTS OF OFFENCE.
III. PROOF.

Annotation.

Authority to administer extra-judicial oaths, 28 D.L.R. 122.

I. In general.

MISAPPREHENSION OF QUESTION.

It is not perjury when a witness denies a fact which took place several years before, believing that, upon a general question, he was only obliged to answer as to what took place within a recent period.

Lafontaine v. Fournier, 48 Que. S.C. 113.

STATEMENT UNDER OATH OF OFFICE.

Perjury is not chargeable in respect of a court bailiff's certificate purporting to be made under his "oath of office" previously administered on his appointment; e.g., in Quebec a procès-verbal of service certifying the distance traveled in order to serve court process.

R. v. Tremblay, 35 D.L.R. 209, 26 Que. K.B. 37, 28 Can. Cr. Cas. 21.

II. Elements of offence.

KNOWLEDGE OF FALSITY.

The corroboration required on a charge of perjury need only be as to the falsity of the previous deposition, although the circumstances may be such that to prove guilt a further element must be shewn such as the knowledge of the accused that the party with whom he claimed he had entered into a contract on behalf of another had in fact no authority to do so.

R. v. Nash, 17 D.L.R. 725, 23 Can. Cr. Cas. 38, 7 A.L.R. 449, 6 W.W.R. 1390, 28 W.L.R. 960. [Affirmed, 8 W.W.R. 632.]

A conviction for perjury that follows the

precedent of form 64 (e) of the Schedule to Cr. Code need not allege that the defendant had knowledge of the falsity of the testimony on which the charge is founded.

R. v. Yee Mock, 13 D.L.R. 220, 21 Can. Cr. Cas. 490, 6 A.L.R. 231, 4 W.W.R. 1342.

When an indictment or a charge under the Speedy Trials clauses alleges perjury in that the accused had previously voted on an election day and with intent to vote again on that day had sworn that he had not already voted, there is implied in such allegation that he is charged with making the false oath "wilfully and corruptly" or "knowingly," and the form of the charge will be sufficient under such circumstances as the charge contains in substance a "statement that the accused has committed some indictable offence therein specified" (Cr. Code, s. 852), although it does not in terms state the offence as done "wilfully and corruptly" (Cr. Code, s. 172) or "with knowledge of the falsity of the assertion."

R. v. Morrison, 28 D.L.R. 113, 26 Can. Cr. Cas. 26, 49 N.S.R. 446.

EVIDENCE THROUGH INTERPRETER — SUBSTANCE OF ANSWERS TRANSCRIBED.

On a charge of perjury against a witness speaking in a foreign tongue, it is not essential that the prosecution should prove that every word uttered by the witness in the witness-box had been translated by the interpreter and repeated by him in English so as to be placed upon the official stenographer's notes; it is enough that the court is satisfied on the interpreter's testimony in the perjury trial that he repeated in English all that was material of what the accused had said in a foreign language.

R. v. Bogh Singh, 12 D.L.R. 626, 18 B.C.R. 144, 21 Can. Cr. Cas. 323, 24 W.L.R. 941.

Notwithstanding the method of administering an oath to a witness lies within the control of the Trial Judge, upon a subsequent prosecution for perjury the sufficiency of the manner of administering the oath on the trial in which the perjury is alleged to have been committed, is to be decided by the judge presiding at the perjury trial.

R. v. Lee Tuck, 5 D.L.R. 629, 19 Can. Cr. Cas. 471, 4 A.L.R. 388, 21 W.L.R. 669, 2 W.W.R. 605.

AUTHORITY TO ADMINISTER — JUDICIAL PROCEEDINGS.

Where a person acted de facto as a registrar under the Manhood Suffrage Act, 7 Edw. VII. (Ont.) c. 5, without objection and under colour of right as having been appointed by the only statutory member of the Board of Registrars then officially acting, the administration of the qualification oath by the registrar so appointed to an applicant applying to be registered as a voter takes place in "judicial proceedings" within the meaning of s. 171 of the Cr. Code, so as to found a charge of perjury in respect of wilfully false and misleading statements sworn to by the applicant, whether or not such de facto registrar had been regularly appointed. [Drew v. The King, 6 Can. Cr. Cas. 424, 33 Can. S.C.R. 228, followed.]

R. v. Mitchell; R. v. West, 10 D.L.R. 717, 27 O.L.R. 615.

FALSE STATUTORY DECLARATION.

A statutory declaration, made in the form provided by the Canada Evidence Act, by the assured, wherein he states the loss by fire, of the goods insured under a fire insurance policy and assigns a value to same is a "solemn declaration," which the assured is "required or authorized by law" to make, within the terms of Cr. Code, s. 175, and the declarant is liable to conviction under s. 175, if statements therein contained would amount to perjury if made in a judicial proceeding, the same being known by him to be false and being intended by him to mislead the insurance company or its adjuster.

R. v. Nier, 28 D.L.R. 373, 25 Can. Cr. Cas. 241, 9 A.L.R. 353, 33 W.L.R. 180.

FALSE OATH AT ELECTION—ADMINISTERING—DE FACTO OFFICER.

A charge of perjury in taking a false oath, at a municipal election held under the Towns Incorporation Act, R.S.N.S. c. 71, that the deponent had not previously voted at the election, will not be quashed because it does not specifically set out the appointment by the municipality of the election officer which it names as the "presiding officer" for the polling subdivision before whom the alleged false oath was taken; Cr. Code, s. 862 makes it unnecessray to state the nature of the authority of the tribunal before which the oath was taken and the charge sufficiently indicated the person described as "presiding officer" was acting as such under an appointment made in pursuance of the Towns Incorporation Act. [See annotation on "Authority to administer extra-judicial oaths," 28 D.L.R. 122.]

R. v. Morrison, 28 D.L.R. 113, 26 Can. Cr. Cas. 26, 49 N.S.R. 446.

FORM AND MAKING OF OATH.

A Chinaman cannot be convicted of perjury where, when presented as a witness in the case in which the false testimony was alleged to have been given, in response to a question from the clerk of the court, the accused stated that he was a Christian and that he desired to be sworn upon the Bible, but, under the directions of the Trial Judge, without further inquiry or any assent on the part of the Chinaman, the clerk administered the Chinese oath by burning paper, as under such circumstances no binding oath was administered.

R. v. Lee Tuck, 5 D.L.R. 629, 19 Can. Cr. Cas. 471, 4 A.L.R. 388, 21 W.L.R. 669, 2 W.W.R. 605.

FORM OF OATH—UPLIFTED HAND.

A witness who testifies to what he knows to be false is guilty of perjury, although, without being asked if he had any objection

to being sworn in the usual manner, but without objecting to the form used, he was directed to take the oath by raising his right hand instead of kissing the Bible.

Curry v. The King, 15 D.L.R. 347, 48 Can. S.C.R. 532, 22 Can. Cr. Cas. 191, affirming 12 D.L.R. 13, 21 Can. Cr. Cas. 273, 47 N.S.R. 176.

PROCEEDINGS ON WHICH OATH IS ADMINISTERED.

The fact that the witness, although sworn by the prothonotary was actually examined in the robing-room and not in the presence of the prothonotary or a judge, is immaterial when neither party raised any objection to the mode of examination at the time. A person who makes a statement on oath knowing it to be false, upon examination on discovery under art. 286 C.C.P., is guilty of perjury.

The King v. Howley, 20 Can. Cr. Cas. 36.

PROCEEDINGS HELD WITHOUT AUTHORITY—TAKING EX PARTE STATEMENT OF PERSON FOUND IN ILLEGAL POSSESSION OF LIQUOR.

The obligation imposed on a person found with liquor in his possession to disclose on oath or affirmation the source from which he obtained it (Intoxicating Liquors Act, 1916, N.B. s. 179) does not arise unless such person admits having drunk liquor on the same day. Where there has been no such admission the magistrate has no authority to require the disclosure under s. 179 of that act and perjury cannot be assigned under Cr. Code, s. 172 (a) for false statements in a solemn declaration purporting to be made under that Act, and semble, not under Cr. Code, ss. 170, 171 as the proceeding was not a "judicial proceeding" within the Code definition.

Ex parte Lindsay, 30 Can. Cr. Cas. 387.

PERJURY — OATH — AUTHORITY OF ACTING CROWN TIMBER AGENT TO ADMINISTER.

R. v. Johnston, 2 O.W.N. 106.

III. Proof.

FALSE DEPOSITION—PROOF—RECORD.

Where the deposition containing the false statement charged as perjury forms part of the record of a superior court of record, and is certified and attested by the official stenographer, it is proved by the production of such record; the additional oral testimony of a witness that he had heard the accused make, under oath, the statements charged to be false is not made necessary by Cr. Code, s. 1002.

Spires v. The King, 28 D.L.R. 146, 25 Can. Cr. Cas. 172, 24 Que. K.B. 547.

STATUTORY INVESTIGATION BEFORE A COMMISSIONER.

It is error constituting ground for setting aside the acquittal of the accused and for ordering a new trial upon a charge of perjury before a statutory commissioner that the judge trying the case without a jury (speedy trials clauses) declined to take cognizance of the original record of a superior court produced by its officer for inspection unless the latter would deliver the same up to be filed, where such record was material to prove the proceedings in which the perjury was charged to have been committed and the prosecutor tendered a copy for filing.

R. v. Judge, 24 Can. Cr. Cas. 354, 24 Que. K.B. 115.

CORROBORATION.

On a charge of perjury the material particular for which corroboration is required is not the fact that the accused had sworn to the statement but that the statement itself was false. The appellant was convicted of perjury for swearing that "he did not get from one B. a cheque for four thousand dollars." B. swore that he gave the cheque in question to the appellant and the only evidence relied on as corroborative of his was that of one S., bank manager, who swore that he cashed the cheque for the appellant. Held, that the evidence of B. was "corroborated in some material particular . . . implicating the accused," by the evidence of S. as required by s. 1002 Cr. Code.

Peterson v. The King, 55 Can. S.C.R. 115, [1917] 3 W.W.R. 345, 28 Can. Cr. Cas. 332, affirming 32 D.L.R. 295, 27 Can. Cr. Cas. 3, [1917] 1 W.W.R. 600.

PERPETUITIES.

I. IN GENERAL.
II. REMAINDERS; POWERS; ACCUMULATIONS.
III. SUSPENSION OF ABSOLUTE POWER OF ALIENATION.
IV. GIFTS TO CHARITIES.

See Wills, III G-140.

I. In general.

INDEFINITE OPTION TO PURCHASE LAND.

An option to purchase land, at any time during the term of a 3-year lease, does not create a perpetual right; the rule against perpetuities has no application to an agreement of that kind.

Bennett v. Stodgell, 28 D.L.R. 639, 36 O.L.R. 45.

WILLS—MANITOBA TRUSTEE ACT—JURISDICTION TO DETERMINE WHETHER PERPETUITY CREATED.

Under ss. 42-47 of the Manitoba Trustee Act, R.S.M. 1902, c. 170, permitting the court to give its opinion to or to advise or instruct trustees, the question whether a perpetuity is created by will cannot be determined. [Re Lorenz, 1 Dr. & S. 401; Re Hooper, 29 Beav. 656; Re Willians, 1 Ch. Chamb. 372, and Re Rally, 25 O.L.R. 112, followed.]

Re Crichton Estate, 13 D.L.R. 169, 23 Man. L.R. 594, 25 W.L.R. 18.

DETERMINING POINT OF TIME IN A WILL.

In considering a case in which the rule that a gift which creates or tends to create a perpetuity is void is invoked, it is not after-events that should be looked at, but the situation at the death of the testator;

it must then be seen that the event which is to bring about a final distribution is certain to fall within the period prescribed; if it is not, the gift is void; and the fact that subsequently the event did actually happen within the time, is of no consequence. Any gift not of a charitable nature, the purpose of which is to tie up property for an indefinite term, is void as creating a perpetuity.

Kennedy v. Kennedy, 11 D.L.R. 328, 28 O.L.R. 1, affirming on this point, 3 D.L.R. 536. [Affirmed, 13 D.L.R. 707, 24 O.W.R. 943.]

WILL—CONSTRUCTION—TRUST—FAILURE OF —PERPETUITY—TENDENCY TO CREATE PERPETUITY.

Re McLellan, 7 O.W.N. 447.

II. Remainders; powers; accumulations.

A bequest of income to the issue of a legatee in the event of her death before or after that of a testator, is not brought within the rule against perpetuities by reason of the fact that the legatee did not marry until after the testator's death; since the interest of the issue of the union under such bequest would of necessity vest within the period fixed by such rule. A testamentary direction that, on the death of a legatee to whom income was payable, it should be paid to his or her husband or wife if in needy circumstances, is not brought within the rule against perpetuities by reason of the fact that the legatee was unmarried at the testator's death; since the interest of the husband or wife would vest within the period fixed by the rule on the subsequent marriage of the legatee. [Hade v. Hale, 3 Ch. D. 643; Pearks v. Moseley, 5 A.C. 714, and Seaman v. Wood, 22 Beav. 591, distinguished.]

Re Crichton Estate, 13 D.L.R. 169, 23 Man. L.R. 594, 25 W.L.R. 18, 4 W.W.R. 1184.

Under the rule against perpetuities the mere possibility of the limit allowed by law being exceeded renders the whole provision of a will giving rise to the question void ab initio, thus precluding the splitting up of the clause with a view to giving effect to some of its parts to the exclusion of others.

Re Phillips, 11 D.L.R. 500, 28 O.L.R. 94.

An appointment under a power relates back to the instrument creating the power, and if the appointment would offend against the rule against perpetuities if made at the date of the instrument creating the power, it is bad; the test being properly made by treating the appointment as if witten in the original instrument creating the power.

Re Eliot, 11 D.L.R. 34, 24 O.W.R. 494.

Where under a will a general power of appointment, exercisable by will only, is given to members of a stated class, for instance, grandchildren who may be born after the death of the testator at any time during the life of his widow, and the property is to go over in default of appointment, and such gift over is to take effect on the death of such unborn grandchildren, the provision in question is void as offending the rule against perpetuities.

Re Phillips, 11 D.L.R. 500, 28 O.L.R. 94.

III. Suspension of absolute right of alienation.

SUSPENSION OF ABSOLUTE POWER OF ALIENATION FOR INDEFINITE PERIOD.

Kennedy v. Kennedy, 11 D.L.R. 328, 28 O.L.R. 1, affirming in part 3 D.L.R. 536.

IV. Gifts to charities.

See also Charities and Churches; Religious Societies.

WILL—CONSTRUCTION—GIFT OF INCOME TO WIFE FOR LIFE—SUBJECT TO CERTAIN CHARGES — LEGACIES — ANNUITIES — —GIFTS TO MISSIONARY SOCIETY—CHARITABLE BEQUESTS—CY PRES DOCTRINE—UNCERTAINTY — PERPETUITY — DOWER —ELECTION—LAPSED LEGACIES.

Re Short, 7 O.W.N. 525.

PERSONAL INJURIES.

See Negligence; Death; Master and Servant; Railways; Street Railways; Carriers; Highways; Automobiles.

Measures of damages, see Damages.

PERSONAL PROPERTY.

See Sale; Bills of Sale; Chattel Mortgage.

PERSONATION.

CIVIL SERVICE EXAMINATION.

Personation at a Dominion civil service examination may be prosecuted either under the special provision contained in the Civil Service Act, (Can.) or under s. 409 Cr. Code.

R. v. Lartie, 25 Can. Cr. Cas. 300.

PETITION OF RIGHT.

See Crown; Exchequer Court.

CLAIM AGAINST CROWN.

Where goods submitted for inspection and possible purchase by the Government were rejected by the Government inspector, but owner neglected to remove the goods from the Government property on which they were deliverable subject to inspection and acceptance forthwith after their rejection and, in consequence of urgent need of the space which the goods in question and other rejected goods occupied, the Government officials sold them all and divided the proceeds pro rata, the owner has no claim against the Crown on the ground of wrongful conversion, or on the ground that the price realized on such sale was inadequate, the Crown not being liable for such act of its servant, either as for negligence or tort or as for acts done by the Government officials as volunteer agents, nor was such sale by the Government officers an acceptance of the goods on the part of the

Crown. [Judgment of the Exchequer Court affirmed on an equal division of the Supreme Court.] The only cases in which a petition of right may be brought by the subject against the Crown for a money demand are when the land or goods or money of the subject have found their way into the possession of the Crown and the purpose of the petition of right is to obtain restitution or, if restitution cannot be given, compensation in money, or when a claim arises out of a contract for goods supplied to the Crown or to the public service.

Poirier v. The King, 1 D.L.R. 766, 46 Can. S.C.R. 638.

PHOTOGRAPHS.

Annotation.

Use of; examination of testimony on the facts: 47 D.L.R. 9.

PHYSICIANS AND SURGEONS.

I. Right to practice.
II. Rights, duties, and liabilities.
III. College Council—Powers of.

See also Drugs and Druggists.

Liability for services rendered by quarantine physician, see Shipping, I—1.

I. Right to practice.

(§ I—1) — Unlawful practice — Assistant.

One who professes to practice medicine really practices it, this being the effect of the Medical Profession Act, sec. 63a, clauses a and b. An unregistered person cannot do, as agent, assistant or associate of another what he cannot do in his own name and on his own behalf.

Re Wagner, 25 Can. Cr. Cas. 406, 9 W.W.R. 1000.

Falsely pretending to be a healer of the sick — Medical practice — Isolated case insufficient.

The King v. Armstrong, 18 Can. Cr. Cas. 72.

Medical Profession Act — Registration — Sufficiency — Libel.

Sandwith v. Cowper, 4 S.L.R. 12.

(§ I—3)—Medical law of Quebec—Examination of students—Examiners illegally appointed.

The examiners appointed for the purpose of examining candidates for the study of medicine under R.S.Q. 1909, art. 4911, are public officers, to whom applies the doctrine of officers, de facto of the English common law. Consequently, the acts of an examiner for the above-named purposes, although he was illegally appointed, but is de facto in possession of the office, are valid. [O'Neill v. Attorney-General of Canada, 26 Can. S.C.R. 122; Lacasse v. Roy, 8 Que. S.C. 293, and Rouleau v. St. Lambert, 10 Que. S.C. 85, followed.]

Handfield v. College of Physicians & Surgeons of Quebec, 45 Que. S.C. 140.

Fees—Tariff.

There is no tariff in existence in the province of Quebec to determine what the charges of a physician may be. In the absence of any agreement, the court must in each case determine the fee to be paid by the patient, and, to do so, must take into consideration not only the standing of the physician but also the position, the earning power and the responsibilities of the patient.

Wood v. McMartin, 54 Que. S.C. 391.

(§ I—6)—Scope of license to practice—"Mechanical processes"—Dentistry.

The words "mechanical processes" used in art. 4938, R.S.Q. 1909, do not give to physicians the right to make use of the mechanical and operative part of dental surgery.

Milot v. Marchildon, 47 Que. S.C. 41.

(§ I—7)—Right to practice — Revocation of license.

Where statutory authority is conferred upon a medical council to cause an inquiry to be made by a standing committee of a limited number for the purpose of investigating a charge of misconduct against a member upon which it is sought to revoke his license to practice, and the statute further provides that the council shall "ascertain the facts" of the case by such committee and may act upon its written report upon proof of infamous or disgraceful conduct, it is not competent for the council to act upon a mere report of the evidence and proceedings before the committee unless such report be supplemented by a finding, and determination of the essential facts by the committee; nor is it competent for the council to itself determine such facts upon the evidence reported by the committee.

Re Stinson and College of Physicians & Surgeons, 10 D.L.R. 699, 27 O.L.R. 565.

"Infamous or disgraceful conduct in a professional respect" — Ontario Medical Act, R.S.O. 1914, c. 161, s. 31 (1)—Conviction for offense against Ontario Temperance Act—Evidence—Penalty—Removal of name from register — Suspension — Section 32a of Act (9 Geo. V. c. 25, s. 21).

Re Cherniak and Council of College of Physicians & Surgeons for Ontario, 17 O.W.N. 239.

(§ I—8)—Practising without license—Student assisting physician.

The effect of s. 63a, of the Medical Profession Act (Alta.) (amendment of 1911-12), is that a person who professes to practice medicine is to be held to actually practice; therefore an information or conviction is not irregular for charging that the accused "practiced or professed to practice medicine and surgery," such allegation being merely a statement of different modes of the offence within the curative provisions of Cr. Code, s. 725. [R. v. McDonald, 6 Can. Cr. Cas. 1; R. v. Brine, 8

Can. Cr. Cas. 54, and R. v. Brouse, 9 D.L.R. 458, 21 Can. Cr. Cas. 17, followed.] A medical student who himself prescribes for patients of the registered physician in the Province of Alberta, with whom he is associated as an assistant, and does such acts as would constitute the practice of medicine if done wholly on his own account, is liable for unlawfully practicing medicine in contravention of the Medical Profession Act, 1906 (Alta.), c. 28, as amended by 1911-12 c. 27, although he receives no remuneration from the registered practitioner for his work other than being supplied by the latter with free board and lodging.

Re Wagner, 25 Can. Cr. Cas. 406, 33 W.L.R. 415.

Illegal practice of medicine—Massage—Dressings — Treatment of goitre — Headache — Nervous dyspepsia—R.S. Q. 4938, 4971.

The defendant treated sick people by massage, rubbing their chests and advising them to refrain from taking any other remedy. The treatment lasted one month. For having thus treated sick people presenting themselves to him for massage, the defendant was found guilty of having infringed the medical law of Quebec and was condemned to pay $25, penalty and cost.

Gauvreau v. Sadik Bey, 25 Rev. de Jur. 552.

(§ 1—26)—Chiropractor.

Chiropractic treatment for disease is within the prohibition of the Medical Profession Act, R.S.S. 1909, c. 106, s. 64, if given by an unlicensed person for hire, gain or hope of reward; and a chiropractor doing business for gain is properly convicted if he has not been registered under the provisions of that Act.

R. v. McSloy, 31 D.L.R. 725, 26 Can. Cr. Cas. 381, 9 S.L.R. 265, [1917] 1 W.W.R. 112.

Unlawful practice of medicine—Chiropractic.

The accused, charged with a violation of the Medical Act, held himself out as a "doctor of chiropractic" and "spine and nerve specialist." He treated a patient for asthma by what was termed the "adjustment treatment," the process being the rubbing of the spinal column varied at intervals with the twisting of the head. He received from the patient $1 per treatment. On appeal from the magistrate's conviction, held, that he practised medicine and was properly convicted of a violation of the Medical Act.

R. ex rel. Burrows v. Evans, 23 B.C.R. 128.

Right to charge for services—Owing dues.

A physician who carries on his profession without having paid the annual fee required by art. 4948, R.S.Q. 1909, has no right to any fee or other compensation for the services which he renders or the medicines which he furnishes while he is so in default.

Macdougall v. North Shore Power & Railway Navigation Co., 51 Que. S.C. 24.

Chiropractor—Right to recover fees.

A chiropractor not registered as a medical practitioner cannot recover for his services, as a chiropractor.

Cook v. Foreman, 9 W.W.R. 470.

II. Rights, duties, and liabilities.

(§ II—35)—Compensation—Special fees.

In considering an account of a physician, the court should be governed by the scientific position and of the reputation of the doctor, of the importance and duration of the treatment, of the financial position of the patient, of the gravity of the illness, of the distance of the patient's residence, of the previous relations between the doctor and his patient or his family, of the number and length of the visits and whether they were made in the day time or during the night. It is the custom that all applications of special instruments and all operations, even those of minor surgery, give a right to higher fees. There should also be allowed a fee to the regular physician of the patient for assistance at consultations. But a physician cannot include in his account fees for "daily attendance" on the ground that he was all the day at the disposition of the patient without proving that this was necessary and that he had notified the patient of it.

Chevalier v. Girard, 48 Que. S.C. 211.

Undertaking to attend woman in childbirth—Contract made with woman's husband—Failure of accoucheur to attend—Death of child—Suffering of woman—Action by her against accoucheur — Findings of jury — Perversity — Evidence — Action not brought under Fatal Accidents Act —Damages — Appeal — Dismissal of action.

Smith v. Rae, 51 D.L.R. 323, 17 O.W.N. 253.

(§ II—36)—Frequency of visits.

A physician, employed to treat a child's broken leg, is not necessarily guilty of negligence if he fail to make frequent visits for the purpose of inspecting the leg, where he lives at a considerable distance, and, after treating the leg for 10 days, has left it properly bandaged and secured, and warned the parents against interfering with it, and instructed them that, if anything goes wrong, he is to be called by telephone, to which they have easy access.

Rickley v. Stratton, 4 D.L.R. 595, 22 O.W.R. 282.

(§ II—37)—Compensation—Services rendered under contract—Special work.

McIntosh v. Cramb, 31 D.L.R. 788.

Medical attendance—Defence of excessive charges.

Bisset v. Stewart, 8 E.L.R. 82.

(§ II—39)—DUTIES—DEGREE OF CARE AND SKILL REQUIRED—MALPRACTICE.

The public practice of the profession of a physician involves an undertaking by the practitioner that he has the ordinary skill and knowledge necessary to perform his duty towards those resorting to him in that character; but he will not be answerable in an action for malpractice merely because some other practitioner might have used a greater degree of skill or because he himself might have used more care.

Turriff v. R. L. King, 9 D.L.R. 676, 6 S. L.R. 37, 23 W.L.R. 149, 3 W.W.R. 862.

SKILL—NEGLIGENCE OF NURSE—LIABILITY.

A delay in the healing of a wound, caused by a pus sponge which had been left in it by a hospital nurse, whose duty it was to remove it and account for it, is not negligence attributable to the lack of skill of the surgeon, even though in closing the wound, he, acting on the nurse's report, made no further personal examination.

Jewison v. Hassard, 28 D.L.R. 584, 26 Man. L.R. 571, 34 W.L.R. 904, 10 W.W.R. 1088.

(§ II—42)—LIABILITY FOR WANT OF CARE OR SKILL — EVIDENCE REQUIRED — ABSENCE OF PROOF OF DAMAGE.

Hampton v. MacAdam, 7 D.L.R. 880, 22 W.L.R. 31.

NEGLIGENCE—PHYSICIAN—ASSISTANCE.

Marchand v. Bertrand, 39 Que. S.C. 49.

NEGLIGENCE—WANT OF SKILL—LIABILITY.

Dangerfield v. David, 17 W.L.R. 249.

SURGEON — MALPRACTICE — EVIDENCE — REASONABLE SKILL AND CARE—CAUSE OF BAD CONDITION FOLLOWING DEFENDANT'S TREATMENT.

Hearne v. Flood, 16 O.W.N. 28.

NEGLIGENCE — MALPRACTICE — EVIDENCE—EXPERT WITNESS—FINDING OF FACT OF TRIAL JUDGE—APPEAL.

Cassan v. Haig, 7 O.W.N. 267.

COLLEGE COUNCIL—INQUIRY INTO CHARGE OF MISCONDUCT—MISCONDUCT AMOUNTING TO INDICTABLE OFFENCE—ACQUITTAL BY CRIMINAL COURT.

Re Stinson and College of Physicians & Surgeons, 22 O.L.R. 627, 18 O.W.R. 38, 2 O.W.N. 512.

PLAINTIFFS.

See Parties.

PLANS AND PLATS.

See Expropriation; Highways; Dedication.

MUNICIPAL POWERS—APPROVAL OF PLAN.

Inadvertent action of a town council in approving a plan for a subdivision of land not shewing a public road previously dedicated by a land owner, does not affect the town's right to subsequently assert the existence of such highway, as against a purchaser of land adjoining the road who knew of its existence, and of the town's claim thereto, especially in view of the Land Titles Act, R.S.O. 1897, c. 138, s. 26, in force at the time of the filing of the plan, providing that all registered lands are to be subject to any public highway, etc., subsisting; and in view of the provisions of the Consolidated Municipal Act, 3 Edw. VII. (Ont.) c. 19, ss. 629, 632, for proceedings to close or dispose of public highways.

Larcher v. Sudbury, 11 D.L.R. 112, 24 O.W.R. 659, 4 O.W.N. 1289.

CROWN GRANT — NUMBERED LOTS — ASCERTAINING BOUNDARIES.

The boundaries of land described in a Crown grant merely by lot number are to be determined by the official plan or survey of the district in which the land is located, and ambiguous markings upon the plan are to be interpreted with regard to the intention disclosed by the surrounding circumstances. [Re Ward, 1 B.C.R. 114, followed.]

Re Land Registry Act, 13 D.L.R. 790, 25 W.L.R. 429, 5 W.W.R. 99.

APPROVAL BY STATUTORY AUTHORITY—ALTERNATIVE POWERS OF MUNICIPAL COUNCIL AND COUNTY JUDGE.

The refusal of a town council to approve a plan for the subdivision of land does not preclude its approval by a judge of County Court, under the jurisdiction conferred by s. 80 of the Registry Act, 10 Edw. VII. c. 60, R.S.O. 1914, c. 124, which provides that plans shall be registered when approved by a municipal council or a judge of the County or District Court. [Re Birely and Toronto, Hamilton & Buffalo R. Co., 25 A.R. (Ont.) 88; Aurora v. Markham, 32 Can. S. C.R. 457, and Re Stinson and College of Physicians & Surgeons, 10 D.L.R. 699, 27 O.L.R. 565, distinguished.]

Re Royston Park Subdivision and Steelton, 13 D.L.R. 454, 28 O.L.R. 629.

APPROVAL BY MUNICIPALITY OR BOARD—SUBURBAN SUBDIVISIONS.

The City and Suburbs Plans Act, 2 Geo. V. c. 43, is not retroactive in its intent, and the provisions requiring the submission of a plan proposed to be registered of any subdivision of land lying within five miles of a city having a population of not less than 50,000, to the Ontario Railway and Municipal Board for its approval, and forbidding sales of lots on such a plan by description referring to the plan, until such approval has been obtained, do not apply to the case of a plan of a survey completed and approved by the proper municipality before the passing of the Act, but not tendered for registration until afterwards.

Toronto v. Hill, 10 D.L.R. 639, 24 O.W.R. 388, 4 O.W.N. 1076.

SUBDIVISION PLANS—APPROVAL—OBJECTIONS—JURISDICTION OF ONT. MUNICIPAL BOARD.

The lapse of the period of twenty-one days specified in the City and Suburbs Plans Act, 2 Geo. V. (Ont.) c. 43, s. 7, without notice of objections being filed to a subdivision plan, does not bar the Ontario

Railway and Municipal Board from giving leave to an objecting municipality to be heard in opposition to the proposed subdivision at any time before the board has certified its approval and the board may then, after hearing both parties, dispose of the application on the merits. The provision of s. 7 of the City and Suburbs Act, 2 Geo. V. (Ont.) c. 43, that if no objection is made and filed with the board within a limited period the applicant for approval of a subdivison plan "shall be entitled to have the plan certified as approved unless the board of its own motion shall have otherwise directed," does not limit the power of the board to "otherwise direct" to the period within which objections are to be filed, and does not entitle the applicant to a certificate as of right when objectons have not been filed accordingly.

Re Canadian Building & Loan Ass'n and Hamilton, 10 D.L.R. 539, 4 O.W.N. 1185, 24 O.W.R. 858.

LAND SURVEYOR—ERROR IN PLAN—RESPONSIBILITY.

A land surveyor who undertakes to subdivide and stake out a piece of land in accordance with a general plan made by another surveyor, is not responsible for errors in such plan if not made by him, and when he had no reason to suspect the existence of such errors.

Paquin v. Bourgeois, 23 Que. K.B. 494.

PLEADING.

I. IN GENERAL.
- A. Generally; necessity; form.
- B. Verification.
- C. Definiteness; particularity.
- D. Inconsistency; repugnancy.
- E. Implication.
- F. Conclusion.
- G. Defects waived or cured; time for objections.
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- C. Description of parties.
- D. Statement of cause generally.
- E. Negation of defence.
- F. Prayer; allegations as to damages.
- G. Averments as to ownership, title or possession.
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- A. In general.
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Joinder of causes, see Action.

In criminal proceedings, see Criminal Law; Indictment; Summary Convictions.

Service of, see Writ and Process.

Annotations.

Objection that no cause of action shewn; defence in lieu of demurrer: 16 D.L.R. 517.

Statement of defence; specific denials and traverses: 10 D.L.R. 503.

Enemy alienage, how pleaded: 23 D.L.R. 375, 382.

Ultra vires as defence; estoppel: 36 D. L.R. 107.

I. In general.

A. GENERALLY; NECESSITY; FORM.

(§ I A—1)—WAR RELIEF ACT—APPLICATION TO PROCEED—APPLICATION TO COLLECT RENTS INCLUDED — B.C. STATS. 1916, c. 74—1917, c. 74—1918, c. 97, s. 5 (4).

On the plaintiff applying for leave to proceed under subs. (4) of s. 5 of the War Relief Act, Amendment Act, 1918, the registrar referred the application to the judge in Chambers when the plaintiff included in his summons an application that he be at liberty to collect the rents of the premises in question in the action. Held, that the application as framed should be dismissed and that the application for rents should be the subject of a substantive application.

Mariacher v. Gray, 26 B.C.R. 332, [1919] 1 W.W.R. 505.

(§ I A—5)—HEADING — "STATEMENT OF CLAIM."

A specially indorsed writ must be headed "Statement of claim." [Anlaby v. Praetorius, 20 Q.B.D. 764, followed.]

Sayward v. Brewer, 24 B.C.R. 129, [1917] 2 W.W.R. 233.

CLAIM SPECIALLY INDORSED UPON WRIT OF SUMMONS—AFFIDAVIT OF MERITS FILED WITH APPEARANCE—FAILURE TO MEET REQUIREMENTS OF R. 56—ORDER UNDER R. 57 FOR SUMMARY JUDGMENT—APPEAL—DEPENDANT ALLOWED TO FILE BETTER AFFIDAVIT NUNC PRO TUNC—COSTS.

Carter v. Wees, 13 O.W.N. 364.

IRREGULARITIES.

In civil, criminal and municipal matters, neither party is admitted to complain of an irregularity if he does not suffer any injustice.

Krauss v. Michaud, 26 Que. K.B. 504.

SPECIALLY ENDORSED WRIT OF SUMMONS—APPEARANCE AND AFFIDAVIT OF DEFENCE—ABSENCE OF ELECTION BY PLAINTIFF TO TREAT ENDORSEMENT AND AFFIDAVIT AS RECORD—STATEMENT OF DEFENCE NOT DELIVERED WITHIN 10 DAYS.

Smith v. Walker, 5 O.W.N. 410.

DECLINATORY EXCEPTION — PLACE WHERE CONTRACT ENTERED INTO—ARTICLE 94 C.C.P.

Dufresne v. Dufresne, 24 Rev. de Jur. 140.

(§ I A—6)—WHEN DISPENSED WITH—ISSUE CONTESTED AT TRIAL ALTHOUGH NOT PLEADED.

The rule that issues not pleaded may be considered on appeal was not intended to dispense with pleadings, but merely to meet exceptional cases where, by the tacit consent of both parties, unpleaded issues were clearly and unquestionably fought out at the trial.

Johnson v. Johnson, 14 D.L.R. 756, 18 B.C.R. 563, 26 W.L.R. 3, 5 W.W.R. 525.

(§ I A—7)—ACTION BEGUN BY WRIT OF SUMMONS SPECIALLY ENDORSED—AFFIDAVIT OF MERITS MADE BY DEFENDANT—NEW CLAIM ADDED BY AMENDMENT OF ENDORSEMENT—NECESSITY FOR NEW AFFIDAVIT OF MERITS—RULES 56, 127, 128.

Farah v. Lawless, 7 O.W.N. 725.

(§ I A—8)—PRACTICE — APPLICATION BY WAY OF CHAMBERS SUMMONS—FIRST STEP IN PROCEEDINGS—NECESSITY FOR SUMMONS TO BE SEALED.

Re Gold and South Vancouver Corp., [1919] 2 W.W.R. 249.

(§ I A—12)—BY SPECIAL LEAVE.

In a proper case the plaintiff whose motion for summary judgment has been denied may be granted leave to deliver his pleading without prejudice to a pending appeal from the order denying summary judgment.

Clarkson v. McNaught, 2 D.L.R. 52, 21 O.W.R. 629.

B. VERIFICATION.

(§ I B—15)—VERIFICATION—CERTIFIED COPIES OF PLEADINGS—COLOUR OF PAPER.

Discepolo v. Fort William, 11 O.W.N. 73.

APPEARANCE—AFFIDAVIT—VACATION TIME—SUMMARY JUDGMENT.

If a summary action is returnable before the commencement of the long vacation the defendant is not required to accompany his appearance with an affidavit that he has a good defence to the action but he is obliged to plead within the delay, and if he does not do so, the plaintiff may proceed to judgment ex parte.

Roy v. St. Onge, 20 Que. P.R. 117.

C. DEFINITENESS; PARTICULARITY.

(§ I C—20)—DEFINITENESS — PARTICULARITY — STATEMENT OF CLAIM — FACTS FROM WHICH MALICE INFERRED.

Although King's Bench Rule 331, R.S.M. 1913, c. 46, prescribes that a statement of claim, which alleges malice as a fact, need not set forth the facts from which malice may be inferred, yet the plaintiff may plead such facts if he sees fit.

Tremayne v. Hudson's Bay Co., 17 D.L.R. 756, 24 Man. L.R. 436, 28 W.L.R. 200.

DEFINITENESS — PARTICULARITY — UNCERTAIN AND EMBARRASSING DEFENCE — FRAUD MAY BE PLEADED WITHOUT USING THE WORD "FRAUD," WHEN AND HOW.

Emerson Brantingham Implement Co. v. Jackson, 20 D.L.R. 966.

(§ I C—21)—DEFINITENESS — STATEMENT OF CLAIM—MOTION FOR PARTICULARS—NUISANCE—DAMAGES.

Black v. Canadian Copper Co., 5 D.L.R. 890, 23 O.W.R. 20.

JURIDICAL EXPRESSIONS.

It is not within the province of parties to an action to define expressions which are purely juridical, of which they may make use in their pleadings. The court will not grant a motion to this effect.

Saunders v. Deavitt, 15 Que. P.R. 329.

(§ I C—22)—PARTICULARITY—BREACH OF PROMISE—WHETHER VERBAL OR IN WRITING.

A plaintiff suing for breach of promise of marriage should set up in her statement of claim every material fact upon which she must rely to make out her cause of action; and the pleading should therefore disclose whether the alleged promise was verbal or in writing, and if it is claimed that the contract of marriage was broken by defendant's marriage to another, the date of such marriage should be pleaded.

Morris v. Churchward, 10 D.L.R. 191, 24 O.W.R. 313.

(§ I C—26)—FRAUD—STATEMENT OF CLAIM — MISREPRESENTATIONS — CONTRACT —RESCISSION.

Murray v. Thames Valley Garden Land Co., 24 O.W.R. 52.

(§ I C—27)—VALIDITY OF MUNICIPAL BY-LAW.

Where art. 697 Mun. Code, provides that "the promulgation of every municipal by-law is considered to have been sufficiently made until the contrary is alleged," it is not necessary that this allegation should be made in an action at law but it is sufficient that the interested party be informed by the municipal council of the irregularity; consequently, the value of work done by a contractor under a contract based on such

a by-law after notice of the irregularity has been given by the council but before any action to set aside the contract or by-law is taken cannot be recovered.

Poutres Siegwart v. Deschambault, 5 D. L.R. 395, 41 Que. S.C. 453.

D. Inconsistency; repugnancy.

(§ I D—30)—Action for infringement of patents for inventions—Validity of patents — Inconsistent pleadings — Rule 157.

Visor Knitting Co. v. Penmans, 7 O.W.N. 121.

Conditional sale—Hiring.

When a plaintiff, on a motion for authorization to sue a married woman, alleges that he conditionally sold furniture to her, he cannot be allowed, in his answer to the defence, to claim that it was a hiring he made.

Levitt v. Lacasse, 49 Que. S.C. 329.

In an action to recover the purchase price of a hay press which the plaintiff alleges to have sold and delivered to the defendant, the plaintiff cannot amend his declaration in such a manner as to allege further that the machine in question is at the disposal and risk of the defendant; as such an amendment would entirely change the nature of the action and would be inconsistent with its allegations.

International Harvester Co. v. Ratelle, 18 Rev. de Jur. 458.

Preliminary exception — Preuve avant faire droit—Incompatible demands—Option—C.C.P. art. 166 s. 7.

On a preliminary exception the court cannot order "preuve avant faire droit." An action brought against a municipality in order to declare void a by-law passed by its municipal council to fill the then vacant place of an alderman, and against the nominee for alderman, to declare him incapable of occupying this position, does not contain two incompatible and contradictory demands; and a dilatory exception that the plaintiff should have the option of choosing between the two demands must be rejected.

Sorel v. Brousseau, 25 Rev. Leg. 162.

F. Conclusions.

(§ I F—40)—Inscription in law.

An inscription in law which does not contain conclusions will be rejected by the court of its own motion if the objection is not raised.

Burtner Coal Co. v. Gano Moore & Co., 19 Que. P.R. 291.

Negatory action — Adjoining owners — Dripping from roofs.

The conclusions in a negatory action, praying that the plaintiff's property "be declared free from all servitude or encumbrance as to the defendant and his property," and that the defendant be ordered to give up the works constituting the servitude complained of, are sufficient to form the basis of an executory judgment, without the necessity of claiming also the authorization to undertake such works should the defendant not attend to them. Neighbours, whose properties are so close to each other that the dripping water of the roofs of their houses may alternately splash back on the sides of one or the other house and deteriorate them, must comply with the local custom of putting up a common gutter for both houses in order to prevent the water from penetrating the sides of the house. One refusing to do so will not be allowed to direct a negatory action against his neighbour.

Poulin v. Houde, 53 Que. S.C. 145.

Parties.

If a party has interest in being notified of an action, he cannot complain by way of exception to the form that no conclusions have been taken against him.

Legault v. Charbonneau, 19 Que. P.R. 218.

Discontinuance — Confession of judgment — Costs.

A plaintiff may discontinue a portion of the conclusions of his declaration, even by a proceeding other than a discontinuance properly so called. It is not necessary that the document containing such discontinuance should state that the discontinuance will be made with costs against the plaintiff. After service of a discontinuance a defendant cannot then confess judgment in accordance with that part of the conclusions which the plaintiff has discontinued.

Equitable Realty v. Roy, 20 Que. P.R. 171.

Relevant facts.

Parties to an action may, by their pleadings, submit deductions, for instance, that of an admission. The court will decide whether such a deduction is logical. The renting of an office by the plaintiff, the engagement by him of a manager, and loss of time, may be pleaded as grounds for special damages for nonfulfilment of a contract. A plaintiff may plead the defendants' failure to assist where it might render them liable in a larger amount. A plaintiff may allege that he would have found purchasers for his shares if the defendants had allowed the purchasers' agents to make a trial of the mine. An action against the defendants for refusing to allow such trials, and the settlement of such an action, are relevant facts in the case. It is not permissible to plead that a corporation has acted in spite of the advice of its lawyer, who is a member of its board of directors.

Gruninger v. La Mine d'Or d'Huronia, 16 Que. P.R. 373.

G. Defects waived or cured; time for objections.

(§ I G—50)—Opposition — Minor — C.C. Que. 304.

An opposant who makes his opposition and swears to it the 16th day of July, and only gives notice of it on the 19th of the

same month, when he is 21 years of age, is legally before the court.

Pouliot v. Bernard, 46 Que. S.C. 335.

(§ I G—51)—Heirs sued collectively—Appeal — Family council — Tariff — C.C. Que. 306 — C.C.P., 135.

A defendant's right to sue collectively, and without special designation, the heirs of a deceased person within the 6 months, does not prevent the heirs, if they are minors, from obtaining, before appealing from the judgment given against them, the authorization of the family council homologated by a judge or the prothonotary of the district of their domicile. An inscription in appeal delivered without authority will not be set aside, but time will be given to the appellants to rectify the procedure. If a motion to set aside an inscription is granted for costs only, delay will be given to the appellant to rectify his procedure, the defendant's attorney has a right only to the fee upon and relating to the motion and not to the fee for an abandoned appeal nor the fee for examination, inscription and security.

Chene v. Chene, 16 Que. P.R. 77.

(§ I G—52)—Cured by opponent's pleading.

Joining issue and going to trial without an objection that a counterclaim for wages could not be interposed in an action for tort, is a waiver of the irregularity. [Hyatt v. Allen, 3 O.W.N. 370, applied.]

Hamilton v. Vineberg, 4 D.L.R. 827, 3 O.W.N. 1337, 22 O.W.R. 538.

Defect in statement of claim — May be cured by defence — Negligence — Damages — Employers' Liability Act, R.S.B.C. 1911, c. 74, s. 3, subs. (1), and s. 7, subs. (1) and (3).

A specific denial in the defence of an allegation that the plaintiff should have, but neglected to plead in an action for damages under the Employers' Liability Act, cures the defect, if the issues are thereby defined in the pleadings with sufficient clearness for the trial.

Cook v. Newport Timber Co., 18 B.C.R. 624.

(§ I G—58)—Extending time for indorsement of writ — Time of objection.

A writ cannot be deemed to be specially indorsed and need not be amended, because it is not intituled "statement of claim," nor signed by counsel, and omitting the words "delivered, etc.;" and an objection to an undue extension of an indorsement upon the writ should be raised by motion before the delivery of the defence.

Page v. Page, 25 D.L.R. 99, 22 B.C.R. 185, 32 W.L.R. 854, 9 W.W.R. 442.

H. Exhibits; profert; oyer.

(§ I H—60)—Production of documents —Costs.

If one party declares under oath that the original of a document designated by him in support of a pleading is not in his possession, he will be barred of the right to file it, and the adjudication of the costs, which might result to the adverse party in the course of the action from the default to produce the original of the document with the pleading which designates it, will be reserved for the judge who decides the case on the merits.

Robert Dollar Co. v. Canadian Car & Foundry Co., 18 Que. P.R. 345.

Withdrawal of exhibits — Settlement.

If a cause has been determined and the amount of the judgment paid, the exhibits on the record may be withdrawn without delay.

King Paper Box Co. v. Canada Maple Exchange, 18 Que. P.R. 439.

Promissory note — Tender and deposit with reply.

Although it may be irregular to only tender and deposit with the reply to a defence note which should have accompanied the declaration, the court will permit them to be so tendered and deposited when the interest of justice demands it in the particular circumstances in which the parties are placed.

Finlay v. Boileau, 48 Que. S.C. 444.

I. Particulars.

(§ I I—65)—Ordering particulars—Employer's liability action.

In a workman's action to recover from his employer damages for personal injuries due to the alleged defective conditions of a crane used in building operations, the plaintiff may be ordered to give particulars of what he was doing at the time the accident occurred and, to the extent of his knowledge thereof, particulars also of the alleged breakage causing the injury. The principle upon which an order for particulars may be refused where the case depends upon the doctrine of res ipsa loquitur does not apply to prevent the order being made where the plaintiff has not framed his pleadings on that doctrine exclusively, but has voluntarily set out a statement in the nature of particulars of negligence leading up to the accident; in such case if the statement of particulars in the pleading is insufficient, further particulars should be ordered.

Proctor v. Parsons Bldg. Co., 10 D.L.R. 30, 23 W.L.R. 716, reversing 9 D.L.R. 692, 23 W.L.R. 535, 4 W.W.R. 48.

Establishing allegations or claims — Burden of proof — Order for particulars, when refused.

In an action by plaintiff claiming that his property had been sold for taxes wrongfully claimed as due and unpaid, and that such sale was made without any power or authority in the township making the sale, an order for particulars giving the defects in the authority of the township to sell will

not be made on defendant's application. [Turner v. Surrey, 16 B.C.R. 79, followed.] Beavis v. Langley, 9 D.L.R. 403, 18 B. C.R. 30, 23 W.L.R. 55.

WHEN ORDERED — TRANSACTIONS WITHIN KNOWLEDGE OF PARTY DEMANDING.

In an action between husband and wife for a separation of community property which the wife alleged the husband was disposing of and concealing, the plaintiff will be required to give particulars of her claim notwithstanding that the defendant must of necessity have knowledge of all transactions relating thereto, where the plaintiff's allegations in her statement of claim are of a general nature, without stating time, place or circumstances pertaining to the matters pleaded.

Hall v. Stone, 13 D.L.R. 537, 15 Que. P.R. 113.

PARTICULARS — RAILWAY ACCIDENT — DEATH, LORD CAMPBELL'S ACT.

In an action for damages against a railway company occasioned by the derailment and wrecking of a train, it is not necessary to particularly specify, on a claim for general damages, the negligence alleged in the particulars of claim; the fact that damage is done by something getting out of control which normally is, or ought to be, under control, raises a presumption or rational inference of fact, that the accident is due to the negligence of the user or his servants, and an order by a master for further particulars thereon cannot be supported, the occurrence itself when proved warranting a finding of negligence. In an action under the Fatal Accidents Act, I Geo. V. c. 33 R.S.O. 1914, c. 351, an order for a statement of particulars from the parents of the benefits received from their son during his lifetime should not be made as it would be compelling the plaintiffs to give particulars of the evidence by which they intended to support their claim.

Mulvenna v. C.P.R. Co., 15 D.L.R. 616, 5 O.W.N. 779.

LORD CAMPBELL'S ACT — CONTRAVENTION OF RAILWAY RULES BY COMPANY.

In an action against a railway company under Lord Campbell's Act for negligence causing death, an order should not be made that the plaintiff deliver particulars of the railway company's rules and regulations in contravention of which the plaintiff claimed a defective and improper system was maintained in leaving switches unprotected which had led to the personal injury which caused the death.

Pierce v. G.T.R. Co., 16 D.L.R. 69, 5 O. W.N. 962.

WORKMEN'S COMPENSATION CASES.

Section 15 of the Workmen's Compensation for Injuries Act, R.S.O. 1897, c. 160, R.S.O. 1914, c. 146, requiring that where the injury complained of has arisen by reason of the negligence of any person in the defendants service, particulars shall be given by the plaintiff of the name and description of such person, applies only where the claim is based on some specific act of misconduct on the part of a fellow-servant, and is not intended to shift the onus thrown on the defendant in cases where the plaintiff can rely upon the res ipsa loquitur rule.

Pierce v. G.T.R. Co., 16 D.L.R. 69, 5 O. W.N. 962.

STATEMENT OF CLAIM.

In an action for damages against a municipality for having notified the plaintiff, a contractor for city works, not to proceed and for having refused to furnish cars under the contract and for removing the plaintiff's plant, the plaintiff may be ordered to furnish the best particulars he can of the manner in which, the time when and the place where the defendant notified the plaintiff not to proceed, and the manner in which, the time and place where the defendant refused to furnish cars. [Cousins v. C.N.R., 18 Man. L.R. 320, followed.] Riley v. Winnipeg, 19 D.L.R. 567, 25 Man. L.R. 61, 30 W.L.R. 301.

DEMAND FOR FURTHER PARTICULARS — ORDER BY MASTER — REFUSAL TO SET CASE DOWN FOR TRIAL.

Hallman v. Foundry Products, 45 D.L.R. 747.

IN CRIM. CON. ACTION — SWORN DENIAL.

A defendant to an action for criminal conversation has the right to demand particulars of the time and place of the alleged acts, without first being required to file a sworn denial of the charges. [Keenan v. Birkley, 28 L.R. Ir. 135, followed.] Rhinard v. Ginther, 28 D.L.R. 628, 34 W.L.R. 69, 10 W.W.R. 181.

WORKMEN'S COMPENSATION ACT — QUE. C.P. ART. 123.

The declaration required by art. 123 C. C.P. is general. The law nowhere makes any exception to the rule for an action brought under the Workmen's Compensation Act (Que.). Particulars must be furnished on the nature of the accident which is alleged to have caused the injury; when and by whom the plaintiff was engaged in the employ of the defendant; the nature of his employment and the check number under which he worked; the nature of the injuries which the plaintiff suffered; how and why the plaintiff pretends that his incapacity is permanent.

Biglands v. John McDougall Caledonian Works Co., 20 D.L.R. 979, 16 Que. P.R. 114.

Where a statement of claim alleges fraudulent misrepresentations inducing the purchase of shares and the statement of defence sets up laches and acquiescence, and the reply alleges that the delay in bringing the action was caused by "further misrepresentations," it is not a satisfactory answer to a demand for particulars of the reply to say that such particulars are sufficiently set out in the reply, statement of claim, and particulars of the statement of claim already furnished. A provision in an

order for particulars that they may be given after examination for discovery is not proper where the facts must be within the knowledge of the party from whom the particulars are sought. That party may, in a proper case, obtain leave after discovery to deliver further particulars, but the case ought to be presented upon the pleadings and ancillary particulars before discovery is had.

Carter v. Foley-O'Brien Co., 5 D.L.R. 28, 3 O.W.N. 888.

CLAIM — INFRINGEMENT OF RIGHTS UNDER PATENT FOR INVENTION — POSTPONEMENT UNTIL AFTER DISCOVERY.

Batho v. Zimmer Vacuum Machine Co., 2 D.L.R. 902, 3 O.W.N. 1152, affirming 2 D.L.R. 894.

INFRINGEMENT OF PATENT RIGHTS — POSTPONEMENT TILL AFTER DISCOVERY.

United Injector Co. v. James Morrison Brass Mfg. Co., 2 D.L.R. 910, 3 O.W.N. 1195.

CLAIM — DAMAGE BY FLOODING — ORIGIN OF WATERS — SPECIFIC GROUND OF CLAIM — AMENDMENT.

Day v. Toronto, 2 D.L.R. 898, 3 O.W.N. 1083.

STATEMENT OF CLAIM — NEGLIGENCE — PERSONAL INJURIES — ANTICIPATING DEFENCE.

Mitchell v. Heintzman, 1 D.L.R. 926, 3 O.W.N. 892.

MOTION BEFORE DELIVERY OF DEFENCE — ABSENCE OF AFFIDAVIT — NUISANCE — DAMAGES.

Black v. Canadian Copper Co., 6 D.L.R. 855, 23 O.W.R. 95.

STATEMENT OF CLAIM — MOTION FOR PARTICULARS AFTER DELIVERY OF DEFENCE, BUT BEFORE EXAMINATION FOR DISCOVERY — PLAINTIFFS RESIDENT ABROAD — DEFAULT IN PAYMENT OF INTERLOCUTORY COSTS.

Rickart v. Britton Mfg. Co., 6 D.L.R. 852, 23 O.W.R. 63.

ACTS ANTECEDENT TO WRIT — INABILITY TO GIVE PARTICULARS — MUNICIPAL BY-LAW — CON. R. 552.

Fuller v. Bonis, 6 D.L.R. 901, 4 O.W.N. 306.

STATEMENT OF DEFENCE AND COUNTERCLAIM — POSTPONEMENT TILL AFTER EXAMINATION OF DEFENDANT FOR DISCOVERY — LEAVE TO EXAMINE BEFORE PLEADING TO COUNTERCLAIM.

Caldwell v. Hughes, 1 D.L.R. 898, 3 O. W.N. 639.

STATEMENT OF CLAIM — DISCOVERY.

Grocock v. Allen, 3 D.L.R. 871, 22 O.W.R. 219.

NEGLIGENCE — DEATH IN RAILWAY ACCIDENT — RES IPSA LOQUITUR — DISCOVERY.

Madill v. G.T.R. Co., 3 D.L.R. 876, 22 O.W.R. 233.

CONTRIBUTORY NEGLIGENCE.

An order for particulars of contributory negligence should not be granted unless the party applying satisfies the court that he is likely to be taken by surprise by some accusation or evidence which may be brought against him and which he cannot be prepared to meet unless he is told of it beforehand.

Gillingham v. Lewis, 21 D.L.R. 470, 48 N.S.R. 233.

OVER-PAYMENTS — FRAUD.

In an action by a provincial government for the recovery of over-payments under contracts for the construction of a new Parliament building, also charging fraud and conspiracy, the defendant is entitled to particulars of the amounts claimed to be overpaid, and of the fraudulent representations charged, particularly where they are not within the defendant's knowledge and there is nothing to shew that the plaintiff cannot set out what they are. [Sims v. Slater, 10 C.L.T. 227; Whyte v. Ahrens, 26 Ch. D. 717; Leitch v. Abbott, 31 Ch. Div. 374; Sachs v. Speilman, 37 Ch. D. 295, applied.]

Att'y-Gen'l v. Kelly, 24 D.L.R. 297, 25 Man. L.R. 621, 9 W.W.R. 83, 32 W.L.R. 327.

CONDITIONS OF ORDER.

A judgment ordering particulars to be given should not provide that on default of their being given the allegations of the action will be struck out.

Lessard v. Simard, 24 Que. K.B. 481.

ACTION FOR SEDUCTION UNDER PROMISE OF MARRIAGE — DEMAND FOR PARTICULARS.

Clark v. Treloar, 25 D.L.R. 865, 33 W. L.R. 173, 9 W.W.R. 836.

STATEMENT OF CLAIM — IMMATERIAL ALLEGATION — LIBEL.

McVeity v. Ottawa Citizen Co., 5 O.W.N. 288, 25 O.W.R. 200.

STATEMENT OF CLAIM.

Mexican Northern Power Co. v. Pearson, 25 O.W.R. 422.

STATEMENT OF CLAIM — ALIMONY — ACCUSATIONS AGAINST HUSBAND — DISCOVERY — COSTS.

Love v. Love, 25 O.W.R. 278.

STATEMENT OF CLAIM — CONTRACT — DAMAGES — PRACTICE — INFORMATION OBTAINABLE BY DISCOVERY—TRUE FUNCTION OF PARTICULARS — SUPPLEMENTARY TO PLEADINGS.

Owen Sound Lumber Co. v. Seaman-Kent Co., 25 O.W.R. 48, 61.

STATEMENT OF CLAIM — DAMAGES — BREACHES OF CONTRACT.

Columbia Gramophone Co. v. Real Estates Corp., 25 O.W.R. 45.

STATEMENT OF CLAIM — CHEQUES — REFUSAL TO ACCOUNT — DISCOVERY — PRODUCTION OF BOOKS — BANKS.

Spitzer v. Union Bank, 23 O.W.R. 719.

STATEMENT OF CLAIM — MISREPRESENTATIONS.

Morgan v. Thomas Valley Garden Land Co., 24 O.W.R. 163.

STATEMENT OF CLAIM — CONTRACT — WORK DONE UNDER RAILWAY CONSTRUCTION SUBCONTRACT — EXTRAS — OVERCHARGES — INTEREST.

Eastern Construction Co. v. McArthur, 24 O.W.R. 628.

STATEMENT OF CLAIM — NEGLIGENCE.

Farmers Bank v. Menzies, 7 O.W.N. 134.

ACTION FOR DEFAMATION — SLANDEROUS WORDS IN FOREIGN LANGUAGE — SPECIAL DAMAGE.

Dickman v. Gordon, 23 O.W.R. 512.

STATEMENT OF CLAIM — DELAY IN MOVING — CON. R. 268.

Delap v. C.P.R. Co., 23 O.W.R. 644.

ACTION ON GUARANTY — SUGGESTED ASSESSMENT OF DAMAGES ON A REFERENCE.

Niagara & Ontario Construction Co. v. Wyse, 23 O.W.R. 409.

COUNTERCLAIM — LEAVE TO REJOIN — EXAMINATION FOR DISCOVERY.

Canadian Westinghouse Co. v. Water Commissioners for London, 23 O.W.R. 648.

STATEMENT OF CLAIM — NEGLIGENCE — DISCOVERY.

O'Dell v. London, 14 O.W.N. 201.

MOTION FOR — AFFIDAVIT — NEGLIGENCE — BY-LAWS.

A motion for particulars does not need to be supported by a statement under oath. A defendant charged with negligence has a right to know the act or acts for which he is blamed. Where the negligence consists of the violation of municipal by-laws it is not necessary to point out what by-law has been violated, nor in what the violation consists.

Perrault v. Lacombe, 19 Que. P.R. 174.

LOSS OF PROFITS — TIME — COSTS.

A plaintiff suing for loss of profits cannot be compelled to shew in detail what profits could have been made or to furnish a statement of receipts and expenses upon which he made his calculations. He may, however, be compelled to state the number of days he had lost in order to complete the contract; the cost of deed which he had prepared and the amount of commissions he had to pay to procure the necessary funds to complete the sum required; but not the name of the person to whom he had paid such commission. If both parties partially succeed in their respective claims, the costs of a motion for particulars may be set off.

Brown v. Dupuis, 19 Que. P.R. 319.

CAPIAS.

Upon an application for a capias, as in all other proceedings, the party attacked has a right to demand particulars necessary to enable him to frame his defence.

Stackhouse v. Lorimer, 19 Que. P.R. 480.

STATEMENT OF CLAIM — EX PARTE ORDER — SETTING ASIDE — APPEAL — SUBSTANTIVE APPLICATION — TIME FOR DELIVERY OF DEFENCE — EXTENSION.

Henwood v. Canadian Oak Leather Co., 11 O.W.N. 421.

STATEMENT OF DEFENCE — R. 141 — "MATERIAL FACTS."

Redmond v. Stacey, 13 O.W.N. 79, affirmed at p. 179. [See also id. p. 206.]

SUFFICIENCY.

If the particulars furnished are not as complete and precise as required by the judgment ordering them, but the party swears that he cannot furnish them more fully and explains why, it will be for the Trial Judge to say whether or not the adversary has been taken by surprise and whether or not the enquête should be adjourned to enable the necessary facts to be supplied.

Kawriko v. Gloucester Lumber & Trading Co., 18 Que. P.R. 199.

RIGHT TO.

A defendant cannot demand particulars before he is released from the consequences of his failure to plead.

Frank v. Magalnick, 18 Que. P.R. 277.

MOTION TO REJECT — AMENDMENT.

A defendant barred of the right to plead cannot demand the rejection of the particulars furnished. A plaintiff can without costs amend his declaration at the same time that he furnishes the particulars required of him.

De Felice v. Rolph, 18 Que. P.R. 308.

TIME.

Every demand for particulars, based upon the ground that the petitioner has need of greater details to plead or reply to a plea, should be made and filed within the delay required by law or an additional delay granted by the court to reply to the merits of this proceeding alleged to be insufficiently detailed or itemized. A party barred from filing a plea cannot demand details or particulars of the pleading in respect to which he is in default.

Stark v. Anson, 18 Que. P.R. 156.

ACKNOWLEDGMENT OF DEBT.

One who alleges that the opposite party has often acknowledged that he owes him a certain sum, will be compelled to state when and in what manner this acknowledgment was made and whether it was verbal or in writing.

Boucher v. Brown, 18 Que. P.R. 347.

AFFIDAVIT.

A motion for particulars need not be supported by affidavit. If the plaintiff complains that the defendant had not delivered to him the movables (choses in action) that he had agreed to deliver to him and that the plaintiff had been obliged to give to his purchasers other similar more costly movables, the plaintiff will be obliged to disclose the names of the persons to whom he had resold the obligations in question

and the names, professions and domiciles of the persons from whom he had been obliged to purchase the other obligations.

Thompson v. Provincial Trust Co., 18 Que. P.R. 477.

ACTION AGAINST DIRECTORS.

A defendant sued for the debt of the company in liquidation, of which he is a director, is entitled to receive all the particulars necessary to render clear and precise the allegations of the declaration, for example: Of the difference between the declared assets of the company and the real assets; the dates and the amounts of the advances made by the plaintiff bank to the company; of the dates, amounts and occasions of the loans which the directors had made to themselves out of the property of the company; of the obligations from which the directors are relieved as well against the company as against its shareholders and directors; and when, how and in favour of whom the directors have used the name of the company in business matters; when, how and to what creditors such director of the company has misrepresented its affairs and when and on what occasion he has fraudulently administered the affairs of the company; the dates, amounts and the nature of the loans made by the plaintiff to the company in question and the name of the person to whom these loans have been made.

Merchants Bank v. Blanchet, 18 Que. P.R. 293.

ACTION FOR CAUSING DEATH—DRUGGIST.

In an action for damages against a druggist causing the death of plaintiff's child, by substituting a poison for the remedy prescribed, the plaintiff may be ordered to indicate not only the prescription to be filled but as far as possible through the coroner's inquest or otherwise the poison which had been substituted.

Maurice v. Milette, 18 Que. P.R. 254.

ACTION IN WARRANTY.

A principal defendant who has pleaded to an action without demanding particulars cannot afterwards demand them on the ground that his defendant in warranty has demanded them from him.

Fiset v. Agricultural Co-operative Co. of Cheesemakers, 18 Que. P.R. 479.

DEMAND NOTE — PRESENTATION.

In an action upon a note payable upon demand the plaintiff can be compelled to indicate the time and place of presentation for payment.

Beauchemin v. Aubuchon, 18 Que. P.R. 193.

NECESSITY OF THE MOTION FOR — C.C.P. 123.

When a party must have had knowledge of the particulars asked for, and he does not allege the necessity of such particulars, a motion to dismiss the motion for particulars as unnecessary, will be granted.

Ship v. Crocker, 16 Que. P.R. 109.

TRAMWAYS — MODERN IMPROVEMENTS TO PROTECT PASSENGERS—C.C.P. 123.

A motion asking particulars on an allegation of the declaration that a car of a tramway company was not properly protected by modern, improved and well-known devices designed to protect passengers from falling under the wheels, will be granted.

Rothschild v. Montreal Tramway Co., 15 Que. P.R. 429.

AFFIDAVIT — NECESSITY OF — C.C.P. 123 — R. OF P. 47.

A motion for particulars, not being a preliminary plea but a special demand, must necessarily be supported by the affidavit required by the 47th Rule of Practice, since it is precisely for the purpose of dealing with facts which do not appear in the record. Such a demand can only be granted when it is necessary.

Larose v. Ainey, 16 Que. P.R. 166.

LEGATEE CLAIMING HIS INCOME FROM TESTAMENTARY EXECUTOR — C.C.P. 123 — C.C. QUE. 916, 917, 918, 919.

Where the defendant was testamentary executor, the plaintiff applied to him to get her income to date and fixed the amount at $1,500, and the defendant made a motion alleging that he could not plead to that action, seeing that the plaintiff in her declaration did not state (a) what constituted the income of the estate; (b) how it was due; (c) the separate items constituting that total sum of $1,500; (d) the reasons why that sum might be due; (e) how much was due at and for each month, it was held that the defendant is supposed to know, much better than the plaintiff, the amount, the nature, and the maturity of the revenues of the estate of which he is testamentary executor.

Lafortune v. Bonneville, 16 Que. P.R. 162.

ACTION ON CHEQUE.

When a claimed cheque has been filed in court, the defendant can easily see that it has been endorsed by a third party.

Chaurest v. Provost, 16 Que. P.R. 153.

ACTION AGAINST MUNICIPALITY — EXCAVATION WORK — C.C.P. 123, 202.

A plaintiff suing the city of Montreal for damages resulting from excavation works badly carried out must furnish particulars of the expression that the city has not acted "according to the rules of art and the means of protection" it should have taken. Such allegations are too vague and make it impossible for the other party to answer them himself in accordance with art. 202 C.C.P. in a special and categorical way.

Laliberte v. Montreal, 16 Que. P.R. 143.

FAILURE TO FURNISH — ADMISSIBILITY OF EVIDENCE THEREUNDER.

If the defendant gives reasons shewing why it is impossible for him to give fur-

ther particulars, the court may allow or disallow, at the hearing, evidence of vague allegations.

Woods v. McCrory, 16 Que. P.R. 112.

PERSONAL INJURIES ACTION — FOREMAN KNOWING DEFECTS IN MACHINERY.

When the plaintiff, in an action for damages on account of personal injuries, alleged that certain foremen were aware of the defects in machines at which the plaintiff was at work he may, on motion therefor, be ordered to give the names of such foreman if it is possible to do so.

Lacroix v. Laprairie Brick Co., 14 Que. P.R. 303.

WORKMEN'S COMPENSATION ACT — AVERMENTS IN DECLARATION — EXCEPTION TO FORM — C.C.P. 174.

A petition to sue under the Workmen's Compensation Act (Que.) constitutes the instituting act of an action, and the subsequent issue of the writ of summons is only the fulfilment of an order of the parties before another tribunal equally competent. The omission to insert, in the writ and declaration, the other authorizing the workman to take action cannot constitute a cause of nullity of the summons. An exception to the form based thereon should be dismissed with costs.

Francoeur v. Lawrence, 16 Que. P.R. 118.

EXCEPTION TO FORM — MOTION FOR DISMISSAL—C.C.P. 123, 174.

The plaintiff must make a motion for particulars or a motion to reject the paragraphs which he contends are vague or irregularly pleaded, according to the practice and jurisprudence of this court. An exception to the form is not the proper procedure in such a case.

Godin v. Briggs, 16 Que. P.R. 184.

PRODUCTION OF DOCUMENTS — C.C.P. 123, 289.

A motion for particulars, which requires the production of certain documents, will not be granted if the plaintiff has other special recourses than such motion for particulars to require the filing of documents by the adversary.

Piche v. Cantin, 16 Que. P.R. 201.

ACTION ON NOTES — VALUE GIVEN AND CONSIDERATION RECEIVED — C.C.P. 123.

A defendant, who was sued on 2 promissory notes, wanted to know the value given and what consideration he got back. The defendant was long since interdicted. The plaintiff was presumed to be a holder in due course, and the motion for particulars was dismissed.

Tourneur v. Lalonde, 16 Que. P.R. 189.

When, in obedience to a judgment ordering plaintiff to furnish particulars under certain paragraphs of the declaration, plaintiff has given evidence of his good faith in endeavouring to supply such particulars, the court will not grant defendant's motion for further particulars, more especially when defendant does not allege that such further particulars are necessary for his defence. Under such circumstances the court will grant act of defendant's motion for such further particulars, and reserve the latter's right to make any application for such delay of the enquête as may, in the discretion of the court, be necessary in justice to defendant, should the evidence adduced by plaintiff, owing to the absence of such further particulars, take defendant by surprise.

Conroy v. Conroy, 18 Rev. de Jur. 165.

SLANDER—NAMES—DATE.

In an action for slander, the plaintiff may be ordered to give particulars as to the names of the persons to whom the alleged slanders were uttered, and the date.

McMillan v. Levine, 25 Que. K.B. 206.

"UNJUST AND PREJUDICIAL" — MATTERS OF OPINION.

An allegation to the effect that something in respect of which complaint is made is "unjust and prejudicial" does not involve a question of fact, but is a matter of opinion, and does not permit of a demand of particulars for the purpose of ascertaining wherein it is unjust and prejudicial.

St. Martin v. Hebert, 50 Que. S.C. 262.

INSCRIPTION EX PARTE.

A motion for particulars not being a preliminary plea, the plaintiff may, on the day following the dismissal of such a motion, close the pleading and inscribe ex parte for trial.

Gagne v. Hushion, 17 Que. P.R. 386.

NOMINAL DAMAGES.

Particulars can only be demanded when the action is for special damages, not when it is for nominal damages.

Papineau v. Nickel, 17 Que. P.R. 346.

MOTIONS FOR—DELAY.

Although a demand for particulars ought not to be entertained when the facts are known or presumed to be known to both parties, yet, if there be no truth in such facts, the demand ought to be granted, as the adverse party might have reason to prepare for the contradiction of witnesses which might be heard against him. Such motion might also be refused, when from the whole of the facts alleged and by the attitude of the adverse party, it appears, that he is himself in possession of sufficient information, or means of obtaining information, and that he has no other object in seeking further particulars as to the facts alleged but that of indirectly obtaining delay. A defendant who moves for particulars, without asking that he should not be bound to file his plea until such particulars and the documents in support thereof have been produced and, moreover, without asking that the time for pleading should be enlarged till such production, but who merely prays that the motion should be heard on a date mentioned, is bound to plead to the merits before the expiration of that time whether or not the

particulars have been given. A motion for particulars, being of the nature of a preliminary exception, ought to be made within 3 days following the filing of the document which is attacked for want of precision.

Barnard v. Boulanger, 25 Que. K.B. 83.

MOTION FOR FURTHER PARTICULARS — RIGHT TO LIEN FOR TAXES — DESCRIPTION OF LANDS.

Sturgeon Falls v. Imperial Land Co., 19 O.W.R. 1011.

MOTION FOR PARTICULARS — BOTH PARTIES EXAMINED FOR DISCOVERY — ACTION FOR INFRINGEMENT OF PATENT — REASONABLENESS.

Williams v. Tait, 3 O.W.N. 307, 20 O.W.R. 483.

ACCIDENT POLICY — PLEADING — PARTICULARS.

O'Brien v. Canadian Casualty & Boiler Ins. Co., 12 Que. P.R. 261.

MOTION FOR PARTICULARS — DEFENDANT OUT OF COURT.

A defendant who has not filed his defence, and is barred of his right to do so, cannot obtain an order for supplementary particulars of the plaintiff's claim until he re-established himself.

Lérigé v. Sanoé, 12 Que. P.R. 148.

MOTION FOR PARTICULARS — STATEMENT OF CLAIM—DESCRIPTION TOO INDEFINITE.

Sturgeon Falls v. Imperial Land Co., 19 O.W.R. 757, 2 O.W.N. 1433.

J. PLEADING LAWS AND ORDINANCES.

(§ I J—71)—PLEADING LAWS—ACTS.

The provision in favour of free miners, embraced in s. 53 of the B.C. Mineral Act 1896, c. 34, exempting such class from suffering from any acts of omission or commission or delays on the part of any government official, must be specially pleaded before evidence in respect thereto can be received.

Lightning Creek v. Hopp, 17 D.L.R. 641, 28 W.L.R. 110, 19 B.C.R. 586.

K. JUDGMENT ON PLEADING.

See Judgment.

(§ I K—75)—PRELIMINARY QUESTIONS OF LAW.

A hearing by consent upon a submission of points of law before the trial, is authorized by Exchequer Court r. 126, only as to matters which appear upon the pleadings.

The King v. L'Heureux, 14 D.L.R. 604, 14 Can. Ex. 250.

JUDGMENTS ON — ADMISSIONS — ALTERNATIVE PLEADINGS.

A judgment will not be rendered under Sask. r. 311, on alleged admissions in defendant's pleading, if the latter, being in the alternative, still leaves all the facts in issue.

Marce v. McCall, 13 D.L.R. 424, 25 W.L.R. 47.

JUDGMENT EX PARTE — NO DEFENCE.

If a defendant does not file any defence within the prescribed delays, he is absolutely barred from pleading it, and the plaintiff may proceed to judgment ex parte, against him, without registering the certificate attesting his default to plead.

Vézina v. Clavet et al., 49 Que. S.C. 118.

INSCRIPTION IN LAW — DEFAULT OF ANSWER IN FACTS — C.C.P. 192, 200.

An inscription in law will not be dismissed on verbal demand for the sole reason that there is not annexed to it an answer concerning facts.

Provincial Fire Ins. Co. v. La Protection, 16 Que. P.R. 263.

L. RELIEF UNDER PLEADING.

(§ I L—80)—VENDOR AND PURCHASER — ASKING RIGHT TO REDEEM.

It is not necessary to ask expressly in the pleading for the usual time in which to redeem, in an action against the purchaser under an agreement of sale, for a declaration that the agreement of sale shall be declared cancelled and that the assignee be entitled to retain any moneys paid under it and to possession of the lands.

Pentland v. MacKissock, 9 D.L.R. 572, 23 Man. L.R. 1, 22 W.L.R. 947.

Where a conditional sale contract contains a stipulation that the conditional vendee shall upon his default be liable for any loss upon a re-sale, and the conditional vendor resumes possession and re-sells, the vendee if sued for the balance due without reference to the price realized upon the resale should plead the re-sale and his right to abatement in the price in order to enable the court to take an account of the vendor's expenses upon the resale, otherwise the court may award judgment for the amount claimed with a reservation to the vendee of his remedy in respect of the resale.

Gaar Scott v. Mitchell, 1 D.L.R. 283, 20 W.L.R. 6, 1 W.W.R. 762. [Affirmed, 8 D.L.R. 129, 22 Man. L.R. 474, 3 W.W.R. 19.]

ACTION FOR DISCOVERY.

To entitle the plaintiff to an action for discovery he must allege in his statement of claim some facts as to absence of knowledge on his part constituting a ground for such relief.

Kennerley v. Hextall, 9 D.L.R. 609, 5 A.L.R. 192, 23 W.L.R. 205, 3 W.W.R. 699.

(§ I L—81)—PRAYER FOR FURTHER RELIEF — SPECIFIC ALLEGATIONS.

A prayer in plaintiff's statement of claim asking for further relief is not sufficient to justify a separate kind of relief, different altogether from that suggested by the facts alleged and specifically claimed. [Cargill v. Bower, 10 Ch.D. 509, followed.]

Kennerley v. Hextall, 9 D.L.R. 609, 5 A.L.R. 192, 23 W.L.R. 205, 3 W.W.R. 699.

PRAYER — SUFFICIENCY — DECLARATORY ORDER.

A statement of claim is not open to ob-

jection on the ground that a merely declaratory judgment or order is sought.

Swift Current v. Leslie, 26 D.L.R. 442, 9 S.L.R. 19, 33 W.L.R. 528, 9 W.W.R. 1024.

M. Admissions.

(§ I M—95)—Admissions — Not strictly construed but moulded under the evidence.

In an action by plaintiffs for the price of goods supplied to defendant, where the defendant sets up an agreement of agency between the plaintiffs and himself and counterclaims to have an account taken of what moneys were still due in respect to that agency, and plaintiffs reply to the counterclaim that the contract of agency was entered into, but was subsequently annulled by the parties, and that thereafter the defendant purchased the goods in question, and ask in the alternative for a reference to ascertain what is due them from the defendant if the contract of agency was made and still exists, such admission by the plaintiffs under the modern practice in Manitoba will not be taken strictly against them, but will be moulded in accordance with the evidence adduced at the trial, especially where such evidence shews that there was only a proposition of agency between the parties which was never consummated because the parties failed to agree on the terms.

Gallagher v. Freedman, 10 D.L.R. 436, 23 W.L.R. 389.

Failure to plead — Admission by.

Failure to deny an allegation in the statement of claim that plaintiff is a physician "duly registered" is equivalent to an admission.

Johnston v. Halifax, 9 D.L.R. 220, 46 N.S.R. 474, 49 C.L.J. 157, 12 E.L.R. 251.

Admissions — Scope of issues.

Damages for wrongfully cutting timber on plaintiff's land is properly awarded against two codefendants, where no issue as to the sole liability of one of the defendants was raised at the trial and where the statement of defence admitted the responsibility of both for the cutting.

Field v. Richards, 11 D.L.R. 120, 4 O.W.N. 1301, 24 O.W.R. 606. [Affirmed, 13 D.L.R. 943, 5 O.W.N. 57.]

Divisibility.

When the defendant in an action for money lent does not plead payment, but admits, in an examination sur faits et articles, that he borrowed a certain sum from the plaintiff but reimbursed him with goods, the admission is divisible.

Quevillon v. Quevillon, 52 Que. S.C. 273.

Evidence — Admission — Divisibility of admission — Irrelevant facts — Commencement of proof in writing — Discretion of court.

A trial court, by deciding that there is a commencement of proof in writing giving a right to parol evidence, exercises a discretionary power, and Courts of Appeal should not reverse the judgment unless there is evident error. [Fournier v. Morin, 11 Q.L.R. 98.] An admission in the plea of a party sued for the recovery of a loan, stating that he received the money as a gift, may be divided if, in his testimony as witness, he acknowledges that on the donor's death he was to give the said sum to third parties; also if his answers are in bad faith and also if written documents from him, and containing admissions and promises incompatible with his plea, are filed. His divided admission is a commencement of proof in writing entitling the plaintiff to prove the loan by witnesses.

Malenfant v. Pelletier, 45 Que. S.C. 404.

N. Amendments of pleading.

(§ I N—110)—Amendment of statement of defence — When allowed.

After some of the defendants in an action have filed and served their defences they will be permitted to amend them where another defendant was absent from the province at the time such statements of defence were delivered, and it is shewn that upon his return he gave his codefendants information of which they wish to avail themselves in their defence.

Phillips v. Lawson, 11 D.L.R. 453, 24 O.W.R. 655.

Amendments after trial — Prior pleading not adopted.

Rescission of an agreement for the sale of land on other grounds than those set up in the pleadings may be decreed where evidence in support of such grounds on the part of the plaintiff was given at the trial without objection and the defendant in his evidence went fully into those questions, but such failure to plead will affect the disposition of the costs of the action, and any amendments of the pleadings necessary to effectuate this may be allowed (with or without application by the parties) at any stage of the trial.

Larson v. Rasmussen, 10 D.L.R. 650, 5 A.L.R. 479, 24 W.L.R. 239.

In an action, upon a bond, by a municipal corporation against a manufacturing company and its surety, where the defendant company seeks to amend its pleadings to dispute its execution of the bond, proper tests are (a) whether the fact is admitted by the record (b) whether the defect in execution is at best of a most technical character; and, governed by such tests, the application, in a proper case, will be denied.

Guelph v. Jules Motor Co., 8 D.L.R. 635, 23 O.W.R. 823.

The determination of a question touching the merits of the action should not be made on a Chamber motion, since there is a very limited right of appeal from Chamber orders and the proper policy is to have all questions both of law and fact disposed of at the trial.

Bristol v. Kennedy, 8 D.L.R. 750, 23 O.W.R. 685.

WHEN EFFECTIVE.

Under the Judicature Rules (N.S.), O. 28, rr. 7-10, merely making an entry of an order granting the amendment is sufficient even though no order is taken out; but the amendment must be made to give the defendant an opportunity to plead to it, and failure to do so within the prescribed period renders the order itself ipso facto void.

Sutherland v. Victoria Steamship Co., 27 D.L.R. 622, 50 N.S.R. 146.

MOTION FOR PARTICULARS—WRITTEN AGREEMENT—NECESSITY—DISMISSAL.

Ship v. Croker, 20 D.L.R. 978.

SPECIALLY ENDORSED WRIT OF SUMMONS—STATEMENT OF CLAIM TREATED AS AMENDMENT.

Dunn v. Phillips, 31 D.L.R. 274, 36 O.L.R. 580.

WHEN ACTION AT ISSUE—AMENDMENT OF PLEADINGS—APPLICATION FOR SPECIAL JURY.

Brown v. Telegram Printing Co., 8 D.L.R. 1026.

ALLEGATIONS OF FRAUD.

A plaintiff who in his pleadings carelessly alleges falsehood and fraud, on which ground the action is dismissed, there being no evidence of fraud, is not entitled to have such pleadings amended so as to give him the relief he might have been entitled to had the pleadings been properly drawn.

Twaites v. Morrison, 43 D.L.R. 73, 14 A.L.R. 8, [1918] 3 W.W.R. 349.

AMENDMENT OF—RULE 105—APPLICATION.

Royal Bank v. Nesbitt, 40 D.L.R. 166, 13 A.L.R. 408, [1918] 1 W.W.R. 766.

AMENDMENT OF DEFENCE—WORKMEN'S COMPENSATION ACT—FAILURE TO PLEAD.

Where at the time of the bringing of an action for damages for personal injuries the defendant is aware of a claim made by the plaintiff against another party for compensation under the Workmen's Compensation Act (Man.), but does not plead election of compensation by the plaintiff, he should not be allowed to so plead by amendment at the trial where it appears that the trial might have taken an entirely different course had the defendant raised the point by his defence.

Lechiw v. Sewrey, [1918] 2 W.W.R. 386.

DEED ATTACKED ON THE GROUND OF FRAUD—FRAUD NOT FOUND AT TRIAL—DEED SET ASIDE FOR IMPROVIDENCE—AMENDMENT NOT ASKED FOR OR MADE AT TRIAL—AMENDMENT MADE BY APPELLATE COURT NUNC PRO TUNC — RULES 183, 186 — COSTS.

McCartney v. McCartney, 15 O.W.N. 210.

INSCRIPTION IN LAW—EVIDENCE.

An inscription in law cannot be amended after an order has been given to furnish evidence before the inscription may be disposed of.

Labelle v. Ricard, 19 Que. P.R. 366.

OPPOSITION — NEW FACTS — AFFIDAVIT — DISMISSAL.

An opposition may be amended provided the new facts alleged are supported by an affidavit; it will not be dismissed as frivolous when on its face it invokes a title or right of ownership.

Stackhouse v. Lorimer, 19 Que. P.R. 448.

LEAVE TO AMEND AFTER CASE CLOSED.

Leave to amend the statement of claim, when asked bona fide, and when it can be made without injustice to the defendant, should be made on terms, even after the close of plaintiff's case.

McLean v. C.P.R., 33 D.L.R. 647, 12 A.L.R. 69, [1917] 1 W.W.R. 1466.

AMENDMENT OF DEFENCE ON APPEAL.

A defence which was not raised by the pleadings or considered by the Trial Judge is open to the defendant, by amendment on the appeal, where it rests upon facts disclosed at the trial by the plaintiff's own witnesses and in respect to which the plaintiff could not be prejudiced by the allowance of the amendment.

Jones v. Mackie, [1917] 3 W.W.R. 1021.

IN ACTION ON AGREEMENT OF SALE.

The plaintiffs asked for an amendment to their pleadings claiming in the event of failure to establish their right to enforce the agreement they should recover from the vendor all moneys paid under the agreement. Held, that the amendment to their pleadings should be allowed. [Steedman v. Drinkle, 25 D.L.R. 420, [1916] 1 A.C. 275, applied.]

Price v. Ruggles (Man.), 28 Man. L.R. 1132, [1917] 2 W.W.R. 1035.

SERVICE.

A plaintiff, who amends his writ while the court is in session and when an exception to the form is presented, is not obliged to serve such amendment, and the defendant who does not file his plea within the legal delays after such amendment is made is entirely barred of the right to do so.

Frank v. Magalnick, 18 Que. P.R. 277.

In making an amendment it should be made upon the document to be amended or a new document containing the amendment should be filed. In either case the amended document should be served on the opposite party.

Laperriere v. Paquet, 51 Que. S.C. 99.

RELATING BACK — NOTE — EXCEPTION TO FORM.

An amendment to a declaration relates back, as to its effect, to the time of service of the writ. It interrupts the prescription which without it the defendant would have been able to acquire. The defendant, in an action founded on a note, wishing to take advantage of an omission of the plaintiff to allege that he had signed the note, should do so by an exception to the form or a motion for particulars and not by inscription in law.

Gautier v. Lowe, 52 Que. S.C. 276.

STATEMENT OF CLAIM—MISTAKE—MOTION TO AMEND.

Sheardown v. Good, 23 O.W.R. 949.

ACTION FOR DOWER AGAINST EXECUTORS—APPLICATION OF PLAINTIFF AT CLOSE OF TRIAL FOR LEAVE TO AMEND BY ADDING A NEW CLAIM — AMENDMENT ALLOWED ON TERMS — DIRECTIONS FOR TRIAL.

O'Connor v. Fitzgerald, 16 O.W.N. 70.

STATEMENT OF DEFENCE—MOTION FOR LEAVE TO AMEND BY ALLEGING FRAUD IN BRINGING OF ACTION—CONTRACT—DISCOVERY—LEAVE REFUSED.

Delap v. C.P.R. Co., 5 O.W.N. 850.

AMENDMENT FOR PURPOSE OF JURISDICTION—TRANSFER OF CAUSE.

If a declinatory exception is filed asking that the record be sent to the court of the place where the contract was made, where the defendant has his domicile, and where the action was served on him, the plaintiff cannot by an amendment prevent the operation of this declinatory exception. If a motion to amend is made by the plaintiff for the purpose of giving jurisdiction to the court of the district in which the action was irregularly brought, this court must first take cognizance of the declinatory exception, and, if it is granted, the court will have no longer jurisdiction to adjudicate upon a motion to amend. [See Stewart v. Jubb, 47 Que. S.C. 366.]

Trudeau v. Beaudet, 47 Que. S.C. 401.

All amendments to pleadings must be made before judgment. The Court of Review cannot grant a motion to amend the declaration.

McDonald v. Saunderson, 50 Que. S.C. 422.

AMENDMENT OF DECLARATION—JUDGE'S PERMISSION—C.C.P. 513.

A plaintiff who has received a motion for particulars may file an amendment to his declaration without obtaining permission from the judge, as it is the first time he amends, but such an amendment is an admission that the motion for particulars is well founded.

Wener v. Garneau, 16 Que. P.R. 100.

AMENDMENTS AFTER JOINDER OF ISSUE.

A party cannot be permitted to change, in joining issue, the grounds of his claim or defence after the action has been served and the plea has been filed.

Bacon v. Providence, Washington Insurance Co., 47 Que. S.C. 71.

AMENDMENT — WHEN ALLOWED — CHANGING ACTION—C.C.P. 522.

The character or nature of an action is determined by its conclusions. An amendment will not, therefore, be allowed to change a personal action into an hypothecary action.

Chaurest v. Wolman, 16 Que. P.R. 105.

ISSUES RAISED AT THE TRIAL AND ON APPEAL NOT IN THE PLEADINGS—AMENDMENT—ACTION ON PROMISSORY NOTE—BILLS OF EXCHANGE ACT, R.S.C. c. 119, s. 21, subs. 5.

In an action on a promissory note given for shares in a company, the only defence at the trial and the only ground of appeal, raised by the pleadings, was that "there was no promissory note payable to the order of the plaintiff." The defendant sought to set up, at the hearing of the appeal, that the note sued on was not a promissory note, and introduced issues not raised by the pleadings by arguing that the plaintiff company was not incorporated at the time the note was given, and that before the note was handed over to the plaintiff company, he withdrew his application for shares:—Held, that neither of these questions could be argued under the above ground of appeal:—Held, that the pleadings could not be amended, since neither of the above questions was raised therein and since no evidence was given at the trial upon said questions.

Imperial Rural Telephone Co. v. Baade, 29 W.L.R. 379, 7 S.L.R. 243.

TRIAL—AMENDMENT NEAR CLOSE OF TRIAL — NOT PROPERLY ALLOWED — GROUNDS OF JUDGMENT NOT ESTABLISHED BY EVIDENCE—JUDGMENT REVERSED ON APPEAL — OBLIGATION OF EXONERATION AND CONTRIBUTION BY COPRINCIPALS TOWARDS AGENT.

Plaintiffs brought action to set aside a judgment obtained against them by defendants in a former action for contribution in respect of certain costs of legal proceedings incurred by defendants as trustees on their behalf. The Trial Judge found that plaintiffs did assume a liability for a share of the costs as sued for in the former action, thus finding against them on the issues raised by the pleadings, but at the close of the evidence for the defence near the end of a long trial he allowed an amendment pleading, and subsequently gave plaintiffs judgment on the grounds that the said costs (for a share of which he found plaintiffs) were discharged by defendants' settlement with and release of certain other parties against whom also defendants had at one time claimed payment, and further that defendants, being trustees, had received certain moneys on account of the trust for which they had not accounted. The appellate division reversed this decision on the ground that at that stage of the trial such amendment should not have been granted (especially as it was objected to) and in any case the evidence did not establish the said grounds. Per Beck, J.: The case is one of agents asking exoneration and contribution from their principals. Such obligation of principals is not, strictly speaking, that of contractors. It is one which was raised by the Court of Chancery and ultimately recognized by

common-law courts on the principle of an implied contract; but it always remained an obligation based on equity to do what was just in the circumstances by way of exoneration and contribution. There is no reason in justice nor in law why the release of one coprincipal should release another coprincipal from his obligation to exonerate and contribute to the extent to which he would have been ultimately liable had the one coprincipal not been released. Malowany v. Pasemko, [1919] 1 W.W.R. 553.

PARTIES — ADDING NEW DEFENDANT — AGAINST WISH OF PLAINTIFF — NOT NECESSARY TO DETERMINE MATTERS INVOLVED.

National Trust Co. v. Trusts & Guarantee Co., 20 O.W.R. 379.

(§ I N—111)—AMENDMENT—ALLEGATIONS DEFECTIVE, EVIDENCE SUFFICIENT.

Where a statement of claim is defective in that it does not fully disclose a cause of action, but the evidence does shew a cause of action, and there is no surprise of the opposite party, the Trial Judge should amend if he thinks an amendment necessary.

Stitt v. C.N.R. Co., 10 D.L.R. 545, 23 Man. L.R. 43, 15 Can. Ry. Cas. 333, 23 W. L.R. 641, 3 W.W.R. 1116.

DEFENCE OF FRAUD—REPUDIATION.

Where in an action on lien notes the statement of defence incompletely sets up fraud owing to the failure of alleging repudiation of the contract on account of the fraud, the court, by virtue of s. 30 (7) of the Judicature Act and r. 253, should, for the complete settlement of controversies and avoiding their multiplicity, allow an amendment of the defence to enable the introduction of evidence in support thereof. [Kurtz v. Spence, 36 Ch. D. 770; Tildesley v. Harper, 10 Ch. D. 393, applied.]

International Harvester Co. v. Smith, 26 D.L.R. 102, 9 S.L.R. 46, 33 W.L.R. 540, 9 W.W.R. 1033.

WHAT AMENDMENTS ALLOWABLE, GENERALLY —CONSENT.

Where a plea of general denial is filed in order not to retard the hearing of the case which is to be inscribed for proof and hearing with the understanding that such plea may be replaced later at any time before the trial by a special plea, and the case is inscribed on the roll in the ordinary way, then such agreement precludes the option for a trial by jury on the special plea filed later by consent.

C.N.R. Co. v. Levine, 4 D.L.R. 233, 21 Que. K.B. 521.

STATEMENT OF CLAIM—EX PARTE AMENDMENTS—WHAT ALLOWABLE — ENDORSED WRIT.

The ex parte right to once amend conferred, by r. 127, Ont., on the plaintiff, does not permit an amendment to the statement of claim which alters, modifies, or extends the claim endorsed on the writ under r. 32, so as to introduce a new cause of action.

Snider v. Snider, 16 D.L.R. 720, 30 O.L. R. 105.

DEFECTIVE PLEA OF USURY.

It is the duty of the court, in order that justice be done, no matter how bad or defective a defence of usury appears, to grant such amendments as are necessary to raise the real questions in dispute.

Stuart v. Boswell, 26 D.L.R. 711, 50 N.S. R. 16.

LIBEL—JUSTIFICATION.

The pleadings in a libel action must define the issue which is being tried, and a defendant, upon a plea of justification, is limited to proving the truth of his assertion, and cannot be allowed, to the prejudice of the plaintiff, to amend the plea and adduce evidence raising a totally different issue.

Govenlock v. London Free Press Co., 26 D.L.R. 681, 35 O.L.R. 79.

INCONSISTENCY WITH ENDORSEMENT ON WRIT OF SUMMONS—AMENDMENT—VALIDATION OF PLEADING—COSTS.

Chapman v. McWhinney, 5 D.L.R. 881, 23 O.W.R. 3.

LEAVE TO AMEND—ACTION ON COVENANT—ILLEGAL CONSIDERATION—R.S.C. 1906, c. 115, s. 20.

On an application to amend the defence, where it appears that an arguable question has been raised by the proposed amendment, the application should be granted.

Woods v. Forsyth, 25 B.C.R. 427.

STATEMENT OF DEFENCE — AMENDMENT — JUDGMENT.

Steinberg v. Abramovitz, 25 O.W.R. 89.

STATEMENT OF CLAIM—LEAVE TO AMEND—CHARGING ACTS IN FURTHERANCE OF CONSPIRACY.

St. Clair v. Stair, 24 O.W.R. 764.

STATEMENT OF CLAIM — APPLICATION TO AMEND BY ADDING CLAIM FOR TORT—STALE CLAIM — PREVIOUS ACTION FOR SAME CAUSE—HUSBAND AND WIFE.

Jordan v. Jordan, 24 O.W.R. 525.

STATEMENT OF DEFENCE—ACTION TO ESTABLISH WILL—CLAIM TO PROPERTY STANDING IN NAME OF TESTATOR—COUNTERCLAIM—AMENDMENT.

Re McLaulin; McDonald v. McLaulin, 24 O.W.R. 448.

COUNTERCLAIM — PUIS DARREIN CONTINUANCE — PLAINTIFF FILING COUNTERCLAIM AGAINST DEFENDANT'S COUNTERCLAIM.

Snider v. Minnedosa Power Co., 25 W. L.R. 443.

DEFENCE TO COUNTERCLAIM—STRIKING OUT AS EMBARASSING—LEAVE TO AMEND.

Mitchener v. Sinclair, 25 O.W.R. 296.

ALIMONY—STATEMENT OF CLAIM.

Bulmer v. Bulmer, 11 O.W.N. 180.

CONCLUSIONS—ACCOUNT AND PAYMENT.

A plaintiff will be permitted to amend

the conclusions by withdrawing all that relates to a demand for an account, contenting himself with the conclusion which demands a condemnation pure and simple for payment for a sum of money.

Black Lake Consol. Asbestos Co. v. Slade, 18 Que. P.R. 18.

ADDING ALLEGATION AS TO EXPENDITURES UPON MORTGAGED PREMISES.

An absolutely distinct and different cause of action from that set up in the original claim cannot be set up in an amended claim without leave of the court. A mortgagee in possession, who has asked for foreclosure in his original claim may allege by amendment an expenditure of money upon permanent improvements to the mortgaged property.

Baudistel v. Sinton, 9 W.W.R. 291.

AMENDMENT OF OPPOSITION TO SEIZURE.

An opposition for withdrawal from seizure like any other legal proceeding, may be amended, but the amendment itself should be made under oath.

Goult v. Gratton, 47 Que. S.C. 465.

STATEMENT OF CLAIM — AMENDMENT — PREJUDICE — REFUSAL OF MOTION IN CHAMBERS—LEAVE TO RENEW AT TRIAL.

Delap v. C.P.R., 8 O.W.N. 293.

No admissible amendment to pleading material to the case of the party applying therefor should be refused unless the opposite party cannot be compensated by costs. An application to amend a pleading should be refused if the matter proposed to be pleaded would constitute no ground of action or defence as against the other side.

Att'y-Gen'l v. Winnipeg Electric R. Co., 5 D.L.R. 823, 22 Man. L.R. 761, 21 W.L.R. 906, 2 W.W.R. 854.

SLANDER—DATE WHEN WORDS SPOKEN—APPLICATION TO AMEND — CHANGE TO EARLIER DATE.

Ebeling v. Bucknell, 19 W.L.R. 556.

EXHIBITS TO DECLARATION—COPY FILED INSTEAD OF ORIGINAL—MOTION TO REJECT.

Blouin v. Blouin, 12 Que. P.R. 309.

(§ I N—112)—AMENDMENTS—NEW CAUSE OF ACTION.

Where the plaintiff at the trial applied to amend his pleadings so as to add a claim in detinue to an action of trespass and the case proceeded without the matter of amendment being decided, but evidence directed to the detinue claim and to its answer was taken, the plaintiffs who thereafter rely upon their pleading being considered as amended and are so treated will not be heard to object to the defence being also taken as having been amended by the insertion of a plea setting under a jus tertii to which the evidence was directed but which was not pleaded to the original claim of trespass as it would have been no answer thereto.

Eastern Construction Co. v. National Trust Co.: National Trust Co. v. Miller, 15 D.L.R. 755, [1914] A.C. 197, 110 L.T. 321.

SETTING UP NEW CAUSE—LIMITATIONS—ORIGINAL CONSIDERATION—NOTE.

The principle, that a claim cannot be amended as introducing a cause of action which had become barred by limitations since the issue of the writ, has no application to a case where in an action on a promissory note an amendment of the statement of the claim setting up the original consideration is allowed, though between the date of issuing the order, allowing the amendment and the actual taking out of the order limitations had meanwhile intervened. [Hudson v. Fernyhough, 61 L.T. 722; Weldon v. Neal, 19 Q.B.D. 394, distinguished.]

Cameron v. Hattie, 26 D.L.R. 496, 49 N.S.R. 456.

NEW CAUSE—EFFECT ON COLLATERAL PROCEEDINGS.

A right arising since the commencement of the action may by leave of court, be set up by way of amendment of the statement of claim, particularly where it makes it necessary to continue interim or collateral proceedings, such as the continuance of an injunction growing out of the action.

Robertson v. Wilson, 24 D.L.R. 274, 8 W.W.R. 1068, 31 W.L.R. 708.

NEW CAUSE—CHANGE OF STATUS OF SURETY

A statement of claim in an action to set aside a fraudulent conveyance commenced by a principal and surety may be amended as shewing the change of status of the surety after the commencement of the action. [Stone v. Theatre Am. Co., 14 D.L.R. 62, applied.]

Robertson v. Wilson, 24 D.L.R. 274, 8 W.W.R. 1068, 31 W.L.R. 708.

OF COUNTERCLAIM—PUIS DARREIN CONTINUANCE.

Under r. 338 of the King's Bench Act, R.S.M. 1902, c. 40, a defendant may, in a proper case, be allowed his counterclaim previously filed by setting up a number of causes of action for damages alleged to have arisen since the counterclaim was filed, and such amendment should be allowed if it would not put the plaintiff in such a position that he could not be compensated in costs or otherwise. Winnipeg v. Winnipeg Electric R. Co., 19 Man. L.R. 279]. The plaintiffs had judgment in the action for $3,600, with leave to bring another action for the balance of their claim, a large portion of which had only accrued since the commencement of the action, and they could not, therefore, introduce their new claim in this action by amending their statement of claim. Held, that these circumstances were not such that the allowance of the amendment asked for would inflict upon the plaintiffs an injustice for which they could not be compensated, because they might either counterclaim, at least to the extent of a full set to the latter, under Toke v. Andrews, 8 Q.B.D. 428, and Renton Gibbs & Co. v. Neville & Co., [1900] 2 Q.B. 181, or they might commence

a new action, and then move to consolidate the two actions or have them tried together, or for such other relief as would prevent the defendants from enforcing any judgment for damages in their action pending the result of the new action if diligently prosecuted.

Snyder v. Minnedosa Power Co., 23 Man. L.R. 750, 5 W.W.R. 151.

An amendment setting up a new cause of action that has accrued to the plaintiff since the issue of the writ should not be allowed.

Dominion Investment Co. v. Carstens, 9 S.L.R. 238, 34 W.L.R. 323.

Amendments to the statement of claim which would change the action into one of a substantially different character, and introducing new matters which would more conveniently be the subject of a fresh action, should not be allowed.

London Guarantee v. Henderson, 26 Man. L.R. 568.

(§ I N—113)—AMENDMENT—ADDITION OF CLAIM FOR REFORMATION OF AGREEMENT—CONFORMITY OF AMENDMENT TO ORDER GIVING LEAVE TO AMEND—SUFFICIENCY OF ALLEGATIONS.

Rogers v. National Portland Cement Co., 10 D.L.R. 830, 24 O.W.R. 361.

BEFORE TRIAL.

An amendment of the statement of claim consisting of the substitution of the word "train" for "motor-car" will be allowed if the defendant is not thereby prejudiced in going to trial on the date fixed.

Mercer v. B.C. Electric R. Co., 7 D.L.R. 405, 22 W.L.R. 234, 2 W.W.R. 1102.

Where an amendment is served under art. 514 C.C.P. (i.e., as of right without leave of the court) the delays for peremption are not suspended pending the filing of the amended pleading, and if two years elapse without further proceedings being taken the suit will be dismissed on the motion of the defendant (art. 379).

Samson v. Montreal, 3 D.L.R. 424.

STATEMENT OF DEFENCE—ADMISSION MADE IN MISTAKE.

Northern Sulphite Mills v. Occidental Syndicate, 19 O.W.R. 69.

STATEMENT OF CLAIM—RELIEF SOUGHT BEYOND CLAIM ENDORSED ON WRIT OF SUMMONS — INCONSISTENT RELIEF — AMENDMENT.

Grice v. Bartram, 20 O.W.R. 243.

(§ 1 N—114)—AMENDMENT OF STATEMENT OF CLAIM ON TRIAL.

Where a formal inspector's certificate of completion of a construction contract is waived by the defendant by treating an informal certificate as sufficient, an amendment of the plaintiff's pleading will be permitted at the trial so as to allege such waiver.

Pigott v. Battleford, 12 D.L.R. 171, 6 S.L.R. 235, 24 W.L.R. 365.

ON THE TRIAL.

Leave to amend a pleading will be refused if the claim or objection sought to be added does not appear to be well founded.

Brown v. Bannatyne School District, 2 D.L.R. 264, 22 Man. L.R. 260, 21 W.L.R. 80, 2 W.W.R. 176.

The plaintiffs, a firm of real estate brokers, in an action for the specific performance of a contract to sell lands, may be permitted at the trial thereof to amend their statement of claim so as to shew that such agreement was made in the name of a member of the firm for its benefit.

Edgar v. Caskey, 4 D.L.R. 460, 5 A.L.R. 245, 21 W.L.R. 444, 2 W.W.R. 413.

Where the plaintiff sues for specific performance of an alleged agreement for the sale of lands, and where the agreement as to price was in writing and as to terms oral, the defendant may, at the trial, be allowed to amend his statement of defence so as to plead the Statute of Frauds.

Clement v. McFarland, 8 D.L.R. 226, 23 O.W.R. 613.

An amendment may be granted, on the trial of an action for malicious prosecution, to strike out the word "feloniously" from the plaintiff's statement of claim, in respect of an allegation that the defendant charged the former with having feloniously stolen a watch, to conform with the information laid by the defendant charging the plaintiff with fraudulently and without colour of right converting it to his own use under s. 347 Cr. Code, since the act so charged constituted the statutory offence of theft or stealing, whether or not it was a felony.

Wood v. Newby, 5 D.L.R. 486, 4 A.L.R. 333, 21 W.L.R. 438, 2 W.W.R. 409.

Where the plaintiff in his statement of claim upon a sale and delivery of seed grain does not allege the exact ground of action, whether misrepresentation and deceit or breach of contract or both, but does bring out all the facts basing his action, thus sufficiently informing the defendant what the real complaint is so that the defendant cannot be prejudiced by a proper amendment, such an amendment may be made during the trial to allege a breach of warranty so that a more satisfactory ground of action may be laid under ss. 13 to 17 inclusive of the Sale of Goods Ordinance, N.W.T. Ord. (Alta.), 1911, c. 39, when those sections are applicable.

Carstadt Development Co. v. Alberta Pacific Elevator Co., 7 D.L.R. 200, 4 A.L.R. 366, 21 W.L.R. 433, 2 W.W.R. 404.

Where a petition of right to recover from the Crown compensation for land taken and for resulting damages to property by reason of the erection of ice piers on and opposite the suppliant's land, makes a claim both for the value of the land taken and for damages, an amendment at the

close of the case claiming the value of the land taken and offering to waive expropriation proceedings and convey to the Crown the land taken upon a certain sum being paid over to the suppliant as compensation for the land, is unnecessary and will be refused.

Pickels v. The King, 7 D.L.R. 698, 14 Can. Ex. 379.

AMENDMENTS ON THE TRIAL—NEW THEORY FOR PLAINTIFF DEVELOPED BY DEFENDANT'S EVIDENCE—NEGLIGENCE ACTION.

In an action for damages for the death of an employee by reasons of the alleged negligence of the defendant employer, where there were no eye-witnesses to the accident, the plaintiff may, after verdict, be allowed to amend his pleadings to enable him to set up negligence on a different theory from that already set up, where such amendment is consistent with the facts as developed in the course of the evidence of the defendant's employees and witnesses and with the answers returned by the jury to questions submitted.

Falconer v. Jones, 10 D.L.R. 178, 24 O.W.R. 18.

AMENDMENT AT TRIAL—PLEA OF FRAUD.

Unless there are exceptional circumstances, an amendment will not be allowed on the trial for the purpose of adding a plea of fraud where fraud has not been pleaded in the first instance.

Mackenzie v. Gray, 17 D.L.R. 769, 7 S.L.R. 115, 28 W.L.R. 322, 6 W.W.R. 914.

CROWN—AMENDMENT—CROWN'S PREROGATIVE.

Under s. 11 of the Manitoba Petition of Right Act notwithstanding the omission of the proviso contained in the corresponding section of the English Act, it is not meant to restrict the royal prerogative any more than under the English Act which has not taken away the Sovereign's prerogative in the matter of pleading and procedure; and the Crown may amend its pleadings at any time. Where for reasonable cause counsel was not aware of the actual facts when he framed his original defence, and there is no element of surprise, an amendment, even though of material nature, should be allowed at the trial under the general rules and practice.

Canadian Domestic Engineering Co. v. Regem, [1919] 2 W.W.R. 762.

An application to amend a pleading should be refused where the application is made at the conclusion of the evidence and the truth of the allegations sought to be introduced is not borne out by the evidence. In an action by a city in its own right and by the Attorney-General on the relation of the city and its building inspector against an electric railway company to restrain the breaches of certain city by laws concerning the erection of buildings and any gas works or gas holders within the city, in which action the company claimed that by virtue of the powers derived from another company it was not subjected to the by-laws and also denied the validity of the by-laws, and at the opening of the trial applied to amend its defence by pleading that the plaintiffs, by the judgment of the Privy Council in the company's favour in a former action which the city alone brought against the company and in which the issues were similar to those in the present action, were estopped from denying that the company possessed all the powers of its predecessor, the amendment was allowed as against the city and an opportunity given the company of proving it.

Att'y-Gen'l v. Winnipeg Electric R. Co., 5 D.L.R. 823, 22 Man. L.R. 761, 21 W.L.R. 906, 2 W.W.R. 854.

AMENDMENT AT TRIAL—DELAY.

DeVenne v. Warren, 45 N.S.R. 8, 8 E.L.R. 453.

(§ I N—116)—CHANGING GROUNDS AFTER JOINDER OF ISSUE.

A party cannot be permitted to change, in joining issue, the grounds of his claim or defence after the action has been served and the plea has been filed.

Bacon v. Providence, Washington, Ins. Co., 47 Que. S.C. 71.

(§ I N—118)—AMENDMENT—AFTER TRIAL—ALLOWABLE ON WHAT TERMS.

Under the Manitoba practice, a plaintiff will be allowed to amend his statement of claim at the close of the case where it appears that no injury or prejudice can be occasioned to the defendant thereby and where the imposition of costs will properly compensate the defendant therefor, but the defendant will be given time to file his defence to the amended statement of claim and the case will be reopened, if required, to admit further evidence in regard to any new matter raised by the amendment and the defence thereto. [Lee v. Gallagher, 15 Man. L.R. 677, followed.]

Scandinavian American National Bank v. Kneeland, 11 D.L.R. 243, 23 Man. L.R. 480, 24 W.L.R. 139, 4 W.W.R. 564.

AMENDMENT AFTER VERDICT, OR TRIAL — JUDGMENT — ON MOTION TO VARY REPORT.

A request, after judgment dismissing an action, to permit an amendment so as to allege an alternative claim, not originally pleaded, was rightfully denied.

Davis v. Lowry, 3 D.L.R. 157, 20 W.L.R. 839, 2 W.W.R. 169.

Leave to amend a statement of claim from which was inadvertently omitted particulars of the plaintiff's damages, will be granted by the Supreme Court of Alberta, on an application to vary the findings of the clerk of the court as to assessment of damages, where such omissions was not discovered until the hearing of such application.

Lavallee v. C. N. R. Co. 4 D.L.R. 376, 4 A.L.R. 245, 20 W.L.R. 547, 1 W.W.R. 913.

AMENDMENTS—AT CLOSE OF TRIAL.

Where a plaintiff suing for purely equitable relief is shewn to be disentitled thereto because of his own reprehensible conduct in the transaction, and his claim at law, if any, is contingent upon a future payment by an other of certain purchase money, the plaintiff's action should be dismissed without permitting him to amend his pleadings so as to obtain a declaration of such contingent legal rights; the court, under such circumstances should leave the plaintiff to establish such rights by action at law after they shall have accrued.

McCormick v. Triggs, 9 D.L.R. 681, 23 W.L.R. 183, 3 W.W.R. 852.

AMENDMENT AFTER CONTESTATION—CHANGING NATURE OF ACTION—AMENDMENT OF PLEADINGS.

Andrews v. Compagnie des Chars Urbains de Montreal, 40 Que. S.C. 499.

(§ I N—119)—TO JOIN ASSIGNEES IN FORECLOSURE ACTION.

The nonjoinder of an assignee of a purchaser as a party defendant to an action for foreclosure of the contract may be cured by amendment. [King v. Wilson, 11 B.C.R. 109, applied.]

Gale v. Powley, 24 D.L.R. 450, 22 B.C.R. 18, 32 W.L.R. 65, 8 W.W.R. 1312.

ALTERNATIVE CLAIM.

Where in an action on a promissory note, some of the makers of which are infants, the plaintiff claims as upon a joint contract only, but the note is on its face both a joint and several promise to pay, the plaintiff should, if necessary, be permitted to amend his statement of claim by claiming alternatively against the defendants severally. The effect of rr. 29, 35 of the Judicature Ordinance renders the principle laid down in Chandler v. Parks, 3 Esp. 76, and Boyle v. Webster, 17 Q.B. 950, 21 L.J.Q.B. 202, 16 Jur. 683, no longer applicable.

Park v. Pullishy, 3 A.L.R. 340.

AS TO PARTIES—AFFIDAVIT.

A motion to amend, which contains allegations of fact, should be supported by the affidavit required by r. 47 of the Rules of Practice of the Superior Court. An amendment substituting one defendant for another cannot be granted: e.g., to amend a writ of summons in which the defendant is designated as "The Three Rivers Annex Land Company, a body politic," to read, "Emilie Halin of the City of Three Rivers, doing business under the name and style of the Three Rivers Annex Land Co."

Simard v. Three Rivers Annex Land Co., 52 Que. S.C. 421.

SUBSTITUTION OF PARTIES.

The substitution of one defendant for another, without having recourse to the ordinary method of summons, will not be allowed under pretence of amendment.

Ellis v. Griale, 19 Que. P.R. 332.

PARTIES—TRUSTEE.

Amendment of a statement alleging that the plaintiff sued as trustee for creditors may be properly allowed.

Hellekson v. Harrington, 10 W.W.R. 968.

(§ I N—121)—AFFECTING JURISDICTION.

A plaintiff will be allowed to amend his statement of claim in an action for personal injuries by amplifying an alternative claim made therein under the Employers' Liability Act, although the statutory period within which an action under that Act must be brought has expired.

Mercer v. B. C. Electric R. Co., 8 D.L.R. 144, 17 B.C.R. 465, 22 W.L.R. 691, 3 W.W.R. 190, reversing 7 D.L.R. 405, 22 W.L.R. 234, 2 W.W.R. 1102.

Plaintiff will be allowed to amend his declaration so as to include an item necessary to complete the amount mentioned in the conclusions of the action and omitted by error from the body of such declaration. It is not by an inscription in law, but by a declinatory exception that a defendant may deny the jurisdiction of the Superior Court to hear an action, on the ground that plaintiff has only set forth in the body of the declaration items aggregating to a sum under $100.

Morin v. Paquet, 13 Que. P.R. 195.

(§ I N—123)—TERMS — REASONABLENESS —RETRIAL.

Terms imposed by the court when allowing an amendment, that the whole action be retried and that the costs thereof be paid forthwith, are not unreasonable, and having been rejected by declining to accept the amendment and proceeding with the action, there can be no further relief.

Assiniboia Land Co. v. Acres, 27 D.L.R. 103, 9 S.L.R. 142, 34 W.L.R. 199, 10 W.W.R. 355, affirming 25 D.L.R. 439, 8 S.L.R. 426, 32 W.L.R. 580, 9 W.W.R. 368.

TERMS.

A motion by plaintiff to so amend her declaration that her action should be founded, not only upon her community rights, as set forth in the action, but upon the will of her late husband instituting her his universal legatee, will be dismissed as changing the nature of the demand.

Legarè v. Verret, 13 Que. P.R. 298.

TERMS.

If a defendant obtains, in the course of a suit, permission to amend his defence by adding an important paragraph, he ought to pay, besides the fees on the motion, a fee of $10 and also the difference between the fees provided by arts. 17, 19 of the tariff, and the costs of the witnesses, if the plaintiff wants an adjournment, but not the fee provided by art. 5 of the tariff for contested or non-contested cases above $2,500.

Chene v. Chene Heirs, 15 Que. P.R. 372.

(§ I N—124)—STRIKING OUT REINSERTION IN ANOTHER FORM, HOW TREATED.

An order striking out paragraphs of a pleading precludes their reinsertion in another form in an amended pleading under cover of leave reserve to plead "any matters

which may properly be pleaded in aggravation of damages."

Hallren v. Holden, 20 D.L.R. 336, 20 B. C.R. 489, 29 W.L.R. 802, 7 W.W.R. 462.

STRIKING OUT—DISALLOWING.

Where a plaintiff without leave files and serves an amended statement of claim pursuant to Alberta r. 179, the defendant if dissatisfied should move to disallow the same under r. 181.

Horne v. Jenkyn, 6 D.L.R. 54, 5 A.L.R. 359, 2 W.W.R. 929.

MOTION TO STRIKE OUT STATEMENT OF CLAIM —VEXATIOUS AND FRIVOLOUS.

Baxter v. Young, 20 O.W.R. 736.

MOTION TO STRIKE OUT—ACTION TO HAVE AWARD DECLARED BINDING.

Great Northern Elevator Co. v. Manitoba Ass'ce Co., 18 O.W.R. 907.

STATEMENT OF CLAIM—MOTION TO STRIKE OUT PARTS—SHEWING NO CAUSE OF ACTION — EMBARRASSING — NO IMPROPER JOINDER OF CAUSES OF ACTION.

Hodgins v. Dixon, 20 O.W.R. 383.

STATEMENT OF CLAIM—MOTION TO STRIKE OUT CERTAIN PARAGRAPHS AS EMBARRASSING, FRIVOLOUS AND IRRELEVANT —DISCLOSING NO CAUSE OF ACTION.

Holland v. Hall, 20 O.W.R. 114.

P. FILING AFTER DEFAULT; TIME.

(§ I P—130)—The party seeking to file objections after the lapse of the time limited by statute should apply for an order of extension, and if he files his objections late and without leave and the opposing party moves to strike them out, the filing will be allowed to stand only upon terms of paying the costs of the motion to strike out. [Eaton v. Storer, 22 Ch. D. 91, followed.]

Re Provencher Election: Barkwill v. Molloy, 1 D.L.R. 84, 19 W.L.R. 794, 22 Man. L.R. 6, 1 W.W.R. 463.

Where a consent to file a pleading is given after the expiry of the legal delays, but before the right to a jury trial is forfeited, such consent has an interruptive effect on these delays and the plaintiff has three days from such consent to move for a jury trial. But a consent to file a pleading after the right to a jury trial has lapsed will not make this right revive. [Matthews v. Westmount, 6 Que. P.R. 52; Asselin v. Montreal Light, Heat & Power Co., 7 Que. P.R. 218; Anderson v. Norwich Fire Ins. Co., 17 Que. K.B. 361, distinguished; St. Paul Electric Light & Power Co. v. Quesnel, 12 Que. P.R. 158, followed.]

C.N.R. Co. v. Levine, 4 D.L.R. 233, 21 Que. K.B. 521.

STATEMENT OF CLAIM—FILING TIME.

The court has a discretion to permit a statement of claim to stand where the Statute of Limitations has not intervened, although the statement of claim was delivered too late under the Ont. Con. Rules 1913, and notwithstanding that this was deliberately done for the purpose of avoiding a trial at the first available assize.

Schuch v. Meldrum, 22 D.L.R. 741, 7 O. W.N. 690.

EXTENSION OF TIME OF DELIVERY—SPECIAL GROUNDS.

Delap v. C.P.R. Co., 6 D.L.R. 868, 23 O.W.R. 177.

PRACTICE—APPEAL—FAILURE TO ENTER IN TIME—APPLICATION TO SET DOWN—SPECIAL CIRCUMSTANCES.

On giving notice of appeal, an appeal book was left with respondents' solicitor for approval when appellant was advised the book would be approved upon security for costs being put up. Nothing further was done for 4 weeks, when appellant on the 4th day prior to the last day for setting the case down, called for the appeal book. The book had been mislaid in respondents' office but appellant was reminded that security for costs had not been put up. Appellant then perfected the security and submitted another copy of the appeal book which was approved and returned to the appellant who, on the following day (the day prior to the last day for entry), applied to the registrar at Vancouver for entry of the appeal, but was advised the books had to be approved by the registrar at Nanaimo. They were immediately sent to Nanaimo for approval but arrived back in Vancouver 3 days late. Application was then made to set the case down for hearing. Held that as the parties were at arm's length, the failure of the appellant to send the books to Nanaimo in time for their return and entry was no excuse for failure to comply with the statute and the application should be refused.

Bouch v. Rath, 26 B.C.R. 320.

An order having been made, on the application of the plaintiff, striking out the defendant's statement of defence, unless he should file an affidavit of documents within ten days, and an affidavit of the defendant not having been filed within the ten days, the plaintiff moved for judgment as if the statement of defence had been struck out: —Held, that it was not too late for the defendant to come in and remedy his default, and he should be allowed to do so on proper terms. [Whistler v. Hancock, 3 Q. B.D. 83, and Farden v. Richter, 23 Q.B.D. 124, distinguished.] Held, also, that the affidavit of the defendant's solicitor could not be accepted in lieu of that of the defendant, although the defendant was absent beyond the seas.

Keay v. Brunner, 25 W.L.R. 500.

TIME OF PLEA—ACTION FOR RENT—DECLARATION—SERVICE—FILING.

When the plaintiff, in a summary action between lessor and lessee, summons the defendant to appear within the delay of one clear day, he retains his right to correct the summons by leaving a copy of the declaration with the defendant himself or at the office of the clerk of the court within the

three days following the service of the writ. But the delay of service must be counted from the day of such filing. If the plaintiff brings his action prematurely the defendant may, on motion, demand that the delays for pleading be extended, but he cannot claim the nullity of the summons by exception to the form.

Laroche v. Poulin, 54 Que. S.C. 19, 19 Que. P.R. 433.

PRELIMINARY EXCEPTION.

The court cannot, in any case, extend the delays for presenting a preliminary exception.

Buckley Drouin Co. v. Mayhew, 19 Que. P.R. 210.

PRACTICE—M. R. 973—LAPSE OF YEAR AFTER LAST PROCEEDING—NOTICE OF INTENTION TO PROCEED—NOTICE BY LETTER.

Bird v. Greenhow, [1919] 2 W.W.R. 320.

LEAVE.

Where 21 days have elapsed after notice of appearance, leave must be obtained for the filing of the statement of claim.

Nelson v. Balderson, [1917] 3 W.W.R. 448.

EXTENSION.

Under r. 254 (Sask.) the time limited for reply is the time fixed by the rules and not the time fixed by an order extending the time, and an amended statement of claim delivered without leave after the time fixed by the rules is irregular.

Gillies v. Culbert, 10 W.W.R. 894.

STATEMENT OF CLAIM—DELIVERY OF AFTER TIME LIMITED BY RULES HAD EXPIRED—ORDER ALLOWING MADE.

Bank of Hamilton v. Kraemer-Irwin Co., 20 O.W.R. 46.

Q. SURPLUSAGE.

(§ 1 Q—135)—BURDEN OF PROOF—SURPLUSAGE IN PLEADING.

It is not necessary in an action to recover property alleged to have been sold under an invalid tax sale, for the plaintiff in his pleadings to set up the tax sale and allege it was made without authority; the proper course is to set out his title and allege the wrongful possession of the person who purchased under the tax sale.

Beavis v. Langley, 9 D.L.R. 403, 18 B.C. R. 30, 23 W.L.R. 55.

SURPLUSAGE—REPETITION.

A paragraph of a statement of defence which merely repeats, in effect, what is more formally pleaded in other parts of the defence, may be struck out as unnecessary under Alberta r. 127.

Kennerley v. Hextall, 10 D.L.R. 501. [See 12 D.L.R. 812, 13 E.L.R. 54.]

PROLIXITY—EMBARRASSMENT.

A pleading which is merely prolix, even where it sets out verbatim documents pleaded, is not embarrassing, and the matter of prolixity is one for the taxing officer.

[Theo Noel Co. v. Vitae Ore Co., 7 W.L.R. 353; Sack v. Construction Co., 7 W.L.R. 653, applied.]

Grayson v. Consolidated Land, etc., Co., 31 W.L.R. 763.

STATEMENT OF CLAIM—WRONGFUL DISMISSAL—OTHER CAUSES OF ACTION—PROLIXITY.

Caulfield v. National Sanitarium Ass'n., 23 O.W.R. 761.

PROLIXITY—NOT EMBARRASSING OR DELAYING FAIR TRIAL—NOT STRUCK OUT—ALLEGATION OF FORGERY—FURTHER ALLEGATION OF CONVICTION THEREFOR.

Mere prolixity in pleading, not such as will embarrass or delay the fair trial of an action, does not warrant the striking-out of any portions of it. In an action for conversion as a result of fraudulent negotiation of a bill of lading of plaintiff's goods, the allegation, after alleging forgery, of a conviction of said forgery, is not an embarrassing pleading and should not be struck out. Semble it is not irrelevant or immaterial.

Graham v. C.P.R. Co., [1919] 2 W.W.R. 544.

R. WITHDRAWAL.

(§ I R—140)—REPLY—AMENDMENT OF DEFENCE—RIGHT TO DELIVER NEW REPLY.

Sheardown v. Good, 23 O.W.R. 960.

S. STRIKING OUT.

(§ I S—145)—STRIKING OUT DEFENCE—LEAVE TO SIGN JUDGMENT.

A local judge has jurisdiction, under B.C. practice r. 363, to make an order striking out a defence and giving the plaintiff liberty to sign interlocutory judgment; once the judgment has been entered the plaintiff may proceed with the assessment of damages. [Loomis v. Abbott, 25 D.L.R. 759, distinguished.]

Logan v. Granby Consolidated Mining Co., 30 D.L.R. 623, 23 B.C.R. 188, [1917] 1 W. W.R. 230.

Under practice r. 167, Sask. r. 1911, a pleading will be struck out as embarrassing only in plain and obvious cases.

Douglas v. Young, 8 D.L.R. 788, 22 W. L.R. 733, 3 W.W.R. 523.

MOTION TO STRIKE OUT PORTIONS—IRRELEVANCY—EMBARRASSMENT—MOTION FOR PARTICULARS BEFORE PLEADING—PRACTICE—AFFIDAVIT—"ARRANGEMENT" FOR TRANSFER OF SHARES—PARTICULARS OF TIME, PLACE, PERSONS, ETC.

Wall v. Dominion Canners Co., 6 D.L.R. 868, 23 O.W.R. 183.

DEFENCES TO FOREIGN JUDGMENT—"EMBARRASSMENT AND DELAY.

Where in an action on a foreign judgment the defendant sets up defences already heard and adjudicated upon by the foreign tribunal, they may, at the instance of the plaintiff, be struck out, upon the ground of embarrassment and delay, and under r. 625 (King's Bench Act, R.S.M. 1913, c. 46), the plaintiff may sign judgment.

[Gault v. McNab, 1 Man. L.R. 35; Meyers v. Prittie, 1 Man. L.R. 27, followed; Hickey v. Legresley, 15 Man. L.R. 304, distinguished.]

Sloman v. Breton, 29 D.L.R. 387, 33 W.L.R. 818, 9 W.W.R. 1466.

FALSE AND VEXATIOUS ALLEGATIONS.

A statement of defence cannot be considered false, vexatious or frivolous within the meaning of r. 223 unless, so far as facts within the knowledge of the defendant are concerned, there is an admission express or implied by him that the allegations in his defence are untrue. Such admission may appear from affidavits filed by the defendant or from his examination, if such has been made part of the material to be used on the application or it may be implied from his failure to deny on oath some material fact within his knowledge. But to justify striking it out, it must be clear that the defence was false. If there is a conflict of testimony, that testimony cannot be weighed in an application under r. 223. Where the alleged fact is solely within the knowledge of the plaintiff a defendant's inability to deny it cannot be taken as an admission that the fact so alleged is true. Rule 223 is not intended to afford the plaintiff an opportunity of trying the case piecemeal, so, generally speaking, individual paragraphs should not be struck out, where the plaintiff has to go to court to prove his case.

Canadian Grain Co. v. Lepp, 33 D.L.R. 185, 9 S.L.R. 447, [1917] 1 W.W.R. 684.

STATEMENT OF DEFENCE—INFRINGEMENT OF PATENT FOR INVENTION—ATTACK ON PATENT PROCESS—OFFERS OF SETTLEMENT—VENUE.

Alsop Process Co. v. Cullen, 6 D.L.R. 859, 23 O.W.R. 106.

STATEMENT OF CLAIM—ACTION TO RESTRAIN NUISANCE—JOINDER OF PLAINTIFFS—PROPERTY RIGHTS AND INTERESTS—EMBARRASSMENT—PREJUDICE—JOINDER OF CAUSES OF ACTION—ELECTION—ATTORNEY-GENERAL.

Smyth v. Harris, 6 D.L.R. 865, 23 O.W.R. 144.

STRIKING OUT SCANDALOUS ALLEGATIONS—JUDICATURE ACT—RULE 27.

Echink v. White Pass & Yukon Route Co., 30 D.L.R. 566.

DISCRETION—REINSTATEMENT ON APPEAL—AMENDMENT.

An appellate court has the right to reinstate statement of defence struck out for insufficiency by a Master in Chambers, though within his discretion to do so, if it sufficiently appears that the defendant is entitled to have the case tried in court rather than summarily dealt with in Chambers; the insufficiency may be amended.

Kilgour v. St. John, 37 D.L.R. 118, [1917] 2 W.W.R. 1232.

PROLIXITY.

Mere prolixity which is not such as to embarrass or delay the fair trial of an action is not a ground for striking out portions of a statement of claim.

Allen v. Standard Trusts Co., [1917] 2 W.W.R. 525.

AFFIDAVITS — SCANDALOUS STATEMENTS — AFFIDAVITS ORDERED TO BE REMOVED FROM FILES OF COURT—COSTS.

Black v. Canadian Copper Co., 13 O.W.N. 255. [See 12 O.W.N. 243.]

STATEMENT OF DEFENCE—MOTION TO STRIKE OUT PORTIONS OF—SETTLEMENT OF ACTION—APOLOGY—ADJOURNMENT OF MOTION UNTIL TRIAL OF ACTION.

Gentles v. Fawcett, 13 O.W.N. 376.

After a defendant, in his statement of defence, has demurred to certain paragraphs of the statement of claim as disclosing no facts upon which the plaintiff would be entitled to recover, a motion to strike out the same paragraphs as embarrassing and prejudicial to the fair trial of the action on the same grounds should not be entertained while such demurrer is pending.

Smith v. Murray, 21 Man. L.R. 753, 14 W.L.R. 402.

APPLICATION TO STRIKE OUT DEFENCE—DELAY.

In an action of debt the plaintiff, after notice of trial served, but before the date of trial arrived, moved to strike out the whole of the defence under r. 223, on the ground that the allegations therein were false, frivolous and vexatious. Held, that the delay was not a bar, inasmuch as no prejudice to the defendant was shewn by such delay. Held, also, that as the paragraphs struck out constituted the whole defence, it was proper to order judgment to be entered in favour of the plaintiff in default of amendment.

McDonald v. Maurice, 8 S.L.R. 254, 9 W.W.R. 680, 33 W.L.R. 257.

STATEMENT OF CLAIM—MOTION TO STRIKE OUT—FURTHER CONSIDERATION—PRACTICE.

Chalmers v. Toronto, 7 O.W.N. 827.

STATEMENT OF CLAIM—MOTION TO STRIKE OUT, AS DISCLOSING NO REASONABLE CAUSE OF ACTION AND FOR MISJOINDER OF PARTIES—REFUSAL TO TRY LEGAL ISSUES SEPARATELY — DISMISSAL OF MOTION—LEAVE TO RENEW AT TRIAL—COSTS.

Rankin v. Vokes, 8 O.W.N. 34.

STATEMENT OF CLAIM—MOTION TO STRIKE OUT AS DISCLOSING NO REASONABLE CAUSE OF ACTION — RULE 121 — EXCISION OF PORTIONS OF PLEADINGS—DECLARATORY JUDGMENT — JUDICATURE ACT, S. 16 (b)—ACTION AGAINST ADMINISTRATRIX FOR DISTRIBUTIVE SHARE OF ESTATE—TIME FOR BRINGING—DEVOLUTION OF ESTATES ACT, S. 32—JURISDICTION OF SURROGATE COURT—SURROGATE COURTS ACT, S. 71 (3).

Oke v. Oke, 8 O.W.N. 180.

PRACTICE—APPLICATION TO STRIKE OUT—UNNECESSARY BUT NOT EMBARRASSING.

Although there may appear in the pleadings matters which are unnecessary and superfluous, if they are not embarrassing, an application to strike them out will be refused. A court of appeal will examine more carefully the reasons and pay more attention to the pleadings, and examine them more narrowly to see if any harm has been done by the rejection of the pleadings than in a case where the judge below refused to strike them out.

Wellington Colliery Co. & E. & N.R. Co. v. Pacific Coast Coal Mines, 25 B.C.R. 206.

STATEMENT OF CLAIM—DECLARATORY JUDGMENT—QUESTION OF GENERAL IMPORTANCE.

An action is not open to objection on the ground that a merely declaratory judgment is sought: Judicature Act, R.S.O. 1914, c. 56, s. 16 (b). Rule 124 (English Order XXV., r. 1) is not intended to apply to any pleading which raises a question of general importance or a serious question of law. [Dyson v. Attorney-General, [1911] 1 K.B. 410, [1912] 1 Ch. 158, followed.] The summary procedure under r. 124 can be adopted only when it can be clearly seen that the claim is, on the face of it, clearly unsustainable. [Attorney-General v. London & N. W. R. Co., [1892] 3 Ch. 274, 277; Hubbuck v. Wilkinson, [1899] 1 Q.B. 86, followed.] Rule 145 requires that a statement of claim shall state specifically the relief claimed; and, where a declaration is claimed, the pleading should also state what action or contention on the part of the defendants has made it necessary to ask for a specific declaration. That "doubts have arisen" is not a sufficient reason for asking the court to make a declaration. In this case, where the plaintiffs, by their statement of claim, asked for a declaration as to the "present legal effect" of a certain agreement and of a statute confirming it, in relation to the right of the plaintiffs to take water from the Niagara River for the purpose of generating electricity, it was held that the pleading, though defective, should not be struck out; and an order was made, under r. 138, for the delivery of a further and better statement of the nature of the claim.

Electrical Development Co. v. Commissioners for Queen Victoria Niagara Falls Park, 40 O.L.R. 480.

EX PARTE ORDER IMPROPERLY MADE SET ASIDE—RULES 213, 216—COSTS.

Boston Law Book Co. v. Canada Law Book Co., 15 O.W.N. 127. [See 43 O.L.R. 233.]

DEFENCE—GENERAL DENIAL AS EMBARRASSING—PARTICULARS—ACTION AGAINST BANK—CHEQUES—FORGED ENDORSEMENTS.

Where a paragraph of a defence which denies each and all of the allegations contained in certain pargraphs of the statement of claim is not in compliance with rule 305 of the King's Bench rules, it is not one which should be struck out as embarrassing. Where in an action to recover the amounts of cheques issued by the plaintiff, paid by the defendant bank and charged to the plaintiff, the defence alleges that the proceeds of the cheques went to persons to whom the plaintiff owed money, and the plaintiff received credit therefor, the plaintiff is entitled to particulars of the cheques which, it is alleged, were paid to such persons and the dates and items of said indebtedness; and where the defence alleges that the endorsements, if not made by the payees, shew that they were not so made and that the plaintiffs by acknowledging, without objection, the correctness of the payments thereunder so ratified such endorsements, the plaintiff is entitled to particulars of the dates of such acknowledgments. A paragraph of a defence to such an action which sets up that the endorsements, if not made by the payee, were made by the plaintiff or its agent, or at its or his request, is in violation of r. 329 and should be struck out, but if, instead of applying to have it struck out, the plaintiff asks for particulars shewing which of said cheques are alleged to have been endorsed by the plaintiff or the plaintiff's agent, or at the request of the plaintiff or its agent, such particulars should be furnished by the bank, even though the cheques have been returned to the plaintiff by the bank; and where the defence alleges fraud, the plaintiff is entitled to particulars of such fraud; and if it is alleged that the plaintiff agreed that the bank was not to be responsible for forgeries, the plaintiff is entitled to particulars of said agreement; but where the defence alleges that all the cheques were issued to fictitious persons on fictitious transactions the plaintiff is not entitled to particulars shewing which of said cheques are alleged to have been payable to fictitious persons, and what transactions are alleged to have been fictitious.

Dominion Elevator Co. v. Union Bank, [1918] 3 W.W.R. 979.

EXTRANEOUS ALLEGATIONS — CONTRACT — FRAUD OF SCHOOL COMMISSIONERS.

In a plea by a building contractor to an action for repairs of works done by him on a school house, as also in his reply to the plea he cannot allege facts shewing that the work has not been accepted owing to the fraudulent scheming of the school commissioners, to whom he had refused to pay bonuses. Such allegations may be struck out on inscription in law.

Pion v. Commissaires d'Ecoles St. Stanislas, 24 Rev. Leg. 397, affirming 19 Que. P.R. 3.

IRRELEVANT MATTER.

An allegation of irrelevant facts and conclusions asking that those facts be simply declared as proven, shall be struck out on inscription in law.

Goodwins v. Brosseau, 19 Que. P.R. 295.

ALLEGATIONS AS TO REPUTATION.

An admission of the good reputation of the plaintiff must not be followed by a correction "but she has the reputation of being a wrangler with all her neighbours;" these words will be struck out on an inscription in law.

Peloquin v. Plante, 20 Que. P.R. 237.

DECLINATORY EXCEPTION—DEFENDANT OUTSIDE PROVINCE—COSTS.

If several causes of action are joined in an action against a defendant having his domicile outside of the province of Quebec, and on whom the action has been served outside of that province, a declinatory exception asking the dismissal of the action in toto being made, the items which have not arisen in that province shall not be struck out. In such case the costs on the declinatory exception shall be compensated.

Montreal Abattoirs v. Colwell, 19 Que. P.R. 26.

ACTION FOR PROFESSIONAL SERVICES—CONCLUSIONS OF PLEA.

A plea in an action for professional services, with a conclusion praying "to determine the amount to which the plaintiffs are entitled, and that their action be dismissed with costs," will not be struck out on motion.

Pelissier v. Primeau, 19 Que. P.R. 327.

In an action on a foreign judgment, defences which have been pleaded and fought out in the foreign court will be struck out on the ground of embarrassment. [Gault v. McNab, 1 Man. L.R. 35; Sloman v. Brenton, 29 D.L.R. 387, followed.]

Moore v. International Securities Co., 24 W.L.R. 219.

STRIKING OUT—STATEMENT OF CLAIM—MISREPRESENTATIONS—PARTICULARS.

Murray v. Thames Valley Garden Land Co., 24 O.W.R. 161.

STRIKING OUT—STATEMENT OF CLAIM—WRONGFUL DISMISSAL—OTHER CAUSES OF ACTION—PROLIXITY—IRRELEVANCY—EMBARRASSMENT.

Caulfield v. National Sanitarium Ass'n, 23 O.W.R. 761, 953.

STRIKING OUT—STATEMENT OF CLAIM—RESTRICTION—CLAIM TO SET ASIDE RELEASE—OTHER CLAIMS.

Broom v. Dominion Council of Royal Templars, 24 O.W.R. 62.

NULLITY OF WILL.

To an action based on a will, the defendant who pleads the nullity of the will, may simply pray for the dismissal of the action (secus in the case of annulability.) If he prays to have it declared "that the wills which must rule the estate of the decujus are not those which she made in favour of the plaintiff, but those she made in favour of the defendant" such petition might be set aside by way of an exception to the form, but not by way of an inscription in law.

Verdon v. Clermont, 16 Que. P.R. 246.

(§ I S—146)—LEAVE TO AMEND—ACTION AGAINST MUNICIPALITY — LOCAL IMPROVEMENT BY-LAW.

In an action to annul an assessment by-law for local improvements on the ground of irregularity and uncertainty but without setting up any allegation of fraud against the defendant municipality, the statement of claim may be struck out if upon its face it appears that the action is brought after the time limitations contained in ss. 512, 513 of the Municipal Act, R.S.B.C. 1911, c. 170, by virtue of order 25, r. 4, of B.C. Supreme Court Rules, 1906; but leave may be given to amend by filing a new statement of claim.

Arbuthnot v. Victoria, 9 D.L.R. 564, 18 B.C.R. 35, 23 W.L.R. 563, 4 W.W.R. 145.

STRIKING ENTIRE PLEADING.

A statement of claim will not be struck out under r. 261 (Con. Rules, Ont. 1897), on the ground that the plaintiff was not qualified to maintain the action unless the lack of qualification appears from the pleading itself.

Greer v. Greer, 4 D.L.R. 169, 21 O.W.R. 139.

VEXATIOUS ACTION—BUILDING CONTRACT PREVIOUSLY LITIGATED.

A statement of claim will be regarded as vexatious, and will be struck out, if its purpose is an attempt to obtain a further interpretation and reformation of a building agreement which was already dealt with in a previous action, and the action stayed upon a reference to arbitration under the terms of the agreement, to ascertain the amount recoverable thereunder.

Gunn v. Hudsons Bay Co., 25 D.L.R. 173, 25 Man. L.R. 663, 32 W.L.R. 478, 9 W.W.R. 216.

STRIKING OUT REPLY—DELAY IN FILING—JUDICIAL DISCRETION OF REFEREE—AMENDMENT OF STATEMENT OF CLAIM—COSTS.

Monarch Lumber Co. v. Hewitt, 7 D.L.R. 785, 1 W.W.R. 1013.

STRIKING OUT ENTIRE PLEADING—PUBLIC AUTHORITIES PROTECTION ACT—POLICE MAGISTRATE—ACTION AGAINST, FOR TORT—UNOFFICIAL ACT.

Fritz v. Jelfs, 24 O.W.R. 610, 643, 807.

WRIT OF SUMMONS—SPECIAL ENDORSEMENT—STATEMENT OF CLAIM DELIVERED—IRREGULARITY — AMENDMENT AFFIDAVIT FILED WITH APPEARANCE—STATEMENT OF DEFENCE.

Dunn v. Dominion Bank, 25 O.W.R. 84.

(§ I S—148)—SUFFICIENCY OF ALLEGED DEFENCE.

A plea, in an action to recover a balance alleged to be due under an acceleration clause of a contract, making the entire balance due and payable on default in the payment of any instalment, that the defendant's signature to the contract was fraudulently obtained by plaintiff's agent, who concealed from defendant the fact that the contract contained such acceleration clause, cannot

be struck out on the ground that it discloses no reasonable answer to the action, under the Nova Scotia practice.

Stimpson Computing Scales Co. v. Allen, 10 D.L.R. 349, 47 N.S.R. 90, 12 E.L.R. 365.

(§ I S—149)—Striking part of pleadings.

The superficially frivolous appearance of grounds of action in a plaintiff's declaration does not constitute ground to have them struck out on demurrer, if the matter of such allegations amount to legal grounds of action when read together with the other averments of the declaration.

Edge v. Security Life Ins. Co., 8 D.L.R. 492.

The tendency of the practice at present is against any interference with the pleadings of either party, except in the very plainest cases; the application of Ont. Con. r. 298 (Rules of 1897) is usually confined to cases where statements are made which could not be considered at the trial, and which would tend to prejudice a fair trial.

Ontario & Minnesota Power Co. v. Rat Portage Lumber Co., 3 D.L.R. 331, 22 O. W.R. 1.

In an action for damages for a refusal to license the plaintiff, a professional jockey, who had paid the required fee therefore, in order to enable him to "exercise his profession" as driver of race horses upon the race track of the defendant, a racing club owning a public franchise, that operated for gain a race-course to which the public was invited upon the payment of an admission fee, a portion of the statement of claim will, on motion, be stricken out, where its allegations in substance were that "so public is the function it (the club) exercises, that it has a monopoly of race-horse betting on its tracks, that would be criminal but for the saving grace of legislation, whereby all members of all public, at its race meetings, are forced to bet through the defendant club, which acts as stakeholder, and exacts therefor over 5% on over a million dollars a year of bettors' money passing through its hands, and from which its chief income is derived," since such allegations are merely statements of evidence pertaining to the plaintiff's claim, which, under Con. r. 268, are not properly a part of a statement of claim. A further allegation of the statement of claim, alleging in substance, that other members of such association owned and controlled other tracks where betting was done by means of book-makers in the employ of such members, will not be stricken out, since it is an allegation either historical and explanatory of the nature and composition of the association, or referable to the damages the plaintiff sustained by being prevented from driving upon the tracks of the association, as well as upon that of the defendant.

Trubel v. Ontario Jockey Club, 4 D.L.R. 86, 3 O.W.N. 1453.

In an action for slander, upon a motion to strike out, as embarrassing, certain paragraphs of the statement of defence, and also the particulars of such paragraphs which set out as true a series of alleged facts of public interest and concern, upon which the defendant pleaded fair comment in good faith and without malice, if the defendant's pleading shew that he is prepared to rely, at the trial, on the plea of fair comment and sets out the series of alleged facts as a basis upon which to submit to a jury, the question as to whether in their opinion the comments so based were fair and reasonable, the defendant will not be required to change his pleading.

Brown v. Orde, 6 D.L.R. 297, 22 O.W.R. 1002.

Irrelevant statements.

On an application under r. 167 (Sask.) to strike out part of a statement of defence as unnecessary and as tending to prejudice, embarrass and delay the fair trial of the action, the fact that the objectionable plea contains considerable unnecessary matter of evidence is of itself not sufficient ground for granting the motion, the only question being whether the plaintiff has been embarrassed or prejudiced in any way by the evidence being pleaded. In a statement of defence of an action for malicious prosecution and false imprisonment, where one of the defences is that the defendant acted on the advice of counsel, it is sufficient merely to state that fact without pleading in detail what the defendant was advised by his counsel.

Jones v. Gore, 8 D.L.R. 868, 22 W.L.R. 739, 3 W.W.R. 526.

Striking out part of pleading on ground of falsity—Motion on affidavits.

In an action to recover a balance alleged to be due under an acceleration clause of a contract making the entire balance due and payable on default in the payment of any instalment, a paragraph in defendant's defence denying the making of the contract alleged, is properly struck out under the Nova Scotia practice as being false, where the fact of the execution of the contract is established by affidavit and not denied, and the defendant has further pleaded, by another paragraph of the defence, that when he signed the contract, the fact of its containing an acceleration clause was not disclosed to him, and that he could not read or write in English. Under the modern practice in Nova Scotia, separate paragraphs of a statement of defence are not to be regarded as separate pleas, as was the former practice, but the defendant may rely upon the whole statement of defence. A misrepresentation as to an instrument which causes a total misapprehension of its nature by the person who signed it will entitle him to plead non est factum in an action on the instrument, but not where the person signing knew the nature of the instrument, but laboured at the time under a

misapprehension of the effect or contents of the instrument.

Stimpson Computing Scales Co. v. Allen, 10 D.L.R. 349, 47 N.S.R. 90, 12 E.L.R. 365.

INAPT WORDING OF COUNTERCLAIM—AMENDMENT.

If an alternative claim in a counterclaim is embarrassing by reason of the inapt terms in which it is worded, it is ground only for striking out the alternative claim and not the whole counterclaim, which can be readily cured by amendment.

Tobin v. Commercial Investment, 27 D.L.R. 387, 22 B.C.R. 481, 34 W.L.R. 23, 10 W.W.R. 123.

DEFENCE AND COUNTERCLAIM—ACTION FOR RETURN OF BONDS—DISCLAIMER—INTEREST OF THIRD PERSON NOT A PARTY—PRINCIPAL AND AGENT.

Davison v. Thompson, 10 D.L.R. 854, 24 O.W.R. 621.

DEFENCE—PATENT FOR INVENTION—ROYALTIES—AGREEMENT—VALIDITY OF PATENT.

Moore Filter Co. v. O'Brien, 2 D.L.R. 900, 3 O.W.N. 1084.

STRIKING OUT DEFENCE—CON. R. 298—NONPAYMENT OF INTERLOCUTORY COSTS—REMEDY.

Rickart v. Britton Mfg. Co., 5 D.L.R. 892, 23 O.W.R. 84.

DEFENCE—ACTION FOR SPECIFIC PERFORMANCE OF CONTRACT—SETTING UP FACTS JUSTIFYING TERMINATION OF CONTRACT—EMBARRASSMENT—IRRELEVANCY.

Fuller v. Maynard, 2 D.L.R. 897, 3 O.W.N. 1082.

STATEMENT OF DEFENCE—IRRELEVANCE—FURTHER EXAMINATION REFUSED—CON. RR. 259, 261, 616.

Roscoe v. McConnell, 23 O.W.R. 515.

IRRELEVANT STATEMENTS IN DEFENCE—DOWER ACTION—9 EDW. VII. c. 39, s. 24—MORTGAGED LAND.

McNally v. Anderson, 23 O.W.R. 547.

STRIKING OUT PART OF PLEADING—STATEMENT OF CLAIM.

Cantin v. Clarke, 24 O.W.R. 146.

STATEMENT OF CLAIM—ORDER STRIKING OUT PORTIONS AND FOR PARTICULARS OF OTHER PORTIONS.

Scully v. Nelson, 25 O.W.R. 120.

IRRELEVANT STATEMENT—STATEMENT OF DEFENCE — LIBEL — NEWSPAPER — COMMENT — JUSTIFICATION—PUBLIC INTEREST — IMMATERIAL AND IRRELEVANT PLEADING—STRIKING OUT.

McVeity v. Ottawa Citizen Co., 5 O.W.N. 469.

FACTS AFTER APPEAL.

If a party alleges in his factum facts subsequent to the inscription in review, such allegations will be dismissed.

Barry v. Montreal Tramways Co., 49 Que. S.C. 525.

EXECUTOR—ACCOUNT—DEFENCE.

In an action for an account against an executrix by the universal legatees, an allegation in the defence "that the action of the plaintiffs is vexatious because of animosity against the defendant," will be struck out on inscription en droit as useless.

Bourassa v. Bourassa, 18 Que. P.R. 135.

ACCOUNT — RENDERING AND CORRECTING — DILATORY EXCEPTION—C.C.P. 87, 177.

An action to correct an account, which supposes the fact that an account has already been rendered, is incompatible with an action to account, and the plaintiff is bound on a dilatory exception, to make a choice between the action to account and the action to correct the account rendered.

Perodeau v. Richard, 15 Que. P.R. 322.

LIBEL IN NEWSPAPER — MOTIVES OF PUBLISHER—SEPARATE LIBELS—NO NOTICE OF ACTION AS TO ONE.

Natural Resources v. Saturday Night, 18 O.W.R. 226.

STATEMENT OF DEFENCE AND COUNTERCLAIM—MOTION TO STRIKE OUT PART AS IRRELEVANT AND EMBARRASSING.

Wilbur v. Nelson, 20 O.W.R. 381.

STATEMENT OF CLAIM—MOTION TO STRIKE OUT AS EMBARRASSING—DAMAGES FOR WRONGFUL DISMISSAL.

Rutherford v. Murray-Kay, 19 O.W.R. 975.

SUBSTITUTED SERVICE OF STATEMENT OF CLAIM—MOTION BY DEFENDANT FOR ORDER FOR—TO SET ASIDE STATEMENT OF CLAIM AND VACATE CERTIFICATE OF LIS PENDENS.

Restall v. Allen, 20 O.W.R. 31.

STATEMENT OF CLAIM—MOTION TO STRIKE OUT PART—EMBARRASSING AND IRRELEVANT—QUESTION FOR TRIAL JUDGE TO SAY WHETHER FACTS ARE RELEVANT OR NOT.

Pyne v. Pyne, 20 O.W.R. 175.

DECLARATION—INCOMPATIBLE CLAIMS.

L'Allonette v. Brignon, 12 Que. P.R. 209.

T. DISMISSAL.

(§ I T—150)—IRREGULAR SERVICE—PARTICULARS—"FRESH STEP"—WAIVER.

A demand for particulars by defendant is not a "fresh step" within the meaning of r. 364 (King's Bench Act, R.S.M. 1913, c. 46), and, therefore, does not operate as a waiver by the defendant of his right to have the action dismissed for any irregularities in service of the statement of claim.

Taylor v. Steele, 30 D.L.R. 740, 27 Man. L.R. 49, 34 W.L.R. 1098, 10 W.W.R. 1162, affirming 34 W.L.R. 638.

A party who demands particulars of a claim is not thereby deprived of the right to afterwards demand by inscription en droit the dismissal of such claim. [See Wright v. Thayer, 1 Que. P.R. 165.]

Barrette v. Dumontet, 18 Que. P.R. 53.

INCIDENTAL DEMAND—MOTION FOR DISMISSAL—C.C.P. 174, 215.

It should not be decided, on an exception

to the form, whether an incidental demand is well founded in law or not.

Charlebois v Pelletier, 15 Que. P.R. 415.

OF PART OF PLEADING.

The rejection of a paragraph in a pleading can only be demanded by motion if it is irregularly pleaded; if it is useless, foreign to the litigation and not the basis of the right claimed, its rejection should be demanded by inscription en droit.

Lacavalier v. Vinet, 18 Que. P.R. 337.

ACTION TO ENFORCE LIEN MADE TO COMPANY OF SAME BEFORE INCORPORATION OF PLAINTIFF COMPANY—FAILURE TO ALLEGE OR PROVE ASSIGNMENT OF LIEN.

Canada North-West Land Co. v. Irwin, 19 W.L.R. 750.

U. MISJOINDER; MULTIFARIOUSNESS.

See also Action; Parties.

(§ I U—155)—MISJOINDER—TORT AND EX CONTRACTU CAUSES—DIFFERENT DEFENDANTS—TARDY OBJECTION.

Where a plaintiff misjoins two separate causes of action (tort and ex contractu) against different defendants, either defendant ordinarily may force the irregular plaintiff to his election between the two causes; but where both defendants, without taking objection, proceed to trial, and, after separate verdicts against them, one acquiesces, while the other then for the first time objects to the misjoinder on his appeal for a new trial, the objection will not be given effect, particularly where the verdict against the appellant was trifling and the justice of the case is best met in this way. [See N.B. S.C. Rr. (1909), order 16, rr. 1, 4, 11.]

Wathen v. Ferguson, 10 D.L.R. 330, 41 N.B.R. 448, 12 E.L.R. 427.

ELECTION OF REMEDIES—ACTION FOR WRONGFUL DISCHARGE—CONSPIRACY.

Patterson v. C.P.R. Co., 34 D.L.R. 726, 11 A.L.R. 67.

JOINDER OF DEFENDANTS—OF CAUSES OF ACTION — MULTIFARIOUSNESS — ELECTION AS BETWEEN DIFFERENT CAUSES.

Perry v. Perry, 28 Man. L.R. 5. [See also 28 Man. L.R. 1, [1917] 1 W.W.R. 174.

DIFFERENT DEMANDS.

A demand for payment of interest under a deed can be joined to a demand en déclaration d'hypothèque upon the immovable affected thereby.

Pacaud v. Lamoureux, 18 Que. P.R. 48.

POSSESSORY AND PETITORY CAUSES—SERVITUDE.

In an action en complainte the parties cannot litigate anything but the question of possession. It is an illegal joinder of the petitory to the possessory action to plead a right of servitude as a defence to an action en complainte. The servitude created by art. 882 Mun. Code cannot be claimed because of private utility.

Mercier v. Vidal, 49 Que. S.C. 100.

A plaintiff who asks that a defendant be declared to be bound by the obligations assumed by his auteur towards plaintiff, cannot by subsequent conclusions ask, in the alternative, that the deed between the two defendants be declared to be fraudulent, simulated, null and void.

Heath v. Escanaba Mfg. Co., 14 Que. P.R. 48.

II. Declaration or complaint.

A. JURISDICTIONAL AVERMENTS.

(§ II A—165)—STATEMENT OF CLAIM — AVERMENTS — AMENDED STATEMENT — EFFECT.

The right of one party to read the pleading of another as evidence against the latter is confined to the pleading as it stands, so that if the pleading has been amended, the original pleading cannot be read as such evidence.

O'Kelly v. Downie, 17 D.L.R. 395, 24 Man. L.R. 210, 28 W.L.R. 303, 6 W.W.R. 911, reversing 15 D.L.R. 158, 26 W.L.R. 413, 5 W.W.R. 859.

DECLARATION — NOTICE OF ACTION—HOW PLEADED—DAMAGE ACTION.

The plaintiff in an action for damages against the Montreal Tramways Co. is not obliged to allege in his declaration that he has given the notice of action required by law. [Montreal Street Ry. Co. v. Patenaude, 9 Que. P.R. 1, followed.] If the defendant pleads that, as a question of fact, notice was not given the plaintiff may reply that it was given.

Bain v. Montreal Tramways Co., 15 Que. P.R. 101.

DILATORY EXCEPTION—ACTION FOR DAMAGES—COMPENSATION ACT AND COMMON LAW—INEXCUSABLE FAULT—C.C.P. 177, PARA. 6.

If the plaintiff in an action for damages alleges that the accident was caused by reason of his work and by the inexcusable fault of defendant, and prays that the latter be condemned to pay him an annual rent under the Workmen's Compensation Act, or in default of its applicability, to pay him the sum of $10,000, he must, on a dilatory motion, optate between the two rights of action set forth in his declaration.

Lessage v. Henderson, 15 Que. P.R. 328.

STATEMENT OF CLAIM—DEPARTURE FROM ENDORSEMENT ON WRIT OF SUMMONS—ADDITION OF DEFENDANTS.

Snider v. Snider, 5 O.W.N. 325, 25 O.W.R. 286.

(§ II A—170)—PLACE OF TRIAL.

Where a statement of claim does not mention the place of trial, the setting down of the case for trial and notice thereof will, on the application of the defendant, be struck out.

Thompson v. Herring, 22 B.C.R. 179.

(§ II A—173)—FACT OF JURISDICTION.

A prohibition to a Division Court (Ont.) upon the ground of absence of territorial jurisdiction in respect of a case alleged to have entered in the wrong district or divi-

sion of the province, will not be granted on motion of defendant where the question of jurisdiction is raised for the first time after a default judgment has been entered against defendant and where there is no excuse shewn for defendant's delay and it does not appear that any injustice will be done by allowing the judgment to stand. [Broad v. Perkins, 21 Q.B.D. 533, followed.]

Re Canadian Oil Cos. and McConnell, 8 D.L.R. 759, 27 O.L.R. 549.

(§ II A—174)—Assets within jurisdiction—Averment of.

A foreign plaintiff need not set up in his statement of claim that he has assets within the jurisdiction of the court sufficient to answer for costs.

McEwan v. Marks, 4 D.L.R. 369, 5 S.L.R. 222, 21 W.L.R. 34, 2 W.W.R. 228.

B. Right or capacity to sue.

(§ II B—175)—Authority of husband.

In an action by a married woman separated as to property, it is not necessary that it should be said in the writ that she is authorized by her husband; it is sufficient if this allegation is contained in the declaration. The defendant, if he does not admit this fact, must deny it specially.

Barry v. Montreal Tramways Co., 49 Que. S.C. 525.

(§ II B—176)—Foreign corporation.

Under r. 219 of the Saskatchewan Supreme Court Rules, 1911, giving any party the right to raise by his pleading any point of law and providing for its disposition by the judge before, at or after the trial, the defendant, though he failed to raise the question in his pleading, is entitled to a decision as to whether the plaintiff could succeed in the action if the statement of claim merely alleged that the plaintiff was an incorporated company carrying on business in another province, but failed to allege that it had registered under the Saskatchewan Foreign Companies Act or other facts to establish its status to sue in Saskatchewan. [Stokes v. Grant, 4 C.P.D. 25, applied.]

Ontario Wind Engine & Pump Co. v. Eldred, 2 D.L.R. 270, 5 S.L.R. 194, 20 W.L.R. 697, 2 W.W.R. 60.

C. Description of parties.

(§ II C—180)—Civil engineer—Action by —Necessary allegations — Inscription in law—Q.C.C.P. 191.

When the plaintiff states in his declaration that he is a consulting engineer, and he also assumes that title and quality in the writ of summons, he is not bound to allege that he is one of the members of the Society of Canadian Civil Engineers. An inscription in law based on the omission of such allegation will be dismissed.

Dumazuel v. Denis, 16 Que. P.R. 183.

(§ II C—181)—Rules of court (Sask.)—Defendant sued in representative capacity—Necessity of stating.

Rule 38 of the Saskatchewan Rules of Court provides that "if the plaintiff sues or the defendant is sued in a representative capacity the statement of claim shall shew in what capacity the plaintiff or defendant sues or is sued." Under this rule a garnishee summons against executors in respect of a debt due from the testator must be directed to them as executors and not in their individual capacity.

Strong v. Culver, 45 D.L.R. 542, 12 S.L.R. 134, [1919] 1 W.W.R. 979.

(§ II C—182)—Partnership — Husband and wife.

If a defendant sued as doing business under a partnership name pleads an exception to the form and proves that it is not he but his wife separate as to property, who does business under such name, all that relates to the said partnership in the designation of the defendant will be struck out of the record without costs.

Lachapelle v. Picard, 18 Que. P.R. 320.

D. Statement of cause generally.

Wrongful discharge, conspiracy, see Conspiracy, II B—15.

(§ II D—185)—Matters of evidence not to be pleaded—Action against former Premier — Allegation that he acted as agent for His Majesty—Sufficiency of.

Under the present system of pleading in New Brunswick, it is not necessary to allege matters which are strictly matters of evidence. In an action against a former Premier of the province, for corruptly receiving a secret commission while Premier, and in receipt of a salary from His Majesty and acting as agent for His Majesty—it is sufficient to allege that the defendant acted as agent for His Majesty, and that as such agent he received such secret commission; it is not necessary to set out that he was agent of His Majesty. Held that the allegations in the statement of claim set out in the judgment were sufficient.

The King v. Flemming, 47 D.L.R. 321.

Statement of claim—Statement of cause generally—How set out.

Irrelevant, diffuse and superfluous allegations in a statement of claim may be struck out under the Ontario practice rules which permit only a concise statement of the material facts.

Snider v. Snider, 16 D.L.R. 720, 30 O.L.R. 105.

An action is rightfully dismissed where the plaintiff, if entitled to recover at all, could do so only on an alternative claim which was not pleaded.

Davis v. Lowry, 3 D.L.R. 157, 20 W.L.R. 839, 2 W.W.R. 169.

Negligence—Employer's liability.

The essential function of pleadings is to give the parties notice of the case to be tried; where a statement of claim charges the defendant with negligence as the owner of a factory building, and he has shaped his defence accordingly, the plaintiff cannot,

at the trial, offer to prove the defendant's liability as employer.

Boutilier v. Lewis, 35 D.L.R. 642, 51 N.S. R. 186.

ACTION FOR COMMISSIONS AND DAMAGES.

A statement of claim in an action for commission and damages for failure to deliver certain wheat which the defendant had authorized the plaintiff to sell, held to disclose a clause of action, except as to the claim for commission.

Buchanan v. Hansen Grain Co., 10 S.L.R. 199, [1917] 2 W.W.R. 799.

ACTION FOR POSSESSION OF LAND.

In an action for possession of a house and lot the statement of claim ran as follows: That the plaintiffs are entitled to possession; that the premises were granted and conveyed by the defendant unto and to the use of the plaintiffs, their heirs successors and assigns by way of mortgage, and that the mortgage is still subsisting; that the defendant has never given up possession to plaintiffs and has remained and still remains in wrongful possession thereof. Held, that the statement of claim disclosed a good cause of action, especially in view of the allegation of wrongful possession on the part of the defendant.

Todd v. Wong Gum Tim, 24 B.C.R. 161, [1917] 2 W.W.R. 280.

STATEMENT OF CLAIM — MOTION TO STRIKE OUT AS DISCLOSING NO REASONABLE CAUSE OF ACTION—RULE 124—PRAYER FOR DECLARATORY JUDGMENT—JUDICATURE ACT, S. 16 (B)—QUESTION OF GENERAL IMPORTANCE—DEFECTIVE PLEADING—DIRECTION TO DELIVER BETTER PLEADING—RULE 138.

Electrical Development Co. v. Commissioners for Queen Victoria Niagara Falls Park, 13 O.W.N. 117, 40 O.L.R. 480.

PRACTICE—PARTICULARS—CLAIM FOR DAMAGES FOR BREACH OF CONTRACT.

Particulars will be ordered of a claim for damages for the defendant's alleged failure to fulfil his contract for the supply of goods to the plaintiff, showing the quantities, kinds and prices of the goods which the plaintiff alleges he was compelled to purchase in the place of those which the defendant had contracted to supply and the dates of the purchases.

Standard Supply Co. v. Toupin, 28 Man. L.R. 627.

SUFFICIENCY OF ALLEGATIONS—NOTE—PRESCRIPTION—AMENDMENT.

An omission to state, in a declaration, that the note sued on was signed or endorsed by the defendant is not in itself fatal. It may be replaced by other words implying the same meaning. The form indicated in C.C.P. is not essential. When a plaintiff asks judgment against the defendant on a note which he produces, without saying that the note is signed or endorsed by the defendant, he makes an imperfect and insufficiently detailed statement; but it cannot be said, in such a case, that there is an absolute omission of an essential statement. The rule is that when an essential statement is totally lacking, the proceedings must be attacked by inscription in law; when the essential statement is not lacking, but is insufficiently particularized, the proceedings must be attacked by an exception to form. When an essential statement is not lacking, but is defective in not saying whether the defendants signed or endorsed the notes, such informality may always be covered by an amendment, an allegation of payment on account shews in itself a legal connection. The insufficiency of the allegations in the declaration might have been connected by the amendment allowed, and thus would have taken effect from the institution of the action.

Gauthier v. Lowe, 24 Rev. de Jur. 354.

STATEMENT OF CLAIM—ALLEGATION MADE BY CREDITOR OF COMPANY AGAINST DIRECTORS — WRONGFUL DEALING WITH BONDS OF COMPANY—CLAIM MAINTAINABLE ONLY BY COMPANY—STRIKING OUT ALLEGATION AND CLAIM FOR RELIEF—PLEADING OF DIRECTORS IN DENIAL AND ASSERTION OF PROPER DEALING—LEAVE TO WITHDRAW.

Canada Wire & Cable Co. v. Grant, 14 O. W.N. 79.

OMISSION TO ALLEGE DELIVERY.

A plaintiff cannot change or complete his statement of claim by his reply to the defence. Thus a vendor who claims the price of goods sold, without alleging delivery in his statement of claim, cannot plead delivery in his reply.

Royal Paper Box Co. v. Drummondsville Matches, 56 Que. S.C. 259.

PRACTICE—STATEMENT OF CLAIM—MOTION TO STRIKE OUT—FRIVOLOUS AND VEXATIOUS—CONSENT JUDGMENT—ACTION TO SET ASIDE — RES JUDICATA—FRAUD — ALLEGED IN WRIT BUT NOT IN STATEMENT OF CLAIM.

An action may be brought to set aside a consent judgment on the grounds of mistake or misrepresentation. The indorsement of fraud on a writ will, on application, be struck out where there is no allegation of fraud in the statement of claim.

Skene v. Royal Bank, 25 B.C.R. 456.

PRACTICE—STATEMENT OF CLAIM—REASONABLE CAUSE OF ACTION STRIKING OUT.

A statement of claim for commission on a sale of land does not disclose a reasonable cause of action in the absence of an allegation that the services were performed at the defendant's request.

Decow v. Pearce, 12 S.L.R. 12.

STATEMENT OF CLAIM—ADDITION OF CAUSE OF ACTION NOT ENDORSED ON WRIT OF SUMMONS — RULE 109 — ALIMONY — SEPARATE ACTION — COSTS — UNDERTAKINGS—SECURITY FOR COSTS.

Schmidt v. Schmidt, 7 O.W.N. 427.

STATEMENT OF CLAIM—PARTICULARS—INSPECTION.

Jobin-Marrin Co. v. Quality Canners Co., 17 O.W.N. 96.

PARTICULARS FOR PURPOSE OF PLEADING—STRIKING OUT PARTS OF PLEADING AS IMPROPER — AMENDMENT — LEAVE RESERVED TO MOVE FOR FURTHER PARTICULARS FOR PURPOSE OF TRIAL—FURTHER EXAMINATION FOR DISCOVERY.

Dominion Permanent Loan Co. v. Holland, 15 O.W.N. 446.

TRADE NAME — DECEPTION — DAMAGES — AMOUNTS CLAIMED — RULE 145 — AMENDMENT—PARTICULARS.

Washington v. Raper, etc., Burial Co., 8 O.W.N. 523.

PRACTICE—SERVICE OF STATEMENT OF CLAIM — EXTENSION OF TIME FOR —, KING'S BENCH ACT, RR. 176, 396—LIMITATION OF ACTION.

By virtue of rr. 176, 396 of the King's Bench Act, R.S.M., 1913, c. 46, the court has jurisdiction to allow further time to serve the statement of claim though the application is not made till after the expiration of the six months prescribed in r. 176 and, in extraordinary circumstances, even though the Statute of Limitations has intervened in the meantime. The discretion exercised by the referee in allowing such further time was held by the court to have been rightly exercised under the following circumstances: The statement of claim was promptly handed to the sheriff for service and was returned with an affidavit of personal service on the defendant. Judgment was then signed by default. After the six months had expired defendant succeeded in getting judgment set aside on showing clearly that he had never been served, and it appeared that the sheriff's officer had served some other person by mistake. The plaintiff and its solicitor had no previous knowledge or means of knowledge of this mistake and the time within which, under the Statute of Limitations, the action could be brought had in the interim elapsed. [Smalpage v. Tonge, 17 Q.B.D. 644, followed; Doyle v. Kaufman, 3 Q.B.D. 7, 340; Watson Mfg. Co. v. Bowser, 18 Man. L.R. 425; Taylor v. Steele, 27 Man. L.R. 49, distinguished.]

Bank of B.N.A. v. Metcalfe, 29 Man. L.R. 390, [1919] 2 W.W.R. 202.

STATEMENT OF CAUSE GENERALLY — RELEVANCY OF ALLEGATIONS — COSTS IN THE CAUSE.

Fearnside v. Morris, 2 O.W.N. 676, 18 O.W.R. 271.

HUSBAND AND WIFE — HOMESTEAD — PRACTICE — STATUTES — ACT RESPECTING HOMESTEADS, C. 29 OF 1915, AMENDED BY C. 27 OF 1916—ACTION BY WIFE TO SET ASIDE LEASE ON HOMESTEAD—MOTION TO STRIKE OUT CLAIM BECAUSE STATUTE NOT PLEADED AND NO SUCH RELIEF PROVIDED, DISMISSED.

In bringing an action founded upon a public act of the province the plaintiff need only allege such facts as bring him within its provisions and it is not necessary, though desirable, to set out the statute relied on. In an action brought by a wife to set aside a lease made by her husband to defendant to which she was not a party, defendant's motion before the local master to strike out the statement of claim as not pleading an Act respecting Homesteads, relied on, or as claiming relief not provided by the statute, was dismissed. Such motion should be made under rr. 219, 220 rather than 221.

Ratner v. Vicker, [1919] 1 W.W.R. 631.

PRACTICE—STATEMENT OF CLAIM IDENTICAL WITH COUNTERCLAIM IN ANOTHER ACTION—ABUSE OF PROCESS OF THE COURT.

Plaintiff's statement of claim was struck out as being an abuse of the process of the court because the relief claimed was the same as his counterclaim in another action between the same parties.

Kybich v. Mangus, [1919] 3 W.W.R. 532.

PLEADING—EMBARRASSING PLEADING STRUCK OUT.

An allegation in the statement of claim for malicious prosecution that the magistrate before permitting an amendment to defendant's information examined defendant and announced his opinion that his action was malicious and that no criminal responsibility attached to the plaintiff, was struck out as embarrassing because not a fact material to the issue.

Bain v. Nicholson, [1919] 3 W.W.R. 1026.

E. NEGATION OF DEFENCE.

(§ II E—190) — NEGATION OF DEFENCE — CONSIDERATION FOR BILL OR NOTE.

Since it is presumed that a promissory note is based on a legal and good consideration, it is unnecessary for the statement of claim to allege facts to shew such consideration; it is for the defence to specially plead want of consideration.

Snider v. Snider, 16 D.L.R. 720, 30 O.L.R. 105.

ACTION ON CONTRACT REQUIRED BY STATUTE TO BE IN WRITING—COMPLIANCE NOT ALLEGED.

Whether an agreement for remuneration for the sale of land is in writing as required by c. 27 of the Alberta Act of 1906, need not be alleged in a statement of claim in an action for the recovery of the broker's commission; the lack of such writing being a matter of defence.

Van Ripper v. Bretall, 13 D.L.R. 352, 6 A.L.R. 145, 25 W.L.R. 162, 4 W.W.R. 1289.

(§ II E—197) —MUNICIPAL OFFICER—WANT OF NOTICE—GOOD FAITH.

A public official, sued for damages on account of an act done in the exercise of his functions, can set up his status and complain of want of notice only if he has committed the act charged against him in good faith; good or bad faith is a question affecting the merits of the litigation and

can only be decided upon the merits. When malice and bad faith are alleged the defendant cannot set up want of notice by exception to the form.

Paradis v. Roger, 49 Que. S.C. 7.

F. Prayer; allegations as to damages.

(§ II F—202)—Allegations as to damages — General — Special — Sufficiency.

General damage need not be specially pleaded, but special damage must be pleaded in order that the defendant may not be taken by surprise at the trial.

Staats v. C.P.R. Co., 17 D.L.R. 309, 17 Can. Ry. Cas. 38, 7 S.L.R. 184, 28 W.L.R. 627, 6 W.W.R. 401.

Workmen's Compensation Act — Pleadings under—Power of arbitrator to allow applicant to amend his particulars.

Moore v. Crow's Nest Pass Coal Co., 15 B.C.R. 391.

G. Averments as to ownership, title or possession.

(§ II G—210) — Action for purchase price—Sale of land.

Possession of title by a vendor suing for the balance of the purchase money of land upon an open contract, and his readiness to convey are something more than conditions precedent within the meaning of r. 154 (Sask.); they are material facts which go to the root of the action and must be pleaded in order to entitle the vendor to a judgment. [Mayberry v. Williams, 3 S.L.R. 350; Yates v. Gardiner, 20 L.J. Ex. 327, applied.]

Landes v. Kusch, 24 D.L.R. 136, 8 S.L.R. 32, 30 W.L.R. 444, 7 W.W.R. 1076, reversing 19 D.L.R. 520, 7 S.L.R. 83, 6 W.W.R. 1309.

Averment as to ownership, title or possession.

The defence that a chattel was purchased bona fide for value, is sufficiently raised by an allegation that it was understood between the defendant's vendor and the person from whom the latter bought the chattel, who retained the title thereto, that the former was at liberty to sell and dispose of it.

Delaney v. Downey, 4 D.L.R. 474, 21 W.L.R. 577, 2 W.W.R. 599.

Demand for security—Plea to the merits.

A demand for security as enacted by art. 2073 C.C. (Que.), must be made by a plea to the merits and not by a dilatory exception. [Bastien v. Desjardins, 11 K.B., followed.]

Mutual Ass'ce Co. v. Morency, 15 Que. P.R. 74.

Landlord's seizure in ejectment—Exception to form—Conclusions—Inscription in law — C.C.P. 174, 191, 1150, 1153.

A contention that the written document on which the plaintiff bases his seizure in ejectment is a deed of sale and not a lease, and that the action is not summary, must be pleaded by way of an inscription in law or a plea to the merits, and not by way of an exception to the form. The conclusions of an exception to the form, asking purely and simply the dismissal of the action, are illegal, the court not being able to decide further than what the conclusions mention and therefore being unable to reserve the plaintiff's recourse.

Bourdon v. Cohen, 15 Que. P.R. 276.

The plaintiff, in a possessory action, has to allege that he was in possession a year and a day before the controversy of which he complains. Upon omission of such an allegation the action will be sent back for inscription of the right.

Henry v. Hodge, 18 Rev. de Jur. 47.

Hypothecary action—Registration.

Where, in an hypothecary action, the declaration does not allege the registration of the deed creating the hypothec, the action cannot be maintained.

Drouin v. Legault, 25 Que. K.B. 74.

H. On contract liability.

(§ II H—215) — Misrepresentation—Action to set aside contract.

A plaintiff in an action to set aside a contract entered into on the strength of alleged misrepresentation, must be held strictly to his pleadings as to the false statement relied on.

Medcalf v. Oshawa Lands & Investments, 15 D.L.R. 745, 5 O.W.N. 797.

In an action to recover a debt an allegation of defendant's admission of the debt and promise to pay it should appear in the declaration; if it appears in the reply to defendant's pleas it will be struck, when it alleges merely a promise to pay without specifying whether it was verbal or in writing so as to afford opportunity for a demand of particulars.

Miner v. Keegan, 14 Que. P.R. 412.

Action by bank upon mortgage—Additional security—Mode of pleading.

In an action by a bank upon a mortgage upon real estate it is not necessary to allege in the statement of claim facts shewing that the mortgage was taken by way of additional security to a pre-existent debt. Where the right claimed or the defence raised existed at common law and the subsequent statute has not affected its validity, but merely introduced regulations as to the mode of its existence or performance, the statute does not affect the form of pleading. It is sufficient to allege whatever was sufficient before the statute.

Canadian Bank of Commerce v. Perkins, 33 W.L.R. 78.

Statement of claim—Oral contract—Consideration—Particulars.

Harris v. Elliott, 4 O.W.N. 849, 24 O.W.R. 143.

IMPLIED COVENANT OF TRANSFEREE TO PAY MORTGAGE MONEY—LAND TITLES ACT (SASK.), S. 63—PERSONAL JUDGMENT.

Colonial Investment & Loan Co. v. Foisie, 19 W.L.R. 748.

(§ II H—218)—ON COVENANT.

As the onus rests upon the defendant in an action for specific performance of a contract to sell lands, to shew that, in cancelling the agreement, the procedure agreed upon in the contract was followed, it is immaterial that objection to the sufficiency of the notice of cancelation was not taken by the plaintiff in the pleadings.

Brown v. Roberts, 2 D.L.R. 523, 17 B.C. R. 16, 1 W.W.R. 987.

(§ II H—219)—ACTION AGAINST ENDORSER OF PROMISSORY NOTE—NOTICE OF DISHONOUR.

Having regard to the statutory form of protest contained in the Bills of Exchange Act (Can.), which includes a statement of the notices of protest, a demurrer to a statement of claim which alleges protest without specifying notice of dishonour in respect of a promissory note payable in Canada, will not be allowed.

Wood v. Smart, 16 D.L.R. 97, 26 W.L.R. 817.

DEMAND NOTES—DEED ABSOLUTE AS SECURITY—UNCONDITIONAL LEAVE TO DEFEND.

The fact that the lender suing upon demand notes had taken a deed absolute in form as security for the payment of the debt will support an order giving unconditional leave to defend so that defendant's rights in respect of the mortgage may be tried out in the one action where his affidavit sets up a contemporaneous oral agreement that he should have a period of time not yet expired within which to make payment.

Auld v. Taylor, 21 D.L.R. 577, 21 B.C.R. 192, 8 W.W.R. 552.

BILLS AND NOTES.

In an action on a note against an endorser, no legal ground of action or "lien de droit" is disclosed, if the declaration omits to allege, that notice of the protest was given to defendant as endorser. A declaration is not demurrable if it be therein alleged that defendant has acknowledged to owe and promised to pay the amount of the note sued upon, which means a promise and acknowledgment subsequent to the maturity and failure to give notice of the dishonour of the note. Plaintiff cannot make proof of the protest of the note and of notice thereof to defendant, if the declaration omits to allege such notice. If plaintiff fails to file his exhibits with the return of the writ or with his answer, he cannot afterwards file them without any leave of the court or judge, and without any notice to the defendant. Notice of protest is insufficiently given to an endorser, when such notice is sent by depositing the same directed to the endorser's name, Montreal, in the post office, at Montreal, and prepaying postage, when defendant has under his signature on the note designated his place for the purposes of such note.

Rosenberg v. Johnson, 18 Rev. de Jur. 32.

PROMISSORY NOTE—ACTION BY HOLDER.

Levallee v. Burrage, 12 Que. P.R. 382.

(§ II H—222)—STATEMENT OF CLAIM—SUFFICIENCY OF ALLEGATIONS—ASSIGNMENT OF INTEREST IN LAND.

Ormiston v. Ullerich, 25 D.L.R. 816, 32 W.L.R. 314.

STATEMENT OF CLAIM—RELEVANCY—CONTRACT FOR SALE OF LANDS.

Shumer v. Todd, 2 O.W.N. 645, 18 O.W. R. 275.

(§ II H—223)—SALE OF GOODS.

In an action for the price of goods sold exceeding the value of $50, where there has been no acceptance or receipt of the goods and nothing given in earnest, the vendor who relies upon a written contract must allege it in his action or by subsequent amendment, and otherwise he cannot produce it or make evidence of it at the trial.

Lemay v. Lefebvre, 4 D.L.R. 833, 41 Que. S.C. 541.

J. FOR NEGLIGENCE.

(§ II J—230)—STATEMENT OF CLAIM—SUFFICIENCY OF ALLEGATIONS.

A statement of claim in writing that on a certain day, near a certain place, plaintiff's horse was killed by the defendant railway company's engine, to his damage in a certain sum, is a fairly comprehensive statement of the facts shewing what the cause of the action is for, within the meaning of s. 95 of the County Courts Act, R.S. M. 1902, c. 38, allowing a "simple statement in writing of the cause of action such that it may be known or understood by a person of ordinary intelligence what the action is brought for."

Stitt v. C.N.R. Co., 10 D.L.R. 545, 23 Man. L.R. 43, 15 Can. Ry. Cas. 333, 23 W. L.R. 641, 3 W.W.R. 1116.

ALLEGATIONS AS TO NEGLIGENCE—COMMON FAULT—WARRANTY—QUE. C.P. 185, 191.

The principal defendant may allege that the accident in the case is due to the common fault and negligence of the principal plaintiff and defendant in warranty.

Ramsay v. Montreal, 16 Que. P.R. 199.

ACTION FOR DAMAGES—HYPOTHESIS.

Dagenais v. Dorval, 12 Que. P.R. 217.

(§ II J—231)—SUFFICIENCY OF ALLEGATION.

An allegation in the plaintiff's statement of claim for injuries received by being struck by an automobile, that such vehicle was being driven by the son of the defendant, is not a sufficient allegation of agency to render the defendant answerable, and the statement cannot, at the trial after all the evidence is in and the argu-

ment in progress, be amended to shew such an agency.

B. & R. Co. v. McLeod, 7 D.L.R. 579, 5 A.L.R. 176, 22 W.L.R. 274, 2 W.W.R. 1093.

ALLEGATION OF PREVIOUS ACCIDENTS—QUE. C.P. 191.

In an action for damages, an allegation that "in fact, many accidents happened at the same place, on account of the great speed with which the defendant's cars crossed that place;" will not be allowed.

Neville v. Montreal Tramways Co., 16 Que. P.R. 202.

(§ II J—234)—SPECIFYING NEGLIGENT ACT.

If the plaintiff by his action for damages against the city of Montreal alleges negligence on the city's part or defective drainage he should give the particulars of the facts constituting the negligence or of the defects in the maintenance or construction of the drains.

Capras v. Montreal, 14 Que. P.R. 372.

(§ II J—236)—STATEMENT OF CLAIM—EMPLOYERS' LIABILITY ACT (B.C.).

A plaintiff in a negligence action desiring to claim under the Employers' Liability Act (B.C.) as well as at common law, should specifically raise the claim of defendant's liability under the statute in his statement of claim.

Airey v. Empire Stevedoring Co., 16 D.L.R. 734, 20 B.C.R. 130, 27 W.L.R. 712, 6 W.W.R. 938. [Varied 18 D.L.R. 469, 28 W.L.R. 956, 6 W.W.R. 1465.

AS AFFECTING NATURE OF ACTION.

Where, from the nature of the wrong complained of, there is more than one form of remedy, the plaintiff may elect either, and hence redress for misdelivery of goods by a carrier may be claimed either in contract or in tort.

Williams v. Government Management Board, 11 E.L.R. 10.

(§ II J—238)—NEGLIGENCE—ACTION FOR DAMAGES—FINDING OF JURY—EXCESSIVE SPEED—DEFINITION.

In an action for damages for injuries sustained by being run down by defendants' engine, the court on appeal held that the finding of the jury, that the company was guilty of negligence in not "proceeding with sufficient caution when approaching wreckage zone," was covered by the allegation of "excessive speed" in plaintiff's pleading, and excessive speed would be such speed as would be excessive under all the circumstances of the case, and that the jury had the right to pass upon the question of excessive speed. [Minor v. G.T.R. Co., 35 D.L.R. 106, 38 O.L.R. 646, distinguished.]

Follick v. Wabash R. R. Co., 48 D.L.R. 526, 45 O.L.R. 528.

K. FOR LIBEL AND SLANDER.

See Libel and Slander.

(§ II K—245)—SLANDER.

If in bringing action for damages caused by slander in the evidence given by defendant in an action plaintiff finds it impossible to set out in his declaration all the words and terms used he may file a copy of defendant's testimony in such action as part of his declaration. A motion for further particulars in such a case was dismissed.

Carrington v. Russell, 13 Que. P.R. 252.

LIBEL—STATEMENT OF CLAIM—MOTION TO STRIKE OUT — REASONABLE CAUSE OF ACTION — UNNECESSARY ALLEGATION — MATTER OF INDUCEMENT — EXACT WORDS OF DEFAMATORY LETTER NOT KNOWN TO PLAINTIFF — AMENDMENT AFTER DISCOVERY.

Lynford v. United States Cigar Stores, 12 O.W.N. 68.

LIBEL—STATEMENT OF CLAIM—IRRELEVANT MATTER—STRIKING OUT—DELIVERY OF STATEMENT OF DEFENCE—SOLICITOR'S SLIP—RELIEF FROM—COSTS.

Dominion Sugar Co. v. Newman, 13 O.W.N. 38.

STATEMENT OF CLAIM — LIBEL AND CONSPIRACY—IRRELEVANT ALLEGATIONS.

St. Clair v. Stair, 4 O.W.N. 1141, 24 O. W. R. 450.

(§ II K—246)—LIBEL—FACTS IN AGGRAVATION OF DAMAGES—MAY BE PLEADED, WHEN.

Facts relied on by the plaintiff in aggravation of damages in a libel action may properly be pleaded if relevant to the issue of libel. [Millington v. Loring, 6 Q.B.D. 190, applied.]

Hallren v. Holden, 20 D.L.R. 336, 20 B.C.R. 489, 29 W.L.R. 802, 7 W.W.R. 402.

PARTICULARS—DELIVERY OF—RELEVANCY—VAGUE OR EMBARRASSING — STRIKING OUT.

Augustine Automatic Rotary Engine v. "Saturday Night," 21 D.L.R. 870, 34 O.L. R. 166.

AS TO LIBELOUS PUBLICATIONS.

An action for libel in respect of an article published by a journal which is not the property of the defendant, will be dismissed on inscription en droit if the declaration contains no allegation that the defendant had in fact uttered the words.

Gravel v. Montreal Publishing Co., 18 Que. P.R. 127.

PARTICULARS—LIBEL—ACTUAL AND EXEMPLARY DAMAGES—C.C.P. 123.

In an action of damages for libel, the plaintiff must: (1) give approximately the dates and places where the defamatory language was used by the defendant; (2) produce the number of the newspaper of which the plaintiff complains; (3) state how much is claimed as actual damages and how much as general and exemplary damages.

O'Connell v. Allan, 16 Que. P.R. 49.

NEWSPAPER SUED IN DIFFERENT DISTRICTS FOR SAME ARTICLES—EXEMPLARY DAMAGES—C.C.P. 123.

A plaintiff who sues a newspaper in two

different districts for damages caused by the same libellous articles is not bound to furnish particulars on the special damages suffered in each of those districts, provided he declares that he is claiming only exemplary damages.

Casgrain v. Le Soleil, 15 Que. P.R. 404.

LIBEL—STATEMENT OF CLAIM—CAUSE OF ACTION—APPLICATION OF DEFAMATORY WORDS TO PARTICULAR PERSON.

Cooper v. Jack Canuck Publishing Co., 5 O.W.N. 66, 25 O.W.R. 47.

(§ II K—249)—INNUENDO IN COMPLAINT FOR SLANDER.

The statement of claim in an action for slander, is insufficient where the defamatory words alleged were not, in themselves, actionable, and were without point or meaning, being portions only of three separate conversations had with three different persons, without any allegation of circumstances shewing that the words pleaded were used in a defamatory sense.

Sonier v. Breau, 3 D.L.R. 184, 41 N.B. R. 177, 10 E.L.R. 391.

L. FOR TORTS, INJURIES OR NUISANCE.

(§ II L—250) — SUFFICIENCY OF STATEMENT OF CLAIM—ACTION FOR CONTRIBUTION BETWEEN JOINT TORTFEASORS—COMPANY DIRECTORS.

The statement of claim in an action by a director of a company against his co-directors for contribution under s. 92 (4) of the Companies Act, B.C. Stat. 1910, c. 7, R.S.B.C. 1911, c. 39, s. 93, in respect of a judgment obtained against him by one induced to subscribe for shares in reliance on false statements in the prospectus, must allege the responsibility of the co-directors for the issuance of the prospectus, that the subscription was made on the faith of untrue statements therein, and that the subscriber suffered loss by reason thereof; and it is not sufficient to allege merely a claim for contribution on account of the judgment against the plaintiff, and its payment by him.

Johnson v. Johnson, 14 D.L.R. 756, 18 B.C.R. 563, 26 W.L.R. 3, 5 W.W.R. 525.

STATEMENT OF CLAIM—ACTION FOR DAMAGES FOR NEGLIGENCE CAUSING PERSONAL INJURIES—PARTICULARS OF INJURIES SUFFERED.

McKay v. Toronto R. Co., 17 O.W.N. 73.

INJURY ON PUBLIC WORK—"PUBLIC WORKS HEALTH ACT"—REGULATIONS BY ORDER-IN-COUNCIL — BREACH OF STATUTORY DUTY.

Grand Trunk Pacific R. Co. v. White, 43 Can. S.C.R. 627, reversing White v. Grand Trunk Pacific R. Co., 2 A.L.R. 522.

(§ II L—251)—CONSPIRACY.

The mere use of the words "in collusion" in a pleading claiming damages against a defendant for having "in collusion with" his codefendant defamed the plaintiff is insufficient to support a claim for damages for conspiracy.

Alexander v. Simpson, 1 D.L.R. 534, 20 W.L.R. 641, 22 Man. L.R. 424, 1 W.W.R. 932.

ACTION BY WIFE AGAINST HUSBAND AND OTHERS FOR—STATEMENT OF CLAIM—DEPRIVING WIFE OF CONSORTIUM OF HUSBAND—MOTION TO STRIKE OUT PART OF PLEADING CONTAINING SUBSTANCE OF CLAIM—CON. R. 261.

Ney v. Ney, 2 D.L.R. 884, 21 O.W.R. 523, 3 O.W.N. 896.

(§ II L—252)—FOR DEATH—STATEMENT OF CLAIM—NEGLIGENCE.

Lum Yet v. Hugill, 1 D.L.R. 897, 3 O.W.N. 521.

(§ II L—257)—MALICIOUS PROSECUTION.

Where the statement of claim in an action for damages for malicious prosecution and false imprisonment contains the usual allegations and the statement of defence denies all the material allegations, a further paragraph to the effect that "if the defendant laid or prosecuted said charge or procured the issue of said warrant, or caused the plaintiff to be arrested or imprisoned, the defendant did it on the advice of counsel," followed by a statement in detail of how the charge was laid before a magistrate who issued the warrant of his own accord and without defendant's request, will be stricken out on motion under r. 167 (Sask. Practice Rules, 1911), as tending to prejudice, embarrass and delay the fair trial of the action.

Jones v. Gore, 8 D.L.R. 868, 22 W.L.R. 739, 3 W.W.R. 526.

MALICIOUS PROSECUTION — ALLEGING TERMINATION.

In an action for malicious prosecution, the allegation that the prosecution was determined in the plaintiff's favour is sufficient, where it sets up that "on the case being called the plaintiff was discharged from custody by the presiding judge at the sittings, whereby the said prosecution was determined," the essential allegations being (a) that the proceedings were terminated (b) that they were terminated in the plaintiff's favour; and it is not essential, though advisable, to set out in what manner they were terminated.

Mortimer v. Fisher, 11 D.L.R. 77, 6 S. L.R. 200, 23 W.L.R. 905, 4 W.W.R. 454.

(§ II L—258)—TO REAL PROPERTY.

In an action for damages caused by the falling of the wall of a building erected upon the adjoining premises, by a contractor for the owner of such adjoining premises, the owner or occupant of the property upon which the wall fell should not rest the claim entirely upon the negligence in the construction of the building, but should plead substantively the omission of the adjoining owner to see to the doing of that which was necessary to prevent the mischief. [Bower v. Peate, 1 Q.B.D. 321, 326; Mersey Docks Co. Trustees v. Gibbs,

L.R. 1 H.L. 93, 114; Pickard v. Smith, 10 C.B.N.S. 480, applied.]

Cockshutt Plow Co. v. MacDonald, 8 D.L.R. 112, 5 A.L.R. 184, 3 W.W.R. 488.

M. For infringement.

(§ II M—265)—If the plaintiff in an action for infringement of patent, in which a defence of invalidity is pleaded, desires to shew at the trial that the defendant is estopped from disputing the validity of the patent, he must specifically plead the estoppel.

Imperial Supply Co. v. The G.T.R. Co., 1 D.L.R. 243, 10 E.L.R. 414, 13 Can. Ex. 507.

N. Estates of decedents; wills; trusts.

(§ II N—270)—Acceptance of succession.

In an action brought against heirs it is not necessary to allege that they have accepted the succession of the de cujus; acceptance being the general rule it will be presumed.

Harkness v. McDunnough, 18 Que. P.R. 216.

O. As to corporate matters.

(§ II O—275)—Statement of claim — Action by creditors of company to set aside transfers of property — Want of authority of officers of company.

King Milling Co. v. Northern Islands Pulpwood Co., 1 D.L.R. 913, 3 O.W.N. 774.

Corporate name—Change.

A company which has obtained by supplementary letters patent a change in its corporate name cannot afterwards in its original name demand the peremption of an action brought against it.

Levinson v. H. Bourgie Co., 18 Que. P.R. 183.

As to credit and management.

The plaintiffs sued upon an agreement respecting the acquisition and resale of lands for their mutual profits, claiming large sums for debt and damages. The defendant company with its statement of defence filed a counterclaim for over $2,000,000. On application of the plaintiffs, the referee made an order striking out certain paragraphs as irrelevant in an action upon an agreement between the plaintiffs and the defendant company only. Held, reversing the order, that the defendants were entitled to set up the claim that they had behind them the stability, credit, organization, name and management of the parent company, and to support that claim by alleging sufficient facts, and that all the paragraphs referred to should be allowed to stand on the record. [Knowles v. Roberts, 38 Ch. D. at 270, and Theo. Noel Co. v. Vitæ Ore Co., 17 Man. L.R. 319, followed.]

Transcontinental Townsite Co. v. G.T.P. Develop. Co., 25 Man. L.R. 843.

Extracts from municipal rolls — Default.

Ste. Flore v. Shawinigan Hydro-Electric Co., 12 Que. P.R. 366.

P. Miscellaneous.

(§ II P—283)—Mode of attacking security to creditor.

The more regular course for an unsecured creditor, who desires to attack the security of another creditor, is not to contest it by way of defence or counterclaim in an action for its foreclosure, but to issue a separate statement of claim and then apply for a consolidation order, or for a stay of proceedings in the foreclosure action under r. 233.

Capital Trust Co. v. Yellowhead Pass Coal & Coke Co., 27 D.L.R. 25, 9 A.L.R. 463, 33 W.L.R. 873, 9 W.W.R. 1275.

Creditors' bill.

Plaintiff brought an action to set aside as fraudulent and void as against creditors a bill of sale, and judgment was given in the action in his favour. He then claimed to have an account taken of goods levied upon by defendant under several warrants of distress issued by him against the makers of the bill of sale who were his tenants. It was held, that if plaintiff wished to attack the proceedings under the warrants of distress as part of the scheme to defeat creditors he should have done so in his pleadings, and also, that plaintiff could not raise in this way the question as to irregularity in connection with the distress proceedings, a special action being the only remedy in that case, and that remedy not being open to a person in plaintiff's position. Also, that the distress proceedings having been sufficiently pleaded were an answer to plaintiff's claim. Defendant's costs on the appeal set off against plaintiff's costs in the action.

Pitts v. Campbell, 45 N.S.R. 458.

(§ II P—288)—Judgment.

If the grounds of the plaintiff's claim are not given either in the writ or declaration the objection thereto by the defendant should be taken by exception to the form and not by inscription en droit. The plaintiff who sues to recover the amount of a judgment is not required to give full particulars thereof as it is set up and filed as part of the declaration.

Cardin v. Parent, 14 Que. P.R. 61.

(§ II P—290)—Fraud.

In an action for the rescission of an agreement for the sale of lands, and the return of moneys retained by the defendant, allegations of fraud are sufficiently made without actual mention of the word "fraud" in the statement of claim, where the allegations, if sustained, shew that the defendants were guilty of the perpetration of a fraud on the plaintiff. [Marshall v.

Staden, 7 Hare 728, 19 L.J. Ch. 57, 68 E.R. 177, followed.]

Pringle v. Dwyer, 6 D.L.R. 446, 5 A.L.R. 449, 22 W.L.R. 158.

(§ II P—294)—FACTS OF WHICH THE BURDEN OF PROOF IS ON THE APPLICANT.

Turner v. Surrey, 16 B.C.R. 79.

III. Pleas and answers.

A. IN GENERAL.

As to pleading moratorium, amendment, see Moratorium.

Plea of payment, see Evidence, XIII A—1004.

Plea of fair comment, essentials, see Libel and Slander, III C—110; New Trial, II—7.

(§ III A—300)—ABSOLUTE RIGHT TO DEFEND — TEST FOR UNCONDITIONAL LEAVE.

Wilson v. B.C. Refining Co., 20 D.L.R. 948, 20 B.C.R. 209, 28 W.L.R. 557, 6 W.W.R. 1046.

COUNTERCLAIM.

A counterclaim when properly drawn is not a defence, but is a new and separate action.

Capital Trust Co. v. Yellowhead Pass Coal & Coke Co., 27 D.L.R. 25, 9 A.L.R. 463, 33 W.L.R. 873, 9 W.W.R. 1275.

ACTION FOR AGENT'S NEGLIGENCE—DEFENCE.

It is no answer to an action by the principal against his agent for breach of contract resulting from the agent's wrongful disposal of a document of title to goods and the resulting delivery of the goods by the carrier before the price had been paid to such principal who was the seller and consignee, for the agent to set up that the property in the goods had not passed to the person who had wrongfully obtained possession.

Wolsely Tool & Motor Car Co. v. Jackson, 21 D.L.R. 610, 33 O.L.R. 96. [Affirmed in 33 O.L.R. 587.]

LEAVE TO SERVE—NOTICE.

An application for an order to serve a statement of defence under r. 56 (Ont.) should be made on notice and not ex parte. [Joss v. Fairgrieve, 32 O.L.R. 117, followed.]

Davis Acetylene Gas Co. v. Morrison, 23 D.L.R. 871, 34 O.L.R. 155.

LIBEL — PLEA OF JUSTIFICATION.

The pleadings in an action for libel must define the issue which is being tried. The defendant upon a plea of justification is limited to proving the truth of his assertion, and ought not to be allowed, to the prejudice of the plaintiff, to adduce evidence which may raise a totally different issue. Confusion will arise, and a mistrial may be caused, if evidence is admitted upon the theory that the pleadings do not bind the parties, because of the power to amend. A new trial was ordered.

Govenlock v. London Free Press Co., 35 O.L.R. 79.

EXCEPTION TO THE FORM — JUDGMENT — PLEA TO THE MERITS.

Though the judge who delivers the final judgment has jurisdiction to review the decision given upon an exception to the form, the latter is only provisional as between the parties, and the defendant can set up in his defence on the merits the same grounds already pleaded by the exception to the form which was dismissed. [Montreal Rolling Mills Co. v. De Sambor, 11 Que. P.R. 110, 16 R.L. (N.S.) 80.]

Graham v. Brodeur Co., 47 Que. S.C. 56.

STATEMENT OF DEFENCE — CLAIM FOR CARRIAGE OF GOODS — DEFENCE BASED ON ALLEGED AGREEMENT FOR POSTPONEMENT OF PAYMENT — REASONABLE ANSWER TO PLAINTIFF'S CLAIM.

Canada Steamship Lines v. Steel Co., 7 O.W.N. 832.

STATEMENT OF DEFENCE — RES JUDICATA.

Bradshaw v. Grossman, 8 O.W.N. 275.

STATEMENT OF DEFENCE — MOTION TO STRIKE OUT PORTIONS — EMBARRASSMENT — TITLE TO LAND — LAND TITLES ACT — RES JUDICATA.

Toronto Development v. Kennedy, 5 O.W.N. 922.

PLEA TO LIEN ACTION — PARTICULARS — VALUE OF WORK — CONCLUSIONS.

In an action in declaration of privilege, a plea which does not conclude to the nullity of such privilege, but only asks its radiation is irregular, and such conclusions will be dismissed on motion as being conclusions of a main action or of a cross-demand. A defendant who pleads to an action in declaration of privilege that such privilege is illegal must shew in what such illegality consists. If he claims that the plaintiff's works are worth only a portion of the amount for which a privilege has been registered, he must state in what those works consist.

Angrignon v. Mailloux, 19 Que. P.R. 377.

PREMATURITY OF ACTION — EXAMINATION SUR FAITS ARTICLE.

If a defendant pleads that the action of the plaintiff is premature as he had been granted a delay and being examined sur faits et articles persists in alleging that the delay had been given him, the plaintiff may proceed to judgment without other proof, and the answers of the defendant on his examination cannot be set up in his favour. If a widow sued not personally but ès qualité remarries during the course of the trial a reprise d'instance will not be allowed.

Dagenais v. Racine, 18 Que. P.R. 274.

STATEMENT OF DEFENCE — ACTION BEGUN BY SPECIALLY ENDORSED WRIT — APPEARANCE ENTERED AND AFFIDAVIT FILED — ABSENCE OF ELECTION BY PLAINTIFF TO PROCEED TO TRIAL.

Munn v. Young, 5 O.W.N. 426.

PLEAS — RES JUDICATA — NECESSARY AVERMENTS.

In order that a defence of res judicata may succeed, it is necessary to shew not only that the cause of action was the same, but also that the plaintiff has had an opportunity of recovering, and but for his own fault might have recovered in the first action that which he seeks to recover in the second. The plea of res judicata must shew either an actual merger or that the same point has been actually decided between the same parties.

International Harvester Co. v. Leeson, 7 W.W.R. 590, 30 W.L.R. 293.

PLEAS — NON EST FACTUM — WHO MAY PLEAD — ILLITERATES.

The defence of non est factum ought not to be limited to the illiterate, so as to deprive the literate and educated people entirely of such a defence in cases where they could have read what they signed, but failed to do so.

Dominion Permanent Loan Co. v. Morgan, 7 W.W.R. 844.

STATEMENT OF DEFENCE — CONSTRUCTION OF CONTRACT — RELEVANCY.

Macdonell v. Temiskaming & Northern Ontario Ry. Commission, 2 O.W.N. 894, 18 O.W.R. 677.

STATEMENT OF DEFENCE — PARTNERS SUED DEFENDING UNDER ONE NAME.

Arnoldi v. Hawes, 19 O.W.R. 76, 2 O. W.N. 1019.

STATEMENT OF DEFENCE — MONEY PAID INTO COURT.

Masterson v. Dorer, 19 W.L.R. 622.

COMPENSATION — ART. 191 C.P.Q. — ART. 1188 C.C.

Doré v. Charron, 12 Que. P.R. 380.

MOTION TO REJECT ANSWER TO PLEA — DELAYS.

A motion to reject an answer to plea, being a matter of form, must be proposed within the delays of an exception to the form.

Croysdill v. Mark-Brock, 12 Que. P.R. 139.

(§ III A—303)—DENIALS — PARTICULARITY.

A paragraph of a defence which, without stating any facts, says that the defendants are not and have not become liable under the ordinance or statute upon which the plaintiff's claim is based, is not permissible under the Alberta practice rules and will be struck out.

Guenard v. Coe, 16 D.L.R. 513, 5 W.W.R. 1044, 26 W.L.R. 626, 7 A.L.R. 245. [Reversed, 17 D.L.R. 47.]

STATEMENT OF DEFENCE — SPECIFIC DENIALS AND TRAVERSES.

The party pleading under the New Brunswick Practice Rules must make it quite clear how much of his opponent's case is disputed, and under the rule (order 19, r. 13) as to specific denials a conjunctive denial of several items of alleged trespass means only that defendant denies committing all of them; if he intended to deny committing any of them his traverse of the several items charged as trespass should be a denial of each item with the word "or" separating each denial so as to make the denial disjunctive.

Kennedy v. Gorman, 12 D.L.R. 812, 13 E.L.R. 54.

DENIALS — DEFAMATION ACTION — DENYING INNUENDO.

A defendant is entitled to set up in his pleading in a libel action that the words relied upon by the plaintiff have not the meaning assigned in the innuendo.

Robert v. Herald Co., 10 D.L.R. 21.

It is not necessary for the defendant, in an action for malicious prosecution and false imprisonment, to affirmatively plead reasonable and probable cause, the proper form of defence being merely to deny the plaintiff's allegations.

Jones v. Gore, 8 D.L.R. 868, 22 W.L.R. 739, 3 W.W.R. 526.

DENIALS IN DEFENCE.

Under a rule of pleading which requires each party to deal specifically with each allegation of fact of which he does not admit the truth (Alta. r. 118), denials of the allegations in each of several paragraphs of the statement of claim may be pleaded by separate paragraphs of the statement of defence alleging as to each separately that the defendant "denies each and every of the allegations and facts set forth and contained" in the particular paragraph. [Adkins v. North Metropolitan Tramway Co., 63 L.J.Q.B. 361, 10 T.L.R. 173, applied.]

Kennerley v. Hextall, 10 D.L.R. 501.

GENERAL DENIAL — FAILURE TO SPECIFY.

A general denial in one paragraph of all the allegations in a statement of claim, without specifically denying each allegation of fact as required by r. 213 (B.C.), is bad and must be disregarded. [Hogg v. Farrell, 6 B.C.R. 387, followed.]

Page v. Page, 25 D.L.R. 99, 9 W.W.R. 442, 22 B.C.R. 185, 32 W.L.R. 854.

A party litigant must assert all his rights and every title that he may have justifying his claim; it is not open to him to try the matter piecemeal.

Ontario & Minnesota Power Co. v. Rat Portage Lumber Co., 3 D.L.R. 331, 3 O. W.N. 1078, 1182, 22 O.W.R. 1.

CORPORATION — DENIAL OF AUTHORITY TO SIGN NOTE — AFFIDAVIT.

A corporation sued on a note and pleading that the note was not authorized by it, ought to follow its denial with an affidavit, without which the allegation will be struck out on motion.

Hayes v. Montreal North, 19 Que. P.R. 216.

OVERPAYMENT — DENIAL — PARTICULARS.

If the plaintiff, in answer to a plea of compensation, alleges that he had previously overpaid defendant for stone bought from

him, and if the defendant replies by a general denial and joins issue with plaintiff without asking for particulars, the court should take into consideration all evidence that has been adduced before it, and render a judgment in liquidation of the account.

Poitras v. Thibeault, 18 Que. P.R. 77.

GENERAL DENIAL OF ALLEGATIONS IN DECLARATION — QUE. C.P. 202.

A denial made individually of all the allegations in a declaration is not a general denial excluding all other allegations.

Parke v. Montreal Tramways Co., 16 Que. P.R. 249.

STATEMENT OF DEFENCE — GENERAL DENIAL — FAILURE TO ALLEGE FACTS — RULE 142.

Lampert v. Barrett, 7 O.W.N. 574.

DENIAL—SPECIAL DEFENCE.

The denial of a single allegation in the declaration does not prevent the plea, in addition, of special defences provided that they be regular, but irregular allegations pleaded in these defences, such as a demand for an account, will be dismissed on motion.

Kaufman v. Marks, 18 Que. P.R. 401.

DENIAL — TRAVERSE — AFFIDAVIT — SECURITY.

Where the authenticity of the certificate mentioned in art. 1220, C.C. (Que.) is denied, the contesting party must proceed with the formalities of art. 209, C.C.P., requiring an affidavit and the giving of security for costs. A general denegation or traverse is not sufficient.

Guttman v. Goodman, 26 Que. K.B. 270.

QUALIFIED DENIAL.

An allegation in his plea by which the defendant "denies all and each of the allegations of the declaration as stated" does not exclude any other defence.

Dandurand v. Riendeau, 18 Que. P.R. 242.

DENIALS OF ALLEGATIONS OF FACT IN THE STATEMENT OF CLAIM.

Smith v. Canada Cycle & Motor Co., 20 Man. L.R. 134, 15 W.L.R. 344.

PLEA OF NEVER INDEBTED.

Miles v. Bell, 40 N.B.R. 158.

REPLICATION — PUIS DARREIN CONTINUANCE.

The facts which have happened since the trial began, and of which the plaintiff may avail himself in a supplementary replication to the defence, should be proper facts and grounds and of a nature to overcome the defence, and not facts and grounds which tend to reform, reconstitute, enlarge or complete his action. It is by inscription en droit and not by motion that the dismissal of such a supplementary replication should be asked for. An allegation which only admits one part of the plea will not be rejected on inscription en droit.

Leduc v. St. Boloeil, 18 Que. P.R. 356.

PUIS DARREIN CONTINUANCE.

The new facts which a defendant may plead by his defence and the plaintiff by his reply, under art. 198 C.C.P., must be facts which arose before the commencement of the action, but which the declaration or the defence, as the case may be, does not refer to; they must be so pertinent to and connected with the cause that one party or the other can join issue by a general reply. A supplementary defence and a supplementary answer are each subject to the following conditions and formalities: (a) It can only be pleaded with the permission of the court; (b) that the facts pleaded are material; (c) that the facts arose since issue joined; (d) that the application to plead be supported with the affidavit required by rule 47 of the Superior Court; (e) that the application is made before final judgment, or before the verdict in case of a jury trial.

Mercure v. Munsey, 19 Que. P.R. 182.

(§ III A—304 b) — ABATEMENT — WHAT AMOUNTS TO.

Rule 318 of the King's Bench Rules, R.S.M. 1902, c. 40, which declares that no defence shall be pleaded "in abatement," does not require that a plaintiff should be nonsuited merely because the action was prematurely brought, where the disability had been removed pendente lite.

McKeown v. Lechtzier, 15 D.L.R. 15, 24 Man. L.R. 295, 26 W.L.R. 264, 5 W.W.R. 778.

ABATEMENT.

A dilatory plea to stay the principal action will not be granted when the defendant, a joint maker of a promissory note, does not give any other valid reason for that purpose, except that the note should be paid by the other maker, when in fact the note is to be paid by him.

Droin v. Ambrose, 14 Que. P.R. 58.

B. WHAT MUST BE PLEADED.

(§ III B—305) — ESTOPPEL — SPECIAL PLEADING — WHEN NOT NECESSARY.

An estoppel must always be specially pleaded unless it appears on the face of the adverse pleading or unless there was no opportunity to plead it. [Odgers on Pleading, 6th ed., 222, approved.]

Haynes v. Wilson, 20 D.L.R. 569, 6 W.W.R. 1495, 7 S.L.R. 449, 29 W.L.R. 381.

MORTGAGE — REDEMPTION — VALIDITY OF FIRST MORTGAGE — JOINING PRIOR MORTGAGEE — ACTION TO ENFORCE SECOND MORTGAGE.

Where the validity of the prior mortgage is not attacked there must be an offer to redeem either expressly or impliedly in the pleadings in order to justify the joining of the prior mortgagee as a party to an action brought to enforce the second mortgage. [Elmer v. Creasy, L.R. 9 Ch.D. 69; Wickenden v. Rayson, 6 DeG. M. & G. 210, distinguished.]

Lumber Manufacturers' Yards v. Moose Jaw Flour Mills, 20 D.L.R. 781, 7 W.W.R. 876, 7 S.L.R. 437, 30 W.L.R. 580.

NEGLIGENCE — INEVITABLE ACCIDENT — PARTICULARS.

In an action of negligence it is open to the defendant on the general issue to prove that the injury was due to inevitable accident without expressly pleading it; consequently the defendant who has pleaded inevitable accident should not be ordered to give preliminary particulars as to the nature of and the circumstances which led to such inevitable accident.

Gillingham v. Lewis, 21 D.L.R. 470, 48 N.S.R. 233.

STATEMENT OF DEFENCE — ACTION FOR FALSE ARREST AND IMPRISONMENT — JUSTIFICATION — REASONABLE AND PROBABLE CAUSE — SETTING OUT FACTS.

Misite v. Toronto, Hamilton & Buffalo R. Co., 9 O.W.N. 107.

PARTICULARS — ACTION FOR DAMAGES — SECRETARY-TREASURER SUED FOR ACCOUNT — ALLEGATION OF PROBABLE AND REASONABLE CAUSE FOR BRINGING ACTION — C.C.P. 123.

In an action for damages against a municipality, brought by the secretary-treasurer against whom it had taken an action to account, if the municipality pleads that it had a probable and reasonable cause to believe the said action to account well founded both in fact and in law, it must state the facts and circumstances by which it was induced to take such proceedings.

Richard v. St. Ours, 15 Que. P.R. 307.

PROCEDURE — CONFESSION OF JUDGMENT— DENIAL — DEFENCE — CONCLUSION DISMISSING THE ACTION — C.C.P. ART. 527, 530.

After having brought in a confession of judgment denied by the plaintiff, the defendant, if he intends to benefit himself by this procedure, should move by his defense that his confession of judgment be declared sufficient and that the action be dismissed for the rest, but should not ask simply for a dismissal of the action. If he asks purely and simply for a dismissal of the action, and after the examination of the case the action is maintained against him he incurs all the costs of the action.

Lessard v. Auchu, 56 Que. S.C. 226.

VARIANCE — STATEMENT OF CLAIM — CASE PROVED — DEFENCE OF STATUTE OF FRAUDS — WHEN AVAILABLE — MOTION AGAINST VERDICT.

The plaintiffs, wholesale liquor dealers, alleged that in Nov. 1913, the plaintiffs agreed to pay, and did pay, the defendant $5,000 for certain leasehold premises, and it was agreed that in the event of liquor licenses being issued and in force in Ward 3 in the said town for the year 1917, the plaintiffs should pay the defendant an additional $1,000; that plaintiffs gave defendant their note for $1,000, payable 42 months after date, and it was further agreed that the note should not be negotiated and should be void if licenses were not granted as aforesaid. Defendant did negotiate the note, and plaintiffs were forced to pay it. The case proved was that the plaintiffs bought the property for $6,000, and gave in payment 6 promissory notes, payable respectively 12, 18, 24, 30, 36 and 42 months after date, and it was agreed that the last note should not be negotiated and was to be void if licenses were not granted as aforesaid: A verdict was found for the plaintiffs for the amount of the last note and interest. On motion by the defendant to set aside the verdict and enter a verdict for the defendant, on the grounds that the evidence did not support the issues raised by the pleadings, and that the agreement, not being in writing, could not be enforced under the Statute of Frauds. Held, that there was not such variance between the statement of claim and case proved as to justify the entry of a verdict for the defendant, and as the Statute of Frauds had not been pleaded or raised on the trial it was not available on motion against the verdict.

Boudreau v. Ellsworth, 46 N.B.R. 79.

WHAT MUST BE PLEADED — PART PERFORMANCE.

The equitable defence of part performance must be specially pleaded.

Griffin v. Brunton, 6 W.W.R. 1034.

(§ III B—308)—ASSUMPTION OF RISK.

The maxim volenti non fit injuria has no application nor is it material whether or not it was availed of as a plea, where in the action for negligence, the jury found that it had not been contributed by the plaintiff.

G.T.R. Co. v. Brulott, 46 Can. S.C.R. 629, affirming 24 O.L.R. 154, 19 O.W.R. 514.

(§ III B—309)—ESTOPPEL — SETTING UP CONSTITUENT FACTS.

A plea of estoppel must allege all facts upon which the party relies as constituting the estoppel, and consequently, if a defendant sued for the price of goods sold and delivered, desires to set up that the defendant had, on receiving a statement of account rendered by the plaintiff after the date of the charges in question paid the amount of same and had destroyed vouchers in faith of its being the entire account, such facts must be specifically pleaded in order to form an answer to the demand for items which were not in fact included in the account so rendered

Swift Canadian Co. v. Easterbrook, 14 D.L.R. 838, 6 S.L.R. 281, 26 W.L.R. 142, 5 W.W.R. 631.

ESTOPPEL TO BE SPECIALLY PLEADED.

An estoppel must always be specially pleaded unless there is no opportunity to plead it; and if the matter relied upon as an estoppel appears on the face of the adverse pleading, it is ground for an objection in point of law in lieu of a demurrer.

Mackenzie v. Gray, 17 D.L.R. 769, 7 S.L.R. 115, 28 W.L.R. 322, 6 W.W.R. 914.

ESTOPPEL — ASSIGNEE OF LAND AGREEMENT FAILING TO PLEAD.

Where an assignee of an agreement for sale has an acknowledgment of the debt under such agreement, and comes to trial with full knowledge of the fact that the purchaser intends to set up by way of equitable defence a claim against the assignee for defective construction of the building on the land comprised in the agreement, but fails to specially plead estoppel, the purchaser is entitled to set up a claim in connection with the construction of the building as against the assignee, in the same manner, and to the same extent, as the purchaser could against the original vendor if he were taking proceedings under the agreement.

British Pacific Trust Co. v. Baillie, 20 B.C.R. 199, 7 W.W.R. 17.

(§ III B—310)—FAILURE TO PLEAD LIEN—STATEMENT OF DEFENCE — ACTION FOR POSSESSION OF MOTOR CAR.

McKinney v. McLaughlin, 17 D.L.R. 832, 7 O.W.N. 21.

FAILURE TO PLEAD.

An attempt to shew an agreement to return the money sought to be recovered cannot succeed where it is neither pleaded nor made a ground of appeal.

Maritime Gypsum Co. v. Redden, 8 D.L.R. 155, 46 N.S.R. 285, 11 E.L.R. 586.

(§ III B—312)—FRAUD.

A plaintiff suing for cancellation of an instrument given as security on the purchase of a business as a going concern upon the ground of failure of consideration, will not be permitted, after repudiating the agreement and declining to accept delivery or transfer of the assets of the business, which his vendor was always prepared to hand over in terms of the agreement, to shew that the defendant took an unconscionable advantage of him in making the contract, where he has not pleaded that the contract was voidable as an unconscionable bargain or on the ground of fraud or otherwise.

Aylesworth v. Lee, 3 D.L.R. 286, 21 W.L.R. 48.

WHAT MAY BE PLEADED — NOTE OBTAINED BY FRAUD — RETAINING BENEFITS — COUNTERCLAIM FOR DECEIT.

Although a promissory note given for the purchase price of a stallion was obtained by the fraud of the payee, the note is merely voidable and not void and the maker by retaining the stallion may deprive himself of the defence of fraud, and be compelled to seek relief by way of counterclaim for deceit.

Langley v. Joudrey, 15 D.L.R. 10, 47 N.S.R. 451, 13 E.L.R. 432.

ILLEGALITY OF CONTRACT — COVENANT NOT TO ENGAGE IN SIMILAR CAPACITY.

In an action to enjoin respondent upon a covenant made as an employee not to engage in a similar capacity with another for 1 year, it is a good answer for the respondent to say that he left the employ of the petitioner because he was forced to do so by the acts of the petitioner himself.

Canada Metal Co. v. Berry, 15 Que. P.R. 178.

(§ III B—315)—IN PATENT CASES.

In a patent action pleadings and particulars have an important bearing on the questions at issue, and a plaintiff is entitled under the rules of the Exchequer Court of Canada to a full knowledge before the trial of the issues he is called upon to meet.

Imperial Supply Co. v. G.T.R. Co., 7 D.L.R. 504, 11 E.L.R. 340, 14 Can. Ex. 88.

(§ III B—316)—CLAIM FOR DEMURRAGE—THE RAILWAY ACT.

It is not necessary in an action by a carrier for demurrage under the Railway Act to plead a refusal or neglect of payment on demand.

C.P.R. Co. v. Northern Commercial Co., [1919] 3 W.W.R. 73.

(§ III B—317)—STATUTE OF FRAUDS.

The defence of the Statute of Frauds cannot be raised unless it has been pleaded.

Dominion Meat Co. v. Jamieson, [1917] 3 W.W.R. 929.

(§ III B—318)—STATUTE OF LIMITATIONS.

The court cannot take notice of prescription when it has not been pleaded in the defence filed.

Montreal Tramways Co. v. McNeil, 25 Que. K.B. 90.

A motion for a nonsuit which the defendant had abandoned is not the proper practice to bar the limitation.

Workman v. Vineberg, 13 Que. P.R. 225.

(§ III B—319)—NOTICE OR WANT OF NOTICE.

In an action on a building contract, where it is claimed that under the contract notice should have been given to the owners by the contractor of the latter's application to the architect for a final certificate, such lack of notice must be pleaded or it cannot be raised at the trial.

Brown v. Bannatyne School District, 2 D.L.R. 264, 22 Man. L.R. 260, 21 W.L.R. 80, 2 W.W.R. 176.

PRACTICE — UNCONSTITUTIONALITY OF LAW — PLEA TO ACTION TO RECOVER PARTICULAR LEGACY — PARTICULAR LEGACY ON WHICH NO TAX IS DUE — TESTAMENTARY DISPOSITION OF DEFINITE SUM FOR SPECIAL PURPOSE.

An allegation of the unconstitutionality of a law must be expressly pleaded, and the Attorney-General should be notified accordingly, otherwise the court cannot adjudicate. A universal legatee, sued for the recovery of a particular legacy, cannot, in his plea to the plaintiff's action, raise the point that the estate's business is not settled, and that he has not yet paid the taxes due to the Crown; this last point more especially cannot be raised when no tax is

due on the legacy. A provision in the will of a Dominion Government official, ordering that the amount to his credit, after his death, in the Retirement Fund provided for by R.S.C. c. 17, ss. 27-30, shall be applied to defray the cost of his funeral, does not affect a particular legacy made to his wife to whom that sum is paid by order of the Treasury Board under s. 30 of the said Act.

Roy v. Carrier, 23 Que. K.B. 368.

C. WHAT MAY BE PLEADED.

(§ III C—320)—Where parts of defendant's pleading though couched in obscure terms nevertheless contain some facts which indicate a valid defence to some of plaintiff's allegations, a motion to strike out these parts as embarrassing will be denied.

Bristol v. Kennedy, 8 D.L.R. 750, 4 O. W.N. 537, 23 O.W.R. 685.

When a defendant sued by several plaintiffs in the same action has different ways of pleading against each of them, he can produce separate pleadings against each of the plaintiffs, leaving to the judge to pass upon the question of costs.

Dominion Light, Heat & Power Co. v. Colonial Engineering Co., 13 Que. P.R. 184.

ANNULMENT OF DEED — REPAYMENT OF MONEY.

A defendant may in his defence ask that the deed upon which the action is based be set aside, but not that the moneys already paid under it should be repaid to him; such conclusions can be taken only by direct action or by a conventional demand.

Compagnie des Terrains et Placements v. Provencher, 18 Que. P.R. 441.

PLEA OF COMPENSATION — DAMAGES.

Where a debtor, sued for an account, not being allowed to set up compensation by a claim for damages, a plea by which he admits the account, pleads his said claim and a cross-demand with which he follows this plea, then prays that compensation may be ordered between the said account and the damages ascertained by the judgment upon his own claim, has no legal foundation (C. C.P., art. 196).

Kaswan v. Solin, 24 Rev. de Jur. 226.

POSSESSORY ACTION — TITLE — POSSESSION — BOUNDARY.

In written pleadings the court ought rather to go according to the intention of the person who has pleaded rather than the literal meaning of the words employed by him. The defendant in a possessory action may plead reasons tending to establish his right of property, and even allege that he is not only the possessor but also the owner of the land, for the purpose of rejecting the action, as he can invoke his title to the property in order to determine the nature and the quality of his possession and the applicability of art. 2200 C.C. (Que.). Where there is at least a doubt as to the delimitation of neighbouring and contiguous properties, it is necessary to have recourse to an action in bornage and not to a possessory action.

Bourbonnais v. Denis, 53 Que. S.C. 286.

DEFENCE — CUMULATION OF GROUNDS.

If the plaintiff claims a fixed sum, balance for work done for the benefit of the defendant, the latter can plead that he was in partnership with the plaintiff for the construction of the works in question, and that the share due to the plaintiff is as a member of the partnership. The defendant can also plead a set-off of an ascertained and liquidated debt, and thus cumulate in his plea several grounds of defence, just as the plaintiff can cumulate several causes of action.

Gravel v. Patenaude, 16 Que. P.R. 32.

D. SUFFICIENCY.

(§ III D—325)—BREACH OF WARRANTY.

Where the plaintiff sold to the defendant a horse with a warranty as to age and soundness, and the horse died after the defendant had kept the horse in his possession for about 2 months without returning it, such a plea of failure to return the horse is no answer to a claim for damages for breach of warranty, however effective it might have been as an answer to a defence of fraudulent misrepresentation.

Winterburn v. Boon, 10 D.L.R. 621, 6 S. L.R. 177, 23 W.L.R. 556.

Where parts of a defendant's pleading sufficiently disclose a reasonable ground of defence against the plaintiff or a reasonable cause of counterclaim, it will not be struck out as embarrassing or as tending to prejudice the plaintiff under r. 167 of the Saskatchewan Rules of Practice, 1911. Where, in an action to recover on a promissory note executed by the defendant and another, the defence is that the note in question was given as collateral to a mortgage made by the other person in favour of the plaintiff, which the defendant executed as co-covenanter and surety, that there was a prior mortgage on the same land, which mortgage was foreclosed, thus rendering the subsequent mortgage worthless as security, a further allegation that by reason of the plaintiff's neglect to give notice to the defendant of the foreclosure and to keep alive and preserve the security of the second mortgage for the benefit of the defendant as surety, the said mortgage became worthless as a security to the defendant as such surety and that, therefore, the defendant is relieved from further liability in respect to the said mortgage and of any promissory notes given as collateral thereto, should not be struck out as embarrassing since it sufficiently discloses a reasonable ground of defence.

Douglas v. Young, 8 D.L.R. 788, 22 W. L.R. 733, 3 W.W.R. 523.

DOG TAX AND SHEEP PROTECTION ACT — STATEMENT OF CLAIM.

A statement of claim which alleges that within the time mentioned in s. 18 of the

Dog Tax and Sheep Protection Act (R.S.O. 1914, c. 246), the plaintiff applied to the council for compensation and satisfied the council that he had made diligent search and inquiry to ascertain the owner or keeper of the dog, "without result," sufficiently states a cause of action for a mandamus requiring the council to award compensation. [Re Hogan v. Tudor, 34 O.L.R. 571, distinguished.]

Noble v. Esquesing, 41 D.L.R. 99, 41 O. L.R. 400.

PETITION—AFFIDAVIT.

Where a petition should be accompanied by an affidavit it is only as to those allegations which are not established by the record itself that the affidavit can be invoked.

James Bay & E.R. Co. v. Bernard, 23 D.L.R. 701, 24 Que. K.B. 6.

AFFIDAVIT OF DEFENCE TO MOTION FOR JUDGMENT.

The grounds of defence must be disclosed in an affidavit under r. 276 (Alta.) on the hearing of a motion for judgment, and a mere statement that the defendant has a good defence on the merits is not sufficient.

Advance Rumely Thresher Co. v. Laclair, 32 D.L.R. 609, 10 A.L.R. 446, [1917] 1 W. W.R. 875.

STATEMENT OF DEFENCE — RELEVANCY — CONSTRUCTION OF TRUST DEED — CLAIM AGAINST ESTATE OF DECEASED TRUSTEE AND BENEFICIARY — ISSUES BETWEEN DEFENDANTS — REFUSAL OF MOTION TO STRIKE OUT PARTS OF PLEADING.

Lawson v. National Trust Co., 11 O.W.N. 317.

PARTICULARS.

In furnishing particulars of notices, alleged by defendant to have been given by its engineers to plaintiff, it is insufficient to furnish all the documents and writings in possession of defendant containing the written notices relied on, and extracts from the engineers' diary as to interviews, alleging that as one of the engineers is out of defendant's employment and absent the required information cannot be got from him. It is the defendant who should pick out from the material what it relies on, and as to the verbal notices given by the absent engineer it should give the best particulars it can.

Blome v. Regina, [1919] 1 W.W.R. 315.

SPEEDY JUDGMENT — MOTION FOR — DEFENCE RAISED IN PLEADINGS BUT NOT SET UP IN AFFIDAVIT OPPOSING MOTION.

Easefelt v. Houston, 16 B.C.R. 353.

(§ III D—326)—AS TO CORPORATIONS.

Where an allottee, upon a public subscription for shares of a company organized under the Ontario Companies Act desires to shew irregularities in the organization of the company in seeking to avoid the allotment in an action for calls made after the lapse of a long time during which notice of his refusal to accept had been given the company, but no legal proceedings had been taken by him to declare the allotment void, he must specifically set up in his pleadings the grounds on which he relies, so that the opposing party may have a reasonable opportunity of meeting the case he proposes to advance.

Boeckh v. Gowganda Queen Mines, 8 D. L.R. 782, 46 Can. S.C.R. 645, affirming 24 O.L.R. 293.

(§ III D—328)—PAYMENT — TENDER — SUFFICIENCY OF PLEA OF — PAYING INTO COURT AMOUNT OF PLAINTIFF'S CLAIM WITH RESERVATION OF RIGHTS — STRIKING OUT AS EMBARRASSING.

C.P.R. Co. v. Trusts & Guarantee Co., 7 D.L.R. 796, 2 W.W.R. 314.

TENDER — READY, WILLING AND ABLE.

A plea of readiness and willingness to accept delivery of chattels sold, and to pay for them, implies an ability to do so, and is therefore a sufficient plea.

Wexelman v. Dale, 35 D.L.R. 557, 10 S.L. R. 289, [1917] 3 W.W.R. 235.

COMPENSATION—NOTE.

A defendant who pleads to an action brought by an assignee of a debt, that the assignor was not his creditor at the time of the assignment, since he owed him a sum of money greater than that claimed by the action, which sum is represented by a note which he does not produce, will be obliged to produce this note on pain of his plea of compensation being dismissed.

Guilmette v. Messier, 18 Que. P.R. 234.

Where the plaintiff sued for unliquidated damages, and defendants pleaded tender before action, and paid into court a sum of money which the plaintiff accepted and obtained payment out upon an ex parte order:—Held (1) that the tender was of no value inasmuch as it was accompanied by a statement that it was to be accepted in full satisfaction, and that the defence of tender was improper; (2) that the plaintiff's conduct having been oppressive throughout the transaction, and having made an unfounded charge of fraud, he should be deprived of his costs.

Wainwright v. Farmer, 16 B.C.R. 468, 17 W.L.R. 670.

COMPENSATION.

A plea of compensation even if it comprises only a part of the defence will not be dismissed on motion.

Richemond v. Sparrow, 18 Que. P.R. 12.

(§ III D—332)—JUDGMENT FOR MONEY HAD AND RECEIVED — CLAIM OF TRUST — AMENDMENT OF CLAIM NECESSARY TO MAINTAIN JUDGMENT — STATUTE OF LIMITATIONS COMPLETE ANSWER — RIGHT OF DEFENDANT TO PLEAD STATUTE.

Where a claim of trust is found against a plaintiff, the judgment being only one for money had and received, to which the Statute of Limitations would be a complete answer, the plaintiff cannot maintain the judgment as given without an amendment of the claim, and the defendant has

the right to plead the statute in answer, it not being an answer to the claim as pleaded.

Wineland v. Audett, 45 D.L.R. 406, 14 A.L.R. 314, [1919] 1 W.W.R. 665.

(§ III D—333)—TITLE TO LAND.

It is not necessary in setting up a title under a judicial sale to plead the preliminary proceedings leading up to the order or decree directing the sale if such order or decree was made by a superior court as in such case the proceedings are presumed to be regular, but the order or decree itself should be pleaded with particularity and also the proceedings subsequent thereto taken to vest the title in the party claiming thereunder.

Irwin v. Jung, 1 D.L.R. 153, 17 B.C.R. 69, 19 W.L.R. 901.

CROWN GRANTS — ATTACKING — RIGHT TO HAVE ATTORNEY-GENERAL ADDED AS A PARTY — ACTION BY — PETITION OF RIGHT.

E. & N. Railway Co. v. Dunlop, 41 D.L.R. 737. [The judgment of the B.C. Court of Appeal reversing this judgment, 46 D.L.R. 541 was reversed by the Privy Council, 50 D.L.R. 371 and the above judgment restored.]

JOINT OWNERSHIP.

A plaintiff joint owner, whose rights are contested by a person who is in possession of the joint property, may properly plead that the courts shall declare him entitled to an undivided share in such property, and such plaintiff (while not compelled to continue in the joint ownership) is not obliged to demand distribution, he can have an interest in the estate without proceeding to a distribution, and indeed may prefer to remain in joint ownership. [Armitage v. Evans, 4 Q.L.R. 300; Cannon v. O'Neil, 1 L.C.R. 160; Pothier tit. Petition of Heirship, 9 Bugnet, p. 234, applied.] Where the plaintiffs, as some of the joint heirs of an estate, proceed against the defendant, as a person wrongfully in possession of the joint property, in an action to compel the defendant to render an accounting without in the same action demanding distribution, and where the property in question is essentially divisible in its nature, the action is well taken in this respect, and the plaintiffs may be apportioned their respective shares in the whole estate, without being forced to a distribution.

Houde v. Marchand, 8 D.L.R. 431.

IV. Cross-bill.

See Set-Off and Counterclaim.

V. Reply.

(§ V—345)—REPLICATION — CONFESSION AND AVOIDANCE — SECURITY TO BANK — VALIDITY.

Where an action had been commenced by creditors attacking an assignment of goods to a bank as security, as being a fraudulent preference, a further plea as to the invalidity of the security under the Bank Act (R.S.C. 1906, c. 29, s. 88), though not set out in the statement of claim itself, may be set up in the replication—in confession and avoidance of that issue as set up in the statement of defence.

Laberge v. Merchants Bank, 30 D.L.R. 144, 27 Man. L.R. 84, [1917] 1 W.W.R. 115.

SPECIAL REPLY.

A defendant cannot reply specially without the permission of a judge.

Brentwood Realty Co. v. Surveyor, 19 Que. P.R. 340.

ACTION AGAINST SCHOOL COMMISSION—CONTRACT.

A contractor, who sues a school commission for work done, cannot allege in reply to a plea that if he has not been paid it is because he has refused to submit to the demands of certain commissioners.

Pion v. St. Stanislas de Montreal School Commission, 19 Que. P.R. 3. [Affirmed, 24 Rev. Leg. 397.]

TIME OF FILING.

The filing of a reply more than eight days after defence is irregular where any further step in the action has been taken between the filing of the defence and the reply. [Clarke v. Fawcett, 5 W.L.R. 322; Wright v. Wright, 13 P.R. 268, distinguished.]

Hay v. C.P.R. Co., [1917] 2 W.W.R. 829, 10 S.L.R. 255.

STATUTE OF FRAUDS — ACTION FOR POSSESSION OF LAND — EQUITABLE DEFENCE UNDER AGREEMENT FOR PURCHASE — JUDICATURE ACT, S. 16—RULE 155.

Wingrove v. Wingrove, 7 O.W.N. 827, 8 O.W.N. 26.

MOTION TO STRIKE OUT PARTS OF — QUESTIONS OF LAW AND FACT TO BE DISPOSED OF AT TRIAL — LEAVE TO REJOIN — NOTICE OF TRIAL — MOTION TO STRIKE OUT AS IRREGULAR.

Bradshaw v. Grossman, 8 O.W.N. 522.

(§ V—346)—SPECIAL REPLY — QUE. C.P. 198, 214.

A party can reply specially without permission of the judge. This permission is necessary only for the filing of additional matter.

Berthiaume v. Marchand, 15 Que. P.R. 288.

(§ V—347)—AVOIDANCE OF FORMAL RELEASE PLEADED IN DEFENCE.

A plaintiff may properly plead in reply that a release, which is set up as a defence in an action for damages for injuries sustained through the alleged negligence of the defendant, was obtained by fraud, since, under the Judicature Act, both legal and equitable questions can be disposed of in the one action; and it is not now necessary, as was the former practice, to file a bill in equity to restrain the defendant from relying on the release as a bar on the ground that it was fraudulently obtained.

Trawford v. British Columbia Electric R.

Co., 9 D.L.R. 817, 18 B.C.R. 132, 15 Can. Ry. Cas. 39, 23 W.L.R. 175, 4 W.W.R. 150.

(§ V—348)—Estoppel — Relevancy — Substance — Form — Superfluous language.

Snider v. Snider, 16 D.L.R. 878, 6 O.W.N. 254.

(§ V—349)—Sufficiency.

A reply by defendant to plaintiff's replication in the following terms, "All and each of the allegations in the plaintiff's replication which are not in accord with those in the defendant's pleas are false, and not well founded," is equivalent to a general denial and regular.

Lagacé v. Boyer, 13 Que. P.R. 265.

(§ V—351)—Changing nature of action — Confession and avoidance—Statement of claim — Its functions.

Facts by way of confession and avoidance are properly included in the plaintiff's reply and not by way of amendment to the statement of claim. A plaintiff may both traverse and avoid by his reply following the statement of defence.

Copresham v. Parsons, 19 D.L.R. 443, 7 W.W.R. 944.

Endorsers — Sureties — Striking out.

Where some defendants, in an action by the payee of a note, do not plead and others plead that their endorsements are subsequent to plaintiff's, the latter cannot, by an answer to plea, aver that the defendants have endorsed as warrantors and sureties towards plaintiff, and such allegations will be struck out on motion.

Hutchison v. Argenteuil Granite Co., 17 Que. P.R. 434.

(§ V—352)—Action by assignee of mortgage — Striking out reply—Leave to amend.

The plaintiff alleged that he was an assignee of a mortgage, and sued for the mortgage moneys. The defendant pleaded that no advance had in fact been made, to which plaintiff replied that the mortgage was really made by an agent for him. This part of the reply was struck out and leave given to amend.

Canadian Bank of Commerce v. Harvey, 9 W.W.R. 638, 33 W.L.R. 35.

(§ V—353)—Departure.

When the plaintiff's statement of claim is based entirely upon the provisions of the Assignments Act, it is a departure in pleading to set up in the reply a case based upon the Bills of Sale and Chattel Mortgage Act and such case should not be recognized.

Empire Sash & Door Co. v. Maranda, 21 Man. L.R. 605.

Departure — Embarrassment — Wrongful dismissal—Breach of contract.

Regan v. McConkey, 4 O.W.N. 877, 24 O.W.R. 138.

VI. Set-off; counterclaim; recoupment.

See also Set-Off and Counterclaim.

(§ VI—355)—Counterclaim — Denial — Waiver.

The necessity, under the practice rules, of pleading a denial to a counterclaim, failure of which operates as an admission of the allegations therein, except as to damages, will be deemed waived, if the defendant, without objection, proceeds to trial and offers evidence to substantiate the counterclaim. [Kerr v. Burns, 9 N.B.R. 604, distinguished.]

Dunham v. Marsden, 38 D.L.R. 24, 45 N.B.R. 279.

Counterclaim for fraud — Directors — Misfeasance—Joinder of parties.

The paramount object of the Judicature Act and Rules is to enable all matters arising out of one transaction, particularly where the same parties are involved, to be disposed of in one action, and thus prevent multiplicity of suits; thus a corporation, in an action against it to recover certain moneys and securities claimed to be wrongfully obtained, has the right to counterclaim for fraudulent conspiracy and to set up an agreement that such property was given in restitution for fraudulent acts and misfeasance in office as directors, and may, for that purpose, join other persons jointly connected therewith. [Frankenburg v. Great Horseless Carriage Co., 69 L.J.Q.B. 147, followed.]

Tobin v. Commercial Investment Co., 27 D.L.R. 387, 22 B.C.R. 481, 34 W.L.R. 23, 10 W.W.R. 123.

Affidavit of defence—Counterclaim.

Rule 56 (5) (Ont.) authorizes the granting of leave to deliver a statement of defence only when it sets up a further answer to the claim other than that contained in or provable under the affidavit, and does not include a counterclaim.

Davis Acetylene Gas Co. v. Morrison, 23 D.L.R. 871, 34 O.L.R. 155.

Counterclaim — Damages through interim injunction.

Where plaintiffs claimed as assignees of mining rights under an agreement which (if ever completely made) had been rescinded with the consent of their assignors before the date of the assignment, and obtained an interim injunction restraining the defendants, the grantees of mining rights from the owners of the land, from operating or trespassing on the property, the latter may counterclaim in the action for damages for being prevented from carrying on their mining operations.

United Nickel Copper Co. v. Dominion Nickel Copper Co., 11 D.L.R. 88, 24 O.W.R. 462, 4 O.W.N. 1132.

Set-off and counterclaim — Manitoba procedure as to filing defence.

Thompson v. Yockney, 14 D.L.R. 332, 23 Man. L.R. 571, 25 W.L.R. 602, affirming 8 D.L.R. 776, 23 Man. L.R. 571, 22 W.L.R. 863, 3 W.W.R. 591.

COUNTERCLAIM IN COUNTY COURT—EFFECT AS PLEA NOTWITHSTANDING IRREGULARITY.

Ontario Wind Engine & Pump Co. v. Michie, 15 D.L.R. 359, 5 W.W.R. 948.

SET-OFF—BREACH OF WARRANTY—NOTE.

Unliquidated damages for breach of warranty may be pleaded as a set-off to an action on a purchase price note in the hands of an assignee or trustee.

Executors & Administrators Trust Co. v. Hoehn, 34 D.L.R. 287, 10 S.L.R. 135, [1917] 2 W.W.R. 291.

COUNTERCLAIM—THIRD PARTY.

Where in a counterclaim by a defendant against a plaintiff and a third party, the matter thereof may be set up against the plaintiff as a complete defence without the third party, and the plaintiff is not interested in what is claimed from the third party, the counterclaim is improper: in such case the relief against the third party must be had under third party procedure.

Capital Loan Co. v. Frank, 37 D.L.R. 157, 28 Man. L.R. 70, [1917] 2 W.W.R. 1250.

COUNTERCLAIM—WRIT OF SUMMONS—SPECIAL INDORSEMENT—AFFIDAVIT—LEAVE TO APPEAL.

A writ of summons may be indorsed specially, and at the same time may contain another claim with respect to which there cannot be special indorsement; but the plaintiff is not given the right to have a speedy trial, under r. 56 (2), save in cases in which the whole claim is specially endorsed. A counterclaim is an answer to the plaintiff's claim within the meaning of r. 56 (1); upon a motion for judgment under r. 57 the court may either award judgment or grant a stay of proceedings under r. 117, as may be deemed proper; but, if no motion for judgment is made, and the plaintiff elects to have a speedy trial, the defendant's affidavit setting up a counterclaim is to be treated (r. 56 (2)) as, with the claim indorsed upon the writ, constituting the record of trial. Where the defendant obtains leave, under r. 56 (5), to deliver a statement of defence, that defence when delivered does not supersede the defence set up in the affidavit of merits; and it may reiterate, amend, or enlarge the counterclaim set up in the affidavit. [Davis Acetylene Gas Co. v. Morrison (1915), 34 O.L.R. 155, 23 D.L.R. 871, and Cox Coal Co. v. Rose Coal Co. (1916), 11 O.W.N. 22, explained.] An appeal by the plaintiff from an order of the Master in Chambers refusing to strike out the counterclaim and part of the defence, in an action to recover arrears of salary and commission and damages for wrongful dismissal, was dismissed by Middleton, J., in Chambers—holding as above. A motion by the plaintiff to Riddell, J., in Chambers, under r. 507, for leave to appeal, was dismissed, there being no good reason why the decision of Middleton, J., should be held to be wrong, and no case of conflicting decisions. [Robinson v. Mills (1909), 19 O.L.R. 162, and Forbes v. Davison (1916), 11 O.W.N. 86, followed.] What the defendants, in their affidavit of merits, called a counterclaim was really a set-off; but there was no objection to the parties treating it as a counterclaim—Rule 115—and they did so treat it. Semble, that the defendants were not quite regular in enlarging their counterclaim without leave; but such leave would be granted as a matter of course.

Henderson v. Henderson, 38 O.L.R. 97.

Motion by defendant to dismiss plaintiff's motion to strike out counterclaim as irrelevant and embarrassing—Plaintiff had not obeyed subpœna issued on appointment for his examination—Service of subpœna cannot be disregarded—If party served is paid necessary conduct money—Plaintiff to attend for examination at his own expense—Motion against counterclaim to stand in meantime—Costs in cause.

Evel v. Bank of Hamilton, 3 O.W.N. 336, 20 O.W.R. 531.

SET-OFF—RENT—REPAIRS—PETITION IN REVOCATION OF JUDGMENT—DEFENCE ILL-FOUNDED—C.C.P. 1177 — C.C. (QUE.) 1188.

One sued for rent cannot plead a set-off for repairs which he has made and will make, seeing that the debt is not ascertained, and especially if he does not allege that he made a formal demand therefor. A petition in revocation of judgment asking for the filing of a plea will not be granted if it is evident that the judgment would be the same as that already rendered.

David v. Lambert, 15 Que. C.P. 435.

COUNTERCLAIM—DEFAULT OF DEFENCE — NOTING OF PLEADINGS AS CLOSED.

Smith v. Ransom, 2 O.W.N. 921, 18 O.W.R. 916.

COUNTERCLAIM—MOTION TO STRIKE OUT—DISCLOSING NO REASONABLE CAUSE OF ACTION—ALLEGATION OF CONSPIRING—PLEADING UNNECESSARY AND EMBARRASSING.

Evel v. Bank of Hamilton, 3 O.W.N. 415, 20 O.W.R. 776.

VII. Demurrer.

(§ VII—360)—DEMURRER.

In Ontario, by r. 259, Consolidated Rules of Practice, 1897, demurrers are forbidden in civil actions, and there is substituted the procedure by which a point of law is raised in the pleadings which is to be disposed of at the trial, unless a special order is made that it be earlier dealt with. Embarrassment in a defendant's pleading is where the pleader brings forward, by way of defence, matters which he is not entitled to make use of, while a pleading bad in law, is one which does not shew a defence at all. A motion to strike out a pleading on the ground that the same tends to prejudice, embarrass and delay the fair

trial of an action is not equivalent to a demurrer, filed under the former Ontario practice, since prior to the passing of r. 259 (Con. Rules, 1897) abolishing demurrers in Ontario there also existed a rule authorizing a motion against pleadings as embarrassing.

Bristol v. Kennedy, 8 D.L.R. 750, 23 O.W.R. 685, 4 O.W.N. 537.

INSCRIPTION IN LAW.

Although art. 1144, C.C.P., states that in cases not appealable from the Circuit Court issues of the law are raised by demurrer, the court, for reasons which it believes just, can consider the inscription in law as equivalent to a demurrer.

Goupil v. Van, 24 Rev. Leg. 192.

INSCRIPTION IN LAW—ACTION IN REPOSSESSION OF PROPERTY — ALLEGATIONS OF VIOLENT POSSESSION AND OF IRREGULAR TITLES — PREUVE AVANT FAIRE DROIT, C.C.P. 191; C.C. (QUE.) 2197, 2198.

In an action for the possession of real property resting on titles dating three centuries back, preuve avant faire droit will be ordered on a demurrer asking the dismissal of the action because plaintiff does not claim to be the heir of the de cujus, nor because the violent taking possession of the property by the defendant took place more than two centuries ago.

Caron v. Seminaire de Quebec, 15 Que. P.R. 302.

(§ VII—365)—FORM—OBJECTION THAT NO CAUSE OF ACTION.

In an action to enforce personal liability of company directors for workmen's wages, a general objection in the defence that the plaintiff's claim discloses no cause of action, will be struck out under Alta. practice r. 149, unless it expressly states the point of law involved.

Guenard v. Coe, 16 D.L.R. 513, 5 W.W.R. 1044, 7 A.L.R. 245, 26 W.L.R. 626. [Reversed, 17 D.L.R. 47, 7 A.L.R. 245, 28 W.L.R. 250, 6 W.W.R. 922.]

(§ VII—375)—WHAT DEMURRABLE—LIBEL ACTION—DEFENCES.

A defendant sued for a newspaper libel may plead that the publication of the matter upon which the plaintiff relies was a part only of a series of articles of a similar tenor which had appeared in the newspaper both before and after the article complained of, and that they were published in the public interest without malice, were substantially true and were notoriously known by the public, and that they were a fair criticism of the plaintiff's conduct; such plea is not demurrable as it discloses grounds which may either defeat the action or mitigate the damages.

Robert v. Herald Co., 10 D.L.R. 20.

(§ VII—380)—QUESTIONS RAISED BY DEMURRER—THIRD PARTY JOINED—TIME.

The city of Montreal is authorized to stay an action for damages done by a third party by means of excavations in the street, and to force the plaintiff to make that third party a party defendant; but such right to stay the suit has to be urged by a preliminary exception within 3 days from the return of the action, unless there be ample justification for the delay.

Stewart v. Montreal, 15 Que. P.R. 243.

(§ VII—390)—DEMURRER OR PRELIMINARY HEARING—POINTS OF LAW DISPOSING OF CASE.

While a plea of demurrer in a civil action is no longer permissible, it is still frequently, under Ontario Con. Rules 122, 123, 124 (Rules of 1913) not only a privilege but a duty to raise in the pleadings and submit for preliminary determination any point of law substantially disposing of the whole action.

Stevens v. Moritz, 14 D.L.R. 699, 5 O.W.N. 421, 25 O.W.R. 453.

GENERAL DEMURRER — OVERRULING — COMMISSION ACTION.

An order of court disallowing a general demurrer to a statement of claim, the "matter of demurrer" or points of law not being specifically raised as required by r. 302 of the King's Bench Act (Man.), does not thereby dispose in the plaintiff's favour of all the legal questions involved in the action nor give effect to the interpretation of a commission agreement sought by the plaintiff, but is analogous to the former equity practice, that where a general demurrer is overruled without prejudice the defendant may raise the same objections at the hearing.

Chalmers v. Machray, 26 D.L.R. 529, 26 Man. L.R. 105, 33 W.L.R. 656, 9 W.W.R. 1435, reversing 21 D.L.R. 635, 30 W.L.R. 836, 8 W.W.R. 27.

PRELIMINARY EXCEPTION — JOINDER OF ISSUE.

When parties have joined issue, without producing any preliminary exception, on an irregularly framed petition, the tribunal shall decide upon the merits of the litigation.

Renaud v. Aumais, 49 Que. S.C. 40.

PLEDGE.

Collateral security to banks, see Banks.

I. NATURE AND VALIDITY OF; EXTINGUISHMENT, RELEASE.

II. RIGHTS OF PARTIES AND THIRD PERSONS.

I. Nature and validity of.

(§ I—3) — CHANGE OF POSSESSION — PLEDGEE'S LIEN.

There can be no valid pledge unless there has been an actual change of possession of the article pledged, in such a manner that third persons and other creditors may know that the debtor has dispossessed himself thereof. An automobile purporting to be pledged for a loan, which remains in the place where it was, is not sufficient possession on the part of the lender to establish a contract of pledge. The borrower, having made a judicial abandonment of his

effects, and the effects having been sold by the curator, the lender has no privilege as pledgeee, but is merely a chirographary creditor.

Payenneville v. Prévost, 25 Que. K.B. 246.

Property pledged without the owner parting with possession being a nullity, an opposition based on a contract of pledge of that kind will be dismissed on motion.

Desjardins v. Methot, 17 Que. P.R. 454.

PLEDGE OR SECURITY—POSSESSION—GARAGE —C.C. ARTS. 1966, 1970.

A contract of security or pledge is not binding unless the security is placed in the hands of a creditor or a third party as a surety for the debt, and it must remain in his possession.

Duhamel v. Lebeau, 25 Rev. Leg. 106.

(§ I—6)—EXTINGUISHMENT.

A pledgor cannot claim the restitution of the thing given in pledge until the debt is wholly paid except in cases of misuse by the pledgee of the thing pledged.

Klock v. Molsons Bank, 2 D.L.R. 445, 41 Que. S.C. 370.

(§ I—7)—REDEMPTION—TIME.

There being no agreement at the inception of a transaction that time should be of the essence, a pledgee cannot, of his own accord, without judicial decree, make it so as against a right to redeem.

Walker v. Johnston, 23 B.C.R. 50.

(§ I—8)—RECOVERY OF POSSESSION.

One who holds personalty as security may retake it from the owner who had obtained possession from the bailee by falsely representing that he had paid the debt for which it was held as security.

Pocock v. Novitz, 4 D.L.R. 105, 5 S.L.R. 339, 21 W.L.R. 418.

II. Rights of parties and third persons.

(§ II—10) — INSURANCE POLICY — PREMIUMS.

A creditor, who holds an insurance policy as security for a debt, is entitled to immediate reimbursement by the debtor for the premiums which he paid on the policy because of the latter's default, without being obliged to wait until the maturity of the main debt.

St. Charles v. Duclos, 49 Que. S.C. 188.

(§ II—11)—PROTECTION OF PROPERTY.

It is the duty of the pledgee of shares of stock in selling them upon default to take reasonable means to prevent a sacrifice thereof, and to act as a provident owner would have done. [Latch v. Furlong, 12 Gr. 303, applied.]

Bartram v. Grice, 4 D.L.R. 682, 3 O.W.N. 1296, 22 O.W.R. 191.

(§ II—13)—DEPOSIT OF MONEY—FORFEITURE ON DEFAULT—FORFEITURE OF DEPOSIT.

Money paid in respect of a contract of sale of a business as a guarantee that the intending purchaser would not back down after the seller imparted information of a confidential character to the buyer, cannot be recovered back by the purchaser on his repudiation of the contract, where the transaction fails of completion through no fault of the seller, if the amount so put up as a guarantee is not unreasonable.

Agnew v. McKenzie Ellis Wood Co., 14 D.L.R. 909, 7 S.L.R. 26, 26 W.L.R. 113, 5 W.W.R. 733, 741, affirming 10 D.L.R. 176, 6 S.L.R. 268, 23 W.L.R. 302, 3 W.W.R. 947.

(§ II—20)—SALE.

A sale of shares of stock held as security is irregular and will be set aside, where the order of priority of their sale as provided in the agreement by which they were pledged, was not observed, and the purchaser had notice thereof. A power of sale in an agreement whereby shares of stock were pledged as security, which requires upon default in payment, that tenders should be advertised for 3 times in designated newspapers, with intervals of a week between each insertion, was not properly exercised, and a sale will be set aside, where a full week, excluding the day of publication did not elapse between each publication.

Bartram v. Grice, 4 D.L.R. 682, 22 O.W.R. 191.

(§ II—21)—PURCHASE BY PLEDGEE.

A sale of pledged shares of stock cannot be upheld where the circumstances shew that the purchaser, who paid an inadequate price, knew practically nothing about the company that issued them, or about its affairs or financial circumstances, and that he consulted with the pledgee in relation to the sale, and, was to some extent, in his employ, as the conclusion therefrom was that the purchase was made at the suggestion of and for the benefit of the pledgee. While inadequacy of price is not ordinarily a sufficient reason for setting aside a sale, yet it will have that effect when, taken in connection with other circumstances, it leads to the assumption that the purchase was made for the benefit of the pledgee.

Bartram v. Grice, 4 D.L.R. 682, 22 O.W.R. 191.

(§ II—22)—ACTION BY PAWNBROKER TO RECOVER VALUE OF ARTICLE PLEDGED TO HIM AND TAKEN BY POLICE—ARTICLE IN CUSTODIA LEGIS—UNNECESSARY ACTION—COSTS.

Samuels v. Dominion Bank, 15 O.W.N. 219.

SALE—SECURITY FOR DEBT—POSSESSION.

A sale of movables, with no other intention than to guarantee the debt of the purchaser, is only a contract of pledge; and if the vendor remains in possession of the movables the purchaser has no lien upon them, as under Quebec law movables are not subject to hypothecation.

Champagne v. Jackson, 54 Que. S.C. 388.

PLEDGEE PARTING WITH COLLATERAL SECURITY — BANK MANAGER'S POWER AND AUTHORITY — MANAGER RELEASING BANK'S CLAIM.

Banque L'Hochelaga v. Larue, 3 A.L.R. 42.

WAREHOUSE CHARGES—SALE FOR SAME AND ADVANCES.

Parker v. Blight, 9 E.L.R. 94.

PLEDGING OF GOODS TO A BANK AS SECURITY FOR ADVANCES—WAREHOUSE RECEIPT—BAILEE OF GOODS—CLERK OF THE OWNER—"ACTUAL, VISIBLE, AND CONTINUED POSSESSION."

Banque Nationale v. Royer, 20 Que. K.B. 341.

SALE OF GOODS BY PLEDGOR IN ORDINARY COURSE OF BUSINESS—SECURITY UNDER BANK ACT.

Bank of Montreal v. Tudhope, 21 Man. L. R. 380.

POLICE.

See Arrest.

DOMINION POLICE COMMISSIONER — JURISDICTION.

The jurisdiction of commissioners of police appointed under c. 92, R.S.C. 1906, is restricted to the administration of laws relating to matters over which the Parliament of Canada has legislative jurisdiction.

R. v. Coyne, [1917] 3 W.W.R. 267, 28 Can. Cr. Cas. 428. [Affirmed, 41 D.L.R. 225, 29 Can. Cr. Cas. 216, [1917] 3 W.W.R. 622.]

PENSION — BENEFIT SOCIETY OF POLICE FORCE — DISMISSAL OF MEMBER — INVESTIGATION WITHOUT NOTICE—RULES OF SOCIETY—FAILURE OF COMMITTEE TO COMPLY WITH — JUDGMENT—DECLARATION OF RIGHT TO PENSION AND ALLOWANCE.

Welsh v. Toronto Police Benefit Fund, 9 O.W.N. 156.

NEGLIGENCE IN TAKING CARE OF DRUNKEN MAN.

It is an act of imprudence and neglect to lead a practically helpless drunken man down a dangerous stairway under the charge of but one constable; and where under such conditions the prisoner misses his foothold, falls and breaks his neck the constable's employer is liable; and the fact that the constables knew of the infirmity of their prisoner obliged them to use all the more care.

Dube v. Montreal, 7 D.L.R. 87, 19 Rev. Leg. 181.

POLICE MAGISTRATE.

See Justice of the Peace; Summary Convictions; Criminal Law.

POLICY.

See Insurance.

POOR AND POOR LAWS.

PAUPERS—POOR RELIEF ACT, NOVA SCOTIA — INCORPORATED TOWN — LIABILITY AFTER NOTICE.

An incorporated town being a poor district under the provisions of the Poor Relief Act, R.S.N.S. 1900, c. 50, ss. 22, 23, 29, on receipt of notice requiring provision to be made for the support of a pauper within the limits of the town, is bound to take steps under ss. 22, 23 of the Act to ascertain the place of settlement of the pauper, and, in the event of failure to do so, will be required to recoup the person by whom the notice is given and who has furnished the pauper with necessary support.

Bushby v. North Sydney, 9 D.L.R. 24, 46 N.S.R. 549, 12 E.L.R. 183.

SUPPORT.

Where a pauper was chargeable to the defendant town, and the town authorities after being required to make provision for his support omitted to do so:—Held, that plaintiff, not being liable for the support of the pauper, was entitled under the provisions of R.S.N.S., c. 50, s. 28, to recover against the town a reasonable sum for his support and maintenance. In the absence of statutory authority provision cannot be made for the support of a pauper outside the limits of the district liable for his support.

McDougall v. Sydney Mines, 45 N.S.R. 348.

Under the Poor Relief Act (N.S.) where a pauper was supported on a farm belonging to claimant, and the latter in making her claim for assistance against the board of overseers of the poor for the district notified only one of the 3 members of the board such notice is sufficient notice to the overseers particularly where the overseers so notified had, as a result of the notice, visited the pauper and taken her deposition before a justice of the peace in reference to the claim.

Sillers v. Overseers of the Poor, 6 D.L.R. 109, 46 N.S.R. 224, 9 E.L.R. 505.

SETTLEMENT.

Proceedings on the part of a municipality to confine homeless children in an industrial school under art. 4037, R.S.Q. 1909, can be taken even where no notice has been given to those who may be liable to reimburse the city for the cost of maintenance. In an action by a municipality against the grandfather of three children to recover the sum paid by the plaintiff for their support and maintenance in an industrial school, where it is alleged they were sent there at the request of the mayor, and that defendant is well able to repay, and is the only person who can do so from among those who are liable, that the father is himself confined in an institution for the insane, and the mother is in extreme poverty, and it does not appear the sum charged is unreasonable, the de-

fendant is liable under the laws of Quebec even where defendant received no notice of the proceedings to confine the children, he having been aware of their condition and not having taken any steps to provide for them, although able to do so.

Montreal v. Milot, 8 D.L.R. 817, 42 Que. S.C. 333.

POSSESSION.

See Adverse Possession.

Under Chattel mortgage, see Chattel Mortgage; Bills of Sale.

LAND—IMPROVEMENT—FRAUD.

In order that a person, who in bad faith has obtained possession of an immovable, should have a right to maintain such possession until reimbursed the cost of improvements that he has made thereon, it is necessary that he should be in physical possession; that the improvements made by him should be necessary; that they had been made with his own materials. Violence and fraudulent simulation cannot form the basis of such right.

Rochefort v. Rioux, 49 Que. S.C. 514.

POSSESSION EVIDENCE—CUTTING OF HAY—ALLUVION—RIPARIAN OWNER—CROWN—OWNERSHIP—C.C. ARTS. 420, 421, 427.

In a possessory action regarding land under cultivation, the confession of the defendant that the plaintiff for two years preceding the action, has cut the hay on this lot, relieves him from any other evidence, since in a decision of a possessory action the court should consider only the material facts of the dispute which the plaintiff complains of. When the possession is certain and determined by fixed and visible marks, such as sticks and pickets placed by a surveyor, or a willow plantation, it is unnecessary to have recourse to an action to fix the limits before commencing the action in dispute. A riparian owner whose land is flooded by the waters of a navigable stream, during a great part of the year, is not by that deprived of his right of ownership in favour of the Crown. We should not consider as alluvious or as deposits, benefiting the riparian owners, the lands, which having been several times inundated by a flood, are left uncovered by the falling back of the waters, even though their surface has undergone alterations, if they have not formed a new bed for the overflowing river. These lands continue to belong to the original owner.

Traversy v. Bibaud, 56 Que. S.C. 482.

POSSESSORY ACTION (QUE.).

EXCLUSIVE POSSESSION.

The possession required to support a possessory action for repossession (en réintégrande) must be uninterrupted, unequivocal and exclusive.

Tremblay v. St. Alexis, 3 D.L.R. 552.

DEFENSE OF INJURY IN ALLOWING WASTE WOOD, SAWDUST, ETC. TO ACCUMULATE IN THE NEIGHBOURHOOD — PUBLIC DOMAIN — LACK OF BOUNDARIES — DAMAGES.

Proximity obliges neighbours each to use his land in such a way that he will not injure the land of his neighbor. This rule ought to be understood in this sense, that whatever liberty each may have to do what seems good to him on his own land, he may not do anything which may become a nuisance to his neighbor.

Cimon v. Bouchard, 25 Rev. de Jur. 308.

PRIVATE ROAD.

One who possesses, in common with another a strip of land which serves them for a private road may maintain a possessory action against his copossessor who has placed on the road a pent-house which impedes the passage.

Odesse v. Mathieu, 42 Que. S.C. 481.

POST OFFICE.

OFFENCES—MAILING INDECENT PRINTS.

In the interpretation of subs. (a) of Cr. Code, s. 209, as to mailing indecent prints, etc., the words "or other publication" are to be construed as referring to matters ejusdem generis with the books, pamphlets, etc., which are previously mentioned in the sub-section and do not include indecent matter written in a private letter sent sealed; the sending of such a letter would, however, be an offence under ss. 317, 318 (defamatory libel) if sent without the permission of, and if designed to insult, the addressee; the words "matter or thing" which follow the word "publication" in s. 209 (a) refer to some other object, such as a statue or carving.

R. v. Goyer, 32 D.L.R. 244, 27 Can. Cr. Cas. 10, [1917] 1 W.W.R. 590.

POST OFFICE ACT—EXCLUSIVE RIGHT AS TO TRANSMISSION OF MAIL MATTER — "SENDING" LETTERS.

R. v. Baxter and Johnson, 16 B.C.R. 6, 18 Can. Cr. Cas. 340.

POUNDAGE.

See Sheriff.

POUND BREACH.

The Imperial Stat. 6 & 7 Vict., c. 30, making it a criminal offence to rescue from a poundkeeper cattle which are in his lawful custody, is a part of the criminal law in force in Manitoba by virtue of s. 12 of the Cr. Code, declaring that the criminal law of England as of 15 July, 1870, shall be the criminal law of Manitoba in so far as such English law is applicable and in so far as it has not been repealed, modified or affected by English or Canadian legislation.

R. v. Laughton, 6 D.L.R. 47, 20 Can. Cr. Cas. 30, 22 Man. L.R. 520, 22 W.L.R. 199.

POWER OF ATTORNEY.

See Principal and Agent, II A—7.

POWERS.

Under wills, see Wills; Executors and Administrators.

Sale by mortgagee under power of sale, see Mortgage; Chattel Mortgage.

(§ I—1)—Deed—Conveyance of land—Power of appointment given to 4 grantees—Exercise of power by two appointing in favour of remaining two—Sufficiency to pass estate—Estoppel—Distributive powers—Construction of deed—Title to land—Vendor and purchaser.

Re Scofi and Harris, 17 O.W.N. 223.

(§ I—3)—Revocation—General power of attorney—Right to withdraw.

A general power of attorney from plaintiff to defendant to purchase lands for plaintiff on an understanding that defendant should be paid a commission thereon and should be interested in the purchases, was subject to withdrawal at plaintiff's will.

Bureau v. Laurencelle, 11 D.L.R. 283, 24 W.L.R. 335.

(§ I—5)—Power of attorney to sell or assign—Execution of power.

A power of attorney to sell or assign a mortgage does not authorize the donee of the power to exercise that power in favour of himself.

Re Land Registry Act and Shaw, 24 D. L.R. 429, 8 W.W.R. 1270, 22 B.C.R. 116, 32 W.L.R. 85.

Execution—Will—Power of appointment—Exercise of—Validity—Subsequent attempted exercise of power—Revocation.

Goldsmith v. Harnden, 25 O.W.R. 55.

Power of attorney—Authority to convey land—Provision that power not revoked by death of donor—Powers of Attorney Act, R.S.O. 1914, c. 106, s. 2—Transfer executed by donee after death of donor in name of donor—Refusal of Master of Titles to register—Case stated under s. 88 of Land Titles Act, R.S.O. 1914, c. 126—Land vested in representatives of donor.

Re McCarty, 17 O.W.N. 270.

(§ I—7)—Power of attorney to vote for curator—Mode of proving.

Powers of attorney sous seing privé from creditors of an insolvent authorizing an attorney to vote for them at the meeting of creditors to appoint the curator and the inspector should be legally proved. The mandate to the attorney ad litem is presumed.

Cadrin v. Gauvreau, 48 Que. S.C. 122.

Discretion as to disposition of property—"During life"—Widowhood.

A clause in a will that "my wife will have the right to give my property to one or several of her children in the same manner that she will hold it, and subject to the charges, stipulations and conditions that she will deem proper, provided she does it in a way that will be just to her children and for her living during her widowhood and not otherwise," the widow has a right while she remains a widow, if she cannot fulfill her obligations, to make a donation inter vivos of the property of the succession in favour of one of the heirs, the donor reserving to herself the usufruct of this property during her life. The expression, "during her life," contained in the deed of donation should be interpreted as meaning during her life while she remains a widow, as that was the condition contained in the will of the husband.

Labelle v. Labelle, 47 Que. S.C. 385.

Mode of.

Under a power of appointment contained in a marriage settlement or deed in trust authorizing the trustee to make the appointment "by any deed or instrument in writing duly executed or by any last will and testament to be by her duly executed," the power cannot be validly exercised by a document intended to operate as a will and only prevented from operating as such by defective execution, there being only one witness, and which for that reason would be invalid as an appointment under the Wills Act, R.S.N.S. 1900, c. 139, s. 8.

Delaney v. Delaney, 5 D.L.R. 543, 11 E. L.R. 512.

(§ I—8)—Of attorney—Conflict of laws.

A power of attorney executed in a foreign country to be acted upon in Quebec, is not invalid because of nonobservance of the forms required by the law of the place of execution if it is valid under the Quebec law.

San Martin Mining Co. v. Ingeniera Importadora Y. Contratista Co., 43 D.L.R. 322, 27 Que. K.B. 527.

Power of attorney—Proxy—Meeting of shareholders—Majority—C.C. arts. 17, par. 19, 1719.

When an act is to be performed by more than 2 persons, it may be validly done by the majority of them. Therefore, a power of attorney (proxy) given by shareholders to vote in their name, at the general annual meeting of a company, written in the following terms: "Central Building Company—I, the undersigned . . . , shareholder in the capital stock of the Central Building Company, do hereby appoint Dr. E. P. Lachapelle, president, Alf. W. Hadrill, vice-president, Dakers Cameron, director, Joseph Rhéaume, director, Charles H. Russell, director, or any one of them, with powers of substitution to be my proxy, to vote and act for me, and on my behalf, at the annual general meeting of the company, which is to be held on the 30th day of May, A.D. 1917, and at every adjournment thereof, and at every poll which may respectively take place in consequence thereof, such proxy to continue in force and to be operative at any special or general meeting of

the shareholders of the company held within one year from the date hereof. — Dated this . . . day of . . . A.D. 1917 . . . Signed by the said . . . In presence of"— is joint and individual and could be acted upon by the majority of the mandataries in accordance with the intention of the mandators, by authorizing one of them to vote for the others, notwithstanding the opposition of one of them.

Pitt v. Hadrill, 55 Que. S.C. 166.

PRACTICE; PROCEDURE.

See Pleading; Writ and Process; Parties; Discovery; Trial; Jury; New Trial; Appeal; Costs; Judgment; Execution; Stay of Proceedings.

As to Criminal proceedings, see Criminal Law; Summary Convictions; Certiorari; Habeas Corpus.

Insolvency, winding-up, see Insolvency; Assignment for Creditors; Companies, VI.

See also Attachment; Garnishment; Interpleader; Mandamus; Injunction.

PREFERENCES.

See Fraudulent Conveyances; Insolvency; Assignment for Creditors; Companies, VI.

PRELIMINARY ENQUIRY.

See Criminal Law, II; Justice of the Peace; Summary Convictions.

PRESCRIPTION.

See Limitation of Actions; Adverse Possession; Easements.

PRESENTATION.

For payment, see Bills and Notes.

PRESUMPTIONS.

Presumption and burden of proof, see Evidence, II.

PRINCIPAL AND AGENT.

I. The relation; revocation.

II. Agent's authority; rights and liabilities of principal.

A. In general.

B. Agent's purchase or sale on credit.

C. Agent's fraud or wrong.

D. Ratification.

III. Rights and liabilities of agent.

Annotations.

Holding out as ostensible agent; ratification and estoppel: 1 D.L.R. 149.

Signature to contract followed by words shewing the signing party to be an agent; Statute of Frauds: 2 D.L.R. 99.

Fraud of agent or employee; estoppel by conduct: 21 D.L.R. 13.

Effect of war on agency of alien enemy: 23 D.L.R. 375, 380.

I. The relation.

See Brokers; Companies; Carriers; Partnership; Insurance.

Functus officio, see Vendor and Purchaser, I E—25.

(§ I—1)—Fire insurance—Knowledge of agent.

The relationship of principal and agent is not established between an insurance company and a person not in its employ who upon being requested to procure insurance on certain property by the owner sent the application to a general agent in another place who placed a portion of the insurance applied for with the said company and therefore the company could not be charged with any information acquired by such person as to the nature of the risk or value of the property insured.

Guimond v. Fidelity-Phenix Fire Ins. Co., 9 D.L.R. 463, 47 Can. S.C.R. 216, 12 E.L.R. 350, affirming 2 D.L.R. 654.

The following agreement, "I have received from M. X. the sum of $4,000, advanced for the purpose of employing Indians for hunting during the 1913-14 season and to pay for provisions and other necessities. The said Indians are to send the skins to me in my capacity as agent of the said M. X. and I undertake to keep these pelts for the said M. X. and to send them to him after the return of the said Indians at the market price," constitutes a commission agent or a contract of agency.

Lefaivre v. Vermette, 28 Que. K.B. 193.

(§ I—2)—Revocation of agency—Substitution of company under former agent's control.

On an incorporated company formed by a partnership of insurance agents taking over, with the consent of the principals, the agencies formerly operated by the partnership, the liability of one partner does not extend to the transactions of the company entered into by his former copartner, unless there has been a guaranty in writing under the Statute of Frauds on the part of the defendant partner in respect of the company's liabilities.

Lloyds Plate Glass Ins. Co. v. Eastmure, 14 D.L.R. 770, 25 O.W.R. 406.

Revocation.

Where all that a real estate broker, who had an exclusive right to sell property, did towards making a sale was to advertise it in a newspaper before the owner effected a sale thereof, the agency was revoked, and the agent could recover on a quantum meruit only for the services actually performed, and not the compensation agreed upon in case he should make a sale.

Cadwell v. Stephenson, 3 D.L.R. 759, 21 W.L.R. 199, 2 W.W.R. 291, 5 S.L.R. 308.

Commissions—Termination of agency at will.

McDevitt v. Grolier Society, 30 D.L.R. 471.

VENDOR AND PURCHASER—AGREEMENT FOR SALE OF LAND—AUTHORITY OF AGENT OF VENDOR — REVOCATION BEFORE AGREEMENT EXECUTED——FINDING OF FACT OF TRIAL JUDGE.

Lembke v. Umbach, 17 O.W.N. 97.

REVOCATION OF MANDATE — EXCLUSIVE AGENCY.

A principal can always revoke his mandate, even during the time when the agent had the exclusive right to represent him. Such revocation may be made in a mandate with or without consideration and even where it had been agreed in writing.

Cyr. v. Lecours, 47 Que. S.C. 86.

DAMAGES—CONTRACT—COMMISSION AGENCY —BREACH BY PRINCIPAL—PERIOD OF CONTRACT — CONSTRUCTION — NO DEFINITE PERIOD — REASONABLE TIME — AGENT'S LOSS OF PROFITS.

In an agreement made by correspondence the plaintiff was to be the selling agent of defendant's goods. In a letter from defendant, setting out the proposed terms of agreement, were the words "this offer to be firm for one year." There was nothing elsewhere in the correspondence which fixed any definite time during which the contract was to continue. Defendants broke the agency agreement during the first year. Held that plaintiff was entitled to damages on the basis of loss of profits on a 2 years' contract, as being reasonable under all the circumstances. Where the contract does not fix any definite time during which it is to continue, the court will, where the contract has been acted upon, fix a reasonable time. To ascertain what is a reasonable time, the court must look at the contract, the nature of the business to be carried on, the methods necessary to be adopted to insure success, and the time necessarily occupied before these efforts bear fruit, etc.

Macdonald v. Casein, [1919] 1 W.W.R. 293.

MANDATE—PAID MANDATARY — REVOCATION OF MANDATE—REMUNERATION FOR SERVICES.

Babonte v. Desjardins, 40 Que. S.C. 521.

(§ I—3)—REVOCATION—NOTICE—HOLDING OUT.

A principal is not liable for purchases by the agent after revocation of his authority of which the seller was aware; the fact that the agent was in possession of forms which may lead to the belief that he was still the authorized agent is not of itself negligence of the principal.

Rohoel v. Phillipson, 31 D.L.R. 289.

NOTICE OF REVOCATION.

Notice by the company to its agent cancelling his agency is no notice to the public that he is no longer their agent and until such public notice is given, he will be held the regular agent of the company as far as third parties are concerned. (C. C. Que. 1730.)

Anglo-American Ins. Co. v. LeBaron, 2 D.L.R. 877.

DURATION OF AGENCY—HOW REVOKED—NOTICE.

A mandate in writing which provides: "I authorize you to sell the property . . . and appoint you my agents for the sale of the said property for a period of 30 days from this date . . . this authority to continue until after notice in writing to the contrary," should be interpreted not as coming to an end after the expiration of 30 days, but as continuing to exist until notice in writing to the contrary has been given by the principal.

Brunet v. Caron, 47 Que. S.C. 244.

II. Agent's authority; rights and liabilities of principal.

A. IN GENERAL.

Authority to purchase, offer and acceptance, see Contracts, I D—60.

Authority of solicitor, sale of land, see Solicitors, II B—25.

Authority of building architect, as to extra work, see Contracts, IV A—321.

Implied authority of husband managing wife's property, to employ broker, see Husband and Wife, I B—40.

(§ II A—5)—AGENT ACTING WITHOUT AUTHORITY—VERBAL SALE — PART PERFORMANCE — REMEDY IN EQUITY — BREACH OF WARRANTY.

Where a person assumes without authority to act as agent for another in the sale of real estate and the contract is merely verbal and consequently would not have been enforceable at law as against the supposed principal, even if he had authorized it, the equitable doctrine of part performance does not apply so as to give a remedy in equity in respect of subsequent acts of part performance by the agent so as to attach a liability for damages against him where none attached at the time of the breach of warranty of authority the latter is not a continuing warranty, but came to an end with the making of the contract. [Warr v. Jones, 24 W.R. 695, applied.]

Duncan v. Beck, 20 D.L.R. 682, 6 W.W.R. 1149, 7 S.L.R. 163, 28 W.L.R. 571.

AGENT'S AUTHORITY—EXPRESS AND IMPLIED — USAGES — GRAIN EXCHANGE OPTIONS.

In option deals by a customer on a stock exchange his broker has implied authority to act, in the execution of his express authority, according to the custom and usages of the exchange, except as to any custom or usage which is unreasonable and of which the customer had no notice.

Richardson v. Beamish, 13 D.L.R. 400, 23 Man. L.R. 306, 21 Can. Cr. Cas. 487, 24 W. L.R. 514.

AUTHORITY OF AGENT TO SELL LAND—AUTHORITY TO OBTAIN OFFER OF PURCHASE AND RECEIVE DEPOSIT—SALE FALLING THROUGH BY FAULT OF PRINCIPAL — RIGHT OF PURCHASER TO RECOVER DEPOSIT—ACTION AGAINST BOTH PRINCIPAL AND AGENT—REPUDIATION OF AGENT BY PRINCIPAL—UNCERTAINTY AS TO PERSON

TO BE SUED—RECOVERY AGAINST PRINCIPAL—COSTS OF AGENT—PAYMENT BY PRINCIPAL—RIGHT OF AGENT TO COMMISSION — DEDUCTION FROM DEPOSIT — AGREEMENT TO PAY COMMISSION—NECESSITY FOR WRITING — STATUTE OF FRAUDS, S. 13 (6 GEO. V. C. 24, S. 19) —JUDGMENT—APPEAL—COSTS.

Silverman v. Legree, 47 D.L.R. 713, 45 O.L.R. 107.

CUSTOMS BROKERS—LIABILITY OF NOMINAL PRINCIPAL FOR REBATE CHEQUES RECEIVED FROM AGENT—ESTOPPEL.

Crown Fruit Co. v. Lyons, 30 D.L.R. 545, 9 S.L.R. 269, 34 W.L.R. 1210.

SALE—PROOF OF AGENCY—PRINCIPAL'S LIABILITY FOR BREACH OF WARRANTY AS TO FITNESS FOR BREEDING.

Sim v. Good, 30 D.L.R. 554, 9 S.L.R. 273.

IN ELECTION CASES.

Agency in election cases differs from agency in ordinary business transactions inasmuch as, in the case of an election, the agent constituted by whatever acts are sufficient for the purpose, may bind his principal by acts which are not only outside the scope of any authority expressly given to him but which may be directly contrary to the expressed directions of the person whose agent he is held to be.

Rudyk v. Shandro, 21 D.L.R. 250, 7 W. W.R. 1082, 30 W.L.R. 428. [Reversed 21 D.L.R. 266, 8 A.L.R. 425, 30 W.L.R. 689, 7 W.W.R. 1321.]

GRATUITOUS SERVICE—LIABILITY OF PRINCIPAL.

One who renders a gratuitous service to another at his request is an agent, and if he suffers wrong caused by the execution of that which the principal asked him to do, the latter should indemnify him for it.

Martineau v. Ravary, 48 Que. S.C. 176.

AGENT—CONTRACT BY—GENERAL AUTHORITY —LIMITED AUTHORITY—AFFIRMATION—ACCEPTANCE OF PART—CUSTOM.

The agent of the defendant company hired the plaintiffs, giving them a written memorandum, signed by the agent, which stated that he had hired the plaintiffs "at $3 per day. Can go on dead water. Straight time," telling the plaintiffs that "straight time" meant that they would receive $3 per day from the time they left the railway until they were done driving. The authority of the agent was to hire men for stream-driving for the defendant company, at $3 per day. It was proved that a custom, well established and well known, existed in the locality in which the hiring took place, that men were paid from the time when actual driving commenced, receiving from that time full pay, with no loss of time, until the driving was completed, and this was what was understood by the term "straight time." Held, affirming the judgment of Barry J., that the agent's authority was limited to hiring at $3 per day, according to the usual custom, and that defendant was estopped, by accepting the plaintiffs' services under the alleged contract, from disputing the plaintiffs' claim for wages from the time of leaving the train until actual driving work was begun, defendant having repudiated the agent's authority as soon as the terms of the contract were brought to its attention.

Roy v. Saint John Lumber Co; Fisher v. Saint John Lumber Co., 46 N.B.R. 120.

AGENT'S AUTHORITY—RIGHTS AND LIABILITIES OF PRINCIPAL—RECEIVING PAYMENT THROUGH AGENT.

Where a principal makes out and sends to an agent for sale an account against a purchaser for the amount of the sale made by the agent, and the agent presents the account to the purchaser with a request for payment, the purchaser is justified in assuming that the agent has authority to receive payment, and, if he pays the amount to the agent the principal will be estopped from denying that the agent had authority to collect:—Where an agent has authority to receive payment of a portion of an account, and it is paid to him and credit given therefor by the principal, the debtor is justified in assuming that the agent has authority to receive the balance, unless he knew of the limitation of the agent's authority or was subsequently notified that he was not authorized to receive the same.

Kaestner v. Hosie, 7 S.L.R. 429, 29 W.L. R. 532.

SOLICITOR ACTING FOR SYNDICATE—AUTHORITY TO PERMIT PART DISCHARGE OF MORTGAGE — EVIDENCE — FINDING OF TRIAL JUDGE—APPEAL.

McGibbon v. Crawford, 17 O.W.N. 193.

POWERS OF BRANCH BANK MANAGER—BUILDING CONTRACT.

The authority of a branch manager of a bank does not include the employment of an architect to make plans for a new office building.

Woodman v. Home Bank, 33 W.L.R. 917.

SALESMAN AS AGENT.

One who is appointed by an industrial company an agent to sell their products, and who is given, for the purposes of his employment, blank forms of sale containing restrictive conditions, has only a limited mandate. He can only make sales according to the conditions contained in the forms. He can neither, without obtaining authority, sell an excessive quantity of goods, nor sell them under conditions pertaining to the usual course of business and agreements so made by him do not bind the company. This is especially so in respect to a sale to one who is only the prête nom of his father, the president of the company, who thus acquires through his son, property of which he is administrator in violation of art. 1484 C.C. (Que.)

Roudeau v. Robitaille Eureka Distillery Co., 44 Que. S.C. 91.

AGENT'S AUTHORITY—SECRETARY OF COMPANY—TRAVELLING EXPENSES — PROOF BY WITNESS—C.C. (QUE.) ARTS. 1233, 1666, 1667, 1670, 1718, 1727, 2470, 2471.

The engagement of a manager for a life insurance company is a commercial act, which can be proved by evidence. A secretary of an insurance company who is authorized to open negotiations and to have an interview with a person residing outside of the province, with the intention of engaging this person as manager of the company, does not exceed his authority in bringing this person to Montreal, and in undertaking to pay his expenses in order that he may meet the board of directors.

Brown v. Security Life Ass'ce Co., 46 Que. S.C. 276.

SALE OF PULP-WOOD—C.C. (QUE) 1730—AUTHORITY.

Rousseau v. St. Maurice Lumber Co., 25 Rev. de Jur. 215.

SALE — JOINT PROPRIETORS — ADMINISTRATION — SOLIDARITY — C.C. ARTS. 1105, 1716, 2260.

Where several joint proprietors of a building gave the management of it to one of them who buys coal for the heating of the house, the other owners are his principals and as such are responsible, jointly and severally, to the seller for the price of this coal.

Cohen v. Kalmanovitch, 25 Rev. Leg. 464.

(§ II A—6)—SALE OF WHEAT—INTERPRETATION OF "INSTRUCTIONS TO SELL"—DAMAGES—LIABILITY.

When a commodity such as wheat is put in the hands of parties with instructions to sell, those instructions mean that the parties so authorized, are to sell as soon as a buyer appears, unless such instructions are countermanded or varied.

Sask. Co-operative Elevator Co. v. Jackson, 49 D.L.R. 354, [1919] 3 W.W.R. 572.

SALE OF GOODS — AGENT MAKING SALE — AGREEMENT AS TO COMMISSION—UNDERSTANDING OF PARTIES — AGENT'S AUTHORITY.

Nicholas v. Dumoulin, 46 D.L.R. 687.

SALES—SCOPE OF AUTHORITY—APPROVAL.

One dealing with an agent, with knowledge that orders taken by him were subject to acceptance and that the prices were subject to change, cannot hold the principal to a sale made by the agent on terms which the principal refused to accept.

Clark v. Baird, 34 D.L.R. 265, 44 N.B.R. 413.

AUTHORITY TO SELL—PURCHASE BY AGENT—ACCOUNTING.

An agent's authority to sell does not give him the right to purchase; if he withholds from the principal an offer from a third person, in order to purchase at a lower price, he is bound to account to the principal for the difference between the amount he had paid, and the amount he had realized on a resale.

Lunt v. Perley, 35 D.L.R. 214, 44 N.B. R. 439.

ACTS OF SUPPOSED AGENTS—DAMPING AUCTION SALE — AUTHORITY OF AGENTS — HOLDING-OUT — ACTIONABLE WRONG — DAMAGES—COSTS.

Barber v. Richardson, 13 O.W.N. 177.

FRAUD—INNOCENT THIRD PARTIES.

An owner of property, who intrusts an agent with all the indicia of title with instructions to borrow a certain sum, cannot redeem the securities without paying a bona fide lender all he has lent on the property, although the agent has fraudulently borrowed in excess of the instructions and misappropriated the amount borrowed.

Mahan v. Manness, 40 D.L.R. 136, 28 Man. L.R. 470, [1918] 2 W.W.R. 191.

SALE OF GOODS—ACTION FOR DAMAGES FOR NONDELIVERY — CONTRACT — AUTHORITY OF AGENTS—RATIFICATION.

Walmsley v. Hyatt, 14 O.W.N. 16, affirming 12 O.W.N. 412.

PURCHASE OF PROPERTY BY AGENT FOR PRINCIPAL — EVIDENCE — DECLARATION — CONVEYANCE — DAMAGES — ADJUSTMENT OF ACCOUNT—COSTS.

Duggan v. McCauley, 15 O.W.N. 128.

POWER OF ATTORNEY—AUTHORITY OF AGENT TO PURCHASE LAND — SUBSEQUENT ARRANGEMENT TO GIVE MORTGAGE IN PART PAYMENT.

An agent, under power of attorney, inter alia, "to sell and absolutely dispose of or mortgage real estate," etc., entered into an agreement to purchase two lots in Vancouver for which the vendor was to receive certain lands, stock in a building, and $6,000 cash. The transfers were duly executed and delivered, and the transaction completed with the exception of the handing over of the cash payment. A subsequent arrangement was made whereby, in lieu of the cash payment, the vendor agreed to accept $1,000 in cash and a mortgage for $5,000 on the two lots he had sold. An action for foreclosure of the mortgage was dismissed. Held, on appeal, that there were 2 transactions, the mortgage having been accepted under a later and distinct agreement that the agent had power under the instrument in question to execute, and the plaintiff should succeed. [McKee v. Philip, 55 Can. S.C.R. 286, distinguished.]

Dinsmore v. Philip, 26 B.C.R. 123.

LAW CLERK—AUTHORITY TO PREPARE LEASE —PLEDGING CREDIT.

The express authority given one employed as a law clerk to prepare a lease on behalf of the principal does not import the ostensible authority of pledging the principal's credit with respect to materials and improvements on the leased premises.

Dutton Wall Lumber Co. v. Ferguson, 25 D.L.R. 100, 31 W.L.R. 812.

AUTHORITY OF DEPARTMENTAL HEAD TO PURCHASE WITHOUT CONFIRMATION BY MANAGER.

The fact that the firm had permitted one of the heads of a department in a retail store business to make purchases from the wholesaler without confirmation of same by the manager is admissible in proof of the unqualified authority of the head of the department to buy goods for his department from such wholesaler without such confirmation, although it was customary in the trade to have departmental orders so confirmed.

Duncan v. Pryce Jones, 22 D.L.R. 45.

YEARLY CONTRACT—ORDERS.

A yearly agency contract providing that the agent is to furnish at least one order for a gasoline motor during the year and that on his failure to do so the company would have the right to send him a motor and claim from him the price of it, gives the agent the whole year to furnish an order, and it is only at the expiration of the year that the principal is entitled to avail itself of his stipulated right.

Carette Co. v. Nault, 49 Que. S.C. 510.

(§ II A—6a)—WARRANTY OF GOODS SOLD.

Where a contract for the sale of an engine declared that every term of the agreement was therein expressed, and that its terms and conditions could not be varied, altered or changed, except in writing signed by the vendor, the promise of an agent of the latter, upon the engine not fulfilling its warranty, upon persuading the vendee not to return the engine, that he would rectify it, which was never satisfactorily done, cannot be set up as a defence to an action to recover the purchase price where the vendee afterwards continued to use the engine for nearly a year.

Robert Bell Engine Co. v. Burke, 4 D.L.R. 342, 5 S.L.R. 345, 19 W.L.R. 934, 1 W.W.R. 707.

FALSE STATEMENTS BY SALES AGENT — AGREEMENT LIMITING PRINCIPAL'S LIABILITY.

A sales agent for a machinery manufacturer must be held to have authority to describe a gasoline engine to the prospective purchaser and to tell the latter what it is capable of doing, and if he falsely described it by stating that it would do something which it was not capable of doing, his principals are liable for his fraud, notwithstanding a stipulation in the signed agreement that no agreements, stipulations, conditions or warranties express or implied, verbal or otherwise, save those mentioned in writing therein, shall be binding on the principals. [Russo-Chinese Bank v. Li Yau Sam, [1910] A.C. 174, distinguished; Pearson v. Dublin Corp., [1907] A.C. 351, applied.]

Ontario Wind Engine v. Bunn, 21 D.L.R. 420, 8 S.L.R. 58, 8 W.W.R. 450, 31 W.L.R. 20.

AUTHORITY TO SELL—WARRANTY.

In an action for damages for breach of warranty in the sale of a horse by an agent, authority on the part of the agent to give the warranty cannot be established merely by evidence that the agent had sold 2 or 3 other horses for his principal, there being no evidence that the principal was in the general horse dealing business.

Gallant v. Lounsbury Co., 31 D.L.R. 145, 44 N.B.R. 225.

(§ II A—7)—POWER OF ATTORNEY.

Whenever the very act of the agent is authorized by the terms of the power, i.e., whenever, by comparing the act done by the agent with the words of the power, the act is itself warranted by the terms used, such act is binding on the constituent as to all persons dealing in good faith with the agent, and the persons so dealing are not bound to inquire into facts aliunde. Notwithstanding it was stipulated in a power of attorney, under which an agent had authority to make a sale of land belonging to his principal, that any sale should be for "and in the name of" principal a contract entered into by the agent in his own name is enforceable by the purchaser against the principal. The agency of one who in his own name entered into an agreement for the sale of land he was duly authorized to sell, may be shewn, in order to bind his principal, in an action against the latter for specific performance of the agreement. [Morgan v. Johnson, 3 O.W.N. 297, affirmed on appeal.]

Morgan v. Johnson, 4 D.L.R. 643, 3 O.W.N. 1526, 22 O.W.R. 868.

An agent is not clothed with authority to make a binding agreement for the sale of land, by letters from his principal, in effect stating his price and terms of payment, and that he would refer all inquiries concerning the land to the agent, and directing that the necessary papers, upon a purchaser being found, be sent him for execution, and that he would come at any time if wanted, where subsequently and before any sale was made by the agent, the principal wrote the agent not to do anything until his arrival.

Margolis v. Birnie, 5 D.L.R. 534, 21 W.L.R. 462, 4 A.L.R. 415.

One who enters into possession of land under an agreement for its purchase made by an agent of the owner, which was not satisfactory to the latter, cannot obtain specific performance of the agreement where the agent had authority only to secure a purchaser and not to enter into a contract for the sale of the property.

Havner v. Weyl, 5 D.L.R. 141, 21 W.L.R. 800, 2 W.W.R. 748. [Affirmed in 7 D.L.R. 682, 22 W.L.R. 455, 3 W.W.R. 203.]

That an owner of land in agreeing to sell the same dealt with the purchaser's agent and not directly with the purchaser himself, gives the owner no right to withdraw from the contract until the purchaser signifies his approval of his agent's act, in the

absence of a stipulation to that effect in the contract.

Brown v. Street, 3 D.L.R. 291, 21 W.L.R. 46.

Where an agent is authorized to sell land upon the terms of payment of one-third of the price in cash on signing the agreement, an agreement for sale made by him stipulating for a payment of a lesser sum on signing the agreement and for payment of the balance required to make up the one-third cash when the title and documents are accepted is not binding upon his principal.

Maybury v. O'Brien, 6 D.L.R. 268, 22 O.W.R. 677, 26 O.L.R. 628, reversing 25 O. L.R. 229, 3 O.W.N. 393.

POWER OF ATTORNEY—TO BORROW.

A general power of attorney to "draw, accept, make, sign, endorse, negotiate, pledge, retire, pay or satisfy any bills of exchange, promissory notes, cheques, drafts, orders for payment or delivery of money, securities, goods, warehouse receipts, etc.," confers no general power to borrow money. [Jacobs v. Morris, [1902] 1 Ch. 816, followed.]

Tai Sing v. Chim Cam, 27 D.L.R. 528, 23 B.C.R. 8, 10 W.W.R. 460.

POWER OF ATTORNEY—ACCOMMODATION INDORSEMENT.

A general power of attorney by a married woman to her husband conducting business for her, including the power to make and indorse bills and notes, is sufficient to charge her with liability on an accommodation indorsement signed by the husband on her behalf for the benefit of a third party. [Court divided. See also decision No. 1, 26 D.L.R. 194, 49 N.S.R. 409.]

Robinson v. Green, 36 D.L.R. 631, 51 N.S.R. 204.

POWER OF ATTORNEY—AUTHORITY TO WITHDRAW FUNDS FROM BANK—WITHDRAWAL BY SEVERAL CHEQUES—RATIFICATION.

A power of attorney filed with the bank at the time of depositing a certain sum of money, authorizing the attorney to withdraw the said sum, and give a receipt for same, and to endorse all documents and cheques and ratifying in advance all that the attorney would do to withdraw the said sum, is not exhausted by withdrawing by cheque a part of the money, and the bank is justified in paying cheques issued by the attorney until the sum deposited has been withdrawn.

Robidoux v. Royal Bank, 44 D.L.R. 765, 25 Rev. de Jur. 66.

(§ II A—7 a)—GENERAL OR SPECIAL AGENCY.

An arrangement between the owner of a farm and his brother, whereby the latter was to work the farm on shares, the owner supplying the money needed to carry on farming operations and the profits to be divided between them, does not constitute the brother either the general agent of the owner nor a special agent to purchase lumber for use on the farm, so as to render the owner liable for the purchase price thereof, it appearing that the brother conducted the farm in his own name, made the purchase in question in his own name, and credit was given to him by the seller, the brother having been prohibited from pledging the owner's credit, and the seller believing that the brother was the real owner of the farm.

Crown Lumber Co. v. Saulsberry, 11 D.L.R. 17, 23 W.L.R. 877, 4 W.W.R. 168, 5 A. L.R. 476.

AUTHORITY TO PURCHASE LAND — SCOPE — MINERALS—RESCISSION.

An agent authorized to purchase land cannot bind his principal to an agreement for the purchase of land minus the coal and minerals therein, and the principal has the right to rescind the agreement as being beyond the scope of the agency; it is not open to the vendor, where he has entered the agreement as principal, to allege that the moneys thereunder were paid to him in the character of agent only.

Franco-Canadian Mortgage Co. v. Greig, 38 D.L.R. 109, 55 Can. S.C.R. 395, [1917] 2 W.W.R. 121, affirming 29 D.L.R. 260, 10 A.L.R. 44, 34 W.L.R. 1102, which reversed 23 D.L.R. 860, 32 W.L.R. 280, 9 W.W.R. 22. [Leave to appeal to Privy Council refused memo. 55 Can. S.C.R.]

GENERAL OR SPECIAL AGENCY—AUTHORITY TO COLLECT—SCOPE.

An authority given by a vendor of land to a notary who drew up the contract of sale, to collect from the purchaser a cash payment due under the contract, is merely special, from which no general power to collect the other payments accruing on the same contract can be inferred, so as to charge the principal with payments thus made to such agent who fails to account for them to the principal.

Willett v. Rose, 25 D.L.R. 258, 8 S.L.R. 421, 9 W.W.R. 634, 32 W.L.R. 948, reversing 31 W.L.R. 528.

AUTHORITY TO COLLECT—SCOPE.

An authority given by a principal to an agent to receive money cannot be construed into an agreement to allow the payer of the money to deduct from the same money alleged to be due to him by way of commission. [Todd v. Reid, 4 B. & Ald. 210, and Bartlett v. Pentland, 10 B. & C. 760, followed.]

Wylie v. Jones, 9 W.W.R. 367, 32 W.L.R. 635.

AUTHORITY OF LOCAL MANAGER — SETTLEMENT OF ACCOUNTS.

The settlement of a disputed account for a smaller amount by a local manager having the authority to do so is binding upon the principal, notwithstanding a regulation that "managers must obtain authority in writing from superintendent or home office before making discounts on any account."

Last West Lumber Co. v. Haddad, 25

D.L.R. 529, 8 S.L.R. 407, 9 W.W.R. 578, 33 W.L.R. 15.

SALE OF LAND—SPECIFIC PERFORMANCE—AUTHORITY OF AGENT—ALTERATION IN MATERIAL TERM — AUTHORITY MUST BE CLEAR, EXPRESS, AND UNEQUIVOCAL.

Levitt v. Webster, 4 O.W.N. 554, 23 O.W.R. 633. [Affirmed in 10 D.L.R. 812, 4 O.W.N. 746.]

POWER OF ATTORNEY—REVOCABILITY—DOCUMENT UNDER SEAL—ABSENCE OF REAL CONSIDERATION—HUSBAND AND WIFE.

Ranger v. Ranger, 17 O.W.N. 49.

MONEY LENT — ADVANCE OF MONEY UPON PROMISSORY NOTE MADE IN NAME OF TRADER BY MANAGER AS ATTORNEY—AUTHORITY OF ATTORNEY NOT COVERING TRANSACTION—MONEY PLACED TO CREDIT OF TRADER IN BANK AND USED FOR HIS BENEFIT—LIABILITY TO REPAY—QUASI-CONTRACT — ACTION ON PROMISSORY NOTE — AMENDMENT — RECOVERY FOR MONEY LENT.

Mitchell v. Thompson, 16 O.W.N. 261.

(§ 11 A—8)—POWER TO SELL LAND—SUFFICIENCY OF.

A power of attorney to let, manage and improve land, or to sell and absolutely dispose of it as and when the agent should see fit, will permit him to make a lease of the land and give the tenant an option to purchase it at any time during the term of leasing.

Matthewson v. Burns, 12 D.L.R. 236, 4 O.W.N. 1477. [Affirmed, 18 D.L.R. 399, 50 Can. S.C.R. 115.]

AGENT'S AUTHORITY — VENDOR AND PURCHASER—SALE OF LAND.

Merely instructing an agent to give to a prospective purchaser the owner's price and terms of sale, does not authorize the former to enter into a contract for the sale of land. [Hamer v. Sharp, L.R. 19 Eq. 108; Bradley v. Elliott, 10 O.L.R. 398, applied; Rosenbaum v. Belson, [1900] 2 Ch. 267, distinguished.]

Good v. Bescoby, 14 D.L.R. 325, 23 Man. L.R. 603, 25 W.L.R. 639, 5 W.W.R. 245, reversing 10 D.L.R. 440, 23 W.L.R. 394.

AGENT'S AUTHORITY—SALE OF LAND.

Where one of the owners of the lots of a city subdivision holds a power of attorney from his co-owners authorizing him to make agreements for sale and do all things necessary for carrying out such sales, and where such owner, acting for himself and his co-owners, holds himself out as having authority to carry out such sales, and makes contracts to effect same through a real estate agent, such owner's acts in that regard are binding upon his associates.

Powell v. Hewer, 11 D.L.R. 347, 6 A.L.R. 61, 4 W.W.R. 626.

AGENT'S AUTHORITY — SALE OF LAND — BREACH OF WARRANTY OF AUTHORITY—BURDEN IN ACTION FOR.

To recover in an action for breach of warranty of authority as an agent, the plaintiff must shew that the agent entered into a contract with him which, if the agent in fact had the authority he represented he had, would be binding on his principal. [Godwin v. Francis, L.R. 5 C.P. 295, applied.]

Peacock v. Wilkinson, 18 D.L.R. 418, 7 S.L.R. 259, 29 W.L.R. 373, 7 W.W.R. 85, reversing 15 D.L.R. 216, 26 W.L.R. 396, 5 W.W.R. 1012.

MONEY ORDER—LOAN—CONVEYANCE AS TO A PLEDGE—EXTENT OF POWER OF ATTORNEY OR PROXY — C.C. ARTS. 1703, 1704, 1730.

According to the terms of the following power of attorney: . . . ." and generally to do all that is necessary for the proper preservation of the goods of the donor of the power and for the proper administration of his affairs. To transfer and to receive all monies, and to give all guarantees on mortgages or other matter. And to carry into effect the foregoing, to pass and sign all deeds, contracts and writings necessary and required, to take up his abode and generally in the execution of his function as special attorney of the constituent, and as administrator of his affairs during his absence, to do all that the attorney will judge to be useful and necessary for the constituent, the latter ratifying and promising to ratify everything which the attorney has power to do in conformity with his present powers and in addition that all acts of the said attorney relative to the investment of moneys, the sale of realty and other financial affairs and questions will receive the express approval of M. Arthur Gosselin, undersigned notary, whose advice in every case where the interests and welfare of the constituent are at stake or interested," the attorney has no power to borrow money for the constituent, but he has the right to give all credits and all guarantees. So that the constituent is responsible for any debt due to him from a third party which the attorney has guaranteed, with the guarantee to furnish and give value on any loan made by the latter by virtue of said power.

In the cases when the attorney cannot exercise his power except with the approval of a notary named by the constituent, the acquiescence of the notary will be presumed if he is the one who has acted as notary in the acts agreed to by the attorney.

Gabias v. Legault, 28 Que. K.B. 426.

SALE OF LAND—AGENT'S REPRESENTATIONS—SCOPE.

Representations by the authorized agent of a company employed to sell their lands, made to a friend in the course of social intercourse, not in the company's interest, but for the purpose of giving his friend a "tip" whereby both he and his friend might make a profit, are not binding upon the company.

C. P. R. Co. v. Aitken, 29 D.L.R. 357, 34 W.L.R. 999, 10 A.L.R. 123, 10 W.W.R. 1052.

TITLE TO PURCHASE MONEY.

A., purporting to act on behalf of P., pur-

chased lands from M. and gave in part payment a cheque for $1,700 on the D. Trust Co., the receipt being acknowledged in the agreement for sale. M. sued P. for the balance of the purchase moneys, or foreclosure, and P. counterclaimed for the return of the moneys given in part payment. The Trust Co. (executor of A.) disclaimed any rights to such moneys. The Trial Judge held that the purchase was beyond the authority of A., but that P. had failed to discharge the onus upon him of showing that the moneys belonged to him. The Court of Appeal of British Columbia held that P. has sufficiently established his title to the moneys claimed and judgment was given accordingly. Held, that the judgment of the Court of Appeal should be affirmed.

McKee v. Philip, 38 D.L.R. 731, 55 Can. S.C.R. 286, [1917] 1 W.W.R. 690.

COMMISSION ON EXCHANGE OF PROPERTY—STATUTE OF FRAUDS—6 GEO. V. 1916, C. 24, S. 19—AMENDMENT—8 GEO. V. 1918, C. 20, S. 58—STATUTE UNSATISFIED—FAILURE OF ACTION.

An agreement for commission must satisfy the Statute of Frauds, 6 Geo. V., c. 24, s. 19, as amended by 8 Geo. V., c. 20, s. 58, and be in writing separate from the sale agreement. It is a question whether the statute as amended requires the agreement to be on a separate piece of paper from the sale agreement.

Davis v. Beggs, 49 D.L.R. 662, 46 O.L.R. 169.

PROPERTY LISTED WITH AGENT FOR SALE—AGREEMENT—INTERPRETATION.

Where an owner, with a view of selling his property, lists it with an agent, it is a question of interpretation whether the mention of the suggested terms of the proposed sale in the agency agreement was intended merely as a basis upon which the agent should negotiate, and therefore subject to modification during the negotiations without in any way varying or destroying the agency agreement, or was intended to bind the agent strictly to a sale on the named terms before he can claim his commission.

King v. Schon, 44 D.L.R. 111, 14 A.L.R. 79, [1918] 3 W.W.R. 892.

LAND LISTED WITH AGENT FOR SALE—ABSENCE OF SPECIAL AGREEMENT—SALE BY OWNER—COMMISSION.

An agent with whom property has been listed for sale, but who has not an exclusive listing, in the absence of a special agreement that he is to be remunerated if he does not find a purchaser, is not entitled to a commission where the owner sells to a purchaser whom he himself has found.

Barager v. Wallace, 47 D.L.R. 158, 12 S.L.R. 301, [1919] 2 W.W.R. 858.

AUTHORITY TO SELL LAND.

Williams v. Klingel, 9 D.L.R. 871, 23 W.L.R. 67.

AUTHORITY TO SELL LAND — REPURCHASE AGREEMENT — AGENT CO-OWNER WITH PRINCIPAL—AGREEMENT NOT SIGNED BY AGENT—LIABILITY OF PRINCIPAL FOR REFUSAL TO REPURCHASE.

Clarke v. Latham, 25 D.L.R. 751, 9 W.W.R. 271, 32 W.L.R. 549.

SALE OF LAND—PURCHASE BY AGENT.

The purchase by an agent, of land he was authorized to sell, without the knowledge of the principal, can only be attacked by the principal; it is no defence to an action of ejectment.

Palmason v. Kjernested, 39 D.L.R. 237, 28 Man. L.R. 429, [1918] 1 W.W.R. 607, affirming 36 D.L.R. 448, [1917] 3 W.W.R. 312.

CONFLICT OF DUTY—TRUSTEE—AGENT FOR PURCHASER.

A trustee for the sale of land is not competent to purchase the trust property as agent for a stranger; if the principal repudiates the purchase as soon as the facts come to his knowledge he is entitled to rescission of the contract.

Stahl v. Miller, 40 D.L.R. 388, 56 Can. S.C.R. 312, [1918] 2 W.W.R. 197, reversing 37 D.L.R. 514, 24 B.C.R. 490.

AGREEMENT FOR SALE OF LAND—AUTHORITY OF AGENT OF VENDOR—STATUTE OF FRAUDS—SPECIFIC PERFORMANCE—DISCRETION.

Hetting v. Sneeth, 14 O.W.N. 326. [Affirmed in 15 O.W.N. 162.]

EXTENSION OF MANDATE—EVIDENCE—PRESUMPTION.

Under Quebec law, proof by presumption is admitted without restriction; it is admitted, even in a case where parol evidence is not allowed. Even after the mandate of a real estate agent for the sale of a property has expired, an extension of such mandate may be inferred under the following circumstances, considered together: (a) When 3 months after the delay granted to make the sale the agent transmits to the principal an offer which the latter accepts without making any remark, and that he holds this offer for 2 months and keeps complete silence; (b) when, after 2 months, he calls upon his agent to get the deed signed within 3 days, otherwise he will consider the transaction as null and void, and (c) when the deed of sale is signed by the parties within such delay. In such circumstances the agent, who sues by virtue of his mandate, is entitled to the commission agreed upon.

Parent v. Mendelsohn, 27 Que. K.B. 226.

AGENT EXCEEDING AUTHORITY—LIABILITY OF PRINCIPAL—SALE.

A joint stock company is only bound by the acts of its agents if such acts have been expressly authorized or ratified by it, or if they are connected with the purposes of its undertaking. So a company which speculates exclusively in the purchase and sale of land, without being engaged in building, cannot be made to pay for the price of construction material bought in the name of

the company by one of its agents for the benefit and advantage of third persons.

Blais v. Quebec Realty Co., 27 Que. K.B. 218.

AGENTS REPRESENTATIONS—SALE OF LAND.

A principal is bound by the representation and inducements made by his agent, within the scope of the agency, while negotiating a sale of land for him, even though they be unauthorized, unless they are disaffirmed by the principal as soon as known to him.

Magrath v. Collins, 37 D.L.R. 611, 12 A. L.R. 240, [1917] 3 W.W.R. 677. [See also 32 D.L.R. 29, [1917] 1 W.W.R. 487.]

MISAPPLICATION OF PAYMENTS.

A notary who receives from the purchaser of an immovable a sum of money on account of the purchase price, with instructions to pay off the hypothecs and other charges against the immovable, who out of the same funds pays other debts of the vendor not affecting the property, exceeds his mandate and is obliged to reimburse to the purchaser the amount that he has paid without authority.

Malo v. Archambault, 52 Que. S.C. 363.

(§ II A—10)—CRIMINAL ACTIONS—AGENT'S IMPLIED POWER TO INSTITUTE ON BEHALF OF PRINCIPAL—EMERGENCY.

Authority of an agent to cause the arrest of a person on behalf of his principal may be implied in cases of emergency where the facts shew that the exigencies of the occasion require prompt action in behalf of the principal. The existence of such an emergency or exigency as will justify an agent in causing the arrest and prosecution of a person on behalf of the agent's principal, cannot be implied where the arrest was caused many months after the commission of an offence against the principal.

March v. Stimpson Computing Scale Co., 11 D.L.R. 343, 4 O.W.N. 1259, 24 O.W.R. 591.

(§ II A—12)—RIGHTS OF UNDISCLOSED PRINCIPAL.

On a sale of seed flax, where the sale-note contains the name of the buyer's agent instead of the buyer's own name, but the seller when he made the sale knew who the principal was and that the sale was really being made to him and not to his agent, in an action by the principal for breach of contract, the contract will be read as made with the known principal.

Carlstadt Development Co. v. Alberta Pacific Elevator Co., 7 D.L.R. 200, 4 A.L.R. 366, 21 W.L.R. 433, 2 W.W.R. 404.

Where 2 companies are represented in financial matters by a third, all with common directors, and the financial company uses money which it has in hand to the credit of one company, being the proceeds of a sale of the bonds thereof, for the purpose of redeeming certain maturing bonds of the other company pending recoupment by the sale of a further issue of that company's bonds, and the transaction upon the minutes of the financial company bears the appearance merely of a payment by it on behalf of the company whose bonds are redeemed, and subsequently, upon the failure of the expected source of recoupment the minute is changed so as to shew that the financial company acted only as agent for the company whose money was used, and entries are made in the books of the respective companies, with the approval of the common directors, shewing that the bonds have been purchased by and were the property of that company, the proper conclusion is that the intention was to give permanence to the original temporary transaction, and that the bonds became the property of the company whose money was used in the purchase thereof, and not of the financial company.

Northern Sulphite Mills v. Craig, 4 D.L.R. 82, 3 O.W.N. 1388, 22 O.W.R. 563, affirming 3 O.W.R. 214.

That the name of the person seeking to enforce an agreement to sell land does not appear in the documents constituting the contract will not prevent him shewing that the person named in the agreement acted as his agent.

Selkirk Land & Investment Co. v. Robinson, 13 D.L.R. 936, 25 W.L.R. 392, 23 Man. L.R. 774.

MUTUALITY—LAND SALE—"DUMMY" TRANSFEREE.

A contract made by a man purporting and professing to act on his own behalf alone, and not on behalf of a principal, but having an undisclosed intention to give the benefit of the contract to a third party, cannot be ratified by that third party so as to render him able to sue or liable to be sued on the contract. [Keighley Maxsted & Co. v. Durant, [1901] A.C. 240, applied.]

Ecroyd v. Rodgers, 11 D.L.R. 626, 23 Man L.R. 633, 24 W.L.R. 318, 4 W.W.R. 601.

UNDISCLOSED PRINCIPAL—JUDGMENT — SETTING ASIDE.

A judgment against an undisclosed principal will be set aside where there is no evidence connecting him with the contract.

Nova Scotia Dredging Co. v. Musgrave, 40 D.L.R. 589, 52 N.S.R. 71.

SALE THROUGH STOCK BROKER.

Baker v. MacGregor, 10 D.L.R. 851, 4 W.W.R. 512.

AUTHORITY OF AGENT—ACTION AGAINST UNDISCLOSED PRINCIPALS—LIMITATION OF AUTHORITY — REVOCATION — KNOWLEDGE OF PERSON GIVING CREDIT TO AGENT —GENERAL AGENCY.

McLaughlin v. Gentiles, 17 O.W.N. 245

(§ II A—13)—AUTHORITY TO ADVERTISE.

A financial agent engaged by a company to sell its shares and merchandise (e.g., gas burners) on commission has the power to advertise the sale of the same and solicitations to subscribe for shares in the company.

French Gas Saving Co. v. Desbarats Advertising Agency, 1 D.L.R. 136.

B. AGENT'S PURCHASE OR SALE ON CREDIT.

(§ II B—15)—AGENT'S PURCHASE OR SALE ON CREDIT.

In an action for goods sold and delivered plaintiff's evidence shewed that the goods in question were sold to men employed on board a steamer of which defendant was chief steward, and that defendant's undertaking, if any, was to pay for the goods if the parties to whom they were sold remained on the vessel after she cleared from St. John, N.B., or to return the goods:—Held, affirming the judgment of the County Court, assuming this to be the agreement, that defendant could only be held liable in damages for breach of his contract as bailee of the goods and not in the action as brought for goods sold and delivered.

Levine v. Sebastian, 45 N.S.R. 190, 9 E. L.R. 311.

(§ II B—16) — IMPLIED AUTHORITY OF AGENT IN CHARGE OF RANCH.

The defendant, who was a contractor carrying on large operations, owned a ranch where he kept horses and mules, when they were not required for the purposes of his business. The action was brought to recover $2,200 the price of a stallion which had been purchased for the defendant by the man who had charge of the ranch for the defendant:—Held, upon the evidence, that express authority to purchase was not made out, and that though ranching operations were important, they were only incidental to the main enterprise of the defendant, and therefore that there was no implied authority in the servant to pledge the credit of his master to such a large amount, and to bind the master to a purchase of such a special nature.

Stout v. Kenny, 30 W.L.R. 518.

LIABILITY OF PRINCIPAL FOR GOODS PURCHASED BY AGENT.

A retail merchant who guarantees to a wholesale merchant the payment of merchandise sold to another merchant, and who afterwards purchases the business of the latter, leaving him in possession and as manager of the business, is liable for the price of goods sold and delivered to such agent in good faith.

Dubois v. Bailey, 47 Que. S.C. 349.

CONTRACT FOR PURCHASE OF GOODS MADE BY SUPPOSED AGENT OF DEFENDANT—FAILURE OF PLAINTIFF TO PROVE AGENCY—RATIFICATION—HOLDING OUT — SECRET COMMISSION — FRAUD — STORAGE CHARGES—RECOVERY OF SMALL SUM—COSTS.

Stoney Point Canning Co. v. Barry, 8 O.W.N. 411.

SALE OF GOODS — ACTION FOR PRICE —QUESTION OF FACT — TO WHOM SALE MADE AND CREDIT GIVEN—EVIDENCE—FINDING OF REFEREE — AGENT —ELECTION—ASSIGNMENT OF CLAIM—ACTION BY ASSIGNEE—ABSENCE OF NOTICE OF ASSIGNMENT — ADDITION OF ASSIGNOR AS PARTY PLAINTIFF—COSTS — ITEMS OF ACCOUNT — APPEAL FROM REPORT.

Long v. Gage, 16 O.W.N. 14.

PURCHASING AGENT—PURCHASE OF MACHINERY ON AGENT'S CREDIT.

Johnston v. Canadian Klondike Mining Co., 19 W.L.R. 60.

(§ II B—17)—UNDISCLOSED AGENCY.

Where a promise of sale of immovable property is accepted in these words, "This promise is accepted for our client," and the name of the client is not disclosed at the time, there is a valid sale and the person accepting the promise becomes personally responsible as the purchaser unless he discloses his client's name and the latter accepts the property.

Dagenais v. Modern Realty & Investment Co., 5 D.L.R. 315, 41 Que. S.C. 428.

Where the plaintiffs, who agreed to purchase land from one who did not disclose his agency for the defendant, made a cash deposit thereon, and afterwards sent the agent an agreement of purchase for execution, with directions that, when executed, the agreement, together with a draft for the first payment be sent to a designated bank, but the defendant, who was not informed by the agent of such direction, sent the executed agreement, together with a draft, to a different bank, which returned it to the defendant without making any attempt to collect or notifying the plaintiffs thereof, a delay of a month on the part of the plaintiffs before notifying the agent of the nonreceipt of the agreement, when they stated that if they could not get the land they would be pleased to have the deposit returned, is not so unreasonable as to amount to an abandonment or waiver of the right to compel the defendant to specifically perform such agreement.

Edgar v. Caskey, 4 D.L.R. 460, 5 A.L.R. 245, 21 W.L.R. 444, 2 W.W.R. 413.

AGENT'S INTENTION — UNDISCLOSED PRINCIPAL—NO AUTHORITY—RATIFICATION.

A contract made by a person intending to contract on behalf of a third party but without his authority, cannot be ratified by the third party so as to render him able to sue or liable to be sued on the contract, where the person who made the contract did not profess at the time of making it to be acting on behalf of a principal. [Keighley v. Durant, [1901] A.C. 240 followed.]

Swanson v. Thomas, 20 D.L.R. 609, 7 W. W.R. 652, 25 Man. L.R. 94.

UNDISCLOSED AGENCY—HUSBAND AS WIFE'S AGENT—RIGHT TO SUE BOTH, HOW LIMITED.

Where the husband, who appeared to be principal in the transaction in respect of work ordered done by him, was in fact acting for his wife, who was the real principal, the parties doing the work, on discovering that fact, may elect whether they

will look to the husband or to the wife for payment, but are not entitled to judgment against both.

Stovel Co. v. Detremaudan, 20 D.L.R. 463, 29 W.L.R. 193.

LIABILITY OF UNDISCLOSED PRINCIPAL — ACTION AGAINST AGENT—"FACTOR OR COMMISSION MERCHANT."

M., without disclosing the fact that he was acting as agent for the Crown, purchased hay from the suppliant and was sued in a provincial court for a balance of the purchase price. At the trial that fact became known to the suppliant, but he nevertheless proceeded with the case and recovered judgment against M. Later the suppliant brought an action in the Exchequer Court to enforce the claim against the Crown. Held, the suppliant having elected to proceed to judgment against M. could not afterwards sue the Crown. That M., having been retained to make such purchases on a commission basis, was a "factor or commission merchant" and alone liable under arts. 1736, 1738 C.C. (Que.).

Desrosiers v. The King, 46 D.L.R. 648, 18 Can. Ex. 461.

MANDATE — AGENT ACTING IN HIS OWN NAME — LESSEE — REPAIRS — RESPONSIBILITY—C.C. ART. 1716.

Where a tenant in a building orders, in his personal name, repairs to be made to the elevator for the benefit of the proprietor, without disclosing his authority to act for the landlord, he is an agent acting in his own name, and as such, he is liable to the third party who made the repairs, without prejudice to his recourse against the owner of the building.

Otis Fenson Elevator Co. v. David, 25 Rev. Leg. 240.

AGENCY—RESPONSIBILITY OF AGENT—BANKRUPTCY — VOLUNTARY ASSIGNMENT — SALE OF DEBTS—DELIVERY—NULLITY—REIMBURSEMENT—C.C. ART. 1491, 1494.

Generally an agent cannot be sued, but when the authority appears under the form of a sale, or of any Act whatever by which the authority apparently vests the representative with all the rights of the owner, then the agent becomes a sort of dummy and is personally responsible to a third party, even when the latter knows the true position of him with whom he is contracting. Thus in the case of a voluntary assignment made by a debtor for the benefit of his creditors, the assignees in trust who sells at public auction the book debts of the bankrupt man, among which there are debts represented by notes found in the hands of banks and which cannot be delivered, the vendor can be sued personally for cancellation of the sale on account of default in delivery and for repayment of the price paid even if the sale has been made without any guarantee whatever.

Beaudoin v. Prévost, 56 Que. S.C. 273.

WORKMAN HIRED AND EMPLOYED BY MANDATARY IN HIS OWN NAME.

Demers v. McCrae, 40 Que. S.C. 123.

C. AGENT'S FRAUD OR WRONG.

Liability for negligence of officer or agent, see Municipal Corporations, II G—222.

Liability for agent's negligent driving, scope of employment, see Master and Servant, III A—290.

(§ II C—20)—SALE OF LAND—COMMISSION—PAYMENT BY AGENT APPARENTLY ON BEHALF OF DISCLOSED PRINCIPAL—AGENT SECRETLY ACTING FOR UNREVEALED THIRD PARTY—FRAUD OF AGENT.

Crerar v. Braybrook, 48 D.L.R. 683, [1919] 3 W.W.R. 422, affirming [1919] 1 W.W.R. 640.

AGENT OF COMPANY — DUTY TO FURTHER BUSINESS OF COMPANY—UNFAITHFULNESS—RIGHT TO REMUNERATION.

Where the duty of an agent of a company is to carry on the business of the company so as to attract further business, unfaithfulness in the performance of such duty, even without fraud, will disentitle him to any remuneration. [Canada Bonded Att'y v. Leonard Parmiter, 42 D.L.R. 342, distinguished.]

Cook v. Hinds, 44 D.L.R. 586, 42 O.L.R. 273.

FRAUD OF AGENT — LIABILITY OF PRINCIPAL.

The principal is answerable for damage occasioned a person who was induced to enter into a contract to buy a chattel by the wilfully false representations of the agent for sale of such chattel.

Sager v. Manitoba Windmill Co., 16 D.L.R. 577, 6 W.W.R. 265, 27 W.L.R. 656, 7 S.L.R. 51, affirming 13 D.L.R. 203, 24 W.L.R. 725, 4 W.W.R. 1078. [Affirmed, 23 D.L.R. 556, 7 W.W.R. 1213.]

SALE OF LAND — SECRET PROFIT — PRINCIPAL'S RIGHT TO RECOVER.

An innocent purchaser of property who is induced by the false representation of his agent to pay a price larger than that which the vendor is willing to accept has a good cause of action against such agent to the extent of any secret profit which he is shewn to have derived in the transaction.

Riches v. Zimmerli, 16 D.L.R. 265, 6 W.W.R. 121, 27 W.L.R. 197, 19 B.C.R. 127.

EXCHANGE OF LANDS — AGENT REPRESENTING BOTH PRINCIPALS.

Where a real estate broker acting for both parties upon an exchange of land procures a transfer to his own nominee of the lands of one of such parties for the purpose of effecting the proposed exchange, but closes the exchange agreement by transferring to the other party only a part thereof, retaining the remainder for his own benefit as a secret profit, the property so retained does not belong to the customer to whom he pretended it would have to be conveyed, if at no time in the negotiations was it offered

to the latter; it should revert to the party from whom it was fraudulently obtained by the agent.

Tonucci v. Livingstone, 9 D.L.R. 659, 23 W.L.R. 20, 3 W.W.R. 770.

CRIMINAL ACTION — INSTITUTION BY AGENT — SCOPE OF AUTHORITY.

A person is not the agent of a company so as to render it liable for causing the arrest of a salesman employed by him on a charge of converting property of the company to his own use, where the only authorization of such person was the agent's contract of employment, which provided that he should employ a reasonable number of salesmen, who were to enter into contracts directly with the company and with whom all their dealings were to be directly conducted, notwithstanding the agent by the terms of his contract with the company was required to instruct them as to their duties and to assist them in their work, and notwithstanding a stipulation therein that the agent should be answerable to the company for the acts of the salesmen employed by him, and to bear any charge-backs or advances that the company might make in the salesman's accounts, or which the company should be unable to collect from them, as well as for all goods belonging to the company that might be in the possession of such salesmen.

March v. Stimpson Computing Scale Co., 11 D.L.R. 343, 4 O.W.N. 1259, 24 O.W.R. 591.

SALE OF LAND — AGENT OF VENDEE RECEIVING SECRET PROFIT FROM VENDOR — PRINCIPAL'S RIGHT TO RECOVER.

A secret arrangement between the respective agents of the vendor and the purchaser of property that a price larger than that which the vendor is willing to accept, shall be demanded from the purchaser, and that the surplus shall be paid by the vendor to the agents, will not be upheld by the courts; and the purchaser, having paid the money in ignorance of such agreement, may recover the amount of such secret commission from the vendor. [Grant v. Gold Exploration & Development Syndicate, [1900] 1 Q.B. 233; and Mayor etc. of Salford v. Lever, [1891] 1 Q.B. 168, followed.]

Peacock v. Crane, 14 D.L.R. 217, 29 O.L.R. 282, affirming 3 D.L.R. 645.

AGENT'S FRAUD OR WRONG.

A principal is responsible for the fraud of his agent within the scope of the agent's authority, whether the agent be acting for his own benefit or not.

Re Gloy Adhesives, 7 D.L.R. 454, 23 O.W.R. 348.

A principal is bound to refund to the party with whom his agent contracted on his behalf any profit in the transaction represented by the money he has received through the fraud of his agent, whether the principal authorized the fraud or not. [Kettlewell v. Refuge Ass'ce Co., [1908] 1 K.B. 545, [1909] A.C. 243, applied.]

Canadian Financiers v. Hong Wo, 1 D.L.R. 38, 17 B.C.R. 8, 19 W.L.R. 843, 1 W.W.R. 677.

AGENT'S MISREPRESENTATIONS — TRAVELLING SALESMAN.

A false representation by a travelling salesman, that a certain company had gone out of business, and that his employer had taken it over, made in the course of his employment, thereby inducing a purchaser to buy his goods, the principal retaining the benefit, is an actionable wrong which entitles the company to damages occasioned thereby.

Wodehouse Invigorator v. Ideal Stock & Poultry Food Co., 35 D.L.R. 721, 39 O.L.R. 302, varying 11 O.W.N. 296.

AUTHORITY TO PURCHASE — AGENT'S PROPERTY—CONCEALMENT.

An agent to buy lands cannot hold his principal to an agreement to purchase land which is, in fact, the agent's own, if he failed to make that fact known to the principal, or to disclose all the material facts.

Quebec Bank v. Greenlees, 32 D.L.R. 282, 10 A.L.R. 419, [1917] 1 W.W.R. 746. [Affirmed in 33 D.L.R. 696, [1917] 2 W.W.R. 144.]

SALE — SECRET COMMISSION — REPUDIATION OF CONTRACT.

A sale effected under an agreement by the vendor's agent to split his commissions with the agent of the purchaser is void and may be repudiated by the purchaser; it is not necessary to prove an actual fraudulent or dishonest motive by the vendor's agent, or that the buyer's agent was in fact induced thereby to make the purchase.

Barry v. Stoney Point Canning Co., 36 D.L.R. 326, 55 Can. S.C.R. 51, reversing 30 D.L.R. 690, 36 O.L.R. 522.

CUSTOMS BROKER — MISAPPROPRIATION — — LIABILITY OF PRINCIPAL.

One employing a customs broker under a power of attorney, pursuant to the requirements of the Customs Act (R.S.C. 1886, c. 32, s. 157; R.S.C. 1906, c. 48, s. 132), to transact all business with the collector of the port or relating to the Department of Customs, is liable to the Crown for any duties unpaid through the fraudulent devices of the broker; the burden of proof that they had been paid or received by the Crown is upon the principal.

C.P.R. Co. v. The King, 37 D.L.R. 719, 55 Can. S.C.R. 374, affirming 11 D.L.R. 681, 14 Can. Ex. 150, 12 E.L.R. 309.

FRAUDULENT DEALING BY AGENT WITH COMPANY-SHARES OF PRINCIPAL — FIDUCIARY RELATIONSHIP — RESTORATION OF SHARES OR DAMAGES — ACCOUNTING FOR DIVIDENDS — REFERENCE — COSTS.

McCallam v. Fair, 13 O.W.N. 42.

COMMISSION MERCHANT — SCOPE OF AUTHORITY — NEGLIGENCE.

A contract between 2 merchants, by which one is obliged to sell at the market price vegetables the other has supplied him to be

sold on commission, is a mandate and not a sale. A commission agent who has sold the vegetables for a price payable at a time longer than that authorized by his mandate, has exceeded his authority and is personally liable for the price of the goods sold. When such goods arrive during a hard frost, and the commission agent delays their unloading to prevent their freezing, he is not guilty of negligence nor responsible for the damage if they do freeze.

Dumond v. Vipond, 51 Que. S.C. 54.

AGENT COPURCHASER — FAILURE TO DISCLOSE AGENCY AS FRAUD.

An agent having entered into an agreement with a vendor to find a purchaser for his property at a certain price, and on a commission basis, and subsequently entering into a contract with another for the copurchase of the property with him, is guilty of fraud if he conceals from his copurchaser the fact that he is to receive such commission.

Hitchcock v. Sykes, 23 D.L.R. 518, 49 Can. S.C.R. 403, affirming 13 D.L.R. 548, 29 O.L.R. 6.

ASSURANCE BY REAL ESTATE BROKER—WHEN NOT FRAUD.

A sale of land by a real estate broker on behalf of the owner who placed it for listing, without any formal contract of sale having been entered into between the purchaser and the owner, on assurance by the broker that the owner will abide by the sale, does not constitute a fraud on his part so as to render him liable, upon the failure of the owner to convey, for the loss sustained by the purchaser in a subsequent sale of the land on the strength of the broker's assurance.

Peacock v. Wilkinson, 23 D.L.R. 197, 51 Can. S.C.R. 319, 8 W.W.R. 600, affirming 18 D.L.R. 418, 7 S.L.R. 259, 7 W.W.R. 85.

FRAUD OF AGENT — PURCHASE OF LAND FOR PRINCIPAL — RESPONSIBILITY OF VENDOR FOR FRAUD OF PURCHASER'S AGENT — EVIDENCE — SECRET COMMISSION — RESCISSION.

Cooper v. Parsons Realty Co., 8 O.W.N. 487.

MORTGAGE — PAYMENT BY MORTGAGOR TO SOLICITOR — FAILURE OF SOLICITOR TO PAY OVER TO MORTGAGEE — VALIDITY OF PAYMENT — AUTHORITY OF SOLICITOR — AGENCY — EVIDENCE — ONUS.

Bolton v. Tyndall, 9 O.W.N. 266.

REAL ESTATE AGENT—OPTION—FRAUD.

Mignault v. Desjardins, 39 D.L.R. 400, 55 Can. S.C.R. 618, affirming 23 Rev. Leg. 85.

AGENT RETAINING PROPERTY INSTRUCTED TO EXCHANGE.

An agent who is instructed by his principal to arrange for him the exchange of an automobile valued at $2,000 for real estate, commits an illegal act, if, in so effecting the exchange, he represents to his principal that the price asked for the real estate is $2,000 in excess of the one really demanded by the owner of such real estate. Under the evidence plaintiff in this case is entitled to judgment against defendant for $1,500.

Duranceau v. Cote, 24 Rev. de Jur. 78.

HIRE OF WORK — AUTHORITY — SUPERINTENDENT — RESPONSIBILITY — CONTRACTOR — C.C. ARTS. 1709, 1710.

A worker who is engaged and paid as such, and is charged by his master to conduct and supervise his companions, is not a superintendent and is not responsible for useless work which may have been done, but if the master authorizes him to make a purchase, and the payment of certain merchandise, then he becomes the agent of the latter and is responsible in this respect if he misleads his principal by error and deceit to the profit to the vendor.

St. Amour v. Meunier, 25 Rev. Leg. 387.

FRAUD OF AGENT.

A principal who authorizes an agent to execute a contract is responsible for the fraud of such agent. A fortiori is this so if the principal profits by the fraud of his agent and appropriates to himself the benefit of it.

National Real Estate & Investment Co. v. Meloche, 26 Que. K.B. 212.

RAILWAY TIES — INSPECTION — INSPECTOR EXCEEDING AUTHORITY IN RESPECT OF ACCEPTANCE.

Michaud v. The King, 13 Can. Ex. 147.

AGENT — PAYMENT OF MORTGAGE-MONEYS BY MORTGAGOR TO SOLICITOR OSTENSIBLY ACTING FOR MORTGAGEE — MISAPPROPRIATION BY SOLICITOR — PAYMENT BY CHEQUE — AUTHORITY OF AGENT TO RECEIVE MONEY — EVIDENCE — HOLDING OUT — ESTOPPEL.

Delory v. Guyett, 16 O.W.N. 57.

(§ II C—21)—SALE OF LAND BY AGENT FOR PRINCIPAL — SECRET PROFIT — LIABILITY TO ACCOUNT FOR.

McLeod v. Higginbotham, 18 W.L.R. 296.

RECEIVING A SECRET COMMISSION BY AGENT OR EMPLOYEE — CRIMINAL OFFENCE — INDEPENDENT CONTRACTOR.

The King v. Vici, 18 Can. Cr. Cas. 51.

D. RATIFICATION.

(§ II D—25)—RATIFICATION.

Where a bank's representative gives instructions to seize horses covered by a lien note assigned to the bank as security for money borrowed by the payee thereof, and the person so instructed seizes horses other than those covered by the note, at 2 different times, and the bank's representative ratified the act of such person in the second seizure and detaining of horses and instructed him not to take back the first horses seized until he saw that he had the right ones, the bank is liable for the acts of such person in seizing such horses.

Alfred Thien v. Bank of B.N.A., 4 D.L.R. 388, 4 A.L.R. 228, 21 W.L.R. 192, 1 W.W.R. 795.

AGENT'S AUTHORITY — RATIFICATION — STATUTE OF FRAUDS.

While the requirement of s. 4 of the Statute of Frauds is that writing and signature by the party to be charged or his agent are necessary to make an enforceable contract for the sale of land, the authority of the agent need not be in writing; and where two or three joint owners gave a power of attorney authorizing the third to make sales and to fix the terms of sale of the lots; and where a real estate agent was verbally authorized by such joint owner to proceed to advertise and sell the lots, and did so, and the joint owner ratified the sales so made, the agreements are enforceable under the statute against the three joint owners.

Powell v. Hewer, 11 D.L.R. 348, 6 A.L.R. 61, 4 W.W.R. 626.

AGENT'S AUTHORITY — SALE OF LAND — UNAUTHORIZED CONTRACT — RATIFICATION.

A landowner may repudiate an agreement for the sale of land made by an agent empowered merely to find a purchaser, notwithstanding that, on being informed by telephone by the agent, that a sale had been effected and a cash payment received, but without being informed of the agent's execution of the agreement on his behalf, the principal's expressed approval of the sale, where on learning that he had been misled as to the identity of the purchaser, he notified the agent of his refusal to complete the sale, since his conduct, under the circumstances, did not amount to a ratification of the agent's act.

Good v. Bescoby, 14 D.L.R. 325, 23 Man. L.R. 603, 25 W.L.R. 639, 5 W.W.R. 245, reversing 10 D.L.R. 440, 23 W.L.R. 394.

AGENT'S SALE OF LAND CONTRARY TO INSTRUCTIONS — REPUDIATION — RIGHTS OF PURCHASER.

The property owner is not bound by the act of his real estate agent in selling subdivision lots at a lesser price than his instructions warranted where there has been no approval or ratification of such sale by the owner; the purchaser in such case who has paid purchase money to the agent may sue the latter for its return on the principal repudiating the agent's promise of sale, as money received under warranty of authority.

Messier v. Chenery, 22 D.L.R. 527.

AUTHORITY TO PURCHASE — GENERAL OR SPECIAL.

A person originally employed as a "special agent" for purchasing certain goods may by the subsequent conduct of the parties become a "general agent" for purchasing that class of goods; such purchases being within the scope of the business intrusted to him, and a number having been ratified by his employer, parties with whom he deals have a right to assume that he has full authority to make such purchases.

Stoney Point Canning Co. v. Barry, 30 D.L.R. 690, 36 O.L.R. 522.

ARREST — RATIFICATION — ESTOPPEL.

An employer who permits his name to be used for the purpose of a criminal prosecution thereby ratifies the act and is estopped from setting up want of authority.

Landry v. Bathurst Lumber Co., 35 D.L.R. 701, 44 N.B.R. 374.

An agent's unauthorized agreement for the sale of land can be ratified by his principal only by his unequivocal and definite assent to the transaction.

Margolis v. Birnie, 5 D.L.R. 534, 4 A.L.R. 415, 21 W.L.R. 462, 2 W.W.R. 445.

On the failure of the contractor to complete the erection of a school for the plaintiff school district, the defendant, as secretary-treasurer, and another trustee, without the authorization of formal trustee meetings, expended certain moneys of the corporation in completing the building which was afterwards taken over by the corporation and used as a school-house. There were only 3 trustees and the third was not in the Province that season:—Held, that there had been such an adoption by the plaintiff corporation of the acts of the defendant and the other trustee, that the defendant was entitled to credit in his accounts as treasurer for the moneys so paid out. [French v. Backhouse, 5 Burr. 2728; Sentance v. Hawley, 13 C.B.N.S. 458, and Bristow v. Whitmore, 31 L.J. Ch. 467, followed.] As the school building was built upon land which was not the property of the school district, the rule that an employer does not, as against a contractor, accept the work done in the erection of a building merely by reoccupying his own land, did not apply.

School District of Vassar v. Spicer, 21 Man. L.R. 777, 18 W.L.R. 147.

RATIFICATION — AGENTS' ACTS — PRINCIPAL ENTITLED TO BENEFIT OF PURCHASE.

Bell v. Coleridge, 5 O.W.N. 655.

SALE OF GOODS TO AGENT — AUTHORITY — ESTOPPEL.

Agnew v. Davis, 17 W.L.R. 570.

AUTHORITY OF AGENT — RATIFICATION — ESTOPPEL.

Giberson v. Toronto Construction Co., 9 E.L.R. 553.

OPTION — AUTHORITY OF AGENT OF VENDOR — RATIFICATION.

C.P.R. Co. v. Rosin, 2 O.W.N. 610.

RATIFICATION — PURCHASE MONEY PAID.

Taylor v. Helgeson, 3 S.L.R. 461, 15 W.L.R. 273.

(§ II D—26)—WHAT CONSTITUTES.

Where one who represents himself as an agent to purchase standing timber on an island enters into an agreement therefor and notifies his principals thereof and draws a draft on them in favour of the vendor marked "on account of the purchase," and his principals pay the draft, and enter the payment in their books as

being "on account of the purchase" of the island, and write to the agent that they are pleased that he has secured the island and trust it will turn out a good one for timber, and subsequently send the agent to inspect the island and estimate the timber thereon, and the agent in his defence describes the transaction as a purchase, and it appears that the principals had for some time desired to purchase the island, the principals must be taken to have ratified the transaction as a purchase and cannot thereafter be heard to say that they had taken an option only.

Thomson v. Playfair, 6 D.L.R. 263, 26 O.L.R. 624, 22 O.W.R. 866, affirming on other grounds 2 D.L.R. 37.

Ratification of an agent's unauthorized agreement for the sale of land does not arise from the fact that the sum paid the agent by the purchaser was, without the principal's knowledge, included in the amount of a cheque given the principal by the agent for money actually due from him, which sum the former returned to the purchaser's agent as soon as he learned of its inclusion in the cheque.

Margolis v. Birnie, 5 D.L.R. 534, 21 W.L.R. 462, 4 A.L.R. 415, 2 W.W.R. 445.

Where an agent sold pulp wood from the land of his principal, though he was authorized in writing only to mine and explore the property, a letter from the principal stating that the matter of "selling the pulp wood would be taken up when" the agent returned to his principal's head office was insufficient to add to the agent's authority.

British North American Mining Co. v. Pigeon River Lumber Co., 2 D.L.R. 609, 3 O.W.N. 701, 21 O.W.R. 291.

Where several owners of land gave one of their number a power of attorney which authorized him to sell it and to approve on behalf of the other owners, of an offer of purchase, his tact approval of a sale effected by a third party employed by such co-owner to sell the land must be deemed to be also their approval and ratification of the sale.

Rogers v. Hewer, 1 D.L.R. 747, 19 W.L.R. 868, 5 A.L.R. 227, 1 W.W.R. 481.

RATIFICATION—WHAT CONSTITUTES—MACHINERY ORDERED THROUGH SUPPOSED AGENT.

Where a dealer in machinery, as an alleged seller receives and undertakes to fill a machinery order from a construction company through a middleman, whom the construction company reasonably believes to be the agent of the dealer, the dealer may constitute himself a seller and the middleman's principal by estoppel, unless the transaction is disavowed and the alleged agency repudiated within a reasonable time, where it appears that the dealer had notice of the other party's reliance upon the supposed agency.

Edmonton Steamshovellers v. Gunn, 14 D.L.R. 638, 26 W.L.R. 234.

RATIFICATION OF UNAUTHORIZED ACTS.

Where a benevolent society appoints a committee to secure rooms for lodge purposes, and an officer of the society, although not a member of such committee, but with its approval, enters into a contract for the rental of rooms and makes a payment thereon, the conduct of the society in reimbursing him for his outlay adopting a vote thanking him for his services, and treating the office as binding, ratifies such agreement. [Reuter v. Electric Telegraph Co., 6 E. & B. 341, 119 Eng. R. 892; Smith v. Hull Glass Co., 8 C.B. 668, 11 C.B. 897; Hoare v. Mayor of Lewisham, 85 L.T.N.S. 281; and Conway Bridge Commissioners v. Jones, 102 L.T.N.S. 92, applied.]

Pulford v. Loyal Order of Moose, 14 D.L.R. 577, 23 Man. L.R. 641, 25 W.L.R. 868, 5 W.W.R. 452.

RATIFICATION OF AGENT'S CONTRACTS—ESTOPPEL.

Where, upon a sale, with implied warranty, of certain machinery, the alleged principal, in whose name the sale was effected, received for confirmation a copy of the agreement and held it for a protracted period without repudiation and accepted specific part payments on the purchase price, and took part in correspondence assuming the relationship of principal and agent, he is thereby estopped, in an action on the warranty, from denying the agency.

Maple Leaf Portland Cement Co. v. Owen Sound Iron Works Co., 10 D.L.R. 33, 23 O.W.R. 907. [Affirmed, 4 O.W.N. 1189.]

AGENCY BY RATIFICATION—ADOPTIVE ACTS WITH KNOWLEDGE.

An agency by ratification must be evidenced by clear adoptive acts which must be accompanied by full knowledge of all the essential facts.

Eastern Construction Co. v. National Trust Co.; National Trust Co. v. Miller, 15 D.L.R. 755, [1914] A.C. 197.

RATIFICATION CONSTITUTING AGENCY.

To constitute an agency by ratification it is essential that the agent in doing the act to be ratified shall not be acting for himself but should intend to bind a principal actually named or ascertainable. [Keighley v. Durant, [1901] A.C. 240, applied.]

Eastern Construction Co. v. National Trust Co. National Trust Co. v. Miller, 15 D.L.R. 755, [1914] A.C. 197.

ACT WITHOUT AUTHORITY—KNOWLEDGE.

In order that a person may be deemed to have ratified an act done without his authority, it is necessary that at the time of the ratification he should have full knowledge of all the material circumstances under which the act was done, unless he intends to ratify the act and take the risk whatever the circumstances may have been.

Wheeler v. Hisey, 43 D.L.R. 92, 42 O.L.R. 654.

OSTENSIBLE AGENT—ESTOPPEL—JUDGMENT —SATISFACTION.

In considering whether a person is bound by acts of an ostensible agent which are alleged to have been ratified, the distinction is to be observed between a ratification to be implied from conduct shewing an intention to ratify and an estoppel to deny ratification, the case, that is, where, without a conscious intention to ratify, the so-called principal is estopped from denying that his conduct must be treated as a ratification. In an action for a declaration that a judgment obtained by the defendant against the plaintiff had been satisfied, held that there was evidence to justify the jury in finding that there was an arrangement made between the plaintiff and the defendant's ostensible agent whereunder goods were handed over to the defendant in satisfaction of the judgment and that the agent's act had been ratified, or adopted by estoppel, by the defendant.

McKay v. Tudhope Anderson Co., 44 D.L.R. 100, 14 A.L.R. 131, [1918] 3 W.W.R. 994.

AGREEMENT FOR SALE OF LAND—AUTHORITY OF AGENT OF VENDOR—RATIFICATION—SPECIFIC PERFORMANCE.

Mooney v. McCuaig, 11 O.W.N. 163.

SUM LODGED WITH BANK TO BE PAID OVER UPON INSTRUCTION — AUTHORITY OF AGENT — PAYMENT — RATIFICATION—ESTOPPEL.

Barrett v. Bank of Toronto, 11 O.W.N. 10.

CONTRACT MADE BY INDIVIDUAL—EVIDENCE TO ESTABLISH AGENCY FOR COMPANY—AUTHORITY OF DIRECTOR.

Bird v. Hussey-Ferrier Meat Co., 25 O.W.R. 13.

DELAY IN REPUDIATING COMPROMISE.

A creditor who has been offered by his debtor a compromise of his debt, who instructs a collection agency, usually employed by him, to see if it would not be better to accept such offer, and the agency accepts the debtor's offer and gives him a discharge, cannot, after a year's delay, repudiate the act of the agency it being equivalent to an acquiescence and ratification of the compromise.

Ogilvie Flour Mills v. Pinard, 49 Que. S.C. 282.

BONDS PURCHASED BY AGENT—DISPUTE AS TO OWNERSHIP—EVIDENCE — DECLARATION AS TO—AGENT GIVEN LIEN FOR PART PURCHASE-MONEY PAID.

Northern Sulphite Mills v. Craig, 20 O.W.R. 317.

AGENT'S COMMISSION—BREACH OF CONTRACT.

Gibson v. Carter, 24 O.W.R. 821.

III. Rights and liabilities of agent.

(§ III—30)—AGENT EMPLOYED TO DO CERTAIN WORK FOR A CERTAIN SUM—COMPLETION OF WORK—WORK USELESS—RIGHT TO RECOVER AMOUNT AGREED ON.

If an agent is employed to perform certain work for an agreed amount, that amount is payable when the work is completed even should it transpire that the work done by the agent prove useless to the person employing such agent. The general principle, that a solicitor must exercise the utmost good faith in transactions with his client, does not apply where the solicitor is employed to do special work, far removed from that of an ordinary solicitor, where no bad faith is shewn.

Whiteside v. Wallace Shipyards, 45 D.L.R. 434.

DISOBEDIENCE OF INSTRUCTIONS.

An agent who disobeys the instructions of his principal is liable to pay for any loss which in the ordinary course of things is the result of such disobedience.

Globe & Rutgers Fire Ins. Co. v. Wetmore 23 D.L.R. 33, 49 N.S.R. 55.

There is no cause of action for breach of implied warranty of authority of an alleged agent where there is no misrepresentation of the fact of authority, e. g., where the person signing in a representative capacity tells the person with whom he is dealing that he has no authority, but the negotiations proceed in anticipation of their being confirmed by the principal. [Jones v. Hope, 3 T.L.R. 247 (a), followed; Polhill v. Walter, 3 B. & Ad. 114, distinguished.]

Thomson v. Playfair, 2 D.L.R. 37, 21 O.W.R. 867, 25 O.L.R. 365.

SALE OF LAND—FRAUD—LIABILITY OF AGENT —CONCEALMENT—RESCISSION.

Clark v. Hepworth, 39 D.L.R. 395, 55 Can S.C.R. 614, [1918] 1 W.W.R. 147, affirming 34 D.L.R. 177, 10 A.L.R. 465, [1917] 1 W.W.R. 806.

FIDUCIARY RELATIONSHIP—ACCOUNTING BY AGENT FOR MISAPPROPRIATED FUNDS—ACTION TO RECOVER BACK PAYMENTS—DOCUMENTARY EVIDENCE AS TO VERACITY.

Wood v. Hanes, 33 D.L.R. 166, 38 O.L.R. 583, reversing 10 O.W.N. 46.

CLAIM FOR MONEYS DUE BY AGENT—COUNTERCLAIM FOR BREACH OF CONTRACT.

Canadian Lake Transportation Co. v. Browne, 24 O.W.R. 149.

SALE OF MONEY ORDER — ACCOUNTING TO PRINCIPAL—DEFENCE — CONVICTION FOR THEFT—C.C. (QUE.) 1030, 1709, 1713.

In an action by a principal against his agent for $3,998, representing the sale of money orders, wherein the declaration alleges a contract of agency, and also that the defendant had received for sale a certain amount of money orders "belonging to the plaintiffs upon terms requiring the said defendant to account for," verbal evidence can be admitted to prove the business between the parties and the amount for which the defendant should render an account. The facts that the principal had another person arrested and convicted for theft as agent of money orders, does not relieve the defend-

ant of his civil responsibility to account for the sale of the same money orders.

Dominion Express Co. v. Dini, 46 Que. S.C. 396.

JOINT MANDATE—ACCOUNTING.

When heirs entrust a person with the receipt of debts due the succession, they thereby give him a joint mandate, and the agent is only bound to render a common account without specifying the share of each heir. Further, he is only obliged to pay over the balance of the account upon a joint discharge by all these principals so long as the latter have not settled their respective portions between themselves.

Martineau v. Paquet, 49 Que. S.C. 165.

AGENCY—OBLIGATIONS OF AGENT—AUTOMOBILE — RENDERING OF ACCOUNTS—C.C. ART. 1713, 1714.

A person who delivers an automobile to his agent for the purpose of selling it and allows him to use it for that purpose, can reclaim it from him even 2 years afterwards, and the car must be returned in the same condition as when it was delivered. If the machine, while in the possession of the agent, has been several times broken and repaired, if the motor has been changed in a considerable degree, and the carriage has also deteriorated, the agent must return the automobile and pay all the damages. In a case where two parties have accounts against each other, they have a right of action for rendering account, but this action is not essential when the defendant does not pretend that the plaintiff is indebted to him and all the necessary elements to decide the action are before the court.

Duranceau v. Coté, 56 Que. S.C. 127.

(§ III—31)—FIDUCIARY CAPACITY — CONFLICT OF INTEREST—AGENT'S NONDISCLOSURE—PRINCIPAL'S REMEDY.

A person in a fiduciary relation is not allowed to put himself in a position where his duty and interest conflict; he is bound to communicate all the information he has acquired respecting the property which is the subject of the fiduciary transaction, and may be held liable to account for the share of profit which in bad faith he obtained by the amount of which the person to whom he owed the duty would have benefited had disclosure been made. [Bray v. Ford, [1896] A.C. 44; Emma Silver Mining Co. v. Grant, 11 Ch. D. 918, applied.]

Radford v. Stannard, 19 D.L.R. 768, 8 A. L.R. 405, 7 W.W.R. 986.

FIDUCIARY CAPACITY—HONEST BREACH OF DUTY—COMPENSATION.

Upon an agency contract to sell lands a breach of duty by the agent which is not tainted by dishonesty but is merely the result of a mistaken notion of his rights, will not disentitle him to commission, although he is liable to his principal for any profits illegally received. [Hippisley v. Knee, [1905] 1 K.B. 1, applied; Andrews v. Ramsay, [1903] 2 K.B. 635, distinguished; Manitoba & N.W. Land Corp. v. Davidson, 34 Can. S.C.R. 255, considered.]

Complin v. Beggs, 13 D.L.R. 27, 24 W. L.R. 871, 24 Man. L.R. 596, 4 W.W.R. 1081.

Where an option of purchase has been obtained by real estate agents to themselves from the owner under circumstances which render it voidable for nondisclosure by the agents of facts brought to their knowledge while they were acting in a fiduciary capacity for the owner, a conveyance made to the agents in conformity with such option may be set aside together with the option agreement which is impeached; and the conveyance will not operate by way of estoppel or confirmation unless it clearly appears that the owner had, in the meantime, obtained from some source the information and advice which his agents had improperly withheld, and had notwithstanding, elected to affirm the transaction.

Laycock v. Lee, 1 D.L.R. 91, 19 W.L.R. 841, 17 B.C.R. 73.

SECRET PROFITS—FIDUCIARY RELATIONSHIP—AGENCY VEL NON.

Roach v. Gray, 27 D.L.R. 726, 22 B.C.R. 553, 10 W.W.R. 813.

FIDUCIARY RELATIONSHIP — PROFITS — ACCOUNTING—DAMAGES.

Marler v. Marler, 27 D.L.R. 11.

PURCHASER BY AGENTS IN NAME OF THIRD PERSON—CONTRACT UNDER SEAL—LIABILITY OF AGENT—UNDISCLOSED PRINCIPAL—DAMAGES FOR LOSS OCCASIONED BY SALE TO PERSON WITHOUT MEANS—RETURN OF COMMISSION.

Millar v. Philip, 9 O.W.N. 469.

FIDUCIARY CAPACITY—CONFLICT OF INTEREST—GOODS SOLD UNDER WRITTEN AGREEMENT— "TO ACT AS AGENT ON COMMISSION" — ASSIGNMENT OF AGENT FOR BENEFIT OF CREDITORS—OWNERSHIP OF FLOUR ON HAND — OUTSTANDING ACCOUNTS DUE AGENT FOR SALE OF GOODS BELONGING TO PRINCIPAL—AGENT TRUSTEE FOR SELLER—ASSIGNEE ALSO TRUSTEE.

Western Canada Flour Mills, v. Middleboro, 19 O.W.R. 722, 2 O.W.N. 1379.

ACCOUNT—COMMISSION — SECRET DEALINGS OF AGENT—COSTS.

Brodey v. LeFeuvre, 6 O.W.N. 175.

AUTHORITY — DOUBLE COMMISSION — REAL ESTATE AGENT — COMMISSION — EXCHANGE — IMMORAL CONTRACT — C.C. ARTS. 989, 1200, 1710.

A person cannot act as an agent for two parties in an exchange of property, that would be illegal, and although this fact should not be pleaded in an action for the recovery of commission, the court should, where proof is shown, take cognizance of the duty and refuse the demand.

Aubut v. Garneau, 27 Que. K.B. 474; Cote v. Détournay, 25 Rev. Leg. 63.

TACIT AUTHORITY—SALE OF REAL ESTATE—COMMISSION—SOCIETY—RENDERING OF ACCOUNT — GOOD FAITH — C.C. ARTS. 1701, 1713, 1842.

If a person at the request of another submits to him properties which ought to be offered for sale, and the latter in doing so offers him a certain piece of real estate and procures for him, at his request, an option from the buyer, there is a tacit authority conferred to the person who has acted between the buyer and seller. If, again, this representative forms an association with his employer and other persons to exploit the real estate bought, they form between themselves a society in which all members ought to act in good faith and loyalty towards each other, and this representative ought to render to the society an account of all the commission he has received from the seller.

Crown Real Estate Co. v. Mack 25 Rev. Leg. 292.

AGENCY—AGENT CONTRACTING WITH PRINCIPAL—NO CONFLICTING INTEREST.

The rule of law as to an agent not dealing as a principal with his principal rests on the consideration of a conflicting interest in the person of the agent, but where an agent contracts to raise money for his principal to be secured on mortgages by the principal on specified terms, there is no conflicting interest to prevent the agent advancing the amount himself, if there is no special stipulation to the contrary.

Gray v. Dalgety, [1919] 2 W.W.R. 953.

(§ III—32)—CONTRACT—PERSONAL LIABILITY.

Where the terms of a contract clearly indicate that an agent making the contract is to be personally liable, he is bound by the contract, regardless of his own intention, unless it can be shewn by extrinsic evidence that there was an express agreement that the agent should not be liable, and that the contract rendering him liable was so drawn by mistake. [Wake v. Harrop, 6 H. & N. 768, followed.]

Currie v. Wreford, 38 D.L.R. 516, 11 S. L.R. 22, [1918] 1 W.W.R. 315, reversing 10 S.L.R. 117. [Affirmed in 49 D.L.R. 694, [1919] 1 W.W.R. 380.]

CONTRACTS BY AGENT—NECESSARIES.

A person placed in charge of range cattle to find feed for them may be considered the owner's agent to contract for necessary pasturage for starving cattle which it was found en route it would not be practicable to drive to the destination of the herd.

Campbell v. Newbolt, 20 D.L.R. 897.

ON CONTRACTS.

An agent appointed by parol cannot bind his principal by deed. Under an instrument authorizing an agent to mine and explore the property of his principal and "to act for and take such action or actions as he may consider necessary in the interest of" his principal, such agent was appointed and employed to "mine and explore" only and the general words in the concluding part of the document are limited to that employment and gives the agent no power to sell trees and timber from the principal's property.

British North America Mining Co. v. Pigeon River Lumber Co., 2 D.L.R. 609, 21 O.W.R. 291.

CONTRACTS—PERSONAL LIABILITY OF AGENT.

The question whether an agent who has made a contract on behalf of his principal is to be deemed to have contracted personally, and if so, the extent of his liability on the contract, depend on the intention of the parties to be deduced from the nature and terms of the particular contract and the surrounding circumstances.

Dusseault v. Kopp, 23 D.L.R. 332, 8 S. L.R. 88.

DEPOSIT PAID BY PRINCIPAL TO AGENT ON NEGOTIATION FOR LEASE—PAYMENT OVER TO LESSOR—LEASE NOT EXECUTED—ACTION AGAINST AGENT FOR RETURN OF DEPOSIT—EVIDENCE.

Goodrich v. Robins, 9 O.W.N. 71.

ON CONTRACTS.

Action to recover price of a gasoline engine, claimed by the plaintiff to have been sold to the defendant. Defence that defendant was acting as agent only of L., the actual purchaser. Defendant admitted in his evidence that he informed plaintiffs that they might charge the price of the engine to "L. or to P. our agent at A":—Held, upon the evidence, that the defendant was liable as purchaser.

Bruce Stewart & Co. v. Wedlock, 12 E. L.R. 408.

CONTRACT MADE THROUGH AGENT — CORRESPONDENCE—CONDUCT.

Maple Leaf Portland Cement Co. v. Owen Sound Iron Works Co., 4 O.W.N. 1189.

(§ III—33)—CUSTOMS BROKER—LIABILITY FOR NEGLIGENT HANDLING OF BILLS OF LADING.

A customs broker entrusted with an endorsed bill of lading solely for the purpose of clearing the goods through the customs is not justified in lending the bill of lading to the carrier to enable the latter to fix the freight charges, and is answerable in damages if the seller who has consigned the goods to himself loses them in consequence of the broker's wrongful or negligent act. A customs broker who is entrusted by his client with a duplicate bill of lading endorsed in blank to facilitate the passing of customs is liable in damages to the client if, through the negligence of the broker's agent the bill of lading is improperly delivered either to the buyer of the goods or to the railway company at destination if as a result the buyer obtained delivery without paying for the goods which were under consignment to the seller; the damage in such case is the price plus the interest at 5 per cent from the time of wrongful delivery to the date of entering judgment.

Wolsely Tool & Motor Car Co. v. Jackson

Potts & Co., 21 D.L.R. 610, 33 O.L.R. 96. [Affirmed in 33 O.L.R. 587.]

INSURANCE AGENT — LIABILITY FOR NEGLIGENCE—FAILURE TO ADVISE INSURED OF RISK IN PROHIBITED CLASS.

An insurance agent is liable for the legally enforceable damages sustained by his company where he insured against a risk contrary to instructions given him by the company, by issuing an interim receipt to the insured, but where knowledge of this fact never reached the company until the loss was sustained; it appearing that the agent acted negligently and carelessly and without due regard to the interests of his principal. The measure of damages is the sum which the company was liable for under the policy and the premium paid to but not accounted for by the agent, but the company is not entitled to the sum paid out for costs of court or counsel fees in unsuccessfully defending an action brought by the insured under the policy in question.

Independent Cash Mutual Fire Ins. Co. v. Winterborn, 10 D.L.R. 113, 4 O.W.N. 674, 24 O.W.R. 6.

FILLING IN BLANKS—REGISTRATION.

The duty of an agent under the agency contract, to fill in blanks "to permit of proper registration," refers to the body of the instrument and not to the affidavit.

Gray-Campbell v. Reimer, 36 D.L.R. 181, 11 A.L.R. 437, [1917] 2 W.W.R. 991.

NEGLIGENCE OF AGENT—SALE OF WHEAT—LOSS TO PRINCIPAL—AGENT'S LIABILITY.

The prompt carrying out of the express orders of his principal by an agent even though loss results therefrom does not constitute negligence or breach of duty on his part; unless circumstances are such that no reasonable agent would carry out his principal's orders. [Saskatchewan Co-operative Elevator Co. v. Jackson, 49 D.L.R. 354; Commonwealth Portland Cement Co. v. Weber [1905] A.C. 66, followed.]

Gearhart v. Quaker Oats Co., 49 D.L.R. 357, [1919] 3 W.W.R. 888.

Where a principal orders to be done on his premises a work, lawful in itself, but from which, in the natural course of things, injurious consequences to his neighbour must be expected to arise unless means are adopted by which such consequences may be prevented, the principal himself is bound to see to the doing of that which is necessary to prevent the mischief, and he cannot relieve himself of his own responsibility by employing some one else (whether servant or independent contractor) to do what is necessary to prevent the act he had ordered to be done from becoming wrongful. [Bower v. Peate, 1 Q.B.D. 321, 326; Mersey Docks Co. Trustees v. Gibbs, L.R. 1 H.L. 93, 114; Pickard v. Smith, 10 C.B.N.S. 480, applied.]

Cockshutt Plow Co. v. MacDonald, 8 D.L.R. 112, 5 A.L.R. 184, 3 W.W.R. 488.

An agent who had no authority to bind an insurance company until it had approved an application for insurance, is not liable for failure to effect insurance upon property before it was destroyed by fire, where he agreed with the applicant only to submit his application to the company for approval, which he did without negligence, and it did not appear that he unconditionally agreed to place and effect such insurance.

Binkley v. Stewart Co., 4 D.L.R. 150, 22 O.W.R. 330.

A person employed to secure additional insurance on certain property, a correct specification of what was required being given him, who receives the policy from the underwriters and forwards it to his clients without reading it is liable for the damages sustained by the latter by reason of their being compelled, upon the loss of their property by fire, to compromise their claim against the insurance because of an erroneous specification in the policy so obtained of the prior insurance carried by them.

Rudd Paper Box Co. v. Rice, 3 D.L.R. 253, 20 O.W.R. 979, affirming 2 O.W.N. 1417.

The agency of the defendant to his son, whose negligent driving of an automobile resulted in an injury to the plaintiff, is not established by the facts that the son had the opportunity of using the vehicle whenever he liked, and that on the day when the accident occurred it was the intention of the defendant that his son should later in the day take the defendant's family riding, where it appeared that the son had obtained the car from the garage where it was kept by the defendant, and was taking a few of his own friends for a ride when the accident occurred since, at the time of the accident, the automobile was being used solely for the purposes of the defendant's son.

B. & R. Co. v. McLeod, 7 D.L.R. 579, 5 A.L.R. 176, 22 W.L.R. 274, 2 W.W.R. 1093.

LIABILITY FOR NEGLIGENCE.

In an action on a fire insurance policy the defendant insurer may recover from its agent, made a third party, as damages for the latter's neglect of duty as the insurer's agent to give the insurer sufficient information of the hazardous character of the risk, resulting in too small a premium being charged, the difference between the accustomed premium which would have been charged on a proper discovery of the material facts known to the agent and the lower premium which was in fact charged upon his negligent classification of the risk.

Stoness v. Anglo-American Ins. Co., 3 D.L.R. 63, 21 O.W.R. 405.

INVESTMENTS — LIABILITY OF AGENT—CONFLICT OF EVIDENCE — FINDING OF FACT.

Boyd v. Brodie, 9 O.W.N. 477.

(§ III—34)—LIABILITY OF AGENT TO PRINCIPAL FOR FRAUD.

One employed to ascertain the lowest price for which property may be purchased, who deceives his principal and induces him to pay more than the owner of the property was willing to accept, is answerable to his principal for the difference. [Hutch-

inson v. Fleming, 40 Can. S.C.R. 134, followed.]

Fry v. Yates, 17 D.L.R. 435, 19 B.C.R. 355, 28 W.L.R. 23, 6 W.W.R. 746, affirming 12 D.L.R. 418, 4 W.W.R. 1055.

SECRET PROFIT BY AGENT — REAL ESTATE BROKER — NONDISCLOSURE ON GETTING OPTION FROM PRINCIPAL.

Where a real estate broker, holding an option from his principal for the purpose only of satisfying prospective purchasers that he could carry out a sale, reports to his principal that he had been unable to get the price but would take the property himself and charge no commission, and the principal acquiesces, the agent must account to the principal for the profit made on an undisclosed resale which he had already effected at the time when he got his principal to sell to him. [Andrews v. Ramsay, [1903] 2 K.B. 635, applied.]

Gilbert v. Store, 17 D.L.R. 189, 28 W.L.R. 106, 6 W.W.R. 719.

INVESTMENTS MADE BY AGENT FOR PRINCIPAL — LIABILITY OF AGENT'S ESTATE FOR LOSSES — TRUSTEE — DEALINGS IN SPECULATIVE STOCKS — WANT OF CARE IN INVESTING IN MORTGAGES — ABSENCE OF FRAUD — HONESTY AND GOOD FAITH OF AGENT — ACCOUNT — REFERENCE.

Brewer v. McDougal, 16 O.W.N. 337.

AGENT'S INNOCENT MISREPRESENTATION.

While liability for a fraudulent representation made by an agent would be upon both the principal and agent, the responsibility is that of the principal alone when the representations are innocently made by the agent.

Goody v. Carlson, 16 D.L.R. 822, 28 W.L.R. 651.

PRINCIPAL AND AGENT — PROPERTY OBTAINED BY AGENT OF VENDOR FROM PURCHASER BY MISREPRESENTATION — LIABILITY OF AGENT TO PURCHASER.

Whittaker v. Taylor, 4 A.L.R. 40, 19 W.L.R. 662.

(§ III—36) — COMMISSIONS — REPOSSESSION OF GOODS.

A provision in an agency agreement that no commission is to be earned or paid on "goods taken back," includes goods "repossessed" from the purchaser, under the terms of the contract of sale, owing to a default in payment of the balance of the purchase price, and if any commission has been previously paid, it is the duty of the agent, upon repossession of the goods, to refund it. [Taylor v. Laird, 1 H. & N. 266; Button v. Thompson, 38 L.J.C.P. 225, distinguished.]

Cowie v. Sawyer-Massey, 27 D.L.R. 524, 9 S.L.R. 222, 34 W.L.R. 274.

COMPENSATION — INSURANCE AGENCY — BASIS FOR COMPUTING COMMISSION.

A stipulation in a contract for a fire insurance agency that the agent shall receive in addition to a regular commission a stated percentage on the "annual net profits" from business in his territory, arrived at by deducting from the gross premiums all return premiums, rebate, losses, and loss expenses paid and commissions paid, is to be construed as a mode by which the net profits of the year were to be adjusted; the words "losses and loss expenses paid" as used in relation to such annual net profits mean losses actually paid during the year and deduction is not to be made of other losses and expenses paid afterwards in respect of that year's business.

Douglas v. Acadia Fire Ins. Co., 19 D.L.R. 565, reversing 15 D.L.R. 883, 14 E.L.R. 74, 47 N.S.R. 517, and restoring 12 D.L.R. 419, 13 E.L.R. 157.

COMPENSATION — COMMISSION ON ACCEPTED ORDERS WHEN FILED — FAILURE TO COMPLETE.

White v. National Paper Co., 16 D.L.R. 861, 6 O.W.N. 83.

REAL ESTATE AGENT — PRINCIPAL'S DUTY.

Upon a contract by a real estate agent to sell lands for his principal, the obligation of the latter to treat the agent honestly and to do nothing calculated to deprive him unfairly of his commission is as strict as that of the agent to act honestly and to refrain from accepting (under ordinary circumstances) any commission or other benefit from the purchaser.

Complin v. Beggs, 13 D.L.R. 27, 24 Man. L.R. 596, 24 W.L.R. 871, 4 W.W.R. 1087.

AGENT'S COMPENSATION — ACCOUNTING — CLAIM FOR TRAVELLING EXPENSES.

On an accounting for services of a financial agent, he should not be allowed the full amount of travelling expenses incurred upon a trip upon which he bought property for his principal, where it appears that he purchased much more property on his own account at the same time.

Bureau v. Laurencelle, 11 D.L.R. 283, 24 W.L.R. 335.

COMPENSATION — AGENT'S COMMISSION ON SALE OF ASSETS OF COMPANY — AGREEMENT — TERMINATION — QUANTUM MERUIT.

Strong v. London Machine Tool Co., 10 D.L.R. 813, 23 O.W.R. 592.

RIGHTS OF AGENT — COMPENSATION — RESCISSION OF AGENCY CONTRACT.

On declaring a contract for an exclusive sales agency for a company for a fixed period not binding on the company as the other contracting party had failed in his fiduciary duty as a director of the company to disclose the material facts to the shareholders on arranging with his fellow-directors that the contract should be given him on his resigning his directorship, the court may award him compensation on a quantum meruit basis for services rendered as sales agent for the company in faith of the contract so set aside.

Denman v. Clover Bar Coal Co., 15 D.L.R. 241, 48 Can. S.C.R. 318, 26 W.L.R.

435, 5 W.W.R. 564, affirming 7 D.L.R. 96, 22 W.L.R. 128, 2 W.W.R. 986.

An agent is not entitled to any remuneration in respect of a transaction in which he has been guilty of any misconduct or breach of faith towards his principal.

Canadian Financiers v. Hong Wo, 1 D.L.R. 38, 17 B.C.R. 8, 19 W.L.R. 843.

Where the plaintiff was employed by 2 of the 3 defendants to attend to the purchasing of an interest in lands for their benefit under an agreement that he should receive for his services one-fifth of the net profit realized from the transaction, to which agreement the third defendant was not a party and to whom notice of making such agreement by the other 2 defendants was not brought home, the plaintiff upon rendering such services is entitled to recover from the 2 defendants who entered into such agreement with him, one-fifth of the net profits realized by the three defendants.

McLaws v. Smith, 5 D.L.R. 559, 21 W.L.R. 780.

COMPENSATION.

Where the defendant agreed to pay the plaintiff a commission for all sales of stock the latter's subagent should make, the plaintiff may recover from the defendant profits he would have realized on sales made by such subagent under an agreement between the latter and the defendant, made without the agreement between the plaintiff and the defendant being terminated, and with knowledge on the latter's part that the subagency still existed, to the effect that the subagent was to make sales independent of the plaintiff for the same commission the defendant had agreed to pay to the plaintiff. An agent whose subagent was, to the knowledge of the former's principal, to sell shares of stock belonging to the latter, cannot recover from such principal commissions for stock personally purchased from the principal direct by such subagent on his own account.

Aronovitch v. Loper, 3 D.L.R. 389, 22 Man. L.R. 325, 21 W.L.R. 263, 2 W.W.R. 378.

COMMISSIONS—DEFECT IN TITLE.

A borrower who agrees to pay an agent a commission of 2 per cent. if this latter procures him a loan, is bound to pay him this commission if the loan has fallen through by reason of defects in the borrower's titles.

Johnson v. Regent Construction Co., 53 Que. S.C. 463, reversing 37 D.L.R. 790.

AGENT'S RIGHT TO COMPENSATION — ACCEPTED ORDERS — CANCELLATION.

An agreement by a manufacturing company to pay their agent a stipulated commission on all "accepted orders" obtained by him as soon as the orders are shipped, entitles the agent, upon obtaining an order, to recover his full commission on the whole order even though only part of the order had been shipped and the remainder had been countermanded by the purchaser.

Whyte v. National Paper Co., 23 D.L.R. 180, 51 Can. S.C.R. 162, reversing 17 D.L.R. 842.

COMMISSION ON SALE OF GOODS — REFERENCE.

Barr v. John Martin Paper Co., 31 W.L.R. 504.

AGENT'S COMMISSIONS ON SALES OF COMPANY SHARES — EVIDENCE — AGREEMENT — PERCENTAGE RATE — COMMISSIONS ON SALES IN AGENT'S TERRITORY — ACCOUNT — REFERENCE.

Harris v. Townsend, 7 O.W.N. 801.

SALE OF LAND ON UNAUTHORIZED TERMS — COMMISSIONS.

When a proprietor gives to a person, even if not a real estate agent, a writing by which he binds himself to pay to him $1,500 if he sells his property for $44,500 on certain conditions, and the latter in fact sells it for that price but at conditions a little different as to the rate of interest, but which is agreed upon between the vendor and the purchaser, the agent is entitled to his commission, not the one mentioned in the writing, but the commission settled by usage, viz., 2½ per cent.

Baikie v. Latourelle, 24 Que. K.B. 171.

COMPENSATION — EFFICIENT CAUSE — QUANTUM MERUIT.

A person employed by an insurance company to effect a contract of reinsurance with another company, on the basis of a "reasonable compensation," which contract is consummated with the liquidator of the latter company, is the efficient cause of the transaction as finally carried out and is entitled to recover on a quantum meruit.

Foster v. British Colonial Fire Ins., 37 D.L.R. 404, 28 Man. L.R. 211, [1917] 3 W.W.R. 598.

COMPENSATION — INSURANCE ADJUSTMENT.

One employed to effect the adjustment of an insurance claim, but who merely assists in the prosecution of the claim, and is not the instrumentality whereby the negotiations and settlement are made, can only recover for the value of the services rendered, and not upon his retainer.

Gilbert v. Weaver, 35 D.L.R. 377, [1917] 2 W.W.R. 948.

COMMISSIONS—SALE OF MINING CLAIM.

In an action by an agent for the recovery of a commission on the sale of a mineral claim, held that the evidence shewed that the employment was a general one in the sense mentioned by Lord Watson in Toulmin v. Miller, 12 App. Cas. 746, the price mentioned being intended not as a hard and fast one, but as a basis of negotiations, and, therefore, the plaintiff was entitled to the agreed commission on the price obtained. [Bridgman v. Hepburn, 13 B.C.R.

389, affirmed in 42 Can. S.C.R. 228, distinguished.]

Prentice v. Merrick, 38 D.L.R. 388, 24 B.C.R. 432, [1917] 3 W.W.R. 1060.

COMMISSIONS — SALE OF LAND — CONDITION.

Purchasers of land agreed to pay commission on the sale to an agent, on the condition that "if J. (the vendor) is unable to deliver his property" to the purchaser there was to be no commission. Held, that the agent was entitled to be paid his commission, the purchasers having failed to prove that the contingency, the occurrence of which would alone exonerate them from liability for the agent's commission, had actually occurred and become an existing fact.

Campbell v. Boland, [1917] 2 W.W.R. 819.

COMMISSION ON SALE OF SECRET PROCESS — CONTRACT — LIABILITY — JOINT OBLIGATION TO TWO AGENTS — RELEASE BY ONE — EFFECT OF — REFERENCE.

Whyte v. Henderson, 12 O.W.N. 346.

AGENT'S COMMISSION ON SALE OF COMPANY-SHARES — RATE OF COMMISSION — EVIDENCE — FINDING OF REFEREE — SCOPE OF AGENCY — SALES DURING CERTAIN PERIOD — SALES MADE BEFORE COMMENCEMENT OF AGENCY — APPEAL — DIVIDED COURT.

Kidd v. National Railway Ass'n, 13 O.W.N. 392.

CONTRACT — SHIPMENT OF HAY — AGENTS OR BROKERS — SALE ON COMMISSION — CORRECTNESS OF RETURNS — FINDINGS OF FACT OF TRIAL JUDGE — EVIDENCE — APPEAL.

Williams v. Sparks, 12 O.W.N. 118, affirming 10 O.W.N. 391.

COMMISSIONS ON SALES.

Employing an agent to sell and naming a price, but not limiting the sale to that price, constitutes a general employment, and if a sale be made to a purchaser introduced by such agent the latter will be entitled to a commission, though the sale price be less than that first named. [Bridgman v. Hepburn, 42 Can. S.C.R. 228, distinguished.]

Prentice v. Merrick, 38 D.L.R. 388, 24 B.C.R. 432, [1917] 3 W.W.R. 1060.

COMMISSIONS—SALES "SECURED."

An agent under an agreement whereby he is to receive a commission "on each accepted and filled sale . . . which he has secured either with or without the traveller's assistance" is not entitled to a commission for simply introducing a prospective purchaser to the travelling agent and doing nothing further to promote the sale.

Law v. Sawyer-Massey, 39 D.L.R. 547, 13 A.L.R. 126, [1918] 1 W.W.R. 727, affirming 38 D.L.R. 333.

COMMISSION ON SALE OF SECRET PROCESS — CONTRACT — LIABILITY — JOINT OBLIGATION TO TWO AGENTS — RELEASE BY ONE — EFFECT OF — JUDGMENT — DECLARATIONS — PAYMENT OF MOIETY OF COMMISSION TO ONE AGENT — RECITAL IN JUDGMENT — REFERENCE UNNECESSARY — COSTS — APPEAL.

Whyte v. Henderson, 13 O.W.N. 460.

AGENT'S COMMISSION ON SALE OF GOODS — COMMISSION ON BASIS OF DIFFERENCE BETWEEN SALE PRICE TO AGENT AND PRICE TO PURCHASER — INCREASE IN PRICE TO AGENT — APPLICATION TO PARTICULAR SALES — EVIDENCE—FINDING OF FACT OF TRIAL JUDGE — APPEAL.

Pringle v. Wisconsin Electric Co., 15 O.W.N. 17.

AGENT'S COMMISSION ON SALE OF GOODS — COMMISSION CONFINED TO GOODS ACTUALLY DELIVERED — FAILURE TO PROVE SUBSTITUTED CONTRACT — FINDINGS OF FACT OF TRIAL JUDGE — APPEAL.

Forbes v. Lumbers, 15 O.W.N. 133.

AGENT'S COMMISSION ON SALE OF GOODS — TRAVELLING SALESMAN — AGENCY AGREEMENT — CONSTRUCTION — COMMISSION ON ORDERS FROM PERSONS IN SALESMAN'S TERRITORY — ORDER FROM PERSON FROM WHOM PREVIOUS ORDER OBTAINED BY SALESMAN — EVIDENCE — FINDINGS — APPEAL.

Meade v. McLagan, 15 O.W.N. 183.

COMMISSION — SALE OF LAND — EFFICIENT CAUSE.

Where a person discovers that another is considering the purchase of a certain piece of land and then ascertains from the owner that he will sell and pay a commission, but does not afterwards communicate with the prospective buyer, and the latter and the owner complete the sale themselves, there is no commission payable by the owner. [Burchell v. Gowrie and Blockhouse Collieries, [1910] A.C. 614, applied.]

Langton v. Nicholson, [1918] 1 W.W.R. 908.

COMMISSION — LISTING AGREEMENT — SALE BY VENDOR — MEMORANDUM OF AGENCY.

Where land is listed with a real estate agent for sale and is afterwards sold by the vendor directly to a purchaser introduced by the agent, the latter is entitled to his commission, even though the terms of sale given in the listing as the basis on which the agent is to negotiate, are not strictly adhered to. [George v. Howard, 16 D.L.R. 468, 49 Can. S.C.R. 75, followed; Herron v. Como, 16 D.L.R. 234, 49 Can. S.C.R. 1, distinguished.] It is merely the terms of the agency agreement, whether they be meagre or detailed, that must be in writing under ch. 27, 1906. Once they are evidenced by writing the meaning thereof is just as subject to interpretation as if they had been evidenced only by oral testimony. The price and the other terms of the pro-

posed sale may or may not be mentioned. If they are, in the circumstances, an essential part of the agency agreement they ought to be in writing. But it is a question of interpretation, even since the statute, whether the terms mentioned as those of the proposed sale are intended merely as a basis on which the agent may negotiate or are intended to bind the agent strictly to a sale on the named terms before he can claim his commission. The parties to the sale, and the land and terms of sale are not necessarily part of an agency agreement at all, and, therefore, unless they are made such need not be in writing.

King v. Schon, 44 D.L.R. 111, 14 A.L.R. 79, [1918] 3 W.W.R. 892.

SALE OF LAND — DEPOSIT RETAINED AS COMMISSION — RIGHT TO RECOVER — FORM OF ACTION.

Where a vendor has agreed to pay a commission to his agent and has agreed that the amount received by the agent as a deposit from the purchaser should be retained by the agent in part payment of such commission, and has given security for the balance, the deposit must be treated as paid over to the vendor, it is no longer in the agent's hands qua deposit, and in an action for money had and received it is only from the vendor that it can be recovered. [Bamford v. Shuttleworth, 11 Ad. & El. 926, followed.] It may, however, where the circumstances support such an action, be recovered from the agent in an action for deceit.

Brunstetter v. Zushing, 14 A.L.R. 66, [1918] 3 W.W.R. 546.

COMMISSIONS—QUEBEC.

In a business affair a mandate is not presumed to be gratuitous; on the contrary, according to recognized usage, a business agency carries with it a remuneration in the form of a commission, even when none has been agreed upon.

Juneau v. Took, 54 Que. S.C. 291.

COMMISSIONS — EVIDENCE — LOST DOCUMENT.

Where papers are destroyed or not produced, unless full and satisfactory explanation is given the court ought to draw a conclusion unfavourable to the person who destroys or who does not produce essential papers.

Ingley v. Routhier, 24 Rev. de Jur. 342.

COMMISSIONS—DELAY.

When a vendor agrees to pay a fixed commission to a real estate agent if he sells the property within a certain time, the agent can claim nothing if he finds a purchaser who is unable or refuses to purchase the property, and there being no fault on the part of the vendor.

Communauté des Sœurs de la Charité de L'Hopital Général de Montréal v. Colonial Real Estate Co., 27 Que. K.B. 433. [Affirmed, 45 D.L.R. 193, 57 Can. S.C.R. 585.]

COMMISSIONS — CONSIDERATION — ILLEGALITY—ACTING FOR BOTH PARTIES.

No one can be the paid agent of two persons whose interests are opposed, such as vendor and purchaser, or 2 persons who are exchanging. In such case, if the purchaser or one of those exchanging has promised to pay the agent a commission, knowing that the latter represents the other party also, the contract is immoral and void. A real estate agent who, entrusted by one person to sell vacant lots, receives from another an offer to exchange a property for such lots, does nothing which he should be paid for if he merely transmits the latter proposition to his first principal; and if the one who offered to exchange promised in writing to pay the agent a commission, the contract is void, as being without consideration. One who offers to sell or exchange a piece of real property, and who is rendered unable to fulfil his obligation by the fact that he has been compelled, by the judgment of a court, to reconvey the property, cannot be liable to the real estate agent, whom he had employed, for damages representing his commission. If 2 parties agree to make an illegal contract neither of them has, in such case, a right of action, and courts ought to refuse their protection to either party. They cannot even allow an action for the recovery of money paid by mistake on the execution of the agreement.

Aubut v. Gareau, 27 Que. K.B. 474.

AGENT'S COMMISSION ON SALE OF LAND — RETENTION OUT OF DEPOSIT PAID BY PURCHASER — SALE NOT CARRIED OUT BY AGREEMENT BETWEEN VENDOR AND PURCHASER — EXECUTED TRANSACTION — AGREEMENT TO PAY COMMISSION NOT EMBODIED IN SEPARATE DOCUMENT — STATUTE OF FRAUDS, S. 13 (6 GEO. V. C. 24, S. 19, AS AMENDED BY 8 GEO. V. C. 20, S. 58).

Wingrove v. Mappin, 16 O.W.N. 232.

AGENT'S COMMISSION ON SALE OF GOODS — RETURN OF GOODS BY PURCHASER — AGREEMENT — REFUND OF COMMISSION.

Gramm Motor Truck Co. v. Windsor Auto Sales Agency, 10 O.W.N. 60, 35 O.L.R. 224.

AGENT'S COMMISSION ON SALE OF LAND — CONTRACT — SHARE OF PROFITS ON SALE — QUANTUM MERUIT.

Clayton v. Ramsden, 10 O.W.N. 106, 240.

AGENT'S COMMISSION ON SALE OF GOODS — ACTION FOR — EVIDENCE — FAILURE TO ESTABLISH CLAIM.

Loubrie v. Graham, 17 O.W.N. 40, 129.

ACTION BY AGENT FOR COMMISSION ON SALE OF SHARES — EVIDENCE — ONUS — SPECIAL AGREEMENT—RELEASE.

Fielden v. Jacques, 17 O.W.N. 219, affirming 17 O.W.N. 99.

AGENT FOR PURCHASE OF GOODS — CLAIM FOR MONEYS ADVANCED AND COMMISSION — FINDINGS OF JURY — INTEREST — AMENDMENT — COUNTERCLAIM — COSTS.

Petch v. Newman, 6 O.W.N. 705, 26 O.W.R. 650.

COMMISSIONS ON SALES OF GOODS — ACCOUNT — DEMAND — PAYMENT INTO COURT — INTEREST — COMMISSIONS UPON GOODS TAKEN IN EXCHANGE — COSTS.

Miller & Richard v. Lanston Monotype Machine Co., 7 O.W.N. 241.

AGENT'S COMMISSION ON SALE OF COMPANY-SHARES — ACTION AGAINST TWO COMPANIES — CONTRACT — TERMS OF EMPLOYMENT — EVIDENCE — RIGHT TO COMMISSION — LIABILITY OF COMPANIES RESPECTIVELY — COSTS.

Kidd v. National Railway Ass'n, 6 O.W.N. 710, 26 O.W.R. 636.

AGENT'S COMMISSION ON SALE OF BLOCK OF SHARES IN COMMERCIAL COMPANY — EVIDENCE — EMPLOYMENT OF AGENT — SALE EFFECTED THROUGH INSTRUMENTALITY OF AGENT — QUANTUM OF COMMISSION.

Westbrook v. Kernahan, 7 O.W.N. 465.

AGENT'S COMPENSATION — COMMISSION AGREEMENT — LOST DOCUMENT.

Connell v. Bucknall, 5 O.W.N. 610.

AGENCY TO PROCURE LOAN — ASSIGNABILITY — COMMISSIONS.

A mandate to procure a loan can be transferred to a third party, and the latter, if he finds a lender on the desired conditions, is entitled to his commission. The borrower must submit his titles from the time of a sheriff's sale to the lender for examination, the sale only determining a part of the rights and of the charges which are on the immoveable, and if a loan does not take place on account of the refusal to do so, the agent who has found the loan at the request of the borrower has a right to a commission of 1 per cent according to the recognized custom.

Hicks v. Lamarre, 47 Que. S.C. 335.

COMMISSION UPON SALE OF LAND — SET-OFF AGAINST ACTION BY PRINCIPAL.

Vendors of land, who instructed their agent for sale not to accept further instalment payments from defaulting purchasers, must pay the commission agreed upon with respect to the sale of such land, and in an action by the vendors to recover moneys retained by the agent, the agent is entitled to set up the amount of his commission by way of set off.

Rothesay Park Co. v. Montgomery, 8 W.W.R. 1177.

REAL ESTATE AGENT—COMMISSION.

Wood v. Mitchell, 33 W.L.R. 20.

COMMISSION ON SALE OF LAND—CONDITION NEVER CARRIED OUT — CONTINGENT AGREEMENT.

Piggott v. Jupp, 32 W.L.R. 696.

SALE OF LANDS—SHARE OF PROFITS—COMMISSION—COSTS.

Livingston v. Cummings, 8 O.W.N. 545.

AGENT'S COMMISSION ON SALE OF PROPERTY — EMPLOYMENT OF AGENT — DESCRIPTION OF PROPERTY — AMENDED DESCRIPTION — FAILURE TO SELL ACCORDING TO.

Rushworth v. Johnston, 9 O.W.N. 93.

AGENCY — UNTIMELY REVOCATION — COMMISSION — SALE OF TIMBER LIMITS — C.C. s. 1722.

A commission agent, charged with the sale of a property at a fixed price and in consideration of a commission agreed on between him and the vendor, has a right to his commission if the property is sold on the conditions agreed upon, to a purchaser whom he has introduced, although the final agreement between the parties only took place subsequently to the revocation of his agency.

Pruneau v. Flood, 55 Que. S.C. 106.

AGENCY — REAL ESTATE — SUBAGENT COMMUNICATING WITH AND DEALING FOR PRINCIPAL.

The plaintiff listed with the defendant, as a subagent, the lands of a certain principal, agreeing to pay the defendant 25 cents an acre for finding a purchaser. The defendant unknown to the plaintiff communicated directly with the principal, obtained a listing of the lands from him and effected a sale thereof, deducting the commission. Held, That the plaintiff was entitled to recover from defendant the commission less the sum of 25 cents per acre.

Oswalt v. King, [1919] 3 W.W.R. 72.

AGENT'S COMMISSION ON SALE OF GOODS — PURCHASER INTRODUCED BY AGENT — SALE MADE BY ANOTHER AGENT.

Mason v. Reeves & Co., 18 W.L.R. 536.

COMMISSION — OPTION — SUBSTITUTED CONTRACT — SALE OF MINERAL CLAIMS — ERASURES IN DOCUMENT — EVIDENCE AS TO — ADMISSIBILITY.

Beveridge v. Awaya Ikeda, 16 B.C.R. 474, 17 W.L.R. 674, affirming Murphy, J.

(§ III—41)—CUSTOMS BROKER — NEGLIGENCE.

A customs broker, who is requested by a client to clear and deliver a machine from the Customs House to the latter's building, acts as the agent of the client in procuring a carter and is not liable for such carter's negligence.

Leithead v. Doucet, 42 D.L.R. 514, 54 Que. S.C. 307.

LIABILITY OF SUBAGENTS — NOTICE OF PRINCIPAL'S CLAIM.

An arbitrator, appointed pursuant to a partnership agreement, for the purpose of a voluntary winding-up of the partnership, is not liable to a claimant for moneys collected by him for the firm, but which moneys really belonged to the claimant, where the arbitrator accounted to the firm for that money, although he knew that it belonged to the claimant, since there is no privity

between the claimant and the arbitrator, the latter being accountable only to the firm.

Ross v. Webb, 10 D.L.R. 85, 23 Man. L.R. 503, 23 W.L.R. 254, 3 W.W.R. 932. [Affirmed, 14 D.L.R. 395, 23 Man. L.R. 503, 4 W.W.R. 1122.]

The general rule involved in the maxim delegatus non potest delegare merely prevents an agent from establishing the relationship of principal and agent between his own principal and a third person without the authority of his principal as regards the service which the agent has personally undertaken to perform, but the rule is relaxed where the instructions necessarily may have to be carried out by another, in which case the original agent may appoint a subagent or "substitute" and thus constitute in the interests and for the protection of the principal a direct privity between the principal and such "substitute" (or subagent). [De Bussche v. Alt, 8 Ch. D. 286, at p. 310; Powell v. Jones, [1905] 1 K.B. 11, followed.]

Edgar v. Caskey, 7 D.L.R. 45, 22 W.L.R. 91, 5 A.L.R. 245, 2 W.W.R. 1036.

DELEGATION BY AGENT.

The fact that the donee of a power of attorney for the sale of land which left to his discretion the price and terms of payment authorized a third person to find purchasers for him at a stated price and on stated terms, did not constitute a delegation to such third person of the discretion lodged in the donee.

Rogers v. Hewer, 1 D.L.R. 747, 19 W.L.R. 868, 5 A.L.R. 227, 1 W.W.R. 481.

PRINCIPAL AND SURETY.

I. SURETYSHIP; LIABILITIES OF SURETY.
A. In general.
B. Release or discharge.
II. RIGHTS AND REMEDIES OF SURETY.

I. Suretyship; liabilities of surety.

A. IN GENERAL.

See also Guaranty; Bonds; Bills and Notes.

Conclusiveness of accounts, see Evidence, IV J—435.

Surety's liability for interest, see Interest, I B—20.

(§ I A—1)—NOTE—PRIMARY LIABILITY.

A promissory note signed as security for another's debt does not create a suretyship, when it is apparent that a primary liability was intended.

Macdonald v. Fox, 35 D.L.R. 198, 39 O. L.R. 261.

Where a municipality under a special contract conditionally agrees to sell and convey certain lands to a manufacturing company; and where among other conditions of the grant the company stipulated to maintain in the manufacturing establishment so purchased from the city a plant up to a certain standard in capacity and value; and where this stipulation was guaranteed by the bond of a surety company and the manufacturing company; the fact, that, pending action on such bond for its breach, the municipality proceeds, on the default of certain other covenants of the grantee, to resume possession of the lands in question, does not necessarily affect the liability of the obligors on the bond, where the breaches of the different covenants give rise under the express terms of the contract to different and appropriate remedies; such covenants being severable, and the one independent of the other.

Guelph v. Jules Motor Co., 8 D.L.R. 635, 4 O.W.N. 401, 23 O.W.R. 823.

SECURITY FOR COSTS.

Where security for costs is given, in the Superior Court, the surety who signed the bond is not relieved by the first judgment, which may be in favour of the party giving security, but is bound, if the final judgment adjudges the costs, against the person for whom he gave security. It is not necessary for the plaintiff, suing on the bond, to prove that he has paid the costs to his attorney.

Levine v. Cohen, 50 Que. S.C. 357.

MORTGAGE OBLIGATION — TRANSFER—NOVATION—GUARANTEE TO "FURNISH AND TO GIVE VALUE"—EXTENT OF THIS GUARANTEE—C.C. ARTS. 1171, 1577, 2161 ET SEQ.

There is no novation when an obligation is transferred with a promise to furnish and give value. This guarantee is different from that of art. 1577 C.C. (Que.). The clause to furnish and give value obliges the guarantor to pay, on default of the debtor, without limiting the time, that is to say that it guarantees not only the actual solvency of the one who was indebted originally at the time of the transfer, but also at the moment of the exigibility of the debt, and this responsibility does not cease except by a personal act of the creditor, by an act or default which is imputable to him and which prevents him from subrogating the transferor to the rights, mortgages, and privileges guaranteeing the debt, by art. 1959, C.C. (Que.) or by any other reason extinguishing his obligations. The fact of not having given his address to the registrar, and of not having assisted at the sheriff's sale of the mortgaged property, are not sufficient reasons to affect the rights of the creditors. The transferee of a mortgage is not required under art. 2161, C.C. (Que.) et seq., to make known his address to the registrar.

Hodge v. Gagnon, 56 Que. S.C. 291.

QUEBEC PRACTICE — RIGHT TO SUE — DEFAULT.

A surety, who invokes the benefit of the exception of discussion, must indicate to the creditor the effects he must discuss, and advance him the necessary money for that purpose. He must further invoke that benefit by way of dilatory exception. A

creditor has the right to sue the surety, without putting him in default, when the principal debtor does not fulfil his obligation.

Richard Young Co. v. Brodeur, 54 Que. S.C. 486.

FIDELITY BOND — COLLECTOR OF MUNICIPAL TAXES—LIABILITY OF SURETIES—BOND EXECUTED BY ONE PROPOSED SURETY AND BY HIM FOR THE OTHER—FAILURE TO RATIFY EXECUTION — ACCEPTANCE BY MUNICIPAL CORPORATION IN GOOD FAITH —FAILURE TO NOTIFY CORPORATION— CLAIM AGAINST NONEXECUTING PARTY NOT PRESSED—LIABILITY OF EXECUTING PARTY—TAXES NOT COLLECTED WHICH SHOULD HAVE BEEN COLLECTED—LIABILITY OF COLLECTOR BUT NOT OF SURETY.

Charlottenburgh v. Barrett, 16 O.W.N. 154.

(§ I A—3)—WHEN JOINTLY LIABLE—JOINT SIGNING OF CONTRACT OF SALE.

A party who signs a contract for the sale of machinery as surety for but jointly with the purchaser thereby becomes a joint debtor and subjects himself to the stipulated liability for the prompt accrual of the whole contract price upon the failure to furnish notes and collateral security before the use of the machinery.

Maytag Co. v. Kolb, 23 D.L.R. 221, 32 W.L.R. 3.

PERFORMANCE OF CONDITION PRECEDENT.

As to the provisions of a construction contract to the effect that an architect, who was thereby empowered, under certain circumstances, to take the work from the contractor's hands and complete it, should ascertain the cost of so doing, which award should be binding upon and be paid by the contractor, does not bind a surety upon a bond given by the latter, indemnifying the plaintiff against loss or damage arising from the contractor's failure to fulfil his contract, the Trial Judge, in an action against such surety, rightfully ordered the plaintiff to furnish the defendant with particulars of loss, together with full details as to how it arose, where the only damages claimed referred to in the plaintiff's statement was the amount found by the architect to be due from the contractor to the plaintiff.

Power River Paper Co. v. Wells Construction Co., 2 D.L.R. 340, 17 B.C.R. 37.

(§ I A—6)—FAILURE OF OTHERS TO SIGN—CONTRIBUTION—EXTENT OF LIABILITY.

Where a bank manager, when he takes the signature of a guarantor, knows that such guarantor intends that his liability shall be conditional on the signatures of the other proposed guarantors, such guarantor will not be bound in the event of those signatures not being procured. Where two or more persons join as sureties for a common principal but bind themselves in different amounts, in the event of the principal being in default they are liable to contribute to the satisfaction of the creditor's claim in proportion to the limits of their respective liabilities, and not in equal amounts. [Ellesmere Brewery Co. v. Cooper, [1896] 1 Q.B. 75, followed.]

Scandinavian v. Kneeland, 8 W.W.R. 61.

CONDITIONAL GUARANTY — FAILURE OF OTHERS TO SIGN IT.

A guaranty, signed by a person conditionally upon its future signature by other persons, is not binding upon such first-mentioned person in default of the signatures of the other persons.

Robinson v. Ellis, 9 W.W.R. 934.

(§ I A—8)—APPLICATION OF PAYMENTS.

Where an agent has become bonded after he was in the company's debt and subsequent payments are applied in payment of specific premiums due prior to and not covered by the bond, and this to the knowledge of the debtor, the bondsmen or sureties cannot complain of such imputation of payment and be relieved from liability under the bond on the ground that if the imputation had been made against premiums covered by the bond they would be clear. [Morgan v. Western, 3 Que. K.B. 51, explained.]

London & Lancashire Fire Ins. Co. v. Hart, 8 D.L.R. 332; Northern Ins. Co. v. Hart, 8 D.L.R. 805, 43 Que. S.C. 28.

SECURITY FOR RENT—APPLICATION OF PAYMENTS.

Where a lease provides for a rent of $100 per month, the person who becomes surety for the lessee, to the amount of $200, does not become responsible for the rent of the two first months only but for $200 generally. He gives only a limited security and his obligation does not extend to the accessories of the debt, namely, interest or damages resulting from nonexecution of the principal obligation as would be the case in an unlimited suretyship. The sums received by the lessor in payment of his rent should be imputed to the amount secured, and if they are sufficient to cover it, the lessor has no recourse against the surety for the balance which may remain due.

Dumontet v. Poirier, 49 Que. S.C. 454.

B. RELEASE OR DISCHARGE.

Impairment of security discharging surety, see Sale, I C—19.

(§ I B—10)—CONTRACT—SURETY—RELEASE OF—SURETY DEPRIVED OF RIGHT UNDER CONTRACT—OMISSION BY CONTRACTOR.

To release the contractor's surety who has guaranteed the completion of a contract for excavating a building site, there must be some act done which deprives the surety of a right under the contract or of the power to insist on its exercise, or some omission to do some act which the contractor has contracted with the surety to do or to preserve some security to the benefit of which the surety is entitled.

Wright v. Western Canada Accident & Guarantee Ins. Co., 20 D.L.R. 478, 20 B.C.R. 321, 29 W.L.R. 153, 6 W.W.R. 1409.

SURETYSHIP — PRIVITY — TRANSACTIONS WITHOUT SURETY—EFFECT.

Where a contract of suretyship has been formed, it is the clearest and most evident equity that the creditor and the principal debtor should not carry on any transaction without the privity of the surety. [Rees v. Berrington, 2 Ves. J. 543, approved.]

Drinkle v. Regal Shoe Co., 28 D.L.R. 775, 23 B.C.R. 24, 34 W.L.R. 690, 10 W.W.R. 448, affirming 20 B.C.R. 314, 7 W.W.R. 194.

SECURITY—SEIZURE OF DEBTOR—SUSPENSION OF ACTION—C.C. ARTS. 1942, 1943.

A surety is not discharged on the dismissal of the action of a creditor; he can only ask for a discharge in so far as the latter has seized the goods of the debtor, by the surety pointing out the goods and offering him the costs of the seizure. No provision of law authorizes the surety to ask, when the principal debtor is insolvent, that he be not obliged to pay as long as the goods of the debtor are not liquidated.

Racine v. Beauchamp, 56 Que. S.C. 289.

RELEASE OF ONE NO RELEASE TO OTHERS—DOCUMENTS RESTRICTING LIABILITY—NOTICE.

Where two or more sureties contract severally, the creditor does not break the contract with one of them by releasing the other. The contract remaining entire, the surety in order to escape liability must shew an existing right to contribution from his cosurety which has been taken away or injuriously affected by his release. [Ward v. National Bank of New Zealand, 8 A.C. 755, followed.]:—Held, that on the facts the defendant had failed to prove that the bank or its officers had actual knowledge of the contents of certain documents alleged to restrict the liability of the defendant on the note sued upon. The necessity for actual notice in such a case discussed.

Merchants Bank v. Guthrie, 32 W.L.R. 484, 9 W.W.R. 295.

MUNICIPAL LAW—SCHOOL DISTRICT—BUILDING CONTRACT—MISNOMER IN NAME—AMENDMENT—NO RESOLUTION UNDER SEAL AUTHORIZING SUIT.

The defendant company was surety for the due performance by G. of a contract for the erection of a schoolhouse for the plaintiff school district. There was a misnomer in the name of the plaintiff as given in the suit and there was no authority from the plaintiff under seal for the bringing of the action. Moreover, it appeared in evidence that it was a term of the contract of suretyship that the contract price was to be paid only upon certificates of the architect, whereas the amount paid to the contractor was considerably in excess of the amounts authorized by the architect's certificates. Held, that the misnomer in the corporate name was a matter for amendment, the defendants not being misled. That the objection to the absence of authority under seal should be overruled, the defendant company not having taken objection until the argument after the evidence was in. That the payment by the school district to the contractor of moneys in excess of those authorized by the architect's certificates operated to release the defendant company.

Macklin School District v. Saskatchewan Guarantee & Fidelity Co., 12 S.L.R. 269, [1919] 2 W.W.R. 396.

(§ I B—11)—BY CHANGE OF CONTRACT—RELEASE OF SURETY.

A waiver of a claim for damages which may arise out of delays or interruptions in the performance of a contract does not constitute any material change in the contractual obligations of the parties, or enlarge the liabilities of the surety, so as to operate as a discharge of the contractor's surety.

Niagara & Ontario Construction Co. v. Wyse, 10 D.L.R. 116, 4 O.W.N. 975, 24 O.W.R. 302.

BY CHANGE OF CONTRACT.

In an action upon a bond, where the surety resists upon the plea that the contract guaranteed by the bond had been varied to the prejudice of the surety by a subsequent agreement between the principal and the obligee, the court will consider whether the alleged variance was a matter contemplated and provided for in the guaranteed contract itself, and well known to the surety from the outset.

Guelph v. Jules Motor Co., 8 D.L.R. 635, 4 O.W.N. 401, 23 O.W.R. 823.

ALTERATION OF CONTRACT—EXTENSION—LOSS OF VENDOR'S LIEN—EVIDENCE.

Clason v. Selensky, 31 D.L.R. 793, 9 S.L.R. 396, 10 W.W.R. 677.

(§ I B—12)—EXTENSION OF TIME.

A surety is released by an agreement between the creditor and the principal debtor for an increased rate of interest during an extended period granted for payment, notwithstanding the surety's prior express consent to an extension simply at the will of the creditor and the principal debtor.

General Financial Corp. v. LeJeune, 39 D.L.R. 33, 11 S.L.R. 38, [1918] 1 W.W.R. 372.

EXTENSION—GUARANTY UPON ASSIGNMENT OF MORTGAGE.

The well established principle, that an extension of time given to the principal debtor without the consent of the surety thereby discharges the surety, has no application, when, upon an assignment of a mortgage, the assignor covenants to indemnify the assignee in case of defaults in payments thereon by the mortgagor that shall continue to a certain date, and the extension is given by the assignee for a period terminable prior to the time fixed for the defaults. [Prendergast v. Devey, 6 Madd. 124; Rouse v. Bradford Banking Co., [1894] 2 Ch. 32, applied.] The covenant cannot be construed as a "guaranty" and does not put the transferor in the position of "surety"

for the performance of the mortgage contract.

Walker v. Bowen, 26 D.L.R. 22, 32 W.L.R. 871, 9 W.W.R. 484. [Affirmed in 29 D.L.R. 417, 34 W.L.R. 989, 10 A.L.R. 14, 10 W.W.R. 1071.]

PROMISSORY NOTE — USED AS COLLATERAL FOR NOTE OF SMALLER AMOUNT—POSITION OF MAKER OF LARGE NOTE—SURETY—NO NOTICE TO BANK—RENEWAL OF SMALLER NOTE—RELEASE OF SURETY.

If the creditor grants an extension of time to the debtor, as a rule the surety is released on the presumption that such extension so incommodes the surety as to deprive him of his rights against his principal; but when the creditor does nothing to prejudice the surety after learning of his suretyship the latter is not discharged. [Bailey v. Griffith, 40 U.C.R. 418, distinguished; Devanney v. Brownlee, 40 U.C.R. 418.]

Royal Bank v. Wagstaffe, 50 D.L.R. 77, 46 O.L.R. 372.

ADVANCES BY BANK TO CUSTOMER — CONTRACT GUARANTEED—SILENT AS TO TIME OF REPAYMENT — RENEWAL NOTE BY BANK—RELEASE OF SURETY.

A contract which guarantees "advances" made by a bank to a customer up to a certain amount, and which is silent as to the time when such advances should be made, and the period or periods of credit, and there being nothing to shew that any time for repayment was contemplated, and where the nature of the customer's business makes it clear that the advances were to be made from time to time, is a continuing guarantee and the guarantor is not relieved from liability by the bank consenting to take a renewal note for the amount advanced without the consent of such guarantor.

North Western National Bank of Portland v. Ferguson, 44 D.L.R. 464, 57 Can. S.C.R. 420.

COLLATERAL SECURITY—CHATTEL MORTGAGE — FAILURE TO KEEP RENEWED AS AGAINST CREDITORS—DELAY AND NEGLIGENCE OF HOLDER OF NOTE — TIME GIVEN TO PRINCIPAL DEBTOR.

Pearson v. Tibbetts, 10 O.W.N. 422.

(§ I B—13)—REALIZING UPON SECURITIES — VENDOR'S LIEN — PERSONAL JUDGMENT.

Where a creditor has securities in his hands for the debt guaranteed, he is entitled to realize upon those securities without releasing the surety; a vendor's assignment of the agreement of sale together with the land, covenanting to guarantee the purchaser's defaults in payments, gives the assignee the right, immediately upon the purchaser's default, to a judgment against the guarantor for the whole amount claimed and to the enforcement of a vendor's lien on the land for the unpaid purchase money, the judgment being enforceable to the extent that the sale of the property does not wholly satisfy it; and the assignor can not be heard to say that being in the position of surety, he is entitled to the securities and that by ordering a sale of the land he is thereby discharged from liability. [Pearl v. Deacon, 24 Beav. 186, applied.]

Regina Brokerage & Investment Co. v. Waddell, 27 D.L.R. 533, 9 S.L.R. 154, 34 W.L.R. 229, 10 W.W.R. 364.

LOSS OF DISTRESS AS DISCHARGE OF SURETY.

A surety for the payment of rent is not discharged because by an assignment of the lease the right of distress is lost. [Re Russell, 29 Ch. D. 254, followed.]

West v. Shun, 24 D.L.R. 813, 8 S.L.R. 243, 32 W.L.R. 961, 9 W.W.R. 644.

IMPAIRMENT OF SECURITY.

The dealing with a security by a principal creditor, which does not prejudice the surety in a sense that he suffers pecuniary loss or damage as the reasonably direct or natural result of that act, will not discharge the surety. [Section 26 (r) of the King's Bench Act (R.S.M. 1913, c. 46), applied; Blackwood v. Percival, 14 Man. L.R. 216, followed.]

National Land & Loan Co. v. Rat Portage Lumber Co., 36 D.L.R. 97, [1917] 3 W.W.R. 269.

SURRENDERING CHATTELS UNDER LIEN NOTE.

Where a purchaser under a lien note, of certain chattels by agreement with the vendor, surrendered some of the chattels to him and received a credit upon the amount of the note and it was not shewn that the chattels returned would under any other conditions or circumstances of sale have realized a greater price, or that if the lien had been turned over to him and he had proceeded under it, the chattels would have brought more, the surety who signed the note was not released.

Toovey v. Brock, 34 W.L.R. 973.

(§ I B—14)—BUILDING CONTRACT—ALTERATION — NONDISCLOSURE — DISCHARGE OF SURETY.

Ferrara v. National Surety Co., 39 D.L.R. 175, [1917] 1 W.W.R. 719, reversing 27 D.L.R. 518, 23 B.C.R. 15, 10 W.W.R. 526.

PRINCIPAL'S PROFITS HINDERED BY CREDITOR.

The defendant gave his promissory note as surety for the payment of the debt of P. to the plaintiff, after certain differences between P. and the plaintiff had been settled, by the plaintiff agreeing to supply a new motor to drive a tractor, over which the dispute had arisen. The plaintiff did not supply a new motor and the one supplied did not do the work, so that the profits of P. which were to reduce the debt for which the defendant was surety were too little to do so. Held, that the defendant was released.

Rumley v. Leighton, 34 W.L.R. 717.

II. Rights and remedies of surety.

Duty not to prejudice rights of surety, see Bills and Notes, V B—130.

(§ II—15) —Guarantee to bank — Defences.

One who freely and voluntarily enters into guarantees and a collateral agreement with a bank, the bank acting upon them to its detriment, cannot set up the defence that he did not intend to undertake the liability shewn to exist, and that he would not have entered into the guarantees if he had known the true state of the accounts.

Bank of Hamilton v. Bamfield, 40 D.L.R. 482, 25 B.C.R. 367, [1918] 2 W.W.R. 953.

Shortages—Good faith of principal.

A surety is not entitled to recover from the principal for money paid out for shortages in pursuance of the terms of the bond not attributable to the principal's negligence, and where he otherwise faithfully performed his duties.

U.S. Fidelity & Guaranty Co. v. Weber, 24 D.L.R. 113, 32 W.L.R. 5.

Notice of default.

A surety is not entitled to notice of the principal debtor's default unless there is a contract to that effect express or implied.

Massey-Harris Co. v. Baptiste, 24 D.L.R. 753, 9 A.L.R. 71, 32 W.L.R. 435, 9 W.W.R. 149. [Followed in 25 D.L.R. 519, 9 A.L.R. 97, 32 W.L.R. 654, 9 W.W.R. 333.]

Indemnifying purchaser's defaults — Notice of default.

The assignor of an agreement for the sale of land who covenants to indemnify the assignee for any default made by the purchaser is not discharged from liability under the covenant for want of notice of the default. [Massey Harris v. Baptiste, 24 D.L.R. 753, followed.]

Crown Life Ins. Co. v. Clarke, 25 D.L.R. 519, 9 A.L.R. 97, 32 W.L.R. 654, 9 W.W.R. 333.

Contractor's bond—Advances to assist completion of contract.

Where a subcontractor has completed his work and performed his contract with the assistance of advances made him by his head contractor, the latter cannot recover these advances from the surety of the subcontractor who entered into a bond conditioned for the due performance of the work, such being beyond the conditions expressed in the bond; if, however, the head contractor had completed the work on his own account upon the subcontractor's default and charged the cost thereof against the subcontractor deducting from this amount the sums due under the contract, the surety would still be liable, provided notice as required by the contract had been duly given to the surety.

Niagara & Ontario Construction Co. v. Wyse, 10 D.L.R. 116, 4 O.W.N. 975, 24 O.W.R. 302.

Credit for allowances—Waived.

Where a person under bond for the performance of work waives any claim for an allowance arising out of the contract, his surety will be entitled, on the taking of the accounts, to credit for the amount voluntarily released.

Niagara & Ontario Construction Co. v. Wyse, 10 D.L.R. 116, 4 O.W.N. 975, 24 O.W.R. 302.

Where cosureties on a contractors' bond entered into a written agreement between themselves prior to the abandonment of the work by the contractors under which they jointly completed the work, the drawback of 20 per cent returned by the owner as the work proceeds from the value of all the work from the commencement of the contract is, when finally paid, to be considered as salvage attributable to the joint efforts of the sureties, and where the amount owing for the work on completion is received by one of the sureties, who was both the assignee of the contractors' rights under the contract, and the agent of his cosureties for completing the contract, he is liable to account to his cosureties for the drawback of 20 per cent.

Where cosureties upon a contractors' bond for the due performance of work, prior to the abandonment of the work by the contractors, in order to protect themselves, appoint one of their number to represent all with authority to do all things necessary for the carrying on of the work, and on their completion of the work a loss results, the cosureties are liable to the managing surety for contribution for advances made under the new obligation created by the agreement so made between themselves.

Cadwell v. Campeau, 3 D.L.R. 555, 3 O.W.N. 616, 21 O.W.R. 263.

The defence based on the right to the benefit of discussion (taking of accounts, etc.) can only be set up, under art. 177 C.C.P. by dilatory exception. Security will not be received to raise it by peremptory exception en droit. The surety for the principal debtor preventing the exception must, on pain of nullity, indicate the property of the principal debtor which he wishes to discuss and tender an amount sufficient to pay the costs. The notorious insolvency of the principal debtor evidenced by his assignment for benefit of creditors making it impossible to indicate the property to be discussed takes away his right to the exception.

Barrette v. Leclair, 44 Que. S.C. 1.

Warranty.

A surety who has bound himself without the consent of the debtor, cannot recover from him if he has not paid the debt. He cannot therefore, if he is sued by the creditor, call the debtor in warranty.

Howard v. Findlay, 51 Que. S.C. 375.

(§ II—16)—Between sureties.

One of several cosureties on a contractors' bond, who has made advances to the contractors for materials and labour which enabled the contractors to continue the work, and who has obtained an assignment of all moneys due or to become due under the contract, has no greater or higher rights

than the contractors had, and he cannot, apart from contract, claim contribution from his cosureties for such advances even though these, by enabling the contractors to proceed with the work, lessened the liability of the sureties. [Ludd v. Chamber of Commerce, 60 Pac. R. 713, followed.]

Cadwell v. Campeau, 3 D.L.R. 555, 3 O.W.N. 616, 21 O.W.R. 263.

SPECIAL AGREEMENT—RELATIONS OF SURETIES INTER SE.

Villeneuve v. Bilodeau, 39 Que. S.C. 385.

SURETYSHIP — HYPOTHECATION OF IMMOVABLE—RECOURSE AGAINST SURETY AND HOLDER OF THE IMMOVABLE — DEBTOR AND CREDITOR.

Begin v. Chainé, 40 Que. S.C. 495.

SURETY — DEBT OF THIRD PARTY — OBLIGATION TO CREDITOR.

One who becomes surety, by pledge or hypothec, for the debt of another is under no personal obligation to the latter's creditor but is only bound propter rem.

Paquin v. Chainé, 12 Que. P.R. 331.

LIABILITY OF WIFE AS SURETY—WHEN INDEPENDENT ADVICE NECESSARY — INDEPENDENT JUDGMENT — ABSENCE OF FRAUD OR MISREPRESENTATION.

Union Bank v. Crate, 19 O.W.R. 299.

PRIORITIES.

See Mechanics' Liens; Assignments for Creditors; Companies, VI; Execution; Levy and Seizure; Attachment; Garnishment; Interpleader.

Mortgages, vendor's lien, costs, see Mortgage, II A—35.

Distress, chattel mortgage from tenant, see Landlord and Tenant, III D—110.

MONEY IN COURT—CLAIMANTS OF—PRIORITIES—REFERENCE.

Re G.T.R. Co. and Brooker, 13 O.W.N. 321.

MORTGAGE MONEY IN HANDS OF AGENT—PRINCIPAL AS CREDITOR—DEPOSITOR.

Fraser v. Dominion Trust, 33 W.L.R. 392.

PRISONS.

Prison-made goods, see Customs, I—5.

PRIVATE INTERNATIONAL LAW.

See Conflict of Laws.

PRIVILEGE.

See Liens.

PRIVILEGED COMMUNICATIONS.

See Evidence X.

RULE NOT EXTENDING TO INSTRUCTIONS TO COMMON SOLICITOR IN PRESENCE OF BOTH PARTIES.

The privilege of a client that his solicitor must not be admitted to disclose confidential communications does not extend to the nonadmission of evidence of instructions given to a common solicitor in the presence of both parties.

Wilson v. McLellan, [1919] 3 W.W.R. 62.

PRIVY COUNCIL.

See Appeal.

PRIZE COURT.

JURISDICTION TO PRESERVE CARGO—SEIZURE BEFORE WRIT.

The Prize Court has jurisdiction, both statutory and inherent, to take all necessary steps to preserve property in its custody, and therefore an order will be made that the cargo of a seized ship should be unladen, inventoried and warehoused to protect it from damage by damp and heat. This jurisdiction begins from the "moment of seizure," and may be exercised before the issue of a writ.

The "Oregon," 31 D.L.R. 161, [1917] 1 W.W.R. 139, 23 B.C.R. 53.

APPEARANCE — LAPSE OF TIME — ENEMY CLAIMANT'S AFFIDAVIT.

Where leave is given to enter an appearance after the expiration of eight days after service of the writ it is not a condition precedent to the granting of the application that an alien enemy should then file an affidavit stating the grounds of his claim.

The "Oregon," 31 D.L.R. 163, [1917] 1 W.W.R. 141, 23 B.C.R. 56.

EXAMINATION OF WITNESSES—POSTPONEMENT—PLEADINGS—PARTICULARS.

The examination of witnesses, officers of a seized ship, who are about to leave the jurisdiction, will not be postponed until a petition is filed by the Crown. Pleadings and particulars of the grounds for condemnation will only be ordered in very special cases. Particulars ordered in the circumstances of the present case, there being no intimation given in the writ of such grounds.

The "Oregon" 31 D.L.R. 164, [1917] 1 W.W.R. 142, 23 B.C.R. 57.

TRANSFER OF CAUSE.

By virtue of the provisions of the Imperial Prize Courts Act, 1915, c. 57, a Canadian Prize Court will order, at the instance of the Crown, the transfer of a prize case to an English Prize Court for the purpose of the more convenient conduct of the proceedings.

Re The "Hocking," 17 Can. Ex. 226.

PRIZE—CARGO—PLEADINGS.

Where parties appear and make claim to a cargo seized as a prize, the claimants are to commence their action by a petition or statement of claim, in the form of pleadings, to which the Crown pleads by what is technically called under the rules an answer.

Re The "Sandefjord," 17 Can. Ex. 238.

PRIZE—APPRAISEMENT—SHIP—COAL.

In appraising a ship brought in as a prize the coal in the bunkers is not to be ap-

praised as part of the ship; it should be inventoried separately. Where the appraisers have acted in good faith the court will not interfere with their judgment.

Re The "Hamborn," 17 Can. Ex. 243.

PRIZE—SHIP AND APPURTENANCES—COAL.

Bunker coal does not pass as part of a ship brought in as a prize.

Re The "Hamborn," 17 Can. Ex. 250.

PRIZE FIGHTING.

Annotations.

Criminal law; sparring matches distinguished from prize fights: 12 D.L.R. 786, 21 Can. Cr. Cas. 395.

Definition; Criminal Code, 1906, ss. 105-108: 12 D.L.R. 786.

INTENT—BOXING MATCH.

To constitute a "prize fight" within the prohibition of Cr. Code s. 105, there must have been the intention of fighting until one of the participants shall have become exhausted by blows or fatigue; it is not a "prize fight" merely because the participants were paid for the exhibition.

R. v. Fleming, 30 D.L.R. 419, 26 Can. Cr. Cas. 182.

WHAT CONSTITUTES—PRIZE OR REWARD.

An encounter of the nature of a fight, with fists or hands, between two persons who have met for such purpose by previous arrangement is a "prize fight" under Cr. Code, s. 105, within the statutory definition of the phrase "prize fight" in s. 2 (31), if the contest be one in which each strives to overcome or conquer the other, although there is no prize offered to the visitor.

R. v. Pelkey, 12 D.L.R. 780, 21 Can. Cr. Cas. 387, 6 A.L.R. 103, 24 W.L.R. 804, 4 W.W.R. 1055.

DEFINITION.

To constitute a "prize fight" under Cr. Code ss. 31, 106, the encounter must be between two persons acting together, with the intention of fighting, whether with or without gloves, till one or the other gives in from exhaustion or from injuries received. The words "encounter" and "fight" are synonymous. A sparring or boxing match for a given number of rounds, which would not ordinarily exhaust either participant, is not a "prize fight," although the boxers were paid fixed sums not depending upon the result, for giving the exhibition.

The King v. Fitzgerald, 19 Can. Cr. Cas. 145.

ASSOCIATION FOR OPERATING—ACTION FOR CONTRIBUTION AND INDEMNITY DISMISSED FOR ILLEGALITY—CR. CODE, SS. 104, 105.

Bithell v. Butler, 30 Can. Cr. Cas. 275.

PRIZE FIGHTING—STATUTORY DEFINITION CONSIDERED—BOXING EXHIBITION—CONTRACT.

The King v. Wildfong and Lang, 17 Can. Cr. Cas. 251.

PROBABLE CAUSE.

See Malicious Prosecution; False Imprisonment; Arrest.

PROBATE.

See Wills; Executors and Administrators; Courts.

PROCESS.

See Writ and Process.

PROCURING.

CAB-DRIVER—DRIVING PROSTITUTES AND MEN TO PLACE WHERE THEY MAY HAVE INTERCOURSE—NOT GUILTY UNDER CRIMINAL CODE.

A cab-driver who uses his conveyance to drive prostitutes and men who are mutually desirous of having sexual intercourse, to a place where they can and do have it, is not guilty of "procuring" within the meaning of s. 216 (1) (a) Cr. Code as enacted by 3 & 4 Geo. V. c. 13, s. 9. The fact that it was the cab-driver who brought them together for such purpose makes no difference.

R. v. Quinn, 44 D.L.R. 707, 43 O.L.R. 385, 30 Can. Cr. Cas. 372.

ATTEMPT—FALSE PRETENCES.

Notwithstanding the special inclusion of attempts in the preceding clauses of s. 216 Cr. Code, dealing with the offence of procuring, an indictment will lie under s. 571, dealing generally with attempts to commit indictable offences, for the offence of attempted procuring by false pretences within s. 216, clause (j) as re-enacted by the Criminal Code Amendment Act, 1913, as to which s. 216 omits any special mention of attempts; the doctrine of "expressio unius, etc." does not apply to exclude the attempt of the principal offence as against the express language of s. 571.

R. v. Wing, 15 D.L.R. 741, 29 O.L.R. 553, 22 Can. Cr. Cas. 426.

PROSTITUTION—CR. CODE, 216.

The word "prostitution" in Cr. Code, s. 216 (amendment of 1913) means promiscuous sexual intercourse with men, and is negatived where the magistrate finds that the intent of the accused man was only that the woman should become his mistress and not to bring about sexual connection between the woman and other men.

R. v. Cardell, 19 D.L.R. 411, 23 Can. Cr. Cas. 271, 7 A.L.R. 404.

PRODUCTION OF DOCUMENTS.

See Discovery.

Documentary evidence, see Evidence.

PROFITS.

Compensation for loss of, see Damages, III.

PROHIBITION.

I. POWER TO ISSUE.
II. ADEQUACY OF OTHER REMEDIES.

III. Persons to, or against whom, writ may be granted.
IV. Proceedings that may be forbidden.
V. Procedure.

I. Power to issue.

(§ I—1)—Power to issue.

An unsuccessful motion before a Division Court judge under s. 160 of the Division Courts Act to discharge garnishment proceedings does not defeat the right to prohibition for want of jurisdiction.

Re McCreary v. Brennan, 3 D.L.R. 318, 3 O.W.N. 1052.

Power of Supreme Court to issue to County Judge when acting as Master of Supreme Court (N.S.).

Since a judge of a County Court acting as a Master of the Supreme Court of Nova Scotia, is an officer of the latter court, and not an inferior tribunal, the Supreme Court should not issue a writ of prohibition to restrain his proceeding as such without jurisdiction; an order directed to the Master as an officer of the court is sufficient.

Re Noble Crouse; R. v. Crouse, 11 D.L.R. 749, 12 E.L.R. 416, 47 N.S.R. 64, 21 Can. Cr. Cas. 231.

A Judge in Chambers has no jurisdiction to entertain a motion for a prohibition to a County Court Judge. [Watson v. Lillico, 6 M.R. 59, followed.]

Re Landsborough, 18 W.L.R. 601, 21 Man. L.R. 708.

To Circuit Court—Inscription en faux.

Art. 50 C.C.P., does not confer on the Superior Court the right to revise judgments of the Circuit Court. It would only be in the case of a denial of justice or abuse of power causing a grave prejudice and a manifest injury that the Superior Court should exercise its right of control and of surveillance over the Circuit Court and its judges if otherwise it possesses such right. If in an action on a note the defendant states at the hearing that the note was altered after the defence was filed, he can only demand to be allowed to file a new plea under the provisions of art. 208, C.P.Q., and cannot demand the right to inscribe en faux.

Larocque v. Circuit Court of Montreal, 18 Que. P.R. 416.

Dental college.

The "Board of Governors" of the College of Dental Surgeons of the Province of Quebec is not a body politic, but being charged with making rules respecting the honour, dignity and discipline of the members of the College, and of deciding upon charges brought against them, it is an inferior tribunal subject to a writ of prohibition. Although a writ of prohibition has the same object in view as a writ of injunction, it differs from it, however, in that the latter should be addressed to the litigant parties, whilst the former is addressed to the court itself.

Maillet v. Board of Governors of Quebec College of Dental Surgeons, 27 Que. K.B. 364.

(§ I—2)—Defect on face of proceedings.

Where the defect of jurisdiction is clear on the face of the proceedings of an inferior court, the issue of a prohibition, though not of course, is of right and not discretionary. [Farquharson v. Margon, [1894] 1 Q. B. 552, applied.]

R. v. Jack, 25 D.L.R. 700, 24 Can. Cr. Cas. 385, 49 N.S.R. 328.

(§ I—4)—Summary conviction — Non-jurisdictional error—Appeal.

Error in law upon a question apart from the jurisdiction to try, will not give a right to prohibition, and the forcing of respondent into the witness-box, whether justified or not under the provincial statute under which the prosecution was brought, does not raise the question of jurisdiction of a County Judge to hear an appeal from the dismissal of a summary conviction. [Re Royston Park and Steelton, 13 D.L.R. 454, 28 O.L.R. 629; Re McLeod and Amiro, 8 D. L.R. 726, 27 O.L.R. 232, referred to.]

Re Sigurdson, 28 D.L.R. 375, 25 Can. Cr. Cas. 291, 25 Man. L.R. 832, 33 W.L.R. 325, 9 W.W.R. 940.

Jurisdiction—Effect of prior prosecution.

Prohibition does not lie to raise the question whether the entry of a nolle prosequi in a prior prosecution for the same cause operated as a bar to the second prosecution. An objection on that score is one to be determined in the course of the second prosecution but does not go to the jurisdiction of the tribunal.

R. v. Spence, 31 Can. Cr. Cas. 365.

Summary conviction.

Where, as in the Lord's Day Act, R.S.C. 1906, c. 153, s. 7, an exception is created by the same statutory clause as that which creates the offence, a summary conviction is bad if it does not negative the exemption or exception; and the objection may be raised on a motion for a writ of prohibition to restrain the enforcement of the conviction.

McBrien v. Recorder's Court, 31 Can. Cr. Cas. 352.

II. Adequacy of other remedies.

(§ II—5)—Other remedy—Right to apply for relief to tribunal to be prohibited.

That objections to the jurisdiction of a court to entertain an appeal may be raised on the hearing will not prevent the granting of a writ of prohibition against such tribunal by a superior court. [Mayor of London v. Cox, L.R. 2 H.L. 239, followed.]

Re Buchanan, 15 D.L.R. 232, 23 Man. L.R. 943, 26 W.L.R. 447.

Alternative remedy of appeal.

It is not a bar to the granting of prohibition to a magistrate for exceeding his territorial jurisdiction that an alternative remedy of appeal was available to correct the absence or excess of jurisdiction.

[Channel Coaling Co. v. Ross, [1907] 1 K.B. 145, referred to.]

R. v. Jack, 25 D.L.R. 700, 24 Can. Cr. Cas. 385, 49 N.S.R. 328.

DIVISION COURT IN ONTARIO — POWER OF TRANSFER — PROHIBITION PREMATURELY ASKED.

Re Walker v. Wilson, 16 D.L.R. 853, 5 O.W.N. 802.

JUDGMENT—WANT OF JURISDICTION.

Nothing shall be intended to be within the jurisdiction of an inferior court except that which is so expressly alleged, and where the objection to the jurisdiction appears upon the face of the proceedings, prohibition lies even after judgment, even though there is an alternative remedy by a motion to set aside the judgment.

Camosun Commercial Co. v. Garetson, 20 B.C.R. 448, 7 W.W.R. 219.

OTHER REMEDY.

The writ of prohibition is confined in cases where no other remedy exists.

Henry Morgan Co. v. Montreal, 24 Rev. Leg. 486.

NUISANCE—OTHER REMEDY—CERTIORARI.

Legislative authority to commit a nuisance will not be assumed where the legislative authority to a proprietor to make a particular use of his property is permissive only. The effect of such legislative authority can be examined on certiorari, and prohibition will not lie in such a case.

Montreal Abattoirs v. Cour du Recorder, 17 Que. P.R. 305.

AGAINST SUMMARY CRIMINAL PROCEEDINGS ON DEFECTIVE INFORMATION.

Prohibition may be ordered to restrain a magistrate from proceeding on an information which he had erroneously ruled sufficient to support the charge, whereas in fact it did not disclose a criminal offence; but the prohibition order will not bar proceedings on a fresh information or even upon the same information if properly amended and resworn. [R. v. France, 1 Can. Cr. Cas. 321, applied.]

R. v. McAuley, 30 Can. Cr. Cas. 145, [1918] 3 W.W.R. 178.

III. Persons to, or against whom, writ may be granted.

(§ III—10)—PERSONS TO, OR AGAINST WHOM, WRIT MAY BE GRANTED.

The Council of the Bar when investigating a charge against an advocate accused of having committed an act derogatory to the dignity of the profession exercises judicial functions; and as such constitutes an "inferior court" amendable to certiorari and prohibition. [Honan v. Bar of Montreal, 30 Can. S.C.R. 1, followed; O'Farrell v. Brassard, 1 L.N. (Que.) 28, distinguished.]

Gosselin v. Bar of Montreal, 2 D.L.R. 19.

PARTIES OR STRANGERS MAY APPLY.

It is not essential that the party applying for a prohibition to an inferior court which is exceeding its jurisdiction shall be a party to the cause; the motion will lie at the instance of a stranger.

Re Holman and Rea, 9 D.L.R. 234, 23 O.W.R. 428, 27 O.L.R. 432.

AGAINST WHOM—BOARDS OF CONCILIATION—INDUSTRIAL DISPUTES — INVESTIGATION ACT.

A board of conciliation and investigation appointed by the Minister of Labour to investigate a pretended dispute between an industrial company and its employees, on the application of persons describing themselves as members of a trade union that has no legal existence, who do not shew that they are authorized by a majority vote of that, nor of any other, trade union, who are not employees of the company, and at a time when there exists no dispute between the company and its employees, and neither a strike nor a lockout is imminent, is unlawfully constituted and the Superior Court, in the exercise of its controlling power over all courts and persons within the province (art. 50, C.C.P.), has the power and duty, at the instance of the company petitioning for a prohibition, to restrain such board from acting in the matter. A board appointed under the Act 6-7 Edw. VII., c. 20, is a court of inferior jurisdiction and prohibition will lie to restrain it from acting, if unlawfully constituted, or if it assumes to act in excess of its jurisdiction.

Montreal Street R. Co. v. Board of Conciliation & Investigation, 44 Que. S.C. 350.

IV. Proceedings that may be forbidden.

(§ IV—15)—DISPUTING TERRITORIAL JURISDICTION OF DIVISION COURT—FAILURE TO APPEAR AT TRIAL — JUDGMENT ON ADMISSION.

[Re Canadian Oil Companies v. McConnell, 8 D.L.R. 759, referred to.]

Re Sovereen Mitt, Glove & Robe Co. v. Cameron, 26 D.L.R. 793, 35 O.L.R. 143.

APPEAL BY INFORMANT FROM DISMISSAL OF ACCUSED ON SUMMARY TRIAL—DEFECT OF JURISDICTION.

Prohibition lies to prevent a County Court entertaining an appeal launched by an informant from the decision of a police magistrate dismissing on summary trial a charge of an indictable offence, on the ground that no appeal lies; and the prohibition motion is properly brought as soon as the notice of the proposed appeal has been filed in the inferior court to which the appeal is taken.

Re Buchanan, 15 D.L.R. 232, 23 Man. L.R. 943, 26 W.L.R. 447.

DIVISION COURT (ONT.)—SUIT IN WRONG DIVISION.

Prohibition may be ordered against the enforcement of a judgment entered in a Division Court in Ontario for defendant's nonappearance at the hearing, where a notice disputing the jurisdiction had been regularly filed and the action was in fact

brought in the wrong district; and this notwithstanding the failure of defendant to make application to the Division Court for a transfer of the cause to the proper division or district.

Mitchell v. Doyle, 10 D.L.R. 297, 4 O.W.N. 725, 23 O.W.R. 926.

To County Court Judge — Scrutiny of ballots—Certifying result of election—Exceeding jurisdiction.

A County Court Judge may be prohibited from certifying the result of a local option election on a scrutiny of the ballots cast, where he has exceeded or proposes to exceed his jurisdiction. [Re Saltfleet Local Option By-law, 16 O.L.R. 293, followed; Reg. v. Coursey, 27 O.R. 181; Davidson v. Taylor, 14 P.R. 78, distinguished.]

Re Aurora Scrutiny, 13 D.L.R. 88, 28 O.L.R. 475.

Garnishment proceedings in Division Court.

Prohibition lies against garnishment proceedings in a Division Court before judgment in an action for breach of warranty of quantity upon a sale of goods such being a "claim for damages" within the exception of s. 146 of the Division Courts Act (Ont.), and there being, therefore, no jurisdiction in the Division Court to issue garnishment proceedings before judgment in respect thereof.

Re McCreary v. Brennan, 3 D.L.R. 318, 3 O.W.N. 1052.

Attachment or garnishment proceeding in Division Court — Money deposited in bank by unenfranchised Indian.

Avery v. Cayuga, 5 O.W.N. 471.

Division Courts—Action for sum in excess of $100—Place of payment.

McDonald Thresher Co. v. Stevenson, 4 O.W.N. 732, 23 O.W.R. 957.

Proceedings under Illegitimate Children's Act—County Court Judge.

Prohibition will not lie to restrain a County Court Judge from considering evidence given by a respondent in proceedings taken under the Illegitimate Children's Act unwillingly and after objections to his being compelled to testify.

Re Pall Sigurdson, 9 W.W.R. 940, 25 Can. Cr. Cas. 291.

(§ IV—17)—Proceedings under municipal by-law.

Prohibition will lie against the enforcement of a summary conviction under an invalid municipal by-law, as the magistrate in assuming to find the by-law valid attempted to give himself jurisdiction by an erroneous conclusion of law.

R. v. Sparks, 10 D.L.R. 616, 18 B.C.R. 116, 21 Can. Cr. Cas. 184, 23 W.L.R. 613.

Justice of the peace—Proceedings after dismissal of case.

Prohibition to an inferior court will not be refused on the ground that the proceedings in that court are at an end by the dismissal of the case therein, so long as anything remains to be done to complete the proceedings sought to be prohibited, ex. gr., the granting of a statutory certificate of dismissal so as to enable the dismissal to be pleaded in bar to any future proceeding. [Brazil v. Johns, 24 O.R. 209; and Mayor of London v. Cox, L.R. 2 H.L. 239, followed.]

Re Holman and Rea, 9 D.L.R. 234, 23 O.W.R. 428, 27 O.L.R. 432.

(§ IV—20)—Special tribunals.

Where a board of investigation has been appointed by the Minister of Labour on a judge's order directing an investigation into an alleged combine in virtue of the Combines Investigation Act (Can.), prohibition will not lie to prevent the board from carrying on its enquiry on the ground that the applicants for such investigation were not persons competent under the Act to make such application; the procedure leading up to the order directing an investigation being sharply distinguished from the procedure of the investigation proper and not forming part thereof.

United Shoe Machinery Co. v. Laurendeau, 2 D.L.R. 77.

Writ of prohibition—Expropriation—Arbitrators acting without jurisdiction—Notice of proceedings.

The arbitrators named for the purpose of an expropriation under s. 196 of the Railway Act (R.S.C. 1906, c. 37), form a court of inferior jurisdiction, and a writ of prohibition may be issued against them if they act without jurisdiction, or exceed ther jurisdiction. 2. Notwithstanding the name in the book of reference sanctioned by the Railway Commission, and deposited by the company in accordance with ss. 159, 160, as being that of the owner of the land to be expropriated, if this land is alienated before the company has instituted the arbitration proceedings provided for in ss. 190 et seq. it is considered as giving notice to the new purchaser and taking up the case with him. He has the remedy of prohibition to prevent the arbitrators from taking cognizance of the matter if the company has not given him notice of its proceedings, or has only given notice to the former owner as if the alienation had not taken place. [Park & Island Ry. Co. v. Shannon, 6 B.R. 195; Jones v. Laurent, 1 Que. S.C. 438, and Atlantic & North-West Ry. Co. v. Wood, [1895] A.C. 257, followed.]

Reid v. Charpentier, 45 Que. S.C. 56.

(§ IV—23)—To superintendent of public instruction — Excess of powers—Hearing and report.

The Superintendent of Public Instruction, in obeying the orders of the Provincial Secretary which governs his department, acts in administrative matters only, and is not subject to a writ of prohibition. The report of the delegate of the Superintendent upon a hearing does not constitute the trial of a person mentioned in it, and the latter is not

entitled to a writ of prohibition against the delegate restraining him from all proceedings, and especially in making a report to give his opinion, or his appreciation, or a decision upon the proof made before him. If in any respect the delegate exceeds his powers, the excess in jurisdiction should be invoked in limine or at least before the enquête is finished and the case taken under consideration. A writ of prohibition cannot issue against such delegate after he has made his report and has become functus officio.

Therrien v. Mercier, 24 Que. K.B. 352.

(§ IV—24)—Courts Martial—Jurisdiction—C.P. (Que.) art. 1003—Army Act—Rules of procedure.

Courts Martial are courts of inferior jurisdiction under C.C.P. art. 1003. They require to be legally constituted, and the accused should be persons subject to military law. A writ of prohibition may be issued only where there is absence of jurisdiction or where the tribunal exceeds its jurisdiction and will not lie for alleged breaches of the Rules of Procedure or alleged errors by the court in its findings on the pleas of the accused.

Goulet v. Winters, 49 D.L.R. 484, 56 Que. S.C. 521.

V. Procedure.

(§ V—26)—Parties—Notice—Attorney-General.

A defendant or party added in a case of prohibition cannot inscribe a case unless all the other parties added in the case have pleaded in the action, or are in default in doing so. If an application for prohibition is based on the unconstitutionality of a Dominion Act, and the Attorney-General of Quebec has not been made a party to the proceedings, the court cannot, on an application by the person applying for the writ to annul the placing of the case on the roll, decide whether or not the Attorney-General of Quebec should be added as a party. Semble, that an inscription should be served on the opposite party. The date of the hearing of a case before its turn cannot be fixed ex parte without notice to the adverse party and unknown to him.

Mongeau v. St. Cyr, 19 Que. P.R. 382.

(§ V—27)—Objection to jurisdiction.

Where there is doubt in fact or law whether an inferior court is exceeding its jurisdiction, or is acting without jurisdiction, the Superior Court should exercise its discretion to refuse prohibition.

R. v. Hamlink, 5 D.L.R. 733, 22 O.W.R. 107, 26 O.L.R. 381, 19 Can. Cr. Cas. 493.

(§ V—32)—Illegal and irregular exercise of jurisdiction.

Upon a motion for prohibition, where, in a matter in which it has jurisdiction, an inferior court has made an order which is incorrect, but which it can easily set right, the proper course is not to grant prohibition, but to enlarge the motion so as to give the inferior court an opportunity to correct the mistake, and, if it be corrected, to dismiss the motion. Prohibition is not ex debito justitiæ; it is an extreme measure, and is not granted in case of a mere illegality or irregularity not going to the jurisdiction, or where the judicial officer having jurisdiction exercises it in an irregular manner. [See Re Birch, 15 C.B. 743; Re Cummings and Carleton, 25 O.R. 607, 26 O.R. 1; Regina v. Mayor of London, 69 L.T.R. 721; Regina v. Justices of Kent, 24 Q.B.D. 181.]

R. v. Hamlink, 5 D.L.R. 733, 22 O.W.R. 107, 19 Can. Cas. 493, 26 O.L.R. 381.

(§ V—33)—Interim proceedings.

The court has no power, pending an application for prohibition, to make an interim order staying the proceedings in the inferior court as to which the prohibition is sought.

Re Holman and Rea, 9 D.L.R. 234, 23 O.W.R. 428, 27 O.L.R. 432.

Writ of prohibition—Board sitting under the Combines Investigation Act.

The powers conferred to the Board sitting under the Combines Investigation Act, are of a quasi-judicial nature; such board constitutes an inferior tribunal and is subject to a writ of prohibition when it exceeds its powers.

United Shoe Machinery Co. v. Laurendeau, 12 Que. P.R. 319.

Summary conviction — Adjournment of hearing for more than eight days.

Donohue v. Recorder's Court of Quebec, 18 Can. Cr. Cas. 182, 12 Que. P.R. 267.

Unauthorised award of costs to be taxed by clerk — Prohibition — Enlarging motion to permit amendment.

The King v. Hamlink, 17 Can. Cr. Cas. 162.

Prohibition — Practice — Civil or criminal proceedings.

The King v. Suck Sin, 18 Can. Cr. Cas. 266, 20 Man. L.R. 720.

PROMISSORY NOTES.

See Bills and Notes.

PROOF OF LOSS.

See Insurance.

PROSTITUTION.

See Disorderly House; Vagrancy.

PROXIMATE CAUSE.

I. In general.
II. Of death, injury, or loss by the elements.
III. Of loss or injury by carrier or railroad company.
IV. Of injury to pedestrian on highway or bridge.
V. Of injury to servant.
VI. Of injury by falling objects or building.
VII. Of injury inflicted by animal.

See Negligence.
See Insurance, VI B—280.
Improperly packed frog in track as cause of accident, see Trial, V C—285.
Lack of sanitation causing sickness, see Master and Servant, II A—35.

I. In general.

(§ I—1)—Dismissal of action when cause unknown.

When the cause of an accident is unknown and cannot be established, the action of the plaintiff should be dismissed.

Collin v. G.T.R. Co., 48 Que. S.C. 106.

(§ I—8)—Cause of efficient cause—causa causans.

Where one person is negligent, and, by the negligence or wilful act of another, his negligent act causes injury to a third person, if the first negligent act be not in its nature such that the second might be looked for as a natural and probable consequence, then the first negligent person is not responsible, but, if it be so, then he is liable.

Johnson v. Montreal and Merchants' Telephone Co., 7 D.L.R. 233, 42 Que. S.C. 450.

Excessive drinking in hotel — Death from exposure to cold—Action by personal representative — Liability of owner of hotel and bartender—Proximate cause of death.

De Struve v. McGuire, 25 O.L.R. 87, 20 O.W.R. 374.

II. Of death, injury, or loss by the elements.

(§ II—15)—Death from burns—Epileptic fit.

Wadsworth v. Canadian Railway Accident Ins. Co., 13 D.L.R. 113, reversing 3 D.L.R. 668. [Affirmed, 16 D.L.R. 670, 49 Can. S.C.R. 115.]

Breach of a contract to furnish water for the extinguishing of fires cannot be said to be the cause of a loss by fire, as it may have been caused by any one or more of a number of causes; and if the loss, as a fact, is not the direct result of a breach by the water company of its contract to furnish water for extinguishing fires, it is not liable for the loss resulting from the fire.

Belanger v. St. Louis, 8 D.L.R. 601.

(§ II—17)—Spread of fire across intervening lands.

Where it appears that the loss by fire was occasioned by the concurrence of several fires for only one of which the defendant was liable, a refusal to put to the jury the question of what other fires were burning at the time in that vicinity and which one or more of such fires occasioned or contributed to the burning of the plaintiff's property, will not justify a new trial, where the judge in his instructions to the jury fully covers that point.

King Lumber Co. v. C. P. R. Co., 7 D.L.R. 733, 22 W.L.R. 553, 14 Can. Ry. Cas. 313, 17 B.C.R. 502, 3 W.W.R. 442.

(§ II—25)—Injury by electricity—Contact of telephone wire with power wire.

A telephone company empowered to erect its poles and wires on a street upon which the poles and wires of an electric power line are already strung is under a duty to string the telephone wires at a safe distance from the power wires, and where a telephone lineman is killed by the telephone wires with which he was working becoming charged by contact with an electric wire which had sagged low by the settlement or bending of the electric company's poles not resulting from any negligence on the part of the electric company, the proximate cause of the injury is the negligence of the telephone company and not of the electric company, although the latter had taken no precautions by guy wires or otherwise to obviate the effect of such sagging.

Roberts v. Bell Telephone Co., and Western Counties Electric Co., 10 D.L.R. 460, 4 O.W.N. 1099, 24 O.W.R. 428.

(§ II—30)—Loss by explosion—Breach of statutory duty—Unlicensed person in charge of blasting.

In an action for personal injury through alleged negligence in blasting operations, it is not sufficient for the plaintiff to shew merely that there was a breach of statutory duty in the employment by the defendants of an unlicensed person to do the blasting: it must further appear that such breach, if relied upon in proof of negligence, was the proximate cause of the accident.

Thacker Singh v. C. P. R. Co., 15 D.L.R. 487, 5 W.W.R. 125. [Affirmed in 20 D.L.R. 511, 19 B.C.R. 575.]

III. Of loss or injury by carrier or railroad company.

(§ III—46)—Ejected passenger—Killed at different place several hours later — Liability of railway company.

A railway company is not liable in negligence for the death of a passenger, who is ejected from the train at a proper stopping place, for drunkenness and riotous conduct, if at the time he is put off the train he is capable of taking care of himself, although subsequently he wanders on to the track and several hours later is killed by another train at a place where those in charge of the latter train could not see him in time to prevent the accident.

Dunn, Administrator v. Dominion Atlantic R. Co., 45 D.L.R. 51, 25 Can. Ry. Cas. 143, 53 N.S.R. 88 at 91. [Reversed by Supreme Court of Canada, 52 D.L.R. 149.]

IV. Of injury to pedestrian on highway or bridge.

See Highways; Bridges.
Question for jury as to, see Trial.

V. Of injury to servant.

(§ V—104)—Delivery or cartage.

The master's negligence in furnishing for the use of his servants a horse which he

knew had the vice of running away is the proximate cause of an injury received by a servant from the horse running away while he was, at his master's request, assisting a fellow-servant in the delivery of the master's goods.

Veitch v. Linkert, 3 D.L.R. 39, 3 O.W.N. 874.

VI. Of injury by falling objects or building.

(§ VI—105)—In order to absolve a subwarrantor who manufactured a steel structure to support a water tank erected upon the roof of a building, from liability for damages occasioned by the fall thereof, on the ground that the walls were defective, the defective condition must be shewn and it must appear that that was the immediate and proximate cause of its fall.

Wilson v. H.G. Hogel Co., 4 D.L.R. 196.

VII. Of injury inflicted by animal.

(§ VII—110) — ANIMALS RUNNING AT LARGE CAUSING FRIGHT OF HORSES—INJURY TO PROPERTY—REMOTENESS.

The perilous alternative one is placed in while driving away animals running at large contrary to a by-law in consequence of which his horses became frightened, causing damage to his property, does not render such damage too remote to bar recovery.

Moon v. Stephens, 23 D.L.R. 223, 8 S.L.R. 218, 31 W.L.R. 832, 8 W.W.R. 1165.

ALLOWING HORSE TO STAND HARNESSED BUT UNBRIDLED—ESCAPE.

The defendant's act in allowing the horse to stand harnessed but unbridled in an open space was the proximate cause of the injury, and the action of the horse in rolling was not an independent intervening cause.

Gray v. Steeves, 42 N.B.R. 676.

PUBLICATION.

Of libel, see Libel and Slander.

PUBLIC CONTRACTS.

See Contracts, VII; Municipal Corporations, II; Crown.

PUBLIC HEALTH.

See Health; Nuisance; Negligence.

PUBLIC IMPROVEMENTS.

See Public Works; Assessment for, see Taxes; Municipal Corporations.

PUBLIC LANDS.

I. OF CANADA.
  A. In general.
  B. Disposal through land department: entry; sale.
  C. Patents.
II. OF THE PROVINCES.

Annotation.

Escheat, provincial and Dominion rights: 26 D.L.R. 137.

I. Of Canada.

A. IN GENERAL.

(§ I A—1)—INDIAN RESERVE—INDIANS AS PURCHASERS.

Under the Indian Act (39 Vict. c. 18, s. 31, R.S.C. (1886), c. 43, s. 42) Indians have the right to become purchasers of public lands which, on surrender to the Crown, have ceased to be a part of an Indian "reserve."

Att'y-Gen'l for Can. v. Giroux, 30 D.L.R. 123, 53 Can. S.C.R. 172, affirming 24 Que. K.B. 433.

RIVER BEDS — "RAILWAY BELT" LANDS IN BRITISH COLUMBIA.

The beneficial ownership of the beds of navigable nontidal waters within the "railway belt" in British Columbia, which were vested in the Crown in the right of that province at the time of the transfer of the "railway belt" lands to the Dominion of Canada, passed to the Dominion in virtue of the transfer.

Re British Columbia Fisheries, 11 D.L.R. 255, 49 C.L.J. 304, 47 Can. S.C.R. 493, 23 W.L.R. 723, 4 W.W.R. 525. [Affirmed, 15 D.L.R. 308, 13 E.L.R. 536.]

CONSTRUCTION OF CROWN GRANTS.

Crown grants are to be construed most favourably for the King where a fair doubt exists as to the real meaning of the instrument.

The King v. Tweedie, 22 D.L.R. 498, 15 Can. Ex. 177. [Reversed 27 D.L.R. 53, 52 Can. S.C.R. 197.]

INDIAN LANDS ON RESERVES—SURRENDER—DOMINION OR PROVINCIAL DOMAIN.

Indian lands are not possessed by the Crown in trust for the Indians who have surrendered them; they belong to it in full ownership as other public lands subject to distribution every year among the members of the tribe who have agreed to surrender them, the interest derived from the proceeds of their sale. [Church v. Fenton, 5 Can. S.C.R. 239, followed.] When a tribe of Indians has surrendered a reserve to the Crown, the beneficial interest of the tribe in the lands of this reserve enures to the provinces and not to the federal power.

Doherty v. Giroux, 24 Que. K.B. 433. [Affirmed sub. nom Att'y-Gen'l for Canada v. Giroux, 30 D.L.R. 123, 53 Can. S.C.R. 172.]

To give title or possessory rights as against the Crown the proof should be clear and unequivocal. The occupation and use of land on the sea shore, where the acts of occupation (apart from the erection of small structures not of a permanent character) are shown to have been of a casual, temporary and irregular character, in the absence of enclosure or anything to indicate the extent of possession, are not sufficient to give title as against the Crown.

Carr v. Ferguson, 45 N.S.R. 132, 9 E.L.R. 218.

(§ I A—3)—Grant of bed of navigable river—Title to.

In a grant of part of the public domain from the Crown to a subject the bed of a navigable river will not pass unless an intention to convey the same is expressed in clear and unambiguous terms in the grant.

Leamy v. The King, 23 D.L.R. 249, 15 Can. Ex. 189. [Affirmed in 33 D.L.R. 237, 54 Can. S.C.R. 143.]

B. Disposal through land department; entry; sale.

(§ I B—5)—Validity of lease—Approved by order-in-council — Amendments — Approval by Minister—Signature—No subsequent order-in-council — Validity.

A lease of Crown land made between a corporation and a minister acting on behalf of the Crown, and approved by order-in-council, must have the indenture containing amendments to the same duly approved by order-in-council otherwise such indenture is a nullity.

The King v. Vancouver Lumber Co., 50 D.L.R. 6, affirming Supreme Court of Canada, which affirmed 41 D.L.R. 617, 17 Can. Ex. 329.

Occupation license—Rights of assignee—Sale by Crown by letters patent—Colonization purposes.

The assignee of the rights of one who has obtained an occupation license of a lot of public land loses his rights by the sale of the lot by the Crown under letters patent. Neither the license nor the assignment made to him gives a right of action against the holder of the letters patent to wood cut upon the lot by the latter. The prohibition against acquiring by letters patent, by means of transfers of occupation licenses, of more than 300 acres of land for the purpose of colonization, is of public interest, and can be invoked by all interested as well as by the Crown.

Howard v. Stewart, 23 Que. K.B. 80.

Disposal through land department—Entry—Sale.

The alienation by sale of Crown lands is perfected by the mutual consent of the agent of the Crown and the purchaser in respect to the property and the price independently of any title or document attesting it.

Pelletier v. Roy, 44 Que. S.C. 147.

Validity of dominion lease—Deceit—Notice.

Vancouver v. Vancouver Lumber Co., [1911] A.C. 711.

Crown lands and Crown timber dues—Timber cut before issue of letters patent granting ownership.

Deschamps v. Giroux, 39 Que. S.C. 454.

Land taxation—Exemption until lands "sold"—Exemption for twenty years after "grant from Crown."

The Minister of Works of Alberta v. The C.P.R. Co.; The King v. The C.P.R. Co., [1911] A.C. 328, 27 T.L.R. 234, affirming Supreme Court of Alberta, January 21, 1910.

Unpatented lands—Liability of grantee for taxes—Railway grant.

Calgary & Edmonton Land Co. v. Attorney-General of Alberta, 45 Can. S.C.R. 170.

(§ I B—7)—License to cut standing timber—Right of renewal.

Under s. 54, of c. 43, R.S.C., 1886, and R.S.C. 1906, c. 81, s. 73, giving authority to the Superintendent-General of Indian Affairs to grant licenses to cut timber on Indian lands, the licensee is not entitled at the expiration of his term of license to a renewal of the privilege as a matter of right, but his right to such renewal must depend upon whether or not a contract has been entered into between the Crown and himself entitling him to such renewal, in view of the provisions of s. 55 of c. 43, R.S.C. 1886, to the effect that no license shall be granted for a longer period than 12 months. [Bulmer v. The Queen, 23 Can. S.C.R. 488; Lakefield Lumber Co. v. Shairp, 19 Can. S.C.R. 657, followed; Attorney-General v. Contois, 25 Grant, 346; Muskoka Mill Co. v. McDermott, 21 A.R. (Ont.) 129; Smylie v. The Queen, 27 A.R. (Ont.) 172; W.C. Edwards Co. v. D'Halewyn, 18 Que. K.B. 419, applied.]

Booth v. The King, 10 D.L.R. 371, 14 Can. Ex. 115, 12 E.L.R. 144.

Lease of Crown lands—Liability for damage caused to first lessee.

One who leases land from the Crown, the property being already leased and occupied by another person, and who does work upon it, is liable for the damages caused to the first lessee. A clause in the first lease that the lessee abandons all recourse for damages against the Crown of any nature whatever, does not apply to the act of the Crown itself, which is bound to provide peaceable enjoyment for its lessee, and the second lessee has no greater right than his lessor himself had.

Bonhomme v. Montreal W. & P. Co., 48 Que. S.C. 486.

(§ I B—8)—Setting aside certificate—Cancelling lease.

In proceedings on behalf of the Crown to annul and cancel a certain lease of ordinance and admiralty lands, it appeared that although there was information on their files respecting litigation at one time pending in the civil courts between the defendant's predecessor in title and other parties with respect to the property demised, the officials of the Department of the Interior issued the lease in question. It appeared, however, that at the time the lease was issued the department was not aware of a judgment in one of the civil courts which decided adversely to the rights of the defendant's predecessor in title:—Held, under all the circumstances, that the lease was issued through inadvertence and im-

providently and should be cancelled. The officers of the Crown should have satisfied themselves before issuing the lease that the litigation, of which there was knowledge in the department, had first been disposed of in favour of the applicant.

The King v. Crumb, 14 Can. Ex. 230.

(§ I B—9)—Purchase from Crown—Purchase money unpaid — Assignee of purchaser—Right to sue in trespass—Evidence — Order-in-Council—Removal of pine timber—Damage to land by covering with refuse—Assessment of damages by jury—New trial.

Severt v. Plaunt, 9 O.W.N. 94.

(§ I B—10)—Transfer to others, possession continued—Rights.

Where a wharf had been built on land the title to which is vested in the Crown, and the party in possession had used the property for many years in connection with a mill on the property, and subsequently transferred it to others who also went into agent has the right to reclaim possession of possession, and continued to remain in possession, the parties so in possession have a good title against every one except the true owner, and cannot be dispossessed except by one shewing better title.

Jones v. Sullivan, 23 D.L.R. 843, 43 N.B. R. 208.

Crown lands—Crown lands agent—Receipt—Possession—Title of ownership—Expenses and improvements—S. ref. [1909], art. 1559, 1562.

The bearer of a receipt of the Crown lands agent has the right to reclaim possession of his land of which he has been dispossessed by a third party, and to obtain damages, even though he cannot be declared the owner of the land. When two persons are each the holders of receipt from the Crown lands agent, for the same land, the rights of the one holding the first receipt cannot be affected by the second. The claims for expenses and improvements should form the object of a defense and not of a reply to a defense.

Diotte v. Bernier, 55 Que. S.C. 467.

C. Patents.

Presumption of ownership from possession under Crown grant, see Taxes, I E—48; Mechanics' Liens, V—30.

(§ I C—15)—Reservation as to repossession—Right of Dominion or province.

In letters patent for a water-lot in the River St. Lawrence, granted by the Crown in the right of the Province of Canada in the year 1848, the Crown reserved the right to resume at any time possession of the property upon paying to the grantee the value of any improvements and erections thereon. The right so reserved was never exercised before Confederation. Held, that the right so reserved was indivisible, and could only be exercised in respect of the whole of the land mentioned in the grant and not for a part thereof. Quære: Whether the right to resume possession enures now to the Dominion Crown, or the Crown in the right of the Province of Quebec.

Raymond v. The King, 29 D.L.R. 374, 16 Can. Ex. 1. [Affirmed 49 D.L.R. 689, 59 Can. S.C.R. 682.]

Conclusiveness of Crown grants—Prescriptive and possessory rights.

The Act (N.B.) 4 Geo. V, c. 36, coupled with the provisions of the Act 3 Edw. VII., c. 19, notwithstanding any previous claims that might exist on the part of any person to the land designated therein, authorizes and empowers the Minister of Lands and Mines to sell such land and to issue a Crown grant thereof, which, when issued, is perfectly good and conclusive against all the world, and a prescriptive title can be of no avail against a grant from the Crown under these special statutes.

Ouellet v. Jalbert, 27 D.L.R. 459, 43 N.B. R. 599.

Crown grant — Indian lands — Adverse possession.

The King v. Bonhomme, 49 D.L.R. 690, 59 Can. S.C.R. 679, affirming 38 D.L.R. 647, 16 Can. Ex. 437.

Homestead — Abandonment — Misrepresentation—Subsequent patent—Estoppel.

The cancellation of a homestead entry by the Crown, brought about by the false statements of the entrant in his declaration of abandonment, will estop him from attacking a patent to the land subsequently issued by the Crown in good faith.

Attorney-General of Canada v. Massinghill, 17 Can. Ex. 510.

Homestead — Assignment — Administrator—Dominion Lands Act.

An agreement between the administrator of an estate and the beneficiary thereof that the former may take as his own an unpatented homestead left by the deceased is not "an assignment or transfer or an agreement to assign or transfer" within the meaning of s. 142, the Dominion Lands Act, R.S.C. 1906, c. 142.

Western Trust Co. v. Olson, 11 S.L.R. 418, [1918] 3 W.W.R. 811.

Indian reserve — Surrender — Trust — Dominion and provincial powers.

The surrender made by the Abenaquis Indians of the Coleraine Reserve, on February 14, 1882, in favour of the Dominion Government, and accepted by it, by an order-in-council of April 3, 1882, is not an abandonment pure and simple, but a trust, by virtue of which the Dominion Government obtained the right to sell these lands for the benefit of the Indians of that reserve. The Dominion Government could legally dispose of these lands by the issue of letters patent, and confer a good title on the patentee. The Provincial Government has not acquired any right in those lands by reason of that surrender.

Gouin v. Thompson, 24 Rev. Leg. 271.

DOMINION GRANT—LEASE FROM PROVINCE—COAL RIGHTS—TRESPASS—SETTLEMENT ACT — EVIDENCE — PARTIES — ATTORNEY-GENERAL.

In an action for trespass involving a conflict between a grant in fee simple from the Crown, represented by the Government of Canada, of certain lands and the minerals thereunder and a subsequent lease from the Crown, represented by the Provincial Government, of an alleged portion of the same lands for coal or petroleum mining purposes, the Attorney-General of the province is not a necessary party. [Quesnel Forks Mining Co. v. Ward, 42 D.L.R. 476, distinguished.] In such an action the burden of proving that the area in question is, as the defendant asserts, within exceptions set out in ss. 3 and 4 of the Settlement Act, c. 14, 1884 (B.C.S.), lies on the defendant.

Esquimalt & Nanaimo R. Co. v. McLellan, [1918] 3 W.W.R. 645. [See 41 D.L.R. 737, [1918] 3 W.W.R. 828, 44 D.L.R. 697, 26 B.C.R. 104.]

PATENT FOR LAND—WATER LOT GRANTED BY CROWN — BOUNDARIES — SURVEYS — PLANS—DETERMINATION OF TRUE BOUNDARY-LINE — EVIDENCE — DECLARATION —COSTS.

Hamilton Motor Works v. Browne, 15 O.W.N. 90, reversing 13 O.W.N. 120.

TITLE TO BED OF NAVIGABLE RIVER.

In the absence of express terms, to that effect, a Crown grant of township lands will not pass title to the bed of a navigable river within the area described in the letters patent.

Leamy v. The King, 33 D.L.R. 237, 54 Can. S.C.R. 143.

CROWN—PATENT FOR LAND—MISSTATEMENT IN APPLICATION FOR—RIGHTS OF SQUATTER—RECOGNITION BY PATENTEE—PRIORITY OF APPLICATION — EVIDENCE — SPECIAL CIRCUMSTANCES—ACTION FOR CANCELLATION OF PATENT—CERTIFICATE OF OWNERSHIP UNDER LAND TITLES ACT —COSTS.

Grabot v. Giles, 12 O.W.N. 140.

PATENT FOR LAND—WATER-LOT GRANTED BY CROWN — BOUNDARIES — SURVEYS — PLANS—DETERMINATION OF TRUE BOUNDARY-LINE—AMENDMENT OF PATENT — TITLE BY POSSESSION TO SHORE-LOTS—CONFLICTING EVIDENCE —APPLICATION FOR LEAVE TO ADDUCE FURTHER EVIDENCE —COUNTERCLAIM—DAMAGES—COSTS.

Hamilton Motor Works v. Browne, 13 O.W.N. 120.

PATENT FOR LAND—ACTION TO SET ASIDE CROWN PATENT — QUESTION WHETHER LAND COVERED BY PRIOR PATENT—DESCRIPTION—BOUNDARIES — SQUATTERS' RIGHTS—APPLICANT FOR PATENT FAILING TO INFORM CROWN LANDS DEPARTMENT OF OCCUPATION—PATENT ISSUED BY MISTAKE—JURISDICTION OF COURT—LOCUS STANDI OF PLAINTIFFS—LIMITATION OF RELIEF—COSTS.

Johnston v. Steacy, 16 O.W.N. 135.

REVOCATION OF GRANT — IMPROVEMENTS — BONA FIDE PURCHASER.

The revocation of a permit of occupation under the authority of art. 1574, 1909 R.S.Q., has not the effect of confiscating for the benefit of the Crown, the improvements and outlays made by a third party in good faith. The latter has recourse against a subsequent grantee to recover the value of those improvements and outlays.

Marchand v. Fournier, 49 Que. S.C. 298.

ISSUE OF PATENT TO LIFE TENANT—ASSIGNMENT—RIGHTS OF HEIRS—LIMITATIONS.

Where C. received a quit claim of his mother's interest in Crown lands as a family representative acting as express trustee for the benefit of the heirs of his brother, a deceased pre-emptor, the patent to the lands having issued erroneously to his mother as supposed heir-at-law of the deceased pre-emptor, the heirs acquired a statutory right to the property which the Crown could not take away. [Boulton v. Jeffrey, 1 Ont. E. & A. 111, distinguished.] In such a case the Statute of Limitations is inapplicable.

Cook v. Cook, 8 W.W.R. 506.

PATENTS—NOTICE.

Although a commissioner of lands must give a pre-emption record holder 30 days' notice of the hearing of an application to cancel his pre-emption record, yet, if the pre-emptor appear and attend on the hearing at an earlier date, he cannot object afterwards that he has not received proper notice.

Heselwood v. Jones, 16 B.C.R. 485.

PATENT FROM CROWN—RESERVATION OF MINERAL RIGHTS—AMENDING ACT, 8 EDW. VII. c. 17, s. 4.

Austin v. Riley, 23 O.L.R. 593, 19 O.W.R. 40.

DOMINION LANDS—ERROR IN PATENT—OMISSION OF RESERVATION OF RAILWAY RIGHTS — IMPROVIDENCE — CANCELLATION—CERTIFICATE OF TITLE—RECTIFICATION OF REGISTER—JURISDICTION.

The King v. Powell, 13 Can. Ex. 300.

CROWN PATENT — DOMINION LANDS ACT AMENDMENT—MEANING OF WORD "PROVINCE."

Larence v. Larence, 21 Man. L.R. 145, 17 W.L.R. 197.

CROWN GRANT—WATER LOT—PUBLIC HARBOR.

Zwicker v. Lahave S.S. Co., 9 E.L.R. 114.

(§ I C—17)—HOMESTEAD—JURISDICTION OF EXCHEQUER COURT—VALIDITY OF PATENT — DELIVERY — "IMPROVIDENCE" — JUDGMENT CREDITORS—BONA FIDE PURCHASERS.

The defendant, S., an alien, for a number of years was a homestead entrant on land in Manitoba and entitled to a patent therefor under the Dominion Lands Act. He refused to make application for the patent, because, until the patent was registered in Manitoba, the land was not subject to

the payment of certain taxes, nor to the execution of judgments against such lands. He was induced to consummate the application for patent under threat of the Dominion land-office to cancel his homestead entry, and having taken out his naturalization papers and signing the application, the patent regularly issued and was mailed to him at his post-office address. It was later returned to the land-office because not called for by him. In the meantime a copy of the patent was registered against the land, whereupon the land was sold to satisfy the taxes and judgments, and thus found its way into the hands of innocent purchasers for value. Proceedings were instituted to set aside the patent and subsequent conveyances on the ground that the patent was procured by fraud and improvidently issued. Held, the Exchequer Court has no power to review or question the validity of the judgments obtained by the creditors in the Provincial Courts; that it has jurisdiction, under s. 94 of the Dominion Lands Act (7–8 Edw. VII., 1908, c. 20) and s. 31 of the Exchequer Court Act (R.S.C., 1906, c. 140) to determine the validity of the patent, and to set aside, if need be, the registration of instruments affecting the land in the registration offices of the province. The patent having been duly issued, in conformity to the provisions of s. 90 of the Dominion Lands Act, physical delivery was not essential to render it operative or effective. Upon the registration of the patent thus issued the judgment creditors of the patentee had the right to treat it as having been regularly issued and to secure a sale of the land in execution of their judgments. Under the evidence adduced, no fraud, error or improvidence was established as would warrant the avoidance of the patent under s. 94 of the Act; the fact that the patentee, in a letter to the land-office, stated his unwillingness or refusal to sign the patent papers, when he in fact did sign them, does not shew "improvidence" in issuing the patent, particularly when his object for doing so was to defeat the payment of taxes and hinder his judgment creditors.

The King v. Deacon, 45 D.L.R. 274, 18 Can. Ex. 308.

DOMINION—VOID PATENT TO PERSON DECEASED — CANCELLATION OF CROWN GRANT.

Apart from statutory validating enactments applicable in certain cases, a Crown lands patent issued in the name of a person already deceased at the date of the grant, with habendum to him, his heirs and assigns, is a nullity even where the death is recited in the patent together with a statement that for good and sufficient reasons it is expedient to issue the grant in the name of the deceased. A Crown grant of Dominion lands which is void by reason of its having been issued in the name of a person already deceased may be set aside and cancelled by the Exchequer Court of Canada, upon the hearing of an information in that behalf exhibited in that court by the Attorney-General of Canada. The Dominion Lands Act Amendment, 60–61 Vict. (Can.) c. 29, validating certain Crown grants notwithstanding the death of the grantee before the date of the patent and directing that the lands shall vest in the "heirs, assigns, devisees or other legal representatives of such deceased person according to the laws of the province," has no application where the death of the person named in the patent as the grantee took place before the territory in which the lands were situate was erected into a "province" of the Dominion. [Larence v. Larence, 21 Man. L.R. 145, approved.]

The King v. Larence, 10 D.L.R. 195, 15 Can. Ex. 145.

CANCELLATION OF PATENT—SCIRE FACIAS.

In an action in annulment of letters patent (scire facias) which requires, for its institution, the consent of the Attorney-General on cause being shewn, no ground can be alleged in the action unless it has been disclosed to the Attorney-General.

Laurentide Paper Co. v. Canada Iron Furnace Co., 9 D.L.R. 278.

PATENTS—FORFEITURE WHEN FRAUDULENTLY OBTAINED.

A Crown land patent may be declared void where, by reason of the grantee's misrepresentation, he succeeded in obtaining land previously granted to another, although the descriptions in the two patents were not identical.

Zock v. Clayton, 13 D.L.R. 502, 28 O.L.R. 447, reversing 6 D.L.R. 205, 3 O.W.N. 1161.

II. Of the provinces.

See also Waters, I A—5; Escheat.

Tidal waters as public lands of province, see Constitutional law, I G—140.

(§ II—20)—PRIORITIES—BONA FIDE PURCHASER—EXECUTION—SHERIFF'S DEED.

A sheriff's deed, in sale of a locatee's interest in unpatented lands, under execution, conveys no title as against the rights of a bona fide purchaser who acquired them of the locatee prior to the judgment; although the purchaser failed to record the deed with or notify the Department until after the execution was lodged therein, he is entitled, so long as the Crown had not cancelled the rights of the locatee and recognized the deed as his proper assignment, to have the sheriff's deed set aside, and to be declared the owner of the property subject to the rights of the Crown.

Hamilton v. Shaule, 29 D.L.R. 766, 35 O.L.R. 584.

PROVINCIAL GRANT FOR RAILWAY PURPOSES—SETTLEMENT ACT—COAL MINES ACT—LEASE — DETERMINATION OF RIGHTS — REMEDY—PETITION OF RIGHT—PARTIES —INTERVENTION OF ATTORNEY-GENERAL.

Esquimalt & Nanaimo R. Co. v. McLellan, 37 D.L.R. 803. [Affirmed in 44 D.L.R. 697, 26 B.C.R. 104.]

LICENSE TO CUT TIMBER—VALIDITY.

An agent of the Government has no authority to issue a license for the cutting of timber for the purpose of commerce on Crown lands unless the limits where the timber stands had been sold at public auction. A license granted contrary thereto is void. In a contestation of such license the contestant cannot set up nonpayment by the holder of the license of his annual fees, failure to register his title, and nonrenewal of his license. In order, under arts. 1600, 1601, R.S.Q. 1909, to constitute a sufficient title to authorize the licensee to seize timber cut in the limits in possession of a person who detains them without authority, it is necessary to prove a license which the law authorizes the agent of the Government to issue and not one which he has issued illegally.

Peterborough Realty Co. v. Ferland, 26 Que. K.B. 61.

TIMBER LEASE — SURRENDER — RENEWAL — LAND ACT—PRIORITIES—PRE-EMPTION.

The plaintiff's timber lease obtained in 1902, in accordance with s. 7 of the Land Act Amendment Act, 1901, in renewal of a lease obtained in 1888, held to be subject to Crown grants made in 1893 and 1894 to pre-emptors. [Brohm v. B.C. Mills Trading Co., 7 B.C.R. 123, not followed.] The doctrine of omnia præsumuntur rite acta should apply in its fullest extent in respect to the compliance with statutory conditions in the obtaining of Crown grants for purchase or pre-emption under the Land Act, and, though it may be shewn in a proper case that irregularity, error or deception have in fact led to the issuance of such a grant, yet before it can be attacked the Crown must be at least a party to the proceedings, and the issue will, in many cases, depend upon the attitude taken by the Crown.

North Pacific Lumber v. Sayward, 25 B.C.R. 322, [1918] 2 W.W.R. 771.

PRE-EMPTION—SALE — VALIDITY — "TRANSFER"—LAND ACT.

An agreement for sale of an undivided one-half interest in a pre-emption record, entered into prior to the issue of the Crown grant, comes within the definition of the word "transfer" in s. 159 of the Land Act (R.S.B.C.) 1911, c. 129, and is therefore absolutely null and void under the provisions of said section. [American-Abell Engine & Thresher Co. v. McMillan, 42 Can. S.C.R. 377, followed.]

Burns v. Johnson, 25 B.C.R. 35, [1918] 1 W.W.R. 180.

(§ II—21)—GRANT OR PATENT—AMBIGUITY.

A Crown grant of a named island may include surrounding marsh land by a reference therein to a plan and survey, and to documents indicating the nature and extent of the prior use and occupation of the land making it possible to determine its boundaries.

Bartlet v. Delaney, 17 D.L.R. 500, 29 O.L.R. 426, reversing 11 D.L.R. 584, 27 O.L.R. 594.

GRANT TO SOUTH AFRICAN VOLUNTEER—SALE OF.

Graham v. Graham, 16 D.L.R. 485, 27 W.L.R. 263.

PROVINCES — AGREEMENT TO SELL LAND — PRE-EMPTION.

Simpson v. Proestler, 13 D.L.R. 191, 25 W.L.R. 243, reversing 11 D.L.R. 145, 18 B.C.R. 68, 24 W.L.R. 303.

Where there is not enough land in a township to make out the lots as surveyed, the grantee from the Crown who first takes possession of a lot is entitled to all of the lands called for in his allotment, and a subsequent grant, the boundaries of which overlap those of the prior grant, must yield to the latter. A grant by the Crown of designated numbered lots in a township excludes the inference that such lots were included in a prior grant of a township to such grant and several others, where, in the earlier grant, the land was to be subsequently allotted or laid out to each grantee by a commission to be appointed by the Crown, and such lots were not allotted by them to such grantee. A "township grant" from the Crown to many grantees is valid although it does not specify the locality of the area to which each grantee is to be entitled, reliance being placed therefor on the Provincial allotment proceedings for the location and registering of the allotments. In a case of overlapping by a subsequent grant of part of the same land passed by an earlier grant, the constructive possession of the area is in the person who has the senior or better title. Where one acquires land from a person who obtained it from the Crown by a township grant made to several grantees although it did not specify the location or the area of the land to which each grantee was entitled, the locations being afterwards allotted them by commissioners appointed by the Crown for that purpose, no subsequent allotment will be permitted to disturb the prior allotment so made or the locations of land of which possession had been taken and held.

Boehner v. Hirtle, 6 D.L.R. 548, 11 E.L.R. 222, 46 N.S.R. 231.

GRANT OR PATENT.

Where a grant from the Crown containing no special clause in respect of the water power or the building of a mill, and expressly reserving to the Crown, "the free uses, passages and enjoyment of, in, over and upon all navigable waters that shall or may be hereafter found on or under or be flowing through or upon any part of the said parcel or tract of land hereby granted as aforesaid," the grantee's rights are limited by the terms of the patent and cannot be enlarged by the official correspondence and documents of the Crown Lands Department relating to the issuing of the

patent. [Wyatt v. Attorney-General of Quebec, [1911] A.C. 489, followed.]

Hunter v. Richard, 5 D.L.R. 116, 26 O.L.R. 458, 22 O.W.R. 408. [Affirmed 12 D.D.R. 503, 28 O.L.R. 267.]

PURCHASE OF LAND FROM PROVINCIAL GOVERNMENT—LIEN ON LAND CREATED BY PURCHASER—SUBSEQUENT TRANSFER OF PURCHASER'S INTEREST TO THIRD PARTY.

North-West Thresher Co. v. Bourdin, 20 Man. L.R. 505, 15 W.L.R. 181.

RIDEAU CANAL LANDS—ACTION TO ENFORCE, PAROL AGREEMENT — TITLE TO CANAL LANDS DELIMITED PRIOR TO CONFEDERATION.

Garland v. The King, 13 Can. Ex. 284.

GRANT OF CROWN LANDS TO RAILWAY COMPANY—PREVIOUS RESERVATION OF PORTION FOR SCHOOLS — "ALIENATION" — DECLARATION OF TRUST.

Attorney-General for British Columbia v. Esquimalt & Nanaimo R. Co. 19 W.L.R. 693.

(§ II—22)—RIGHTS OF LOCATEE—COLONIZATION LANDS IN QUEBEC.

Howard v. Stewart, 20 D.L.R. 991, 50 Can. S.C.R. 311, reversing 23 Que. K.B. 80.

(§ II—23)—CANCELLATION OF CROWN PATENT — ATTORNEY-GENERAL AS NECESSARY PARTY.

The High Court Division of the Ontario Supreme Court has jurisdiction under s. 6 of the Law Reform Act, 9 Edw. VII. c. 28, and s. 9 of the Judicature Act, R.S.O. 1897, c. 51, as amended by 3 Geo. V. c. 19, R.S.O. 1914, c. 56, to declare void a Crown land patent issued through fraud, error or improvidence, without the Attorney-General being a party to the action. [Farah v. Glen Lake Mining Co., 17 O.L.R. 1, followed.]

Zock v. Clayton, 13 D.L.R. 502, 28 O.L.R. 447, reversing 6 D.L.R. 205, 3 O.W.N. 1611.

(§ II—24) — CONFLICTING GRANTS FROM THE CROWN — RIPARIAN LANDS — AD MEDIUM FILUM.

In the province of Quebec, watercourses which are capable merely of floating loose logs (flottables à bûches perdues) are not dependencies of the "domaine public" under the designation of "navigable and floatable rivers and streams" within the meaning of art. 400 C.C. (Que.); consequently, the owners of the adjoining riparian lands under a Crown grant extending to the stream as a boundary are the proprietors of the banks and beds of such streams each ad medium filum, and, as such proprietors, are entitled to maintain an action to declare void the title of the holder of a subsequent Crown grant purporting to give title adversely to them to the water lots fronting the river banks at the locus in quo, and to restrain such holder from erecting works thereon for utilizing the water power.

Maclaren v. Attorney-General for Quebec, 15 D.L.R. 865, [1914] A.C. 258, 6 W.W.R. 62, 20 Rev. Leg. 248.

PUBLIC OFFICERS.

See Officers.

PUBLIC POLICY.

As affecting contracts, see Contracts, III.

PUBLIC SCHOOLS.

See Schools.

PUBLIC SERVICE CORPORATIONS.

See Carriers; Railways; Street Railways; Telegraphs; Telephones.

As to control by public utilities commission, see Railway Board.

PUBLIC UTILITIES COMMISSION.

JURISDICTION TO FIX WATER RATES AND REVISE SCHEDULES OF WATER COMPANIES.

The Board of Public Utility Commissioners in New Brunswick has jurisdiction over the water rates to be charged in the towns notwithstanding existing contracts for the supply of water to such towns, and where a company is not otherwise prevented from filing a new schedule of rates, it may do so on 30 days' notice to the Board and the Board may approve of such rates and order them to be effective or the public utility may itself make the application to fix the rate.

The King v. Board of Commissioners of Public Utilities; ex parte Town of Milltown, 47 D.L.R. 219.

POWERS AND JURISDICTION OF BOARD—ALTERATION OF CONTRACTS—5 GEO. V. 1915 (ALTA.) C. 6.

The powers and jurisdiction of the Public Utilities Board (Alta.) as laid down in 5 Geo. V. 1915 (Alta.), c. 6, do not give this Board the right to alter or set aside the terms of contracts except under certain conditions therein provided for.

Re Public Utilities Act; Edmonton v. Northern Alberta Natural Gas Development Co., 50 D.L.R. 506, [1920] 1 W.W.R. 31.

PUBLIC WORKS.

I. IN GENERAL; AUTHORITY FOR.
II. CONTRACTS.
III. ASSESSMENTS.
  A. In general.
  B. Nature and improvement.
  C. Property subject to; exemption.
  D. Procedure.
  E. Rules of appointment.
  F. Enforcement.
IV. DAMAGES.

Contracts for, see Municipal Corporations; Contracts.

Works for general advantage of Canada, see Railways; Railway Board.

Expropriation for, see Expropriation.

Liability for injury on, see Crown.

I. In general; authority for.

(§ I—10)—Contracts.

A person ordered by the Public Utilities Commission to execute certain work is entitled to be paid therefor only if he has complied with the terms of the order ordering such work done after his account, properly proved, has been approved by the Lieut.-Governor in council on the recommendation of the commission; and there is no right to payment for work done under orders of the commission (a) if such work has exceeded the scope of the order given, (b) if the value thereof has not been established by legal proof, (c) if the account has not been submitted to the Lieut.-Governor-in-council.

La Compagnie Electrique de Grandmère v. Public Utilities Commission, 6 D.L.R. 92, 22 Que. K.B. 25.

Public works — Contractor — Engineer —Salary—C.C. (Que.) arts. 1624, 1626.

A civil engineer employed, on a percentage basis, by a municipality to examine certain aqueduct works, to point out the streets in which the pipes should be laid, as well as the dimensions of such pipes, and who is employed by the contractor for such works to supply him with the quantity of materials necessary and to see to their delivery, has a right to claim a salary from such contractor, which, in the present case was fixed at 5 per cent of the value of the materials and the cost of their transport.

Hurtubise v. Giguère, 55 Que. S.C. 76.

II. Contracts.

See Contracts, Municipal Corporations.

III. Assessments.

B. Nature and improvement.

(§ III B—20)—Nature of improvement.

In the case of a general work benefiting the whole of a number of bodies or divisions of marsh, such as a dam, aboiteau, etc., there is nothing to prevent the selection by the proprietors of the whole area of a commissioner for the purpose of constructing or repairing such work, and the cost may be assessed directly upon the proprietors within the whole area, notwithstanding the authority for other purposes of the commissioners of the various bodies contained within such area. Where for a long period of years one of the proprietors of land lying within one or more of the bodies or divisions contained within such area, and his predecessors in title, have assented to this method of carrying on the work, and the work has been regarded as necessary for the protection of this particular area, such proprietor will not be permitted to contest his liability to pay the amount assessed upon him on the ground that other outside areas are also benefited and that they should have been included. The word "reclaim" as used in c. 80 of the Acts of 1893 extends to marsh lands that have been already dyked as well as to lands which have not yet been dyked. The Act repealing the County of Cumberland Sewers Act provided in respect to "any pending matter or thing" that "proceedings may be continued either under the Marsh Act (R.S. 1900, c. 66) or under the Act hereby repealed:"—Held, that the word "proceedings" where used was to be given the same meaning as in the Interpretation Act, R.S. 1900, c. 1, s. 15. The County of Cumberland Sewers Act of 1893, c. 80, s. 5, provided for the appointment by the commissioner "from among the proprietors of such lands" of one or more overseers. Held merely directory and that the commissioner would be justified in appointing as an overseer a person who was not a proprietor. A rate will not be set aside on account of a clerical error as to the amount, which can be corrected by the court on certiorari or otherwise. [Re Bishop's Dyke, 20 N.S.R. 263, distinguished.]

Corbett v. Pipes, 45 N.S.R. 243, 9 E.L.R. 127, 532.

IV. Damages.

See also Damages, Expropriation.

As to evidence of damages by, see Evidence.

Injury from changing and fixing grade of highway, see Highways.

(§ IV—65)—Municipal works of permanent nature — Expropriation—Damage to adjoining owner.

Where a municipality has by law the right to construct works of a permanent nature and obtain from a watercourse the necessary power to light a town, and to acquire by expropriation, land necessary for the completion of the works, it has no right to pay a yearly indemnity based on the value of the crop for damages caused by inundation of the land of an adjoining owner, but must expropriate the land and pay the indemnity in advance.

Fraserville v. Berube, 23 D.L.R. 751, 24 Que. K.B. 108.

Expropriation—Riparian rights — Flooding — Dam — Public work — Negligence.

Where there has been no expropriation by the Crown of any easement to flood the land of a riparian owner, the injury or damage suffered by the latter from flooding, as a result of the construction of a dam by the Crown, is not actionable under the provisions of the Expropriation Act. Nor is it actionable under ss. 19 or 20 of the Exchequer Court Act; the land being situate over 50 miles from the dam, cannot be regarded as "on a public work," and no evidence being adduced that the injury resulted from the negligence of an officer or servant of the Crown acting within the scope of his duties or employment.

Poisson v. The King, 41 D.L.R. 212, 17 Can. Ex. 371.

PUBLIC WHARF—SCOW ATTACHED TO — INJURY TO — DAMAGES — EXCHEQUER COURT ACT (R.S.C. 1906, c. 140.).

A scow lying beside and attached to a public wharf and being used in making repairs to that public work is engaged "on a public work," within the meaning of s. 20 (c) of the Exchequer Court Act (R.S.C. 1906, c. 140).

Generale D'Entreprises Publiques (Cie) v. The King, 44 D.L.R. 459, 57 Can. S.C.R. 527, reversing 32 D.L.R. 506.

CONSTRUCTION OF DYKE — PUBLICATION OF BY-LAW — DEFECTIVE NOTICE — ACTION FOR TRESPASS — BAR BY LACHES AND ACQUIESCENCE.

Delta v. Wilson, 17 W.L.R. 680.

INQUIRY ON PUBLIC WORKS—"PUBLIC WORKS HEALTH ACT"—CONSTRUCTION OF STATUTE—R.S.C. 1906, c. 135, s. 3—REGULATIONS BY ORDER-IN-COUNCIL — STATUTORY DUTY.

G.T.P.R. Co. v. White, 43 Can. S.C.R. 627, reversing Supreme Court of Alberta in White v. G.T.P.R. Co., 2 A.L.R. 522.

EXPROPRIATION OF LAND—COMPENSATION—TRANSCONTINENTAL RAILWAY COMMISSION—RAILWAY ACT.

The King v. Jones, 44 Can. S.C.R. 495.

TRENT CANAL — CONTRACT — MEANING OF WORD "CLAIM"—WAIVER.

Brown v. The King, 13 Can. Ex. 354.

SOULANGES CANAL—ACCIDENT TO WORKMEN — NEGLIGENCE — ELECTRIC LIGHTING SYSTEM.

Sabourin v. The King, 13 Can. Ex. 341.

WORK DEHORS CONTRACT—ACCEPTANCE BY CROWN—PAYMENT—FAIR VALUE.

The King v. Wallberg, 44 Can. S.C.R. 208.

CANALS—FATAL ACCIDENT TO WORKMAN AT A SWING BRIDGE—NEGLIGENCE—STATEMENT OF WITNESS BEFORE CORONER'S INQUEST—INADMISSIBILITY.

Johnson v. The King, 13 Can. Ex. 379.

PUNISHMENT.

See Criminal Law.

PURCHASE MONEY.

See Vendor and Purchaser; Sale.

QUALIFICATIONS.

Of voters, of candidates, see Elections.

QUALITY.

Warranty as to, see Sale.

QUANTUM MERUIT.

See Contracts; Damages; Master and Servant; Principal and Agent; Brokers.

QUARANTINE.

See Shipping, I—1.

QUASHING.

Of indictment, see Indictment, etc.
Of by-law, see Municipal Corporations.
Of convictions, see Summary Convictions; Certiorari; Criminal Law.

QUESTIONED DOCUMENTS.

Annotation.

Proof of handwriting—law relating to: 44 D.L.R. 170.

QUIETING TITLE.

See Cloud on Title; Land Titles; Vendor and Purchaser.

QUO WARRANTO.

I. NATURE OF PROCEEDING.
II. WHEN PROPER REMEDY.
A. In general.
B. To corporations.
C. As to office.
III. WHO ENTITLED TO MAINTAIN; LEAVE.
IV. PROCEDURE; RELIEF.

To contest office, see Officers, Elections, II C—65.

I. Nature of proceeding.

(§ I—1)—PRIVATE RELATOR—AUTHORITY OF JUDGE AT CHAMBERS.

An information in the nature of a quo warranto at the instance of a private relator is an "action" within the meaning of O. 52 of the Judicature Act, 1909, and a motion for a rule must be made to the court on previous notice to the parties affected thereby, and not by an ex parte application for a rule nisi. A Judge at Chambers has no power to grant an order nisi for an information in the nature of a quo warranto.

Ex parte Murchie; Re Levesque, 42 N.B. R. 541.

II. When proper remedy.

B. TO CORPORATIONS.

(§ II B—10)—OFFICERS OF CORPORATION.

A writ of quo warranto may issue against the president of a joint stock company, in the capacity of president, without joining that of director, because, having been elected by the directors in conformity with the law, if he continues to be a director he may be president.

Pineau v. St. Laurent, 25 Que. K.B. 210.

(§ II B—25)—MUNICIPAL CORPORATIONS—DISQUALIFICATION OF COUNCILLOR.

A municipal councillor who hires his horses for work on the public roads done by direction of and under the superintendence of an overseer appointed by the council, does not, ipso facto, incur forfeiture of his seat which must first be declared vacant in the manner provided by art. 207 Mun. Code. Until that is done a writ of quo warranto against him does not lie. A councillor who gratuitously lends his horses to an inspector of highways for work done under art. 405

Mun. Code violates no law and incurs no forfeiture.

Damon v. Lamy, 44 Que. S.C. 489.

C. As to office.

(§ II C—30)—After the close of a municipal nomination under the Manitoba Municipal Act, R.S.M. 1902, c. 116, and after having granted a poll to take the votes for the respective candidates, the returning officer is functus officio as to the nomination and has no jurisdiction on a succeeding day to withdraw the order for a polling of the votes or to declare one of the candidates elected on the ground of disqualification of his opponent as being already an office-holder of the same municipality; there has been no "election," either at the nomination or at the polls, which could be questioned by an election petition under the Manitoba Municipal Act and the proper method of contesting the right to the office which the candidate so declared elected had assumed to fill, is by quo warranto. [Re St. Vital Municipal Election; Tod v. Mager (Decision No. 1), 1 D.L.R. 565, 20 W.L.R. 537, affirmed, as to the right to proceed by quo warranto but on a different ground.] Under subs. (c) s. 217 of the Manitoba Municipal Act, providing that a municipal election may be questioned by an election petition on the ground that the person whose election is questioned was not duly elected by a majority of lawful votes and under s. 218 of the Act providing that any election shall not be questioned on any of the grounds mentioned in s. 217 except by petition, quo warranto will not lie to question a municipal election on that ground. When after two candidates for a municipal office are nominated, objection on the ground of disqualification is made to one of the candidates and the returning officer improperly gives effect to this objection and declares the other candidate elected without the votes being taken, the right to the office is properly tried upon an information in the nature of quo warranto.

Re Vital Municipal Election; Tod v. Mager, 1 D.L.R. 565, 20 W.L.R. 537, 22 Man. L.R. 136, 1 W.W.R. 350.

An allegation on information and belief in an affidavit filed by the relator in proceedings to contest an election, that the municipal councillor whose election is questioned is not a British subject either by birth or naturalization is not admissible under Con. R. 518 requiring affidavits to be confined to a statement of facts within the deponent's knowledge, the quo warranto motion not being an interlocutory one so as to warrant the admission of affidavits on information and belief.

R. ex rel. Froelich v. Woeller, 3 D.L.R. 281, 3 O.W.N. 838, 21 O.W.R. 672.

Ousting school commissioner from office —Inability to read or write.

Not only voters or ratepayers, but any interested party, may have a school commissioner, who is disqualified by reason of not being able to read or write, ousted from office by writ of quo warranto whether within or after the delays for contestation of election.

Desaulniers v. Desaulniers, 9 D.L.R. 201, 22 Que. K.B. 71, 19 Rev. de Jur. 352.

Municipal elections — Disqualification.

R. ex rel. Gardhouse v. Irwin, 10 D.L.R. 844, 4 O.W.N. 1043, 1097, 24 O.W.R. 466.

Ineligibility—Incapacity not waived by failure to contest.

Where a statute enacts that certain persons only are eligible for office, it also means that persons who are not capable are not eligible of holding such office, and the fact that their election has not been contested does not deprive interested parties from taking quo warranto proceedings and this whether such incapacity be a statutory or common law incapacity.

Desaulniers v. Desaulniers, 9 D.L.R. 201, 22 Que. K.B. 71, 19 Rev. de Jur. 352.

Quo warranto—Municipal councillor—Lack of qualification—Withdrawal of respondent and offer to pay costs—Right of applicant to proceed to judgment—C.C.P., arts. 982, 990, C. mun., arts. 227, 228.

The applicant, in quo warranto proceedings, with the object of excluding from a public office a person who holds it illegally, has the right to proceed to judgment on the merits of his application, although the respondent has withdrawn from his office. He is not bound to give up this procedure on account of offers, followed by the deposit in the clerk's office of a certificate of the withdrawal of the respondent and of the amount of the costs thus far incurred in the action.

Parent v. Lavoie, 55 Que. S.C. 437.

Sheriff — Resignation — Expenses — C.C.P., arts. 77, 987, 990, 1549.

When a writ of "quo warranto" is issued against a sheriff holding and exercising his position illegally, and when the latter resigns immediately, his resignation being accepted by the municipal council, and where he tenders and deposits the expenses of proceedings taken against him; the plaintiff no longer has an interest to proceed. If he persists, his action will be maintained only until the expenses deposited have been exhausted and will be rejected for the surplus, with costs of settling the accounts of the defense, inclusively.

Brosseau v. Latraverse, 25 Rev. Leg. 231.

Dispossessing municipal officers — Aldermen — Inscription en droit — Exception to form.

The right to demand by "quo warranto" that an alderman or municipal councillor who usurps that position may be dispossessed of it is a right which pertains to every municipal elector, and it is not necessary that the municipal elector who demands this dispossession for want of electoral status should proceed in the ordinary way for contesting the municipal election.

In any case this ground raised by inscription en droit should have been by exception to the form. It is not permissible to proceed by petition accompanying a writ of "quo warranto" in order to demand that an election be set aside and another person declared elected in the place and stead of one who is charged with usurping the position.

Latour v. Lefebvre, 47 Que. S.C. 261.

DISQUALIFICATION OF ALDERMAN—INTEREST IN CONTRACT — LESSEE OF MARKET STALL.

The city of Moncton Incorporation Act, 53 Vict. c. 60, s. 6, provides that no person shall be qualified to act as alderman "who has any interest in any contract made with the council," and where an alderman of the city was shewn to be a member of a firm occupying a market stall owned by the city and holding a butcher's license from the city, which license could be cancelled by the city council for violation of the market by-laws, the court granted a writ of quo warranto calling on the alderman to shew by what authority he exercised his office.

Ex parte Gallagher; Re Fryers, 41 N.B. R. 545.

ELECTION OF SCHOOL COMMISSIONER—CONTESTATION OF ELECTION.

It is not a case for a quo warranto against the election of a school commissioner when the reasons alleged in the petition have nothing to say regarding the qualification of the candidate elected, to his permanent, temporary, or relative incapacity, or to his ineligibility, but are simply illegal and fraudulent acts committed by partisans and by the presiding officer of the election even though these acts are sufficient to have the election annulled on a contestation, in virtue of the school code.

Lorrain v. Laviolette, 46 Que. S.C. 316.

CONTESTING MUNICIPAL ELECTION — PARTIES.

It is not illegal to join several defendants in the one proceeding for a writ of quo warranto when the complaints alleged against them are identical and based upon the same acts. Although an election of councillors held under the Mun. Code cannot be contested by way of quo warranto, this remedy is nevertheless well founded if the plaintiff allege facts which tend to shew that there was in fact no election at all.

Olivier v. Roger, 52 Que. S.C. 86. [Affirmed 53 Que. S.C. 136.]

AGAINST SCHOOL COMMISSION.

Quo warranto will not lie against a school commissioner on account of fraudulent misconduct in office.

Carriere v. Perrault, 51 Que. S.C. 237.

To constitute a contract between a municipal corporation and a councillor there must be a mutual obligation. Such does not exist in the case where a mayor, for pay, supervises the construction of works ordered by the corporation but executed and paid for by the Colonization Department of the Province. Assuming that the mayor is disqualified in such a case a writ of quo warranto issued against him will be quashed if at the time it is issued the contract had ceased to exist.

Carignan v. Neault, 14 Que. P.R. 14.

QUO WARRANTO — MUNICIPAL COUNCILOR — VALUATION ROLL—ELECTORAL QUALIFICATION—TESTIMONIAL PROOF—C. MUN., ART. 228.

By art. 228, C. Mun. Code, it is the land valuation as shown on the municipal valuation roll in force which determines the electoral qualification required for members of the council. No testimonial proof can be admitted to establish that the true value of immovables constituting the landed qualification of a councilor is greater than that carried on the valuation roll.

Parent v. Bouffard, 56 Que. S.C. 410.

III. Who entitled to maintain; leave.

(§ III—37)—LEAVE.

A motion for leave to file an information in the nature of a quo warranto against a stipendiary magistrate on the ground that he had not taken the oath of allegiance will be dismissed if the oath of allegiance has been since taken by him, although he had acted as a magistrate in the meantime; and the motion is properly refused without considering whether or not the oath is essential.

The King v. MacKay, 1 D.L.R. 481, 19 Can. Cr. Cas. 229, 45 N.S.R. 501.

LEAVE—EXTENSION OF TIME.

R. ex rel. Band v. McVeity, 16 D.L.R. 874, 6 O.W.N. 105.

IV. Procedure, relief.

(§ IV—40)—PROCEDURE — QUESTIONS OF LAW.

A question of law may be dealt with upon the merits, whatever be the name of the proceedings which raised it, provided that such procedure offers nothing incompatible with the one which should have been followed.

Olivier v. Roger, 52 Que. S.C. 86. [Affirmed 53 Que. S.C. 136.]

(§ IV—41)—ALLEGATIONS—PLEADING.

Under Consolidated Municipal Act, 3 Edw. VII. (Ont.) c. 19, s. 220, providing that in proceedings to contest the election of certain municipal officers, upon the relator shewing by affidavit reasonable ground for supposing that the election was not legal, etc., the judge shall authorize the relator upon entering into a sufficient recognizance to serve a notice of motion to determine the matter and under s. 222 of the Act requiring the relator before serving the notice to file all the material upon which he intends to rely, an application upon the hearing of the motion to file such recognizance is too late. Under s. 220, proceedings may be instituted if within six weeks after the election or one month after acceptance of office by the person elected, the relator shews reasonable ground for suspicion that the election was not legal, etc. The applica-

tion of the relator is too late if made more than six weeks after the election and more than a month after the acceptance of the office. [R. ex rel. Telfer v. Allan, 1 P.R. (Ont.) 214, applied.]

R. ex rel. Froelich v. Woeller, 3 D.L.R. 281, 3 O.W.N. 838, 21 O.W.R. 672.

PROCEDURE — PRELIMINARY OBJECTIONS — FAILURE TO ENTITLE NOTICE OF MOTION — REFERENCE TO WRONG STATUTE — NON-PAYMENT OF TAXES AS GROUND FOR AVOIDING ELECTION.

R. v. George, 7 D.L.R. 879, 1 W.W.R. 1094.

APPLICATION FOR WRIT — RIGHT TO PROCEED, HOW LIMITED — ART. 987 C.P.Q.

On a mere application for a writ of quo warranto the parties will not be permitted to proceed to proof pro and con of the facts alleged.

Robillard v. Racette, 15 Que. P.R. 86.

SERVICE OF WRIT — PLEADING — IRREGULARITIES.

C.C.P. does not order the particularized petition required for obtaining a prerogative writ, such as a quo warranto, to be served on the opposite party; a fortiori the latter cannot be allowed to answer the petition in writing nor urge irregularities. When in doubt, the judge should order a prerogative writ to be issued.

Maillet v. Dubeau, 19 Que. P.R. 50.

QUO WARRANTO PROCEEDINGS — DEATH OF RELATOR — PROCEEDINGS AT AN END.

R. ex rel. Warner v. Skelton, 3 O.W.N. 175, 20 O.W.R. 240.

REMOVAL OF PUBLIC FUNCTIONARIES — ABUSE IN EXERCISE OF PUBLIC OFFICE.

Recourse may be had by an action quo warranto for the removal of a public functionary, not only in the case of usurpation, but also for abusive exercise of the public office which he holds.

Martineau v. Debien, 20 Que. K.B. 512.

RAILWAY ACT.

See Railways.

RAILWAY BOARD.

I. IN GENERAL.
II. JURISDICTION.

I. In general.

See also Railways.

(§ I—1)—BRIDGE—TRAFFIC—RAILWAY AND HIGHWAY—AGREEMENT—PROTECTION.

Under an agreement with the Provincial Government of Saskatchewan, a railway bridge was erected by the respondent company over the North Saskatchewan river, with a 12 foot roadway on each side clear of the railway track, and separated from it by a fence admitted to be safe and satisfactory for the purpose. There was no provision in the agreement for protection to vehicular traffic from trains passing over the bridge. The Board refused an application by an adjoining municipality for an order, that the respondent should provide gates and watchmen at both ends of the bridge to warn the public against approaching trains, holding that the necessity for such protection was incidental to the use of the bridge as a highway.

Buckland v. C.N.R. Co., 23 Can. Ry. Cas. 13.

HIGHWAY — CLOSED — PEDESTRIAN AND VEHICULAR SUBWAY — GRADE SEPARATION — APPORTIONMENT OF COSTS — CONSTRUCTION — RAILWAY GRADE CROSSING FUND.

A municipality and a railway company by agreement (ratified by by-law) closed a portion of a highway, except for foot traffic. More than 10 years after the highway was closed the municipality, alleging an improvident bargain, applied to the Board for an order requiring the respondent to construct a vehicular and pedestrian subway under the railway at the closed portion of the highway. The Board ordered the railway company to contribute 60 per cent of the cost of the pedestrian subway, after allowing a 20 per cent contribution out of the Railway Grade Crossing Fund, but held that as to vehicular traffic the agreement must stand and that if the city wished to construct a vehicular subway, the contribution of the respondent should not be increased.

Brantford and South Dumfries v. G.T.R. Co., 23 Can. Ry. Cas. 7.

CONNECTION — TRAFFIC — INTERCHANGE — EXPENSE.

An interchange track between the lines of the C.P.R. Co. and a branch line of the G.T.P.R. Co. was ordered by the Board to be constructed at Forrest, 10 miles from Brandon, at the expense of the G.T.P.R. Co. in order to give Brandon a connection with the latter railway.

Brandon Shippers v. C.P.R. and G.T.P.R. Cos., 23 Can. Ry. Cas. 28.

TRAFFIC — INTERCHANGE — INTERSWITCHING — FACILITIES — PUBLIC INTEREST — APPORTIONMENT OF COST — RAILWAY ACT, S. 228.

The Board under s. 228 of the Railway Act, 1906, grants, to any person or persons interested, interchange tracks and interswitching facilities, not for the purpose of benefiting one railway company at the expense of another, but solely in the public interest, the cost of providing such facilities to be borne by the applicant industry, and the railway company to whose tracks access is desired. [G.T.R. Co. v. C.P.R. Co. and London (London Interswitching Case), 6 Can. Ry. Cas. 327, at p. 331, followed.]

Gillies Bros. v. G.T.R. Co. and C.P.R. Co., 18 Can. Ry. Cas. 44.

SIDINGS — RIGHT-OF-WAY — LOCATION — JURISDICTION — APPROVAL — HIGHWAY CROSSED BY RAILWAY — TRAFFIC — ADEQUATE AND SUITABLE ACCOMMODATION.

Subject to the jurisdiction of the Board

in respect of adequate and suitable accommodation for traffic, the railway company may, after the route map has been approved, locate its tracks upon its own right-of-way without approval from the Board as to the location of these tracks, except where highways are crossed.

Re Great Northern R. Co. Sidings, 23 Can. Ry. Cas. 5.

(§ I—3)—SHIPPERS — PRIVILEGES — MILLING, MALTING, STORAGE AND CLEANING IN TRANSIT—TOLLS—UNJUST DISCRIMINATION.

Milling, malting, storage and cleaning in transit are privileges accorded to shippers by the carriers in the sense that the Board cannot order them, except to prevent discrimination, but they become enforceable rights when set out in tariffs under which shipments are made.

United Grain Growers v. Canadian Freight Assn. (Milling in Transit Case.), 24 Can. Ry. Cas. 128.

(§ I—4) — SIDINGS — RIGHT-OF-WAY — REMOVAL — RELOCATION — LEAVE — INDUSTRIES—FACILITIES—C.L.

When industries have become dependent upon C.L. facilities afforded by a particular track (other than a team track) located wholly on the railway right-of-way, such track should not be removed or relocated, if the parties do not agree, without leave of the Board.

Re Great Northern R. Co., Sidings, 23 Can. Ry. Cas. 5.

(§ I—6)—STATIONS—AGENTS.

The Board allowed the agents at 6 stations to be dispensed with and refused the application in the case of 6 others.

Re Quebec, Montreal & Southern R. Co., 24 Can. Ry. Cas. 229.

(§ I—7)—ICE CREAM CONES—CLASSIFICATION—RATING—C.L.—THIRD CLASS.

Ice cream cones should be given a C.L. rating of third class with a minimum of 16,000 lbs.

Canadian Manufacturers Assn. v. Canadian Freight Assn., 23 Can. Ry. Cas. 48.

(§ I—8)—TRAIN SERVICE—COSTS OF OPERATION — EARNINGS — TRAFFIC — LIMITED SERVICE.

Where the costs of operation between 2 points are much higher than the earnings the Board will limit the train service to a movement of traffic not more than once a week.

New Westminister Board of Trade v. Great Northern R. Co., 23 Can. Ry. Cas. 58.

CAR SERVICE — TRAFFIC — EARNINGS — UNREMUNERATIVE — OPERATING COSTS.

Where, after a thorough test of the extra car service ordered by the Board, the earnings on the express traffic from the points in question are unremunerative, being less than the operating costs, the Board directed that the service be discontinued.

Jordan Co-operative Co. and Fruit Growers' Assn. v. Canadian Express Co., 23 Can. Ry. Cas. 55.

(§ I—9)—CONTRACTUAL RIGHTS — BREACH —TRANSFER COMPANIES.

Where no public interest is involved, and no inconvenience results to the public by the operations at a railway station of 2 transfer companies, the Board will not interfere between them on the mere question of their contractual rights, which should be decided in the regular courts. Complaint of breaches of contract to which the applicant and respondent are parties. [Twin City Transfer Co. v. C.P.R. Co., 15 Can. Ry. Cas. 323, distinguished.]

City Transfer Co. v. C.N.R., 19 Can. Ry. Cas. 427.

II. Jurisdiction.

(§ II A—14)—SPURS — CONSTRUCTION — OWNERSHIP — AGREEMENT — RAILWAY ACT, S. 222.

A spur line constructed under s. 222 of the Railway Act, 1906, does not become part of the railway from whose line it is built under the provisions of an agreement with the owner providing that the railway company furnish the rails, ties and fastenings, which remain their property, and the owner provides the right-of-way, even if no reference is made to such agreement in the Board's order authorizing the construction of the spur, and the Board has no jurisdiction to authorize an adjoining owner to use such spur. [Blackwoods & Manitoba, etc., Co. v. C.N.R. Co., 44 Can. S.C.R. 92, 12 Can. Ry. Cas. 45; Clover Bar Coal Co. v. Humberstone, G.T.P.R. etc., Cos., 45 Can. S.C.R. 346, 13 Can. Ry. Cas. 162; Boland v. G.T.R. Co., 21 D.L.R. 531, 18 Can. Ry. Cas. 60; Kammerer v. C.P.R. Co., 21 Can. Ry. Cas. 74, followed.]

Beverly Coal Mine & Humberstone Coal Cos. v. G.T.P.R. Co., 44 D.L.R. 364, 23 Can. Ry. Cas. 64.

ORDERS — ON TERMS AND DECLARATORY — STATUS.

The Board has jurisdiction to make an order upon terms, but not to issue a declaratory order as to the status of the applicant or respondent.

Port Hope Telephone Co. v. Bell Telephone Co., 20 D.L.R. 778, 17 Can. Ry. Cas. 343.

TOLLS—LONG DISTANCE SYSTEM—COMPENSATION—JUST AND EXPEDIENT— 7 & 8 EDW. VII. c. 61, ss. 4 (5, 6), 5.

The scope of the Board's jurisdiction, under s. 5, being concerned with tolls, it is given power, under s. 4 (5, 6), to order one company, subject to its jurisdiction, to afford to another, whether subject to its jurisdiction or not, the use of a long distance system upon such terms as to compensation as it deems just and expedient.

Port Hope Telephone Co. v. Bell Telephone Co., 20 D.L.R. 778, 17 Can. Ry. Cas. 343.

TRAFFIC—ACCOMMODATION AND FACILITIES —COMPETITION — PREVENTION — RAILWAY ACT, ss. 2 (21), 284, 317.

The Board under ss. 2 (21), 284, 317, has jurisdiction to direct the respondent to maintain its dock at Michipicoten harbour and provide facilities thereat for receiving, loading, carrying, unloading and delivering traffic of the applicant in competition with traffic of the respondent. [Canadian Northern Ry. Co. v. Robinson & Son, 37 Can. S.C.R. 541, 6 Can. Ry. Cas. 101, followed.]

Dominion Transportation Co. v. Algoma Central & Hudson Bay R. Co., 20 D.L.R. 886, 17 Can. Ry. Cas. 422.

(§ II—15)—HIGHWAYS CROSSED BY RAILWAY—CLOSED—AGREEMENT — BY-LAWS —LANDOWNERS—ADJACENT—ABUTTING —COMPENSATION—7 & 8 EDW. VII. c. 62 (C) s. 4—1 & 2 GEO. V. c. 22 (C), s. 6—RAILWAY ACT, ss. 13, 29, 60, 235.

Where streets are crossed by the construction of a railway after an agreement is entered into with the municipality specifying the manner in which such crossings are to be made, providing that by-laws are to be passed to close portions of certain streets, and for the payment of compensation by the railway company, and an order of the Board is obtained granting permission to cross the streets upon the conditions of such agreement and providing that the railway company be responsible for any compensation which property owners affected (i.e., landowners adjacent or abutting on the streets) may be legally entitled to recover under the Railway Act and the Municipal Act, and such compensation is withheld or refused to be made by the railway company, the Board has jurisdiction to determine it or refer the matter either to a member of the Board under s. 13, amended by 7 & 8 Edw. VII. c. 62 (Can.), s. 4, or to a person appointed by the Board under s. 60 for inquiry and report, and the previous order of the Board granting permission to carry the railway across the streets should be amended accordingly. Subsequently a by-law was passed, closing the portions of such streets and an amending order became unnecessary. [See ss. 29, 235, amended by 1 & 2 Geo. V. c. 22, s. 6; Holditch v. Canadian Northern Ontario R. Co., [1916] 1 A.C. 536, at p. 543, 20 Can. Ry. Cas. 101; Brant v. C.P.R. Co., 36 O.L.R. 619, 20 Can. Ry. Cas. 268, followed.]

North Bay Landowners v. Canadian Northern Ontario R. Co., 23 Can. Ry. Cas. 35, reversing 18 Can. Ry. Cas. 309.

JURISDICTION — POWER WIRES CROSSED BY HIGHWAY.

Under s. 247 of the Railway Act the Board has no jurisdiction to authorize a highway to be constructed under the wires of a power company.

Coleman v. Toronto & Niagara Power Co., 20 Can. Ry. Cas. 258.

JURISDICTION—COMPENSATION FOR INJURIOUS AFFECTION—RAILWAY ON HIGHWAY —RELEASE.

The Board has no jurisdiction to grant damages for lands injuriously affected by the construction of a railway on a highway where the applicant has signed an agreement releasing the railway company from such claims. Such a release must stand until set aside by a court of competent jurisdiction.

Remy v. Lake Erie & Northern R., 20 Can. Ry. Cas. 207.

RAILWAY ON HIGHWAY—LANDS INJURIOUSLY AFFECTED—DAMAGES.

Damages have never yet been allowed by the Board to an adjoining land owner for the construction of an electric railway along a highway. The Board dismissed the claim of the applicant for damages under s. 235 of the Railway Act, 1906, alleging that his lands had been injuriously affected by the construction of an electric railway on the highway made 2 years after the work was finished.

Griffin v. Toronto Eastern R. Co., 20 Can. Ry. Cas. 210.

JURISDICTION—WATER GATE—CULVERT.

The Board has no jurisdiction under ss. 26 (2) or 26 (a) of the Railway Act, 1906, to make an order directing the respondent to construct a water gate at the culvert on its right of way to protect the applicants from being flooded.

Trites v. C.P.R. Co., 21 Can. Ry. Cas. 1.

EASEMENT — COMPENSATION — CROSSINGS —OVERHEAD AND UNDERGROUND WIRES.

The practice of the Board has been to allow the right of way of railway companies to be crossed by the construction overhead or underground of lines of wires or waterpipes and other pipes without compensation, the Board's order merely creates an easement which can be cancelled or varied as occasion may require from time to time.

Maritime Telegraph & Telephone Co. v. Dominion Altantic R. Co. and Baird v. C.P.R. Co., 20 Can. Ry. Cas. 213.

POWERS OF THE RAILWAY BOARD—HIGHWAY —CONSTRUCTION — CROWN — PREROGATIVE RIGHT TO GRANT SPECIAL LEAVE TO APPEAL.

C.P.R. v. Toronto, [1911] A.C. 461, 12 Can. Ry. Cas. 378, affirming 42 Can. S.C.R. 613, (Viaduct Case), and 10 O.W.R. 483 (Yonge Street Bridge Case).

(§ II—20) — MUNICIPAL IMPROVEMENT — GRADES—DOMINION FRANCHISES — APPORTIONMENT OF COST.

The jurisdiction of the Board is confined in cases of separation of grades to the public interest in so far as Dominion franchises are concerned and the proper administration of them by Dominion railway companies. It is not the business of the Board to decide an issue of municipal expediency, whether or not municipalities should make certain improvements in cases where the whole cost will be on the municipality.

Winnipeg v. C.P.R. Co., 28 D.L.R. 381, 18 Can. Ry. Cas. 317.

GRADE CROSSINGS — ELIMINATION — CLOSING HIGHWAY.

The Board is empowered by the Railway Act, 1906, s. 238, as amended by 8 & 9 Edw. VII, c. 32, s. 5, to act upon its own motion to facilitate the elimination or diminishing of grade crossings; and for this purpose authority is conferred upon the Board to order that part of a highway be closed or to require the proper municipal authority to close it. [Parkdale v. West, 12 App. Cas. 602, distinguished.]

Brant v. C.P.R. Co., 30 D.L.R. 782, 36 O.L.R. 619, 20 Can. Ry. Cas. 268.

(§ II—25)—JURISDICTION—PUBLIC SAFETY —MUNICIPALITIES—GATES AND WATCHMEN—RAILWAYS—DOMINION AND PROVINCIAL — APPORTIONMENT OF COST — RAILWAY GRADE CROSSING FUND—RAILWAY ACT, SS. 8, 59, 227, 237, 238.

Under ss. 8, 59, 227, 237, 238, of the Railway Act 1906, the Board has jurisdiction, in the interest of public safety, to order that a railway crossing of a highway should be protected or that the grades be separated, and to apportion the cost between Dominion and provincial railway companies and municipalities interested in the works ordered. Where the Board ordered a separation of grades and made a contribution from the grade crossing fund, the remainder of the cost was apportioned between the parties interested. [Re C.P.R. Co. and York, 25 A.R. (Ont.) 65, 1 Can. Ry. Cas. 47; Toronto v. G.T.R. Co., 37 Can. S.C.R. 232, 5 Can. Ry. Cas. 138; C.P. R. Co. v. Toronto, 7 Can. Ry. Cas. 274; Toronto v. C.P.R. Co., [1908] A.C. 54, 7 Can. Ry. Cas. 282, followed.]

Hamilton Street R. Co. v. G.T.R. Co., 17 Can. Ry. Cas. 393.

JURISDICTION—SPECIFIC TIME—PUBLIC INTEREST—RAILWAY ACT, SS. 30, 268, 270, 307.

The Board has no jurisdiction under the Railway Act, 1906 (ss. 30, 268, 270, 307), to prevent the use by railway companies of any specific time, unless such use is shewn to be against the comfort, convenience and safety of the traveling public and railway employees. The Daylight Saving Act, 1918, according to the ordinary canons of construction remains in force until repealed. Parliament having stated its intention that the operation of the Daylight Saving Act should not extend beyond the year 1918, it is inadvisable that the Board should under all the circumstances take any action under it. The Board is both a judicial and administrative body, its jurisdiction is largely discretionary and in some instances legislative in its character.

Re Daylight Saving Act, 1918, 24 Can. Ry. Cas. 199.

PROTECTION OF CROSSINGS — APPORTIONMENT OF COSTS.

The Board, in ordering the elimination of a level crossing and the substitution of a subway therefor, for purposes of public safety, has jurisdiction under the Railway Act, 1906, to direct a portion of the cost to be borne by a street railway company benefited or affected by such order. The power of the Board to make such order is not affected by an existing agreement whereby the company obtained rights to lay tracks.

Toronto R. Co. v. Toronto and C.P.R. Co., 30 D.L.R. 86, 53 Can. S.C.R. 222, 20 Can. Ry. Cas. 280.

(§ II—30) — PUBLIC NUISANCE — STOCK PENS — JURISDICTION — RAILWAY ACT, SS. 26 (2), 284.

The Board has no jurisdiction, under ss. 26 (2), 284 of the Railway Act, 1906, or otherwise, to direct the removal, as a public nuisance, of a stock pen on the railway.

Bessette v. C.P.R. Co., 24 Can. Ry. Cas. 113.

(§ II—35) — TELEPHONE RATES — USE OF LONG DISTANCE LINES.

The Board has power under the Railway Act, 1906, to authorize an additional toll to the established rates of a telephone company for the use of its long distance lines; to order compensation for loss in local exchange business occasioned by giving independent companies long distance connection; to authorize payment of a special rate by competing companies obtaining long distance connection, though not subjecting noncompeting companies to a like toll.

Ingersoll Telephone Co. v. Bell Telephone Co., 31 D.L.R. 49, 53 Can. S.C.R. 583, 22 Can. Ry. Cas. 135; affirming 17 Can. Ry. Cas. 266.

JURISDICTION—TELEPHONES—COST OF INSTALLATION AND MAINTENANCE—RAILWAY ACT, S. 245.

Under s. 245 of the Railway Act, 1906, the Board has no jurisdiction to direct railway companies to bear the cost of installation and maintenance of telephones in their stations, but it has jurisdiction to direct them to permit municipalities or corporations carrying on a telephone business to instal instruments without charge to the railway companies in their stations. [Peoples & Caledon Telephone Cos. v. G.T. & C.P.R. Cos., 9 Can. Ry. Cas. 161; Province of Manitoba v. C.P.R. Co., 21 Can. Ry. Cas. 445, followed.]

Alberta United Farmers v. C.P.R. Co., 23 Can. Ry. Cas. 104.

(§ II—40)—JURISDICTION — QUESTION OF LAW—CONNECTIONS AND SWITCHES—RAILWAY ACT, SS. 176-228.

The Board has no jurisdiction to authorize a railway company operating under a provincial law to take and use the lands and trade of a Dominion Railway company and to maintain and operate the necessary switches, but crossings may be authorized and protection thereof ordered at the ex-

pense of the applicant provincial company where it is the junior road.

St. John & Quebec R. Co. v. C.P.R. Co., 20 D.L.R. 914, 17 Can. Ry. Cas. 334.

JURISDICTION — RIGHT OF WAY — SUBDIVISION LANDS—COMPENSATION.

Under the Railway Act, 1906, it is from an order of the Board that a railway company must get power to take their line along or across the streets laid out in a subdivision; and the awarding of compensation to adjacent or abutting landowners, or the direction of alterations of levels or other works, in order to prevent injury to them, rests with the Board.

Holditch v. Canadian Northern Ontario R. Co., 27 D.L.R. 14, [1916] 1 A. C. 536, 114 L.T. 475, affirming 20 D.L.R. 557, 50 Can. S.C.R. 265.

JURISDICTION—PLACING CARS—FACILITIES.

The Board has no jurisdiction to order a carrier to place cars for receipt of traffic at points on its railway other than the point of starting, points of junction with other railways, and established stopping places.

Kammerer v. C.P.R. Co., 21 Can. Ry. Cas. 74.

JURISDICTION — ENFORCEMENT OF AGREEMENT—TRAIN SERVICE—GENERAL ADVANTAGE OF CANADA.

The Dominion Act (8 & 9 Edw. VII. c. 32), declaring the railway company's undertaking to be a work for the general advantage of Canada, does not discharge its covenant to maintain a railway service sufficient and adequate for the requirements of traffic under an agreement with the Crown as represented by the Province of Nova Scotia or discharge or affect the rights of the province to enforce it. The Board has jurisdiction under s. 26A to entertain a summary application by the province to enforce the agreement, or in the alternative the province may bring an action in the Provincial Courts.

North Queens Board of Trade v. Halifax & South Western R. Co., 20 Can. Ry. Cas. 187.

JURISDICTION — TOLLS — DIVISION — LAKE AND RAIL.

The Board has no jurisdiction over the tolls charged or the division demanded by the different steamship companies operating boats on the St. Lawrence or Great Lakes, except that under s. 333 (3) of the Railway Act, 1906, it has jurisdiction over the tolls on the steamships owned, operated and used by the respondent C.P.R. Co.

Boards of Trade of Montreal and Toronto & Canadian Manufacturers' Assn. v. Canadian Freight Assn., 21 Can. Ry. Cas. 77.

REHEARING—NEW EVIDENCE—MATERIAL ISSUE.

The Board will not reconsider its former decision unless doubt has arisen in the minds of the Board as to the correctness of the first conclusion by reason of new matter advanced on an application to reopen or otherwise as to the soundness of the first conclusion, or when new evidence on a material issue can be presented.

American Coal & Coke Co. v. Michigan Central R. Co., 21 Can. Ry. Cas. 15.

TOLLS—ROAD OPEN FOR TRAFFIC.

The Board has no jurisdiction over carriers, so far as traffic is concerned, until proper application is made to open for traffic under s. 261 (2) of the Railway Act, 1906, although it may well be that in the public interest some provision should be made in connection with transportation tolls, even before the railway has passed the construction period. [Baker, Reynolds & Co. v. C.P.R. Co., 10 Can. Ry. Cas. 151; Randall v. C.P.R. Co., 17 Can. Ry. Cas. 252; Riverside Lumber Co v. C.P.R. Co., 18 Can. Ry. Cas. 17, followed.]

Re Edmonton, Dunvegan & B.C.R. Co., 19 Can. Ry. Cas. 395.

TOLLS — REPUBLICATION — REPARATION REFUND—JURISDICTION.

The Board has no jurisdiction to order republication of tariffs of tolls for reparation purposes only, but it has jurisdiction to declare tolls charged since to certain dates are excessive to the extent that they exceed the tolls in effect prior thereto and a refund may be ordered upon the respondents so undertaking.

Imperial Munitions Board v. C.P.R. Co., 24 Can. Ry. Cas. 169.

CARRIERS — DISCRETION — JURISDICTION —PUBLIC INTEREST — TOLLS—REASONABLE—BASIS—LOW.

The jurisdiction of the Board as to tolls concerns only their reasonableness; no matter how much the development of an industry may be in the public interest, the Board is not authorized to be an arbiter of industrial or public policy and cannot strike a low toll basis, independent of its reasonableness, but carriers may in their discretion install development tolls. [B.C. News Co. v. Express Traffic Assn., 13 Can. Ry. Cas. 178; Massiah v. C.P.R. Co., 17 Can. Ry. Cas. 88, at p. 90; Western Retail Lumbermen's Ass'n v. C.P.R., C.N.R. and G.T.P.R. Cos., 20 Can. Ry. Cas. 155, at p. 158, followed.]

Crushed Stone Co. v. G.T.R. Co., 23 Can. Ry. Cas. 132.

JURISDICTION—TRAFFIC AGREEMENT — CONDITIONS—DISPENSED—RAILWAY ACT, S. 364 (2, 3).

The Board has no jurisdiction under s. 364 (3) of the Railway Act, 1906, to dispense with the sanction of the Governor-in-Council required by s. 364 (2), but can only recommend for such sanction a traffic agreement, properly brought before it, of which it approves. The Board has jurisdiction to dispense with conditions as to consent of shareholders, advertising in local papers and other conditions as to

procedure in bringing the matter properly before the Board.

Re Grand Trunk and Quebec, Montreal & Southern R. Cos., 23 Can. Ry. Cas. 101.

JURISDICTION — AGREEMENTS — LEGISLATION — APPROVAL — TOLLS — JUST AND REASONABLE — TRANSPORTATION —COSTS—INCREASE.

Agreements between municipalities and a railway company do not oust the jurisdiction of the Dominion Parliament and the Board in their administration of the Railway Act and in the fixing of tolls. Inasmuch as the agreements in question have not been validated by legislation and submitted to or approved by the Board, and in view of the greatly increased costs of transportation, the Board finds the increased tolls desired by the applicant to be just and reasonable. [Re Increase in Passenger & Freight Tolls (Increase in Rate Case), 22 Can. Ry. Cas. 49, Lyons Fuel & Supply Co. v. Algoma Central R. Co., 23 Can. Ry. Cas. 146, followed.]

Montreal & Southern Counties R. Co. v. Greenfield Park, 23 Can. Ry. Cas. 106.

JURISDICTION — TOLLS — INCREASE — MUNICIPAL AGREEMENT—BY-LAW—7 & 8 EDW. VII. c. 117 (C) s. 10.

Where, under the Act of incorporation of a railway company, municipalities are given power to enter into franchise agreements and pass franchise by-laws and by special Act, 7 & 8 Edw. VII. c. 117 (Can.), declaring such railway to be a work for the general advantage of Canada, it was enacted that the provisions of any municipal by-law relating to the company, or agreement between it and any municipality were not to be affected, the company is bound by them, and the Board has no power to increase the tolls contrary to the terms of such agreements and by-laws. [Increase in Rates Case, 22 Can. Ry. Cas. 49, at pp. 57-60, followed.]

Hamilton Radial Electric Co. v. Hamilton, 23 Can. Ry. Cas. 114.

JURISDICTION — TOLLS — TRAFFIC — WATER BORNE — LOCAL PORTS — RAILWAY ACT, S. 7.

The Board has no jurisdiction to deal with a tariff of tolls for water borne traffic between local ports, no part of such traffic being attributable to railway traffic. [Dawson Board of Trade v. White Pass & Yukon R. Co., 9 Can. Ry. Cas. 190, distinguished.]

Residents of Massett v. Grand Trunk Pacific Steamship Co., 23 Can. Ry. Cas. 121.

QUESTION OF TITLE — SPUR-LINE — EXTENSION—JURISDICTION—RAILWAY ACT, S. 226.

In deciding upon an application to construct a spur line under s. 226 of the Railway Act, 1906, the Board is not the proper forum to determine questions of title. The question is for the Provincial Courts to decide.

Greenfield Conduit Co. v. Hetherington, 16 Can. Ry. Cas. 444.

ACQUISITION OF LANDS—SPUR.

Where a spur is built by a railway company, under an order of the Board, to handle C.L. traffic, the carrier has fulfilled its obligations when it places a car on the spur for discharging or receiving of traffic. The Board has no jurisdiction to direct the respondent to acquire land on such spur for the purpose of leasing it to the applicants for a coal shed site.

Forward v. C.P.R. Co., 19 Can. Ry. Cas. 434.

UNAUTHORIZED CONSTRUCTION OF SPUR-TRACK—TRESPASS ON LANDS OF COMPLAINANT — JURISDICTION OF BOARD — CLAIM FOR DAMAGES.

Upon a complaint of a landowner that the railway company had run a spur-track through his land, using part of his land to obtain water, and damaging his crops, it appeared that no order had been obtained from the Board authorizing the spur-track, and that no proceedings for expropriation had been taken by the company under the Railway Act: — Held, that the company was merely a trespasser, and the Board had no jurisdiction to award the complainant damages for the trespass.

Re Mason and C.P.R. Co., 28 W.L.R. 692.

AS TO CONSTITUTIONALITY—PROVINCIAL CARRIERS.

It is not the function of the Board to decide whether a section of the Railway Act Amendment (8 & 9 Edw. VII. c. 32, s. 5A), giving it jurisdiction over a provincial carrier is ultra vires or not.

Auger and D'Auteuil Lumber Co. v. G.T. R. and C.P.R. Cos., 19 Can. Ry. Cas. 401.

(§ II—42)—VALIDITY OF ORDERS — PUBLICATION.

Publication in the "Canada Gazette" is not a condition precedent to the operation of an order of the Board even as regards general orders affecting the public; s. 31 of the Railway Act requires that judicial notice shall be taken of an order published by the Board or by leave of the Board, but in other cases the order may be proved by a certified copy under s. 69 of the Railway Act. [R. v. C.N.R. Co., 18 Can. Cr. Cas. 170, followed.]

Underhill v. C.N.R. Co., 22 D.L.R. 279, 25 Man. L.R. 254, 18 Can. Ry. Cas. 313, 8 W.W.R. 271.

(§ II—43)—JURISDICTION—BRIDGE—HIGHWAY AND RAILWAY — PEDESTRIAN — TRAFFIC—PUBLIC WAYS AND COMMUNICATIONS—RAILWAY ACT, S. 59.

The Board has only such jurisdiction as is given it by the express terms of the statute or by the necessary implications therefrom. Section 59 of the Railway Act, 1906, does not confer jurisdiction on the Board to order a combined highway and

railway bridge. The Board having found upon the evidence that the respondent built the extensions on either side of a railway bridge for the pedestrian use of the public, it was held that the footpaths so provided were, in fact, public ways and communications. [Duthie v. G.T.R. Co., 4 Can. Ry. Cas. 304, at p. 311, followed.]

Victoria & Att'y-Gen'l for B.C. v. E. & N.R. Co., 24 Can. Ry. Cas. 84.

(§ II—44)—JURISDICTION — DISMISSAL OR DISCIPLINE OF EMPLOYEE — INTERNAL MANAGEMENT.

The Board has no jurisdiction to discipline or remove an employee of a railway or telephone company, the matter is entirely one of internal management of the company. [Tinkess v. Bell Telephone Co., 20 Can. Ry. Cas. 249, at pp. 253, 255; North Lancaster Exchange v. Bell Telephone Co., 21 Can. Ry. Cas. 220, followed.]

Re Anderson and Bell Telephone Co., 24 Can. Ry. Cas. 224.

(§ II—45)—JURISDICTION — QUESTION OF LAW—RAILWAY ACT, S. 55.

A question of jurisdiction may also be a question of law within the meaning of s. 55 of the Railway Act, 1906, and the Board may submit for the opinion of the Supreme Court questions of law which involve the matter of the jurisdiction of the Board. [Essex Terminal R. Co. v. Windsor, Essex & Lake Shore Rapid R. Co., 7 Can. Ry. Cas. 109, at p. 124, 40 Can. S.C.R. 620, 8 Can. Ry. Cas. 1, followed.]

Hamilton v. Toronto, Hamilton & Buffalo R. Co., 17 Can. Ry. Cas. 366.

(§ II—46)—JURISDICTION—APPROVAL—ASSESSMENT—SURFACE WATER—DRAINAGE —RAILWAY ACT, S. 250.

Under s. 250 of the Railway Act, 1906, the only matter open to the Board is to approve of the character of the drainage work on the railroad property, having regard to its sufficiency for railway operation, and the safety of the traveling public. Ordinarily, the Board does not interfere with an assessment under a by-law passed in accordance with the appropriate Act, and has no jurisdiction to do so, except where there are special circumstances. Where the railway company executed works for carrying the water under the railway and interfered with the culverts which formerly carried the water, so as to lessen their capacity, the company was directed to construct suitable culverts under its line of railway.

Humberstone v. G.T.R. Co., 17 Can. Ry. Cas. 316.

(§ II—47)—JURISDICTION OF PROVINCIAL BOARD—WORK FOR GENERAL ADVANTAGE OF CANADA—WHAT IS.

Section 306 of the Railway Act, 1888, which declares certain named railways to be "works for the general advantage of Canada," only applies to the particular railways enumerated in the section and their branch lines, but does not apply to an electric railway that only crosses one of the railways named therein; consequently such railway is not subject to the exclusive jurisdiction of the Dominion Parliament, but it remains subject to the authority of the Legislature of the Province of Ontario by which it was incorporated, and to the orders of the provincial railway board.

Re Ross and Hamilton, Grimsby & Beamsville R. Co., 25 D.L.R. 613, 34 O.L.R. 599, 19 Can. Ry. Cas. 166.

JURISDICTION—CONTRACT AND CIVIL RIGHTS —SEPARATION OF GRADES.

The Board does not pass on matters of contract and civil rights between the parties concerned in the work of grade separation, but only directs by which party the work authorized or ordered shall be done, leaving it to that party to carry out the work properly and without undue expense, and without interference by the Board except for the purpose of seeing that its order is properly carried out.

Vancouver v. V.V., E.R. & N.R. Co., 18 Can. Ry. Cas. 296.

JURISDICTION—CONTRACT BETWEEN SHIPPER AND PURCHASER.

The Board has no jurisdiction to deal with questions of contract between shippers and purchasers, and therefore the parties are not bound by any finding of the Board, except with regard to tolls.

Oliver-Serim Lumber Co. v. C.P. & E. & N.R. Cos., 17 Can. Ry. Cas. 324.

JURISDICTION AS TO COMPENSATION IN EXPROPRIATION.

The Board has no jurisdiction to decide whether the damages sustained by the property owners are recoverable under the appropriate sections of the Railway Act dealing with arbitrations, or by action. [Re Medlar and Arnott and Toronto, 4 Can. Ry. Cas. 13, followed.]

Canadian Northern Ont. R. Co. v. North Bay, 18 Can. Ry. Cas. 309.

JURISDICTION — CLEARANCES ON DOMINION RAILWAYS—STEAM OR ELECTRICITY.

The Board has jurisdiction over all clearances on Dominion railways, whether operated by steam or electricity. Under special circumstances a clearance, in the case of poles already erected of 7 feet, 3 inches, was approved, upon the company undertaking to keep its employees off the side of the cars on that side of the track on which the poles are erected, the clearance for unerected poles to be 7 feet, 6 inches.

Hydro-Electric Power Com. v. London & Port Stanley R. Co., 17 Can. Ry. Cas. 326.

JURISDICTION—EMINENT DOMAIN — LANDS OF PROVINCIAL RAILWAY — LOCATION PLAN.

To the extent necessary to give effect to the purpose of the Dominion incorporation, the Board has jurisdiction under the Railway Act, 1906, to authorize the expropriation by a Dominion railway company of lands of a provincial railway company,

either by an order approving location plan, under s. 159, or in a proper case, by order, e.g., under s. 178, in the same manner as lands of individuals.

Lachine, Jacques Cartier, etc., R. Co. v. Montreal Tramways, etc., 18 Can. Ry. Cas. 133.

POWERS OF—COMPELLING RIGHT OF WAY TO PUBLIC ACROSS RAILWAY — RAILWAY CROSSED BY HIGHWAY — OPENING — RIGHT-OF-WAY.

The Board will not invoke its compulsory powers to compel a railway company to supply a right-of-way across its own lands for a municipal highway to be used for highway purposes quite irrespective of railway purposes.

Courtney v. Esquimalt & Nanaimo R. Co., 18 Can. Ry. Cas. 384.

JURISDICTION TO GRANT CROSSING — HIGHWAY CROSSED BY RAILWAY—PUBLIC INTEREST.

The Board, in granting permission under s. 237 of the Railway Act, 1906, to a railway company to cross a highway against the protest of the municipality, must be satisfied that the crossing is in the public interest—e.g., that additional facilities are necessary—but it has no jurisdiction to require, as a condition of granting the crossing, the acquisition of additional lands.

Canadian Northern Quebec R. Co. v. Montreal, 18 Can. Ry. Cas. 389.

JURISDICTION—MUNICIPAL IMPROVEMENT — SEPARATION OF GRADES — DOMINION FRANCHISES.

The jurisdiction of the Board is confined in cases of separation of grades to the public interest in so far as Dominion franchises are concerned and the proper administration of them by Dominion railway companies. It is not the business of the Board to decide an issue of municipal expediency, whether or not municipalities should make certain improvements in cases where the whole cost will be on the municipality.

Winnipeg v. C.P.R. Co., 18 Can. Ry. Cas. 317.

JURISDICTION — REOPENING TELEPHONE PAY STATION—UNJUST DISCRIMINATION.

The powers conferred on the Board in regard to telephone companies are not necessarily identical with those conferred in respect of railway companies. The powers of the Board with regard to the former are defined and restricted by 7-8 Edw. VII. c. 61, part 1, s. 5. The Board has no jurisdiction to order the reopening of a telephone pay station, although such an application may be justified under the provisions of the Act against unjust discrimination.

Stoney Point v. Bell Telephone Co., 18 Can. Ry. Cas. 319.

(§ II—48)—RAILWAY ACT, 1906—POWERS OF THE RAILWAY BOARD — SPECIAL — CROWN—PREROGATIVE RIGHT TO GRANT SPECIAL LEAVE TO APPEAL.

C.P.R. Co. v. Toronto and G.T.R. Co., [1911] A.C. 461.

(§ II—49)—POWERS OF COMMISSIONERS OF THE TRANSCONTINENTAL RAILWAY—LIABILITY OF CROWN.

Johnston v. The King, 44 Can. S.C.R. 448.

(§ II—50) — POWERS OF BOARD — ONTARIO RAILWAY ACT, S. 260A (8 GEO. V., C. 30, S. 4)—FAILURE TO EXCUSE NON-COMPLIANCE—NO APPLICATION TO RESCIND ORDER OR EXTEND TIME—ONTARIO RAILWAY AND MUNICIPAL BOARD ACT, R.S.O. 1914, C. 186, SS. 25, 42—VALIDITY OF ORDER OF BOARD — "SUPERIOR COURT"—B.N.A. ACT, S. 96—MEMBERS OF BOARD NOT APPOINTED BY GOVERNOR-GENERAL—JURISDICTION — METHOD OF ATTACKING STATUS OF DE FACTO JUDGE — PROCEEDING BY QUO WARRANTO INFORMATION — ADMINISTRATIVE BODY — INCIDENTAL JUDICIAL POWERS—"SUPERIOR COURT"—COURT.

Re Toronto R. Co. and Toronto, 15 O.W. N. 244.

(§ II—51) — EXCLUSIVE JURISDICTION — ACCOMMODATION FACILITIES — REASONABLENESS.

The Board has exclusive jurisdiction to determine whether a railway has provided reasonable accommodation and facilities for traffic as required by ss. 284, 317 of the Railway Act, 1906, and where there is no finding of the Board that the plaintiff had been wrongfully deprived of such accommodation or facilities he cannot recover. [C.N.R. Co. v. Robinson, 43 Can. S.C.R. 387; [1911] A.C. 739, distinguished.]

Meagher v. C.P.R. Co., 42 N.B.R. 46.

(§ II—52)—JURISDICTION — FEDERAL COMPANY SUBMITTING TO IT — RIGHT TO COMPEL A COMPANY TO RUN ITS TRAINS OVER THE ROAD OF ANOTHER—R.S.Q. 1909, ART. 742—1 GEO. V., [1919] C. 15, ART. 4.

Although the Public Utilities Commission has not the superintendence of federal utilities and cannot issue orders against them, this incompetence is only ratione personæ, and can only be invoked by the party claiming to be beyond the jurisdiction of the Commission. The Commission has the right to order a railway company to allow another company to run its trains over its road in consideration of a remuneration which the Commission fixes. This power is drawn from art. 742, R.S.Q. 1909.

Canada & Gulf Terminal Co. v. Fleet, 28 Que. K.B. 112.

(§ II—53) — APPEAL — LEAVE — JURISDICTION OF RAILWAY BOARD — DOUBT AS TO DECISION OF BOARD.

Halifax Board of Trade v. G.T.R. Co.

(Halifax Rates Case), 44 Can. S.C.R. 298, 12 Can. Ry. Cas. 58.

RAILWAY COMMISSION.

See Railway Board.

RAILWAYS.

I. Franchises and rights; leases; railroad aid.
II. Construction and operation.
A. In general; change of gauge or route.
B. Crossings.
C. Fences.
D. Operation.
III. Accidents at crossings.
IV. Contributory negligence.
V. Diversion or obstruction of water.
VI. Insolvency and sale of railway.
VII. Acquisition by government.

See also Carriers; Railway Board; Street Railways; Crown.

As to expropriation matters, see Expropriation; Damages, III L; Arbitration.

Liability for injuries to servants, see Master and Servant.

Lability for injury to animals, see Animals.

Negligence as to fires, see Fires.

Annotations.

Animals at large through "wilful act or omission of owner:" 32 D.L.R. 397; 33 D.L.R. 423; 35 D.L.R. 481.

I. Franchises and rights; leases; railroad aid.

Effect of amalgamation on pending proceedings, expropriation, Dominion and provincial statutes, see Arbitration, III—16.

Effect on railway franchise by annexation of county to city, power of Board, see Municipal Corporations, I B—11.

Exemption from taxation, local assessments, see Taxes, I F—80.

Structures and other property on railway lands, see Taxes, III B—132.

Meaning of "superstructure," see Taxes, III B—112.

Contracts, accounting, see Judgment, I G—5.

(§ I—1)—Right of Dominion railway to build on unused right-of-way of provincial railway.

A provincial railway company that has neither graded nor built tracks upon a right-of-way acquired by it, cannot prevent a Dominion railway company from expropriating the lands so held by the provincial company and utilizing them for the actual construction of a railway authorized by the Parliament of Canada.

Canadian Northern Western R. Co. v. C. P.R. Co., 13 D.L.R. 624, 6 A.L.R. 147, 16 Can. Cr. Cas. 105, 25 W.L.R. 212, 5 W.W. R. 9.

Right of way—Subsidy lands.

There is a marked distinction between lands granted for right of way and other railway purposes and these granted as subsidies; the latter are in the same position as a cash bonus, and part of the remuneration for the building of the railway. The respondents should be ordered to pay their proportion of the cost of the land required for the construction of a transfer track. [Montreal Tramway and Montreal Park & Island R. Co. v. Lachine, Jacques Cartier & Maisonneuve R. Co., 20 D.L.R. 854, 50 Can. S.C.R. 84, 19 Can. Ry. Cas. 122; South Ontario Pacific R. Co. v. G.T.R. Co. (Junction Cut case, 20 Can. Ry. Cas. 152, followed.]

C.P.R. Co. v. G.T.P.R. Co. (Subsidy Lands case), 21 Can. Ry. Cas. 95.

Mortgage to secure bondholders—Foreign judgment — Merger—Priorities—"Working expenditure"—"Any subsequent transaction, matter or thing"—"Rents and revenues."

By the Act incorporating the defendant railway company, 50 Vict. c. 76, s. 18 (O.), the directors were authorized to issue bonds and to secure the same by mortgaging the undertaking in the manner provided by the Railway Act of Ontario, the provisions of which were made applicable. A mortgage having been made in 1910, and an action brought to enforce it, a claim to priority over the claims of the bondholders was made by the assignee of a judgment recovered in a foreign court in 1912, upon a claim for damages for injury sustained in 1911 by a passenger by reason of the defendant company's negligence. Held, that the judgment was not merged and gone because sued upon in Ontario. By s. 44 of the Railway Act of Ontario, 6 Edw. VII. c. 30, a mortgage to secure bondholders is to be a charge on the property, assets, rents and revenues of the company, present or future, "but such rents and revenues shall be subject . . . to the payment of the working expenditure of the railway;" and, by s. 45, the bonds are made a first charge on the company and its property, save as provided in s. 44. In 1913 the Railway Act was revised and amended, 3 & 4 Geo. V. c. 36, and by that Act (s. 48) the mortgage charge was made subject to the payment of the "working expenditure of the railway." Held, that the effect of the change as to make "working expenditure" a charge on all the assets of the company having priority over the mortgage, instead of a prior charge on "rents and revenues" only. And held, having regard to the provisions of the interpretation s. (2(24)) of the earlier Act, that the claim upon the judgment was a "working expense" of the railway. [Re Wrexham Mold and Connah's Quay R. Co., [1900] 2 Ch. 436, distinguished.] But, even assuming a favour of the claimant that the rights of the bondholders were subject to displacement by legislation giving priority to working expenses, held, that a prior charge on capital was given only "as regards any subsequent transaction, matter or thing" (In-

terpretation Act, 7 Edw. VII. c. 2, s. 7, para. 48 (b)), and this claim could not be regarded as a "subsequent transaction, matter or thing;" and so the claimant's priority was confined to "rents and revenues." [Kilgour v. London Street R. Co., 19 D.L.R. 827, 30 O.L.R. 603, followed.] Semble, that the assumption that the security of the bondholders might be impaired by subsequent legislation was not too favourable to the claimant. [Barnhill v. Hampton & St. Martins R. Co., 3 N.B. Eq. 371, not followed.] The claimant was given an opportunity of establishing her prior charge against funds representing rents and revenues of the company which had been used for capital expenses.

Grobe v. Buffalo & Fort Erie Ferry & R. Co., 38 O.L.R. 272, 11 O.W.N. 265.

(§ I—2)—PROTECTION OF PUBLIC—STATUTORY PROVISIONS—CONDUCTING BUSINESS THROUGH PROVISIONAL DIRECTORS, LIMITATION.

The provisions of the Railway Act, 1906, as to the organization of railway companies and the amount of stock subscriptions are provisions made for the protection of the public and must be strictly followed. Under the Act, provisional directors of a railway company have no right to carry on the business of the undertaking, their powers being limited to those specifically defined by s. 81, subs. 3 of the Act, to merely opening stock books, receiving and safely depositing stock subscriptions, making plans and surveys.

Re Burrard Inlet Tunnel & Bridge Co., 10 D.L.R. 723, 15 Can. Ry. Cas. 289, 24 W.L.R. 214.

SENIOR AND JUNIOR—TITLE—RIGHT-OF-WAY.

When a railway company has secured a right-of-way, its tracks on that right-of-way, no matter when laid, are always senior to those of any railway company desiring to cross such right-of-way. [G.T.P.R. Co. v. C.P.R. Co. (Nokomis Crossing Case), 7 Can. Ry. Cas. 299, followed; C.N.R. Co. v. C.P.R. Co. (Kaiser Crossing Case), 11 Can. Ry. Cas. 432, distinguished.]

Erie & Ontario R. Co. v. Niagara, St. Catharines & Toronto R. Co., 18 Can. Ry. Cas. 29.

FRANCHISES.

The sale or conveyance of lands for right of way permitted under the Railway Act from institutes to railway companies, is binding upon the substitutes, notwithstanding violation of the rules respecting payment of the consideration money. Hence, when the company has paid the consideration money to the institute, instead of paying him the annual rent thereon, the substitute has no recourse against the railway company other than a right to recover his share of the consideration money, as determined at the time of the sale. He cannot claim, at the opening of the substitution, his share of the accrued value of the land sold.

Latour v. G.T.R. Co., 40 Que. S.C. 514, 13 Can. Ry. Cas. 404.

(§ I—7)—SUBSIDIES — TRANSFEREE COMPLETING WORK.

A statute authorizing the payment of a subsidy for completing the construction of a line of railway, entitles a company, as the successor of another company who had commenced, the work, to receive subsidy in respect of that portion of the road forming part of the subsidized line which had been constructed by the other company.

Quebec, Montreal & Southern R. Co. v. The King, 29 D.L.R. 466, 53 Can. S.C.R. 275, reversing 15 Can. Ex. 237.

RAILWAY SUBSIDY—DUTY OF GOVERNMENT AS TO DISTRIBUTION—PENDING LITIGATION.

A Provincial Government empowered by statute with the distribution of funds under a railway subsidy contract is not justified in making payments thereon pending an action for the determination of the respective rights relative thereto and of which the Government had full notice. The proper course to be pursued by the Crown in a case where it is charged with the distribution of certain funds under a railway subsidy contract that is being litigated and a receiver appointed is either to apply to the court for a construction of the contract, and to pay accordingly, or to pay the whole amount over to the receiver to be paid out under orders of court.

A stipulation in a contract for the sale of a railway that the balance of the purchase price is to be paid from time to time to the extent of 50 per cent in Government subsidies points to the payment of the balance out of subsidies paid in respect of the residue over and above 50 per cent, not to the payment of the entirety of 50 per cent of the subsidies, as a condition precedent to a demand for payment of so much as has been paid and for an accounting thereof.

Eastern Trust Co. v. Mackenzie, Mann & Co., 22 D.L.R. 410, [1915] A.C. 750, 31 W.L.R. 248, reversing judgment of Supreme Court and affirming 13 D.L.R. 868, 47 N.S.R. 310, 13 E.L.R. 297. (Sub. nom. Irvine v. Hervey.)

RAILWAY BONDS—RIGHT TO RETAIN FROM PROCEEDS TO PAY CLAIMS.

All that part of s. 18 of 4 Geo. V., c. 10, "An Act providing further aid for the construction of a line of railway along the valley of the St. John River," which precedes the last eight lines, apply only to moneys obtained from the sale of bonds under the said Act, and the Provincial Treasurer is only required under s. 18 of the said Act to retain out of such moneys in respect of indebtedness of the company authorized to construct and complete the railway, and the authority of the treasurer to retain does not extend to indebtedness of subcontractors and others due or accruing due at

the passing of the Act for which the company is not liable, notwithstanding that such indebtedness was for actual work of construction and for wages, materials and supplies that have gone into the construction.

St. John & Quebec R. Co. v. Hibbard, 26 D.L.R. 519, 43 N.B.R. 508.

(§ I—8)—Franchises and rights—Consolidation—Amalgamation of two railways — Effect on constituent companies as corporate entities—Railway Act (Can.), s. 362.

Upon an agreement for the amalgamation of two railway companies being sanctioned by order in council under s. 361 of the Railway Act 1906, the amalgamated company becomes a new corporation with the rights and liabilities of the constituent companies, and the latter cease to exist as corporate entities and it is not competent for one of the constituent companies thereafter to prosecute an appeal from an award made against it prior to the amalgamation.

Re Van Horne and Winnipeg & Northern R. Co., 18 D.L.R. 517, 24 Man. L.R. 626, 29 W.L.R. 37, 6 W.W.R. 1535.

Provincial railway—Amalgamation—Expropriation—Award.

The award of arbitrators appointed under the Manitoba Expropriation Act (R.S.M. 1913, c. 61) to fix the compensation for lands crossed by a provincial railway company is not rendered void by the amalgamation of such company with a Dominion company, after the appointment of the arbitrators but before the award has been made, the arbitration proceedings having been continued after the amalgamation without objection on the part of either company. Sections 362, 363 of the Dominion Railway Act, 1906, continue and preserve the award against the amalgamated company. [Fargey v. Grand Junction R. Co., 4 O.R. 232, followed.]

Haney v. C.N.R. Co., 42 D.L.R. 41, 29 Man. L.R. 61, 23 Can. Ry. Cas. 232, [1918] 2 W.W.R. 334, affirming 36 D.L.R. 674, [1917] 3 W.W.R. 105, 21 Can. Ry. Cas. 388.

Consolidation.

Application under s. 361 of the Railway Act, 1906, for a recommendation by the board to the Governor-in-Council for the sanction of amalgamation agreements between Dominion and provincial railway companies. The Montreal Park & Island and Montreal Terminal Ry. Cos. were incorporated by the Parliament of Canada, and the Montreal Street Ry. Co., by a statute of the Province of Quebec. Agreements were made between the 3 companies apparently pursuant to the authority given in two special Acts of the Dominion incorporating the first two railway companies for the sale of these railways with their facilities and assets to the provincial railway. (1) That under ss. 361, 362 (which must be read together) the board has no jurisdiction to deal with the amalgamations of railway companies incorporated under Dominion and provincial statutes. (2) That the proper mode of procedure would be to apply as provided by the special Acts for sanction of the agreements to the Governor-in-Council.

Re Amalgamation Agreements, 13 Can. Ry. Cas. 150.

(§ I—9)—Industrial spur — Construction—Maintenance—Cost of.

Where an industrial spur is built in the interests of commerce at the expense of the industry to be served, the entire cost both of construction and maintenance should be borne by such industry.

Bienfait Commercial Co. v. C.P.R. Co., 23 Can. Ry. Cas. 62.

Siding — Agreement — Right-of-way — Exclusive privileges — Unjust discrimination.

A railway company should not enter into an agreement for the construction of a private siding upon its right-of-way. Such an agreement defeats the purpose of its undertaking and by means of it unjust discrimination may be practised.

C.P.R. Co. v. Vancouver Ice & Cold Storage Co., 23 Can. Ry. Cas. 1, 23 W.L.R. 607.

Siding — Installation — Jurisdiction—Agreement — Facilities — Railway Act, s. 284.

The Board has no jurisdiction under s. 284 of the Railway Act, 1906, to direct that facilities, such as sidings, should be installed between stations, and the fact that such siding has been installed by agreement between the parties does not extend the powers of the Board. [Kammerer v. C.P.R. Co. 21 Can. Ry. Cas. 74, at p. 75, followed.]

New Minas Fruit Co. v. Dominion Atlantic R. Co., 24 Can. Ry. Cas. 97.

Spur — Industrial — Highway crossed by railway—Removal—Notice from municipality—Direction of the board.

An industrial siding crossing a highway should only be removed by direction of the Board and not upon notice given by the council of the municipality controlling the highway. The terms on which it may cross the highway were fixed by the Board. [Shragge v. Winnipeg, 24 Can. Ry. Cas. 61, followed.]

G.T.R. Co. v. Cobourg, 24 Can. Ry. Cas. 58.

Spurs—Location — Construction—Traffic—Facilities — Suitable accommodation—Railway Act, s. 284.

Where the trackage for siding facilities offered by a railway company will only serve a particular site but does not give suitable accommodation for the warehouse of the applicant, the railway company may be ordered to provide siding facilities for the site selected by the applicant, but at no greater cost than if these facilities were furnished at the site proposed by the railway company.

Wolfville Fruit Co. v. Dominion Atlantic R. Co., 24 Can. Ry. Cas. 11.

SPURS — INDUSTRIAL OR BUSINESS — TEAM TRACKS—GENERAL INTERSWITCHING ORDER—EFFECT.

General Order No. 11 of the Board, dated July 8, 1908, known as the General Interswitching Order, was confined in its operations to industrial or business spurs, and did not extend to team tracks which form part of a railway's terminals.

Re Interswitching Service, 24 Can. Ry. Cas. 324.

RAILWAY ACT, R.S.C. 1906, c. 37, ss. 226, 284, 317 — REASONABLE FACILITIES — FAILURE TO PROVIDE SIDING—PRESCRIPTIVE RIGHT TO SIDING—COSTS REFUSED BY BOARD.

Plaintiff shipped produce from his warehouse over defendant's siding for 35 years. In order to provide increased accommodation, defendant in September, 1910, moved the siding some thirty feet away. Plaintiff applied to the Board to compel the defendant to provide a siding to his warehouse, and a consent order was made by the Board that the defendant move plaintiff's warehouse to a site near the siding in its new position. This was done in May, 1911. In an action for damages for depriving plaintiff of reasonable facilities between September and May; after verdict for the plaintiff:—Held, plaintiff could not acquire a prescriptive right to the use of the siding. There is no finding and no evidence to support a finding by the jury that defendant wrongfully refused or neglected to provide plaintiff with reasonable facilities for his traffic. A consent order represents the agreement of the parties thereto and not the judgment of the court making the order. The costs of application to the Board having been refused by the Board cannot be recovered in any other court.

Meagher v. C.P.R. Co., 42 N.B.R. 46.

CONSTRUCTION OF SPUR LINE FOR SHIPPER—EXPENSE — PROVISION FOR PAYMENT — DETERMINATION BY BOARD — RAILWAY ACT, S. 226.

When an order is made by the Board for the construction of a spur line for the accommodation of a shipper, under s. 226 of the Railway Act, 1906, the question as to payment of expenses should be dealt with by the Board———not only the question as to work or practices which may in the future mean expenditure, but also the disposition of the resultant cost.

Re S. A. Hamilton Co. and C.P.R. Co., 28 W.L.R. 109.

SPUR LINE—FLOODING OF HIGHWAY—CONSTRUCTION OF SWITCH BY RAILWAY COMPANY—ORDER OF BOARD.

Upon the complaint of the municipality, an order was made by the Board directing the railway company to construct a ditch on the north side of the railway as an outlet for water which flooded a highway, where it was crossed by a spur line of the railway, and to convey the water to a culvert under the railway.

Re Surrey and Great Northern R. Co., 26 W.L.R. 526.

RAILWAY AID OR SUBSIDY—BOND GUARANTEE—CONTRACT—CONSTRUCTION.

G.T.P.R. Co. v. The King, [1912] A.C. 204.

II. Construction and operation.

Injury from operation or construction of railway, see Limitation of Actions, III F—130, 131.

Liability of Crown as to damages arising out of construction or operation of railway, see Crown, II—25.

Expropriation, compensation for severance, see Expropriation, III—165.

Compensation for loss of access interest of tenants in common, see Expropriation, III E—171.

Compensation for mining rights in expropriation under Railway Act, appeal, power to remit award, see Arbitration, III—17.

Obstruction of highway, compensation, see Expropriation, III E—180.

Employees' insurance, premiums, paymaster's order, see Insurance, III F—145.

A. IN GENERAL; CHANGE OF GAUGE OR ROUTE.

(§ II A—10)—BOARD OF RAILWAY COMMISSIONERS — WIDENING RIGHT-OF-WAY — RETROSPECTIVE ORDER.

The Board cannot, 7 years after the filing and approval of the location plans of a railway, by an order not based on s. 162 or 167 of the Railway Act, 1906, permit the filing of a new plan to take effect as of the date of the original, so as to increase the width of the company's right-of-way.

Chambers v. C.P.R. Co., 11 D.L.R. 669, 48 Can. S.C.R. 162, 15 Can. Ry. Cas. 293, 4 W.W.R. 538.

RAILWAY ACT, R.S.C., c. 37—TENDER OF AMOUNT OF DAMAGES FOR CONSTRUCTION—CONDITION PRECEDENT—NO DAMAGES FOR SMOKE AND NOISE.

Section 235 of the Railway Act, 1906, as amended by 1-2 Geo. V. c. 22, s. 6, does not make the payment or tender of the amount of damages the land would suffer by the building of the railway, on the highway a condition precedent to the building of such railway. The section does not give the court jurisdiction to award damages due to noise, smoke and vibration caused by operation of the railway; any such claim should be made by application to the Board.

Hornstein v. C.N.R. Co., 44 D.L.R. 511, 12 S.L.R. 227, 23 Can. Ry. Cas. 424, [1919] 1 W.W.R. 95.

NEGLIGENCE — RAILWAY YARD — SWITCH STAND TOO NEAR TO TRACK.

In an action by a freight conductor in the employ of the defendant company for damages for injuries sustained while making a flying or drop switch, the jury found that there was no negligence on the part of the plaintiff, but that the defendants were guilty of negligence in building the switch which the plaintiff was operating at the time of his injury. Haultain, C.J.S., on appeal held that in view of the evidence, which

was conflicting, the verdict could not be said to be perverse and should not be disturbed. Newlands, J.A., thought that, the jury having held that the defendants were guilty of negligence, in having the switch too near the track, not for all purposes but for the purpose of performing the operation in which the plaintiff was injured and that operation being a proper one to be performed, at the time and having been properly performed, the verdict should not be disturbed. Lamont and Elwood, J.J.A., held that, according to the evidence, the cause of the accident was the cutting away of the engine from the cars at a point too close to the switch and whoever was responsible for this was guilty of the negligence which caused the accident. Also, the defendants could not be said to be negligent in placing the switch-stand when it was done under the advice of their railway experts, with whose opinions nearly all the experts at the trial agreed, juries could not be allowed to set up a standard which should dictate the practice of railway companies in the conduct of their business and the verdict should be set aside.

Herman v. C.P.R. Co., 44 D.L.R. 343, 23 Can. Ry. Cas. 416, 12 S.L.R. 53, [1919] 1 W.W.R. 254. [Affirmed by Privy Council, 48 D.L.R. 157, [1919] 1 W.W.R. 254.]

HIGHWAY—SENIOR AND JUNIOR RULE—SUBWAY—APPORTIONMENT OF COST.

A street having been opened across the right-of-way of the respondent, the applicant was given permission by the Board to construct and maintain a subway under the railway at its own expense and the respondent, under the senior and junior rule, was not ordered to contribute to the expense, but if the applicant agrees to close a neighbouring street, notwithstanding this rule and that the equities as well as the title are in the respondent's favour, the cost of the subway will be apportioned equally between the applicant and respondent.

Winnipeg v. C.P.R. Co., 28 D.L.R. 382, 18 Can. Ry. Cas. 381.

TRACKS — PAVING — AGREEMENT — APPORTIONMENT OF COST.

Where a railway company laid "T" rails for an electric railway upon the street of a municipality under an agreement and confirmatory by-law containing the provision "the said rails to be level with the existing roadbed and that gravel be placed and maintained in good order by the company between the rails and two feet on either side thereof," such company is not bound at the request of the municipality, at a later date, to construct a permanent foundation of any character and pave between the rails. The Board has jurisdiction under ss. 5 and 26A (8 & 9 Edw. VII. c. 32) and may authorize the municipality at its own expense to change the railway grade to conform to the altered grade of the highway and, if it desires, to surface the railway right of way in the same way and with the same foundations as the adjacent highway, the railway company contributing such portion of the cost as represents its contract liability to lay gravel between the tracks and two feet on either side thereof.

St. Lambert v. Montreal & Southern Counties R. Co., 28 D.L.R. 559, 19 Can. Ry. Cas. 283.

HIGHWAY—JURISDICTION.

Construction of a railway along a highway is objectionable, and, except under special circumstances, the Board will not exercise its jurisdiction to authorize such construction (for example, where the object of the company's incorporation would otherwise fail).

Essex Terminal R. Co. v. Sandwich, 28 D.L.R. 557, 19 Can. Ry. Cas. 304.

CONSTRUCTION OF ROAD—STATUTORY POWERS—NEGLIGENCE—DAMAGE.

A railway company constructing its road under statutory powers will notwithstanding be liable for a negligent user of such powers; the powers granted by statute are to be exercised reasonably and with due care so as not by negligence to cause damage to others. [Manley v. St. Helen's Canal, 27 L.J. Ex. 159 followed.]

McCrimmon v. B.C. Elec. R. Co., 20 D. L.R. 834, 22 B.C.R. 76, 29 W.L.R. 517, 7 W.W.R. 137.

FILING PLANS WITH RAILWAY BOARD—PLAN FOR TAKING LAND TO OBTAIN CONSTRUCTION MATERIALS.

Section 160 (2) of the Railway Act, 1906, providing that copies of the plans, etc., of a railway, when sanctioned by the Board, shall be deposited in the office of the registrar of deeds for the district or county to which they relate, does not apply to or require the registration of plans prepared under s. 180 of the Act, for the compulsory taking of land to obtain stone, gravel, earth, etc., for construction of maintenance purposes.

Saskatchewan Land & Homestead Co. v. Calgary & Edmonton R. Co., 14 D.L.R. 193, 6 A.L.R. 471, 25 W.L.R. 925, 5 W.W.R. 268.

NEGLIGENCE — SWITCHSTANDS — LOCATION —FINDINGS OF JURY—EVIDENCE—RAILWAY BOARD.

A jury may find, without the assistance of expert evidence, that the location of a switch stand in a railway yard is too close to the rail, and is not reasonably sufficient to permit of the safe passage through it of a man riding on the side ladder of a car. [Mallory v. Winnipeg Joint Terminals, 29 D.L.R. 20, 53 Can. S.C.R. 323, 20 Can. Ry. Cas. 362; Phelan v. G.T.P.R. Co. 23 D.L.R. 90, 51 Can. S.C.R. 113, at p. 133, 18 Can. Ry. Cas. 233, distinguished.] The fact that the order of the Board of Railway Commissioners does not govern the location of switch stands of a certain height, constructed according to good railway practice, does not justify a railway company placing such a stand so close to passing cars, that it is dangerous to switchmen.

An employer is not entitled to expose his servants unnecessarily to obvious dangers, which they can escape only by constant vigilance or unfailing alertness.

Nelson v. C.P.R. Co., 39 D.L.R. 760, 24 Can. Ry. Cas. 308, 55 Can. S.C.R. 626, [1918] 2 W.W.R. 177, reversing 35 D.L.R. 318, 10 S.L.R. 125, [1917] 2 W.W.R. 294. [Leave to appeal to Privy Council, refused.]

BLASTING—LIABILITY.

A railway company specially authorized by Dominion Act (2 Geo. V. c. 74) to construct and operate a tunnel is liable in damages, under the Dominion Railway Act and the common law of Quebec, for injury to property caused by blasting in connection with such construction, although a necessary consequence thereof.

Bickerdike v. Canadian Northern Montreal Tunnel, etc., Co., 38 D.L.R. 425, 53 Que. S.C. 93.

NOISE—MUNICIPAL BY-LAW—SMOKE FROM LOCOMOTIVES—PROVINCIAL COURTS.

Unless it can be established that a railway company, in carrying on its undertaking authorized by Parliament upon its own property, in a manner which is calculated to do as little harm to adjacent owners as possible, is not exercising as much care as it might, to lessen the noise of operation, the Board has no jurisdiction to interfere. It is not incumbent upon the Board to summon offending parties before the courts of the Province for violation of its own order and a municipal by-law regulating the emission of smoke from railway locomotives.

Toronto v. C.N.R. Co., 21 Can. Ry. Cas. 452.

"DAMAGE"—POWER OF COURTS—ILLEGAL OPERATION OF RAILWAY.

The "damage" referred to in s. 32, c. 36, 1912 (B.C.), incorporating the defendant railway, includes a claim for compensation because of obstruction of a riparian owner's right of access to the sea. Quære, whether, after a railway has been constructed and is in operation, a court of law can decide that it has been constructed and is being operated illegally.

Nelson v. Pacific Great Eastern R. Co., [1918] 1 W.W.R. 597, 25 B.C.R. 259. [See [1918] 3 W.W.R. 85, 26 B.C.R. 1.]

TAKING GRAVEL—TRESPASS.

Where a railway company, in entering upon land and removing soil therefrom for the purposes of the railway, does not ignore the owner or make the entry defiantly or contemptuously of him, but is reasonably justified, because of their negotiations with him or his agent, in assuming that it is acting with his consent, or, at any rate, that there will be little or no difficulty in reaching a satisfactory adjustment of the price to be paid for the soil removed, it cannot be said that the company is a trespasser. [Hanley v. T.H.B.R. Co., 11 O.L.R. 91; Wicher v. C.P.R. Co., 16 Man. L.R. 343, distinguished.]

Isitt v. G.T.P.R. Co., 26 B.C.R. 90, [1918] 3 W.W.R. 500.

TELEPHONE WIRE CROSSINGS—COST OF RAISING—SENIOR AND JUNIOR RULE.

Where the wires of a telephone company crossing the line of a railway company, which is changing its system of operation from steam to electricity, require to be raised, the railway being senior in construction, the telephone company must bear the cost of raising its wires where the fee of the property crossed is in the railway company, but at highways where the only right of the railway company is to cross with its tracks, the telephone company is senior with its construction to the railway company's new overhead wires and the latter must bear the cost of raising the telephone wires. [Hamilton Street R. Co. v. G.T.R. Co. (Kenilworth Ave. Crossing Case), 17 Can. Ry. Cas. 393, followed.]

London Railway Commission v. Bell Tel. 26 D.L.R. 662, 18 Can. Ry. Cas. 435.

Under s. 159 of the Railway Act, 1906, the Board ordered that the location of the appellants' line of railway along certain streets in the city of Fort William be approved in accordance with an agreement between the appellants and the municipal corporation, but subject to the condition that the appellants shall "make full compensation to all persons interested for all damage sustained by reason" thereof. It was held, that the order must be rescinded. Under s. 237 (3) the power to award damages was in respect of construction, and s. 47 did not on its true construction extend that power to meet the case of location and as the condition failed there was no approval.

G.T.P.R. Co. v. Fort William Landowners and Fort William Land Investment Co., 13 Can. Ry. Cas. 187, [1912] A.C. 224, reversing 43 Can. S.C.R. 412, 11 Can. Ry. Cas. 271.

Application for an order directing the respondent to erect and maintain stations at K. and S. The respondent proposed to locate stations at L. and C. and if these applications were granted there would be 4 stations within less than 11 miles in a sparsely settled locality. The location of a station at K. would involve a yard on a grade with a bridge over a river at one end and a highway crossing in the neck of the yard, while a station at S. would be about 3 miles northerly from L. and about two miles southerly from C. It was held, that the application must be refused, and the locations proposed by the respondent approved.

Eby v. G.T.P.R. Co., 13 Can. Ry. Cas. 22.

IN GENERAL.

Application for approval of its location, "Prince Rupert westerly, mile 0 to mile 3.23." The applicant proceeded to construct the roadbed but found that it could not obtain some $400,000 under its contracts with

the Government unless it was able to shew that the three and one quarter miles of railway had been constructed under the provisions of the Railway Act. The applicant contended that this being merely the yard of the company, no route map or location plan was required. (1) That the company not having complied with ss. 157, 158, 159 of the Act, 1906, the application must be refused. (2) That the Board had no jurisdiction under 9 & 10 Edw. VII. c. 50, s. 2, empowering the Board to approve of works constructed without approval before December 31st, 1909, since the roadbed in question had been constructed subsequent to that date.

Re Prince Rupert Location, G.T.P. R. Co., 13 Can. Ry. Cas. 153.

SENIOR AND JUNIOR RULE—LOCATION PLAN—DEPOSIT — APPROVAL—PRIORITY —CONSTITUTIONAL LAW—R.S.S. 1909, c. 41, ss. 70, 77, 79—RAILWAY ACT, ss. 191, 192, 227, 228.

The provisions of the Railway Act, 1906, as to deposit of location plans in the appropriate Registry Offices, and notice of such deposit override the provisions of provincial Registry Acts, giving priority of plans formally registered in accordance with their requirements; and therefore, a highway laid out on a plan duly registered under a provincial Registry Act is junior to a railway built in accordance with approved location plan, previously deposited in accordance with the Railway Act, but not registered. [Re G.T.P. Branch Lines, 22 W.L.R. 515, distinguished; Tennant v. Union Bank, [1894] A.C. 45, followed; Edmonton v. Edmonton, Yukon & Pacific R. Co., 13 Can. Ry. Cas. 128, referred to.]

Regina v. C.P.R. Co., 16 Can. Ry. Cas. 258.

REGISTRATION OF LOCATION PLAN—SENIORITY HIGHWAYS.

The proper registration of the location plan of a railway approved by the Board sufficiently establishes the railway company's seniority over a municipality, at points of highways not previously dedicated by the filing of plans or used, constructed or accepted by the corporation.

Edmonton v. Calgary & Edmonton R. Co., 30 D.L.R. 222, 53 Can. S.C.R. 406, 22 Can. Ry. Cas. 182.

LOCATION PLANS—REGISTRATION—EFFECT.

The date of the registration of the railway's location plan under the Railway Act 1906, governs as to the compensation to be paid on expropriation; and any change either in title or in improvement to the land to be expropriated is subject to the notice resulting from such registration.

Re Edmonton and The Calgary & Edmonton R. Co., 15 D.L.R. 417, 26 W.L.R. 528, 16 Can. Ry. Cas. 420.

CONSTRUCTION OF RAILWAY ALONG HIGHWAY —CONSENT OF MUNICIPALITY.

While it is true that the fee of highways is vested in the Crown in the right of the province for all material purposes, the occupancy of city streets by railway is a question in which the public right is entirely and adequately represented by the municipality, and the effect of s. 235 of the Railway Act, 1906, is to recognize the paramount interest of the municipality, and to require its consent as a condition precedent to the construction on the highway so far as all street railways or tramways are concerned. Even in the case of a railway which does not come within the proviso of s. 235, and even where an application is meritorious in the sense that a railway is required, that the district in question will undoubtedly be benefited to a greater or less extent by its construction, and that the proposal is supported by the majority of the property owners, the objection of the municipality to any railroad being constructed upon the highway will be given effect to. The merits of the application discussed.

Re Essex Terminal and Sandwich, 31 W. L.R. 514.

OPERATION ON CITY STREETS—CONSENT OF MUNICIPALITY.

Section 235 of the Railway Act, 1906, requiring the consent by by-law of the municipal authority of a city or incorporated town before any company can carry its lines upon the highway, only applies to a street railway or a railway operated as such.

Re London Railway Commission, 32 W. L.R. 224.

(§ II A—14)—SPURS — MAINTENANCE—AGREEMENT.

When a spur is constructed so that it becomes part of the railway company's property, the company should repair and maintain it, but where part of the right-of-way of the spur is upon the property of the railway company and part upon the applicant company's property, the railway company, in the absence of an agreement to the contrary, should maintain that part of the spur upon its own right-of-way and renew the rails (belonging to it) of the extension of the spur into the applicant company's property, but the applicant company should maintain and repair the understructure on its own lands.

Wolfville Milling Co. v. Dominion Atlantic R. Co., 28 D.L.R. 384, 18 Can. Ry. Cas. 367.

When the order of the Board authorizing the construction and operation of an industrial spur provides that the respondent should retain the ownership of the right-of-way on which the siding is located, the Board can only authorize the applicant to take expropriation proceedings to enable it to acquire the right-of-way across the lands of the respondent so as to reach by an extension of the spur another industry which it desires to serve.

G.T.R. v. Hamilton & Toronto Sewer Pipe Co., 28 D.L.R. 383, 18 Can. Ry. Cas. 369.

EXPROPRIATION—SPURS AND SIDINGS—JURISDICTION OF BOARD.

Spur lines constructed under the provi-

sions of s. 222 of the Railway Act, 1906, do not ipso facto become part of the railway of the company from whose line they are built under the provisions of an agreement providing that the railway company furnish the ties, rails and fastenings, which remain their property, and the owner provides the right-of-way. Such a siding cannot be extended to the land of another owner under an order of the Board, but the Board may, in the public interest, authorize the expropriation of the right-of-way upon which the siding is built and its extension to the lands of an adjoining owner requiring railway accommodation. [Blackwoods and Manitoba Brewing & Malting Co. v. C. N.R. Co. and Winnipeg, 44 Can. S.C.R. 92, 12 Can. Ry. Cas. 45; Clover Bar Coal Co. v. Humberstone, G.T.P.R. and Clover Bay Sand & Gravel Cos., 45 Can. S.C.R. 346, 13 Can. Ry. Cas. 162, distinguished.]

Boland v. G.T.R. Co., 21 D.L.R. 531, 18 Can. Ry. Cas. 60.

CONSTRUCTED LINES — LOCATION — DEVIATIONS—JURISDICTION — RAILWAY ACT, SS. 26 (2), 28, 167—MUNICIPAL BY-LAWS—PUBLIC INTEREST.

Sections 26 (2), and 28 of the Railway Act, 1906, give the Board jurisdiction under the provisions of s. 167 to order railway companies to deviate their located and constructed lines. If the powers of the Board are not overridden by the special Act and municipal by-law, it may, on fair and reasonable terms, disregard any contract, agreement or arrangement by ordering deviations of the located and constructed lines of railway companies, as it may decide that the public interest and safety demands. [G.T.R. Co. v. Depart. of Agriculture for Ontario (Vinelands Station Case), 42 Can. S.C.R. 557, 10 Can. Ry. Cas. 84; C.P.R. Co. v. Toronto (Toronto Viaduct Case), [1911] A.C. 461, 14 Can. Ry. Cas. 378, followed.]

Hamilton v. Toronto, Hamilton & Buffalo R. Co., 17 Can. Ry. Cas. 353.

TRAFFIC — INTERCHANGE — GENERAL INTERSWITCHING ORDER — TOLLS — AGREEMENT.

The provisions of the General Interswitching Order do not apply to the case of an agreement making special provision for the cost of interswitching in a particular locality. [C.P.R. Co. v. G.T.R. Co. (London Interswitching Case), 13 Can. Ry. Cas. 435, followed.]

Fergus v. G.T.R. Co., 18 Can. Ry. Cas. 42.

CONSTRUCTION OF SPURS — BREAK IN MAIN LINE — TRAINS — OPERATION — DANGEROUS — TRAFFIC — LIGHT — MOVEMENT—SPURS.

The practice of breaking a single track main line for industrial low spurs at points where trains are operated at high speed is more or less dangerous, and will not be countenanced by the Board, although in the past switches have been put in which were not objectionable on account of light traffic and slow movement on the line. [Pheasant Point Farmers v. C.P.R. Co., 14 Can. Ry. Cas. 13, followed.]

McPherson v. C.P.R. Co., 18 Can. Ry. Cas. 57.

ALTERATION OF ROUTE.

The appellant company having constructed a spur track or siding in to the respondent's yard for the convenience of traffic, in November, 1904, cut it off, and on Feb. 19, 1906, the Board under ss. 214, 253 of the Railway Act of 1903, directed its restoration, which was carried out on Sept. 28, 1906. In an action for damages for breach by the appellants of their statutory obligations between Oct. 31, 1904, and Sept. 28, 1906:—It was held, that under s. 42 of the Act of 1903, the order of the Board, affirmed as it was by the Supreme Court on appeal, was conclusive as to the question of fact, that the facilities previously enjoyed by the respondents were of a kind to which they were entitled. It was held, also, that the special provisions of the Act as to one year's limitation (see s. 242 substantially re-enacted by s. 306 of the Railway Act of 1906), relate to damages sustained by the construction or operation of the railway and do not apply to the refusal of facilities by means of a siding outside the railway as constructed, which is not an act done in the operation of the railway.

C.N.R. Co. v. Robinson, 13 Can. Ry. Cas. 412, [1911] A.C. 739, affirming 43 Can. S.C. R. 387, 11 Can. Ry. Cas. 304.

REMOVAL OF A SIDING CONSTRUCTED FOR CONVENIENCE OF TRAFFIC-LIMITATION—FINDING OF FACT.

C.N.R. Co. v. Robinson, [1911] A.C. 739.

(§ II A—14b)—CARRIERS—TRAFFIC — INTERCHANGE TRACKS — APPORTIONMENT OF COSTS — POINTS—SHIPPING—DESTINATION — COMMON — INTERSWITCHING FACILITIES—LINE HAUL—DELIVERY.

The carrier who obtains access to industries on the lines of other carriers should construct at its own expense tracks to be used for the interchange of traffic. Where traffic moves between a certain point and a shipping point or destination common to the carriers concerned, or any two of them, where interswitching facilities are provided, the carrier upon whose line, including private sidings tributary thereto, the traffic is loaded, is entitled to the line haul and the privilege of effecting the required delivery on the line of the other carrier by means of interswitching at destination, provided that the said carrier can afford facilities and privileges equal to those of the competing carrier at no greater charge.

Re Belleville Interchange Tracks, 23 Can. Ry. Cas. 22.

B. CROSSINGS.

Level crossing, protruding rails, negligence, see Crown, II—25.

Improperly packed frog in track, see Trial, V C—285.

(§ II B—15) — EXPROPRIATION — FARM CROSSING — CONTRACT — SERVITUDE —VALUE.

An owner entitled, under indenture with the Crown, to a crossing from one part of his farm to another, the land expropriated from him having been converted into a railway yard, and it being impossible to give the crossing contracted for, is entitled to the value thereof upon releasing and discharging the Crown from the obligation of constructing the same.

Fontaine v. the King, 38 D.L.R. 622, 16 Can. Ex. 199.

FARM CROSSING—SENIOR AND JUNIOR RULE.

The senior and junior rule applies to the case of a railway company with prior location having a patent of its right-of-way through a farm lot, and when the owner of the adjoining lands has a patent for the severed portions subsequent to the date of the company's patent, the expense of constructing the crossing must be borne by the owner of the farm.

Wimbles v. G.T.P.R. Co., 21 Can. Ry. Cas. 191.

FARM CROSSING—LAPSE OF TIME—AGREEMENT.

Notwithstanding the lapse of time without a demand for a farm crossing, by the land owner or a conveyance of the lands taken for right-of-way for valuable consideration, the Board will apply s. 252 of the Railway Act, 1906, which provides that every company shall make crossings for persons across whose lands the railway is carried convenient and proper for the crossing of the railway for farm purposes, in all cases to which it may be applicable, unless the right to the crossing has by express terms been extinguished, either in the conveyance of the right-of-way itself or by a sufficient agreement otherwise expressed.

Harris v. Great Northern R. Co., 21 Can. Ry. Cas. 193.

FARM CROSSING—CATTLE PASS.

Where the railway was carried across a farm on a high embankment, and any crossing over it would be inconvenient for cattle to get to pasture and water unless driven, the owner of the farm crossed by the railway was held entitled to a cattle pass (not an undercrossing) in line with farm lane. [Re Cockerline and Guelph & Goderich Ry. Co., 5 Can. Ry. Cas. 313, followed.]

Lalande v. C.N.R. Co., 21 Can. Ry. Cas. 194.

FARM CROSSING—LOSS OF RIGHT BY SEVERANCE.

The mere acquisition of lands on both sides of a railway right-of-way does not per se give a right to a farm crossing. The original owner having lost his right to a crossing by conveying the lands on one side to another person, a subsequent owner purchasing the lands on both sides from different vendors does not thereby acquire a right to a farm crossing to connect them. The Board, however, has jurisdiction under s. 253, of the Railway Act, 1906, to order a crossing, which it will exercise in a proper case and on proper terms.

O'Brien Bros. v. C.P.R. Co., 21 Can. Ry. Cas. 197.

FARM CROSSING—REMOVAL OF PLANKS BY RAILWAY COMPANY—DUTY TO RESTORE —ORDER OF BOARD OF RAILWAY COMMISSIONERS — RAILWAY ACT, R.S.C. 1906, c. 37, ss. 252, 253—DAMAGES.

Austin v. G.T.R. Co., 14 O.W.N. 285.

RAILWAY BRIDGE—BRANCH LINE—JURISDICTION OF BOARD.

Where a company is authorized by its charter to build a bridge and lay railway tracks upon it, but has no power to build a railway, the Board has no jurisdiction to authorize it to build a branch line of railway under s. 175, 3 Edw. VII. c. 58 of the Railway Act, 1903.

International Bridge & Terminal Co. v. C.N.R. Co., 21 Can. Ry. Cas. 218.

MAINTENANCE — MUNICIPALITY — JURISDICTION.

In dismissing an application by a railway company to construct a spur on a highway, the Board has no jurisdiction to impose terms on the municipality concerned as to the use it should make of the highway in question. The Board's jurisdiction is confined to authorizing the construction and maintenance of the railway on the highway.

Montreal v. C.P.R. Co., 21 Can. Ry. Cas. 224.

HIGHWAY—DEDICATION—SENIOR AND JUNIOR RULE.

When it is sought to open a highway across a railway, there must be evidence of intention to dedicate by the owner, acceptance by the municipality, user by the public, and expenditure of public money to keep the proposed highway in repair and fit for use to bring it within the category of a public highway under the Municipal Act, R.S.O. 1914, c. 192, s. 432. Without such evidence the proposed highway is junior to the railway and under the senior and junior rule the whole of the expenditure required will be placed on the applicant. [Gooderham v. Toronto, 25 Can. S.C. R. 246, distinguished.]

Hamilton v. Hamilton Radial Electric R. Co., 22 Can. Ry. Cas. 438.

HIGHWAY — DEDICATION — ACCEPTANCE — DEVISE—RIGHT-OF-WAY.

A will devising a right-of-way to a certain class of individuals does not make a right-of-way, where it crosses a railway, a highway crossing: there being no evidence of the acceptance of a highway at that

point by the municipality nor recognition of its existence by the railway company: the railway is senior to the highway at the point of crossing. [Weston v. G.T.R. and C.P.R. Cos. (Denison Avenue Crossing Case), 7 Can. Ry. Cas. 79; St. Pierre v. G. T.R. Co. (Simplex Avenue Crossing Case), 13 Can. Ry. Cas. 1; Montreal v. C.P.R. Co., 18 Can. Ry. Cas. 50, followed.]

G.T.R. Co. v. Hamilton, 22 Can. Ry. Cas. 442.

APPORTIONMENT OF COST — SENIOR AND JUNIOR RULE.

In apportioning the cost of protection at railway crossings of highways which have been in existence for many years, the volume of traffic on the highway and railway respectively, which has made the crossing dangerous, is an element to which more weight should be given than the question of seniority merely.

Montreal v. G.T.R. Co., 22 Can. Ry. Cas. 444.

HIGHWAY — RAILWAY GRADE CROSSING FUND.

Where a highway crossing over a railway has not been legally established prior to April 1, 1909, it may be considered a highway crossing of the railway at grade level within the meaning of the Railway Grade Crossing Fund, s. 239 (A), 8 & 9 Edw. VII. c. 32, s. 7, and the Board may legalize the crossing and make a contribution of 20 per cent out of that fund towards the installation of gates, the remainder of the costs of protection to be borne by the applicants.

Maisonneuve v. C.N.R. Co., 22 Can. R. Cas. 446.

Application under s. 176 of the Railway Act, 1906, for leave to expropriate a portion of a piece of land for the purpose of constructing a spur across it from the applicant's branch line. The land had been acquired by the respondent from the former owner, one A. B., the respondent had been authorized by order of the Board to construct certain spurs across the land in question when the applicant's spur was constructed with the exception of the section crossing the portion of the land aforesaid. The order authorizing construction of the branch line and the said spur of the applicant was made before the respondent had acquired the land. It was held (1) that the applicant should be authorized to take so much of the land as would be necessary for the construction of its spur. (2) That if a dispute should arise as to the area necessary to be so taken, the matter should be determined by an engineer of the Board. (3) The expense of making the necessary railway crossings on the land should be borne jointly by the applicant and respondent. [C.N.R. Co. v. C.P.R. Co. (Kaiser Crossing Case), 7 Can. Ry. Cas. 297; G.T.P.R. Co. v. C.P.R. Co. (Nokomis Crossing Case), 7 Can. Ry. Cas. 299, distinguished.]

Qu'Appelle, Long Lake & Saskatchewan R. & S.S. Co. v. C.P.R. Co., 13 Can. Ry. Cas. 131.

HIGHWAY CROSSED BY RAILWAY — MAINTENANCE OF TRACK LEGALIZED—PROTECTION OF CROSSING.

Upon an application to direct the removal of the respondent's track from a public highway, and by the respondent to legalize its maintenance under ss. 59A, 222, 237 of the Railway Act, 1906, the Board granted the respondent's application upon condition that upon the construction of a street railway upon the highway, diamond crossings should be installed and sufficient protection given at the crossing at the respondent's expense, and that the movement of the steam railway upon the highway should be restricted.

Ottawa v. G.T.R. Co., 14 Can. Ry. Cas. 185.

HIGHWAY CROSSED BY RAILWAY — TEMPORARY DIVERSION AND CLOSING—CONDITIONS — DAMAGES — COMPENSATION —RAILWAY ACT, S. 180.

The Board, under s. 180 of the Railway Act, 1906, in a proper case will authorize the construction and operation of a temporary spur upon and over a highway and the temporary closing and diversion of a portion of the highway for that purpose, imposing such conditions, including compensation to persons directly and specifically injured, as the Board thinks proper. [C.P.R. Co. v. North Dumfries, 6 Can. Ry. Cas. 147, followed.]

Campbellford, Lake Ontario & Western Ry. Co. v. Camden, 16 Can. Ry. Cas. 236.

JURISDICTION—QUESTION OF LAW—PUBLIC INTEREST — INDEMNITY — LOSS, DAMAGE OR INJURY—PROPERTY—EMPLOYEES —TRAVELING PUBLIC—RAILWAY ACT, S. 250.

Under s. 250 of the Railway Act, 1906, the Board has jurisdiction to authorize the laying of a gas main under the tracks of a railway company, by a public utility company, an adjacent land owner, and to fix the amount of damages payable for the privilege, imposing as terms and conditions precedent that the applicant must undertake full responsibility for maintaining the gas main and indemnify the respondent from any loss, damage or injury to its property, employees, or the traveling public.

Montreal Light, Heat & Power Co. v. G.T.R. Co., 20 D.L.R. 975, 17 Can. Ry. Cas. 330.

DISPUTED ACCOUNTS—DECISION BY BOARD—JURISDICTION — REFERENCE — RAILWAY ACT, S. 60.

In a case of dispute between a municipality and a railway company over the cost of a bridge carrying a highway over a railway, of which each pays a certain proportion, where owing to the length and intricacy of the accounts it is impossible for the Board in the exercise of its jurisdiction to

decide the questions at issue at an ordinary hearing, the matter was referred to a Referee under s. 60 of the Railway Act, 1906, to take the accounts and report to the Board what amount (if any) is due by one party to the other, the reference being at the applicant's risk as to costs.

Vancouver v. Vancouver, Victoria & Eastern R. & Nav. Co., 23 Can. Ry. Cas. 123.

SENIOR AND JUNIOR RULE — OWNERSHIP OF LAND — LOCATION — PRIOR CONSTRUCTION.

Ownership of a block of land and approval of a plan of railway located thereon do not give seniority at the place of crossing over another railway whose location plan was approved and line built prior to the construction of the first mentioned railway upon a new location on another portion of the same block of land. [C.N.R. Co. v. C.P.R. Co. (Kaiser Crossing Case), 7 Can. Ry. Cas. 297; G.T.P.R. Co. v. C.P.R. Co. (Nokomis Crossing Case), 7 Can. Ry. Cas. 299; C.N.R. Co. v. C.P.R. Co., 11 Can. Ry. Cas. 432; Edmonton v. Calgary & Edmonton R. Co., 16 Can. Ry. Cas. 420 at p. 423; affirmed 53 Can. S.C.R. 406 at p. 415, 22 Can. Ry. Cas. 182; South Ontario Pacific R. Co. v. G.T.R. Co. (Junction Cut Case), 20 Can. Ry. Cas. 152, followed; G.T.R. Co. v. United Counties R. Co. (St. Hyacinthe Crossing Case), 7 Can. Ry. Cas. 294; Erie & Ontario R. Co. v. Niagara, St. Catharines & Toronto R. Co., 18 Can. Ry. Cas. 29, distinguished.]

Midland R. Co. v. G.T.P.R. Co. (St. Boniface Crossing Case), 23 Can. Ry. Cas. 80.

PROTECTION — INADEQUATE — DANGEROUS CROSSING — TRAFFIC — VOLUME — HEAVY — APPORTIONMENT OF COSTS — RAILWAY GRADE CROSSING FUND—CONSTRUCTION AND INSTALLATION.

Where two railways in close proximity cross two highways the Board decided that towers should be erected to operate pairs of gates day and night at the points of crossing, on the ground that the protection was inadequate (there being none where the junior railway crossed the highways), and the crossings were dangerous owing to the heavy volume of traffic on the railways and highways and the obstruction of the view; apportioned the cost as it considered fair under the circumstances, with the usual contribution from the Railway Grade Crossing Fund towards construction and installation.

Walkerville v. G.T.R. and Pere Marquette R. Cos., 24 Can. Ry. Cas. 1.

NEGLIGENCE — AGREEMENT — BRIDGE — FALSEWORK — CLEARANCES — INDEMNITY.

An agreement between two railway companies for the construction of falsework to carry the line of railway of one company over the tracks of the other company without the standard clearances, may properly contain a clause indemnifying the company whose line is crossed from all loss, damage or expense of any nature occasioned to it, including loss, damage and expense that has been occasioned, or contributed, to by the negligence of its servants or agents or otherwise howsoever.

C.P.R. Co. v. C.N.R. Co. (Falsework Case) 24 Can. Ry. Cas. 5.

SENIOR AND JUNIOR RULE — HIGHWAY CROSSED BY RAILWAY — STEAM AND MUNICIPALLY OWNED RAILWAYS.

A steam railway does not lose its seniority at a crossing on the highway of an electric street railway when the electric railway is acquired by the municipality. [C.P.R. Co. v. Toronto, 7 Can. Ry. Cas. 274, affirmed; Toronto v. C.P.R. Co., [1908] A.C. 54, 7 Can. Ry. Cas. 282; G.T.R. Co. v. United Counties R. Co. (St. Hyacinthe Crossing case), 7 Can. Ry. Cas. 294; C.N.R. Co. v. C.P.R. Co. (Kaiser Crossing case), 7 Can. Ry. Cas. 297, followed; Edmonton Street R. Co. v. G.T.P.R. Co., 14 Can. Ry. Cas. 93, affirmed; G.T.P.R. Co. v. Edmonton Street R. Co. (Twenty First Street Crossing case), 15 Can. Ry. Cas. 445; Edmonton v. G.T.P. & C.P.R. Cos. (Syndicate Avenue Crossing case), 15 Can. Ry. Cas. 443, distinguished.]

G.T.R. Co. v. Kitchener & Waterloo Street R. Co., 24 Can. Ry. Cas. 13.

HIGHWAY CROSSED BY RAILWAY — PRACTICE — JURISDICTION — PROTECTION BY ELECTRIC BELL — APPORTIONMENT OF COST — RAILWAY GRADE CROSSING FUND — CONSTRUCTION — MAINTENANCE — RAILWAY ACT, S. 239 (A).

Where a highway is senior to a railway which crosses it, it is the practice of the Board to exempt the municipality controlling the highway from any contribution to the cost of installation or maintenance of an electric bell to protect the crossing.

Morse v. C.P.R. Co., 24 Can. Ry. Cas. 64.

HIGHWAY CROSSED BY RAILWAY — PROTECTION — APPORTIONMENT OF COSTS — INSTALLATION — MAINTENANCE — OPERATION — RAILWAY GRADE CROSSING FUND.

At the crossing in question, where there are four tracks and considerable shunting traffic, protection by an electric bell is not so satisfactory as at crossings where there are fewer tracks and less shunting, and the Board directed protection by gates, operated night and day, apportioning the costs of installation, maintenance and operation.

Thamesville v. G.T.R. Co., 23 Can. Ry. Cas. 33.

HIGHWAY CROSSED BY RAILWAY — BRIDGE — RECONSTRUCTION — SENIOR AND JUNIOR RULE.

Under the senior and junior rule the highway being senior to the railway no part of the cost of reconstructing the bridge on the highway over the railway should be put upon the respondent city, but the respondent tramways company being junior to

the railway, one-fourth of the cost of reconstruction to make the bridge strong enough to carry electric cars should be imposed upon it. [Toronto R. Co. v. Toronto and C.P.R. Co. (Avenue Road Subway Case) 53 Can. S.C.R. 222, 20 Can. Ry. Cas. 280, followed.]

C.P.R. Co. v. Montreal and Montreal Tramways Co. (Notre Dame Street Bridge Case), 23 Can. Ry. Cas. 31.

SUBWAY UNDER TRACKS — PRIOR AGREEMENT — PUBLIC PARK — APPORTIONMENT OF COST — SENIOR AND JUNIOR — RULE NOT APPLICABLE.

Where a subway was built under railway tracks in a public park, to which the railway was senior, to give access between the portions lying north and south of the railway of which the entire cost was borne by the municipality except the superstructure (borne by the railway company), and the municipality having given the land on which to lay tracks to serve elevators south of the railway, o which 6 were to be built immediately south of the railway main line, applied for a subway under such 6 tracks, the senior and junior rule does not apply, and the cost of the work will be divided equally between the municipality and the railway companies interested.

Port Arthur v. C.P.R. and C.N.R. Cos., 23 Can. Ry. Cas. 89.

JURISDICTION — LINES — DOMINION AND PROVINCIAL — POINT OF CROSSING — RAILWAY ACT, S. 8 (A).

The Board has jurisdiction to regulate the crossing of a Provincial over a Dominion railway at the point of intersection. [Lake Erie & Northern R. Co. v. Brantford Street R. Co., 16 Can. Ry. Cas. 244, at p. 245; Att'y-Gen'l for Alberta v. Att'y-Gen'l for Canada, [1915] A.C. 363, 19 Can. Ry. Cas. 153; London v. London Street R. Co., 19 Can. Ry. Cas. 436, followed.]

Midland R. Co. v. G.T.P.R. Co., 23 Can. Ry. Cas. 80.

HIGHWAY — SENIOR AND JUNIOR RULE — LOCATION — APPROVAL — PRIORITY.

In applying the senior and junior rule between railway companies, construction of the crossing and not approval of location gives priority, but between municipalities and railway companies that principle cannot be applied, when it is sought to cross a railway by a highway where a road allowance previously existed, then no matter how long the railway may have been constructed it is considered to be junior and the railway company should instal and maintain the necessary crossing. [C.N. Ry. Co. v. C.P.R. Co. (Kaiser Crossing case), 7 Can. Ry. Cas. 297; C.N. Ry. Co. v. C.P. Ry. Co., 11 Can. Ry. Cas. 432, followed.] Where there is no road allowance and the municipality desires to use the land of the railway company upon which to construct a highway, the entire costs of the highway improvements will be borne by the applicant. [Gloucester v. Canada Atlantic R. Co., 3 O.L.R. 85, 1 Can. Ry. Cas. 327, followed.]

Sasman v. C.N.R. Co. (Kylemore Crossing case), 20 Can. Ry. Cas. 246.

HIGHWAY — CONSTRUCTION AND MAINTENANCE—APPORTIONMENT OF COST.

Where the Board grants permission to the applicant to open up a highway across the right-of-way of the respondent, the uniform practice is to place the whole cost of construction and maintenance upon the applicant, but the order may provide, if the applicant so desires, that the work of construction may be done by the respondent, the expense thereof being reimbursed by the applicant. [Weston v. G.T.R. and C.P.R. Cos. (Denison Avenue Crossing case), 7 Can. Ry. Cas. 79; St. Pierre v. G.T.R. Co. (Simplex Avenue Crossing case), 13 Can. Ry. Cas. 1; Bridgeburg v. G.T.R. and Michigan Central R. Cos., 8 D.L.R. 951, 14 Can. Ry. Cas. 10; Montreal v. C.P.R. Co., 18 Can. Ry. Cas. 50; Lachine v. G.T.R. Co., 18 Can. Ry. Cas. 23, followed.]

London v. G.T.R. Co. (Ashland Avenue Crossing case), 20 Can. Ry. Cas. 242.

HIGHWAY — SUBWAY — COST — SENIOR AND JUNIOR RULE.

The senior and junior rule that, when a railway is crossed by a highway, the applicant should bear all the cost, does not apply where the railway company lays out a townsite and benefits from the sale of lots; in that townsite it should assist in providing suitable facilities for the public to get across the railway property. At V. the Board directed the construction of a pedestrian subway by the railway company, the cost of the subway to be apportioned equally between the railway company and the town, and to be kept clean and lighted by the town, and, in case an extension of the subway became necessary in the future, the costs were to be apportioned equally between the parties. [Regina v. C.P.R. Co., 11 Can. Ry. Cas. 165; Medicine Hat v. C.P. R. Co. (Medicine Hat Streets case), 16 Can. Ry. Cas. 413, followed.]

Virden v. C.P.R. Co., 21 Can. Ry. Cas. 70.

HIGHWAY — BRIDGE — MAINTENANCE — APPORTIONMENT OF COST.

Apart from any question of contract, the obligation of a railway company maintaining a bridge carrying a highway over a railway must be construed with regard to the requirements of the present-day traffic. In 1896, by an order of the Railway Committee, the respondent railway company was authorized to carry a highway (King Street Hamilton) over the railway by a bridge of a certain width. The order contained no provision as to maintenance, extension or widening of the bridge. Upon the growth of the city and a new district being laid out beyond the city limits, in which a new bridge was constructed on the extension of King Street, designed to accommodate a double line of street cars, the Board made an order for the construction by the Hamil-

ton company of a new bridge of the same width and strength, in lieu of the bridge built in 1896. Under the special circumstances of the case the municipality was required to contribute 30 per cent, and railway 70 per cent of the cost. [G.T.R. Co. v. C.P.R. Co. (Myrtle Bridge case), 12 D.L.R. 475, 15 Can. Ry. Cas. 433, affirmed, sub nom. C.P.R. Co. v. G.T.R. Co., 49 Can. S.C.R. 525, 20 D.L.R. 56, 17 Can. Ry. Cas. 300, distinguished.]

Hamilton v. C.P.R. and T.H. & B.R. Cos., 20 Can. Ry. Cas. 159.

HIGHWAY—SENIOR AND JUNIOR RULE.

The senior and junior rule which is sometimes applied by the Board when determining who should pay the cost of the crossing of one railway over another, should not be applied where a highway is crossed by a railway, as the municipality being the owner of the street and now being the owner of the street railway, should not be considered junior to the steam railway company and the costs of protecting the crossing should be apportioned equally between them.

Brantford v. G.T.R. Co., 20 Can. Ry. Cas. 166.

HIGHWAY CROSSING—PUBLIC NECESSITY.

The Board will recognize the public necessity for a highway crossing over a railway especially at or near a point where for a long period the railway company has allowed the public the use of such crossing and it will order the railway company to make the crossing conform to its standard regulations affecting highway crossings as amended May 4th, 1910. The Board is not called upon to deal with the question of an encroachment by a railway company upon the highway. [Weston v. C.P.R. and G.T.R. Cos. (Denison Avenue Crossing case, No. 593), 7 Can. Ry. Cas. 79, followed.]

Moodie v. C.P.R. Co., 20 Can. Ry. Cas. 217.

HIGHWAY — STREET RAILWAY — BRIDGE — APPORTIONMENT OF COST — SENIOR AND JUNIOR RULE.

Where the respondent had discharged its responsibility to maintain a bridge carrying a highway over a railway sufficient to accommodate present traffic, the Board in the public interest ordered the bridge to be widened from 40 to 56 feet to enable a street railway line to be double tracked. The proposed second street railway track being junior to that of the respondent the Board apportioned the cost as follows, 65 per cent to the respondent and 35 per cent to the applicant or street railway company. [Hamilton v. C.P.R. and Toronto, Hamilton & Buffalo R. Cos., 20 Can. Ry. Cas. 159, followed.]

Windsor v. C.P.R. Co., 21 Can. Ry. Cas. 66.

The applicant town alleged that the respondent intended to close a certain street where it crossed its tracks and asked that the respondent should bear part of the cost of protecting the crossing. The street in question had been originally a farm crossing but was now used as a general public highway crossing. The Board's officers, after inspection, reported that the crossing should be made a regular highway crossing and be fully protected by gates and watchmen. The Board ordered that the applicant should reimburse the respondent for the cost of construction, maintenance and protection of the crossing, but was entitled to receive from the Railway Grade Crossing Fund, 20 per cent of the cost of the work.

St. Pierre v. G.T.R. Co., 10 E.L.R. 381.

(§ II B—16)—CROSSING BY OTHER RAILWAY.

The obligation of the junior railway which, on obtaining by contract with the senior road the right to cross its line by a subway or undercrossing, covenanted to construct the crossing according to specifications approved by the chief engineer of the senior road, to repair it and keep it in a good and safe state, and to repay to the latter the cost of necessary work done in the event of the junior road failing to "maintain" the crossing to the satisfaction of said chief engineer, is not restricted to the keeping of the crossing in repair merely as it was when it was first passed upon by the chief engineer, but, in view of an intention to be gathered from the entire contract, may be interpreted as covering repair and maintenance which is requisite for the heavier traffic incident to the increased business which time had developed on the senior road.

C.P.R. Co. v. G.T.R. Co., 20 D.L.R. 56, 49 Can. S.C.R. 525.

"JOINING" OF TWO RAILWAYS — "CROSSING" BY ANOTHER RAILWAY.

The "joining" of two different lines of railway for which the leave of the Board is required under the Railway Act, 1906, s. 227, means joining on the same level so as to enable cars to be transferred from one road to the other. The "crossing" of two different lines of railway for which the leave of the Board is required under the Act, 1906, s. 227, means the passing of the tracks of one railway on, over, or under, the tracks of another by meeting at any angle, continuing at the same angle to the opposite side of the track, crossed and immediately leaving the track crossed.

Canadian Northern Western R. Co. v. C.P.R. Co., 13 D.L.R. 625, 6 A.L.R. 147, 25 W.L.R. 212, 5 W.W.R. 9.

RAILWAY CROSSING — SUBWAY — CONTRIBUTION.

The Canadian Northern Ontario Ry. crossed under the line of the G.T.R. by a subway. Subsequently the C.L.O. & W.R. Co. obtained authority from the Board to cross the C.N.O. Ry., using for that purpose the embankment of the same subway:—Held, that the C.N.O.R. Co., was not entitled to receive any contribution from the C.L.O. & W.R. Co. towards the expense it

had already incurred in making the embankment.

Campbellford, Lake Ontario & Western R. Co. v. Canadian Northern Ontario R. Co., 14 Can. Ry. Cas. 220.

CROSSING BY OTHER RAILROAD — BOARD PERMITTING ON TERMS.

The Board granted the application of the C.P.R. Co. to cross the track of the C.N.R. Co. upon the terms that the applicant should, at its own expense, insert a diamond in the track, provide, maintain and operate an interlocking plant including the cost of keeping a signalman in charge of the crossing. The signalman was appointed by the C.N.R. Co. to the satisfaction of both companies. While a C.P.R. train was approaching the crossing the signalman, being intoxicated, derailed the train, killing the fireman.

Pattison v. C.P.R. Co., 14 Can. Ry. Cas. 401, 24 O.L.R. 482.

CROSSING BY OTHER RAILROAD — INDUSTRIAL SPUR LINES.

Re Midland R. Co. and C.P.R. Co., 23 W.L.R. 593.

DOMINION AND PROVINCIAL RAILWAYS.

A provincial railway as distinguished from a Dominion railway, which latter is subject to the Railway Act 1906 (Can.) has a locus standi to make application to the Board for permission to cross a Dominion railway.

Att'y-Gen'l for Alta. v. Att'y-Gen'l of Canada, 22 D.L.R. 501, [1915] A.C. 363, 112 L.T. 177.

SENIOR AND JUNIOR — RULE — FLAGMAN — NEGLIGENCE — PUBLIC INTEREST — EXPENSE — RESPONSIBILITY.

The junior railway company permitted to cross with its line the tracks of the senior should bear all the expenses and responsibility of such crossing, and should employ and pay the flagman at the crossing and not merely reimburse the senior company for the wages of a flagman carried on the payroll of the latter company.

Winnipeg Elec. R. Co. v. C.P.R. Co., 18 Can. Ry. Cas. 36.

(§ II B—17)—CROSSING OF STEAM ROAD BY STREET RAILWAY.

Application that the municipally owned electric railway of the applicant upon a highway be granted leave to cross the line of the respondent by a subway instead of a level crossing. It was held (1) that it was shewn that a plan shewing the location of the street was registered prior to the location plan of the respondent. (2) That the street now being within the boundaries of the applicant municipality carried with it the attribute of seniority acquired by the prior registration of the plan according to the provisions of N.W.T. Ord. c. 4, s. 75 (1901), Public Works Act. (3) That the respondent should shew cause why an order should not be made for a subway, the cost to be apportioned equally between the applicant and the respondent subject to a contribution of 20 per cent, up to $5,000 to the cost of the work from the Railway Grade Crossing Fund.

Edmonton v. Edmonton, Yukon & Pacific R. Co., 13 Can. Ry. Cas. 128.

CROSSING OF STEAM ROAD BY STREET RAILWAY.

The Board granted an application, by a municipally-owned street railway, under s. 227 of the Railway Act, 1906, to cross the tracks of a steam railway on a city street, which was senior to the tracks of a steam railway. The tracks of the municipally-owned street railway were not considered by the Board as junior to those of the steam railway, and the cost of construction and maintenance of the railway crossing, as well as the installation and maintenance of the protection, were directed to be borne equally by the respondent and appellant. The Board gave leave to the appellant to appeal on two questions of law:—1, was the Board bound by the agreement between the City of Edmonton and G.T.P.R. Co., s. 7 of which provides that an application must first be submitted to the Lieut.-Governor-in-council for approval of the crossing before the application is made to the Board, and 2, if it was not so bound, do the provisions of s. 7 of the agreement mean that the railway company should not pay such expense as is placed upon it by the Board's order. The Supreme Court of Canada answered the second question in the negative. The Chief Justice, and Davies, J., in answer to question 1, said that the agreement was an element to be considered in determining the rights of the parties with respect to the cost of constructing and maintaining the crossing, or the installation or maintenance of the protection required. Idington, J.:—The question of the bearing of the relation of seniority of construction upon the determination of the proper shares of the costs respectively to be borne by crossing railways is one entirely in the discretion of the Board.

G.T.P.R. Co. v. Edmonton, 15 Can. Ry. Cas. 445, affirming 14 Can. Ry. Cas. 93.

CROSSING BY ELECTRIC ROAD — DERAIL SYSTEM.

Upon an application to have a temporary right of crossing the tracks of a steam railway with the tracks of a municipal electric railway made permanent, where the highway crossing was permanent, and the respondent steam railway company had originally consented to the temporary crossing and thereupon permanent works had been constructed by the municipality, the Board made no order but directed that unless there was an elimination of grade or change in the street car location a system of derails should be installed against the electric car line on account of the dangerous character of the crossing.

Lethbridge v. C.P.R. Co., 14 Can. Ry. Cas. 345.

HIGHWAY CROSSED BY RAILWAY — STREET RAILWAY—PROTECTION.

The Board granted an application by a municipality for a crossing on the highway of a steam railway by its electric street railway to save a detour of three thousand feet on condition that the applicant pay for its own construction, its own rails, and other work and the diamonds, but the cost of protection, that is, the installation of the interlocking plant, its maintenance and operation, to be borne equally by the applicant and respondent. The municipality was not estopped, and had the right to make the application under the changed conditions, irrespective of any action previously taken by the Board.

St. Thomas v. Michigan Central R. Co., 14 Can. Ry. Cas. 338.

STEAM RAILWAY CROSSING STREET RAILWAY —SENIOR AND JUNIOR — RULE — SENIORITY AS TO OPERATION — HIGHWAY TRAFFIC.

An electric railway using a highway as a right-of-way is to be treated as an ordinary highway occupant, and therefore where it crosses a steam railway, the traffic of the steam railway should have priority, though the steam road, if junior, should pay the cost of construction and maintenance of the necessary crossing. Whether a street railway is incorporated by the Dominion or by a Province does not affect its right as to seniority as against another steam railway crossing it. The fact that an electric railway operating along the highway, not only as a street railway, but also as an interurban or radial line, is in competition with a steam railway which crosses it, does not affect their respective rights as to seniority at the crossing. Its use of the highway is an extension of the ordinary highway user and the traffic of the steam railway should have priority.

Lake Erie & Northern R. Co. v. Brantford Street R. Co., 16 Can. Ry. Cas. 244.

DOMINION AND PROVINCIAL RAILWAYS.

The Board has jurisdiction under ss. 8, 29, 32, 227 of the Railway Act, 1906, to order a single track crossing (provided under an order of the Railway Committee) of a Dominion railway by a Provincial street railway, to be changed to a double track crossing, in the public interest. The applicant which made the application for the double track crossing was ordered to furnish the necessary diamonds, and the street railway company to pay interest at 7 per cent upon the expense incurred by the applicant, the street railway company to lay the necessary tracks and connections.

London v. London Street R. Co., 19 Can. Ry. Cas. 436.

STREET RAILWAY CROSSING—MAINTENANCE —DERAILMENT OF TRAIN.

The defendants having applied to the Board for authority to cross at grade the plaintiffs' tracks at a certain point, were, in June, 1904, permitted to do so, by an order of the Board, which directed that they (the defendants) should at their own expense provide a diamond for the crossing. In the same month the diamond was placed in position under competent supervision; it was carefully and efficiently built. In September, 1912, some cars of the plaintiff passing over the diamond became derailed and were injured or destroyed; the plaintiffs brought this action to recover damages for the injury and destruction, charging that it was the defendants' duty to keep the diamond and all appliances in connection with the crossing in good repair, which they had failed to do, and had so caused the derailment and damage:—Held, upon the evidence, that the derailment was not shewn to have been the result of want of maintenance or of negligence on the part of the defendants; that the defendants were not, under the order of the Board, bound to maintain and repair the diamond. [Guelph & Goderich R. Co. v. Guelph Radial R. Co., 5 Can. Ry. Cas. 180; G.T.R. Co. v. United Counties R. Co., 7 Can. Ry. Cas. 294, distinguished.]

G.T.R. v. Sarnia Street R., 37 O.L.R. 477.

(§ II B—17a)—CROSSING OF STEAM ROAD BY ELECTRIC INTERURBAN ROAD.

An application of a street railway to cross the tracks of a steam railway company at a place where the latter crosses a city street, need not be submitted to the Lieut.-Governor-in-Council for approval, under s. 122 of c. 8, of the Alberta Statutes of 1907, as to steam railways under Federal control, since such application falls within s. 227 of the Railway Act, 1906 (Can.). Where, in point of time, a city street is senior to the tracks of a steam railway that cross it, the tracks of a municipally owned street railway which are subsequently laid across the tracks of the steam railway, are not junior thereto so as to acquire the whole cost of the installation, maintenance and protection of the crossing to be borne by the city, but it will be divided equally between them.

Edmonton Street R. Co. v. G.T.P.R. Co., 4 D.L.R. 472, 21 W.L.R. 808, 14 Can. Ry. Cas. 93. [See 7 D.L.R. 888, 22 W.L.R. 45.]

COST OF HIGHWAY PAVEMENT THROUGH SUBWAY.

C.P.R. Co. v. Calgary, 20 D.L.R. 974, 18 Can. Ry. Cas. 38.

(§ II B—18)—HIGHWAY—APPORTIONMENT OF COST—SENIOR AND JUNIOR RULE.

When a railway is sought to be crossed by a highway the Board will give authority for the construction of the crossing, as long as it is unobjectionable and is constructed in accordance with the standard regulation of the Board, on terms that the cost, under

the senior and junior rule, is not thrown on the respondent railway company. The local authorities will determine whether or not to construct the crossing.

Saskatchewan Board of Highway Comm'rs v. C.N.R. Co., 28 D.L.R. 559, 19 Can. Ry. Cas. 295.

RIGHT-OF-WAY—HIGHWAY.

The Board will not invoke its compulsory powers to compel a railway company to supply a right-of-way across its own lands for a municipal highway to be used for highway purposes quite irrespective of railway purposes.

Courtney v. Esquimalt & Nanaimo R. Co., 28 D.L.R. 381, 18 Can. Ry. Cas. 384.

HIGHWAY—DEDICATION AND PRESCRIPTION.

In the Province of Quebec, as distinguished from Ontario, there are no road allowances, highways being opened across railways (1) by resolution or by-law emanating from the municipal authority, (2) by the Lieut.-Governor-in-Council under s. 2052, R.S.Q. 1909 (3) by dedication and prescription. Where there is nothing in the application to shew that the highway concerned was opened before the railway under any of the above heads, the crossing should be authorized at the municipality's expense. [Caldwell v. C.P.R. Co., 9 Can. Ry. Cas. 497, distinguished.]

Pontiac v. C.P.R. Co., 28 D.L.R. 560, 19 Can. Ry. Cas. 298.

Where the traffic on the highway is much heavier than on the railway by which it is crossed, and protection by gates and watchmen is necessary, the Board ordered 20 per cent of the cost of protection to be paid out of the Railway Grade Crossing Fund, and the remaining 80 per cent to be divided equally between the applicant and respondent as well as the cost of operation.

Toronto v. C.P.R. Co., 28 D.L.R. 558, 19 Can. Ry. Cas. 293.

HIGHWAY CROSSINGS—WHAT ARE—PRIVATE DRIVEWAY.

A private driveway across a railway used by the public as a means of access to an adjoining farm is not a highway crossing within the meaning of s. 155 of the Ontario Railway Act, R.S.O. 1914, c. 185, nor within the purview of s. 259 of the Railway Act (Can.) 1888, respecting the fencing of and regulation of speed at crossings.

Gowland v. H.G. & B. Electric R. Co., 24 D.L.R. 49, 33 O.L.R. 372, 19 Can. Ry. Cas. 214.

HIGHWAY CROSSINGS—DANGEROUS SUBWAY —LIABILITY FOR INJURIES.

A railway company charged with the duty under the Railway Act, 1906 (s. 241) to maintain safe structures by which any highway is carried over or under any railway, will be liable for injuries resulting from the dangerous condition of a subway constructed by the railway company at the expense of a municipality.

Burrows v. G.T.R. Co., 23 D.L.R. 173, 18 Can. Ry. Cas. 183, 34 O.L.R. 142.

HIGHWAY CROSSED BY RAILWAY—RIGHTS OF ABUTTING OWNERS.

When an order has been made authorizing the crossing of certain streets by a railway, upon condition that the railway company should enter into an agreement to indemnify the city against all claims for damages by abutting land owners, the Board will not, after the execution of such agreement, order the railway company to carry out its terms.

Calgary v. C.N.R. Co., 21 D.L.R. 546, 18 Can. Ry. Cas. 25.

HIGHWAY CROSSING.

Leave was granted by the Board to a municipality to carry a highway over the right-of-way and tracks of two railways by means of a bridge where no highway existed and the development of a village had been retarded for want of a crossing upon condition that the municipality bear the whole cost of construction. An easement was granted over the right-of-way, with right of support by piers without payment of compensation to the railway companies.

Bridgeburg v. G.T.R. and Michigan Central R. Co., 8 D.L.R. 951, 14 Can. Ry. Cas. 10.

CROSSING OVER HIGHWAY—ORDER OF BOARD OF RAILWAY COMMISSIONERS—FAILURE TO COMPLY WITH CONDITIONS IMPOSED, WHERE HIGHWAY DIVERTED — RESCISSION OF ORDER—NEW ORDER FOR CONSTRUCTION OF OVERHEAD BRIDGE.

Re G.T.P.R. Co. and Fort Saskatchewan Trail, 7 D.L.R. 891, 21 W.L.R. 364.

HIGHWAY CROSSINGS — APPLICATION FOR CONSTRUCTION OF SUBWAY—EXCESSIVE EXPENDITURE—PROPOSED DIVERSION OF HIGHWAY—SUBMISSION OF PLANS.

Re Savoy and C.N.R. Co., 7 D.L.R. 886, 21 W.L.R. 377.

HIGHWAY CROSSED BY RAILWAY—COST OF PROTECTION — ELECTRIC BELL — SENIOR AND JUNIOR RULE — RAILWAY GRADE CROSSING FUND.

The Board will not require any contribution from the local authority towards the cost of protection by electric bell at a highway crossed by a railway, the question of seniority is not considered, the usual contribution of 20 per cent is made from the Railway Grade Crossing Fund and the remainder of the expense is borne by the railway company.

Mission City Board of Trade v. C.P.R. Co., 24 Can. Ry. Cas. 253.

CONSTRUCTION—JURISDICTION—6 EDW. VII. c. 70, s. 9—RAILWAY ACT, ss. 2 (21), 235, 237.

Where a railway company's Act of incorporation, 6 Edw. VII. c. 70, s. 9, enables it to "construct, maintain and operate" . . . equipment and appliances for the supply of heat, light, water and power, then under ss. 2 (21), 235, 237, of the Railway Act, 1906, the Board has jurisdiction to authorize the company to lay and

maintain across public highways conduits containing pressure steam.

Toronto Terminals R. Co. v. Toronto and Toronto Harbour Commissioners, 24 Can. Ry. Cas. 71.

DIVERSION — ELIMINATION — APPORTIONMENT OF COST.

Where crossings, of a highway by a railway are eliminated by the diversion of a highway, the rule usually followed by the Board is to place the greater portion of the cost on the railway and the remainder on the municipality or municipalities interested. In the present case, two-thirds of the cost was apportioned to the railway and one-third to the local authorities.

Canadian Government Rys. v. Mulgrave et al. (Cesale's and Auld's Cove Crossings Case), 24 Can. Ry. Cas. 68.

RAILWAY CROSSED BY HIGHWAY—SUBWAY—PEDESTRIAN AND VEHICULAR—APPORTIONMENT OF COSTS—PUBLIC INTEREST.

The decision of the Board in Brantford v. G.T.R. Co., 23 Can. Ry. Cas. 7, was varied by directing a vehicular subway to be built in the public interest, the respondent railway company to make the same contribution towards the cost of the vehicular subway that it was ordered to make in the case of the pedestrian subway, namely 60 per cent of the cost of the pedestrian subway.

Brantford v. G.T.R. Co., 24 Can. Ry. Cas. 371.

HIGHWAY CROSSED BY RAILWAY—CROSSING CREATION — RIGHT-OF-WAY — ACQUISITION — CONTEMPORANEOUS — EQUAL RIGHTS — RAILWAY GRADE CROSSING FUND—APPORTIONMENT OF COST.

Where the rights of the municipality are at least equal to those of the railway company, the creation of the street crossing having been contemporaneous with the acquisition of the land for railway right-of-way, the Board may make an order for contribution by the municipality towards the cost of protecting a level crossing by gates and watchmen. The Board has jurisdiction to make a further contribution from the railway grade crossing fund towards the cost of protection works at a crossing after contributing to the cost of installing an electric bell at the same crossing more than a year ago.

Lachine v. G.T.R. Co., 18 Can. Ry. Cas. 23.

SENIOR AND JUNIOR — RULE — CROSSING — CONSTRUCTION — PROTECTION — OPERATION AND MAINTENANCE — APPORTIONMENT OF COST.

Under the senior and junior rule the junior respondent interfering with the tracks of the senior applicant, should pay all the cost of constructing the crossing and operating and maintaining the protective appliances, but where the track to be crossed was not authorized by the Board to be laid, and both parties acted improperly, the applicant should bear the cost of constructing the crossing, and the respondent the cost of maintaining and operating the protective appliances.

C.P.R. Co. v. Winnipeg Electric R. Co., 18 Can. Ry. Cas. 31.

RAILWAY CROSSED BY HIGHWAY—DEDICATION—APPORTIONMENT OF COST—CONSTRUCTION AND PROTECTION—RAILWAY GRADE CROSSING FUND.

The Board has decided on a number of occasions, that to fix a railway company with a portion of the cost of constructing and protecting a highway crossing, there must be some act by the railway company dedicating the crossing to the public, but, where the crossing is a way of communication under the Act, the municipality will be assisted to the extent of 20 per cent from the railway grade crossing fund in bearing the whole cost of constructing and protecting a proper crossing. [Weston v. G.T.R. and C.P.R. Cos., 7 Can. Ry. Cas. 79: St. Pierre v. G.T.R. Co. (Simplex Ave. Crossing Case), 13 Can. Ry. Cas. 1, followed.]

Montreal v. C.P.R. Co., 18 Can. Ry. Cas. 50.

SUBSTITUTED HIGHWAY—NEW CONDITION—DANGEROUS AND UNSATISFACTORY—APPORTIONMENT OF COST.

Where it is necessary to open a new highway across a railway on account of the dangerous and unsatisfactory condition of existing highway crossings, it may be considered as a substituted highway and the expense of protection at the crossing should be divided equally as near as possible between the municipality and railway company concerned.

Sarnia v. Pere Marquette R. Co., 16 Can. Ry. Cas. 233.

RAILWAY GRADE CROSSING FUND — APPORTIONMENT OF COST.

Where there has been actual long-continued use by the public (though without legal right) of a level crossing in the nature of a highway crossing over a railway, the Board, in ordering in the public interest, that the highway be legally established, and carried across the railway by means of a subway, may direct that part of the cost be paid from the Railway Grade Crossing Fund, as in the case of separation of grades at a railway crossing of a legal highway. [Regina v. C.P.R. Co., 11 Can. Ry. Cas. 165, followed.]

Medicine Hat v. C.P.R. Co., 16 Can. Ry. Cas. 413.

MUNICIPALITY—BY-LAW—NEW HIGHWAY—BRIDGE.

In dealing with an application by a municipality to direct a railway company to carry a new highway across its tracks by an overhead crossing, the Board's jurisdiction is confined to giving directions as to the structure when railway property is interfered with, and upon the municipality passing a by-law providing a proper and suitable structure for the purpose an order

will go approving of same, and in such case the whole cost of the new highway will be upon the applicant.

Mission District Board of Trade v. C.P.R. Co., 14 Can. Ry. Cas. 331, 23 W.L.R. 590.

LEVEL CROSSINGS — MUNICIPALITIES AND RAILWAYS.

The rights of municipalities to apply to the Board to open level crossings, in the public interest, are higher and should more readily be given effect to than applications of railway companies to cross highways on the level.

St. Thomas v. Michigan Central R. Co., 14 Can. Ry. Cas. 338.

Application to determine the character of the protection at a crossing of a highway by a railway and to apportion the cost thereof. The railway of the first respondent crosses a public highway leading to an amusement park, known as Grimsby Beach with a double track and the other respondent operates an electric railway on the east side of the highway ending a short distance south of the tracks of the first respondent. It was held (1) that one watchman should be employed from May 1 to Oct. 1, for the first year to see if that would afford sufficient protection. (2) That the township should bear 15 per cent and the first respondent the remaining 85 per cent of the cost and that the second respondent should bear no portion of the cost of protection.

Grimsby Beach Amusement Co. v. G.T.R. and Hamilton, Grimsby & Beamsville Elec. R. Cos., 13 Can. Ry. Cas. 138, 22 O.W.R. 258.

A complaint by a town that the respondent intended to close S. street where it crossed its tracks and asking that the respondent should bear part of the cost of protecting the crossing. S. street had been originally a farm crossing but was now used as a general public highway crossing. The Board's officers reported that the crossing should be made a regular highway crossing and be fully protected by gates and watchmen. It was held, that the applicant must reimburse the respondent for the cost of construction, maintenance and protection of the crossing, receiving from the Railway Grade Crossing Fund, 20 per cent of the cost of the protection works.

St. Pierre v. G.T.R. Co., 13 Can. Ry. Cas. 1.

Section 75 of the Public Works Ordinance, 1901 (N.W.), is not limited in its application to land in an unincorporated village or town, but applies to all lands not within the limits of an incorporated city or town. The registration in the proper land titles office of a plan of subdivision shewing a street establishes the street as a highway from the date of registration. And, where a plan shewing a street was registered before the approval of the location plan of a railway, crossing a highway, not shewn on the railway plan, but shewn by a plan registered as above, the question of seniority was decided in favour of the highway; and the railway company were called upon to shew cause why they should not bear half the cost of a subway at the crossing, the highway having been included in the limits of a city.

Edmonton v. Edmonton, Yukon & Pacific R. Co., 21 W.L.R. 630.

LEVEL HIGHWAY CROSSING IN TOWN—MAINTAINING GATES AND WATCHMAN — NECESSITY FOR PROTECTION.

An order was made by the Board in January, 1914, directing the railway company to instal gates at a level highway crossing at First Avenue, in the town; the gates to be operated by day and night watchmen; 20 per cent of the cost of installation to be paid out of the Railway Grade Crossing Fund, and the remainder to be paid by the railway company; the cost of maintenance and operation to be also paid by the railway company:—Held, that, although the crossing had been much improved since the order, the order should not be varied. The consideration for the municipality's closing Third street consisted in the protection of First avenue by gates and watchmen at the company's expense; and there was still need for protection.

Re Souris and C.P.R. Co., 28 W.L.R. 694.

HIGHWAY CROSSING — ESTABLISHMENT OF HIGHWAY — REGISTRATION OF PLAN — FILING OF LOCATION PLAN OF RAILWAY —SENIORITY—R.S. SASK. 1909, C. 41, SS. 77, 79—DOMINION RAILWAY ACT, S. 191 (1) — CONFLICT—CONSTITUTIONAL LAW—POWERS OF BOARD—RECOGNITION OF LEGAL HIGHWAY — PERMISSION TO CROSS DOMINION RAILWAY BY MUNICIPAL STREET RAILWAY.

Re Regina and C.P.R. Co., 26 W.L.R. 521.

HIGHWAY CROSSING—SEPARATION OF GRADES —BRIDGE.

Front of Escott v. G.T.R. Co., 12 Can. Ry. Cas. 315.

(§ II B—19)—ABOLITION OF GRADE CROSSINGS — COST — LIABILITY OF STREET RAILWAY—POWER OF COMMISSIONERS TO IMPOSE PART OF COST ON.

Where the Board makes a permissive order on the application of a municipal corporation authorizing the latter to construct viaducts to carry streets over a railway which is subject to Dominion legislation and it is left to the municipality to avail itself of the order or not, s. 59 of the Railway Act, 1906 (Can.) does not apply, and it is not competent for the Board to include in its order a direction that a tramway company, whose line and crossing of the other railway would be affected by the change of grade, shall contribute (on the ground of the benefit which it would receive) a certain portion of the expense if the application on which the tramway company appeared was one solely between

the other railway and the municipality and no relief was claimed against the tramway company in the notice of motion.

B.C. Elec. R. Co. v. Vancouver, Victoria & Eastern R. Co., 19 D.L.R. 91, 28 W.L.R. 813, [1914] A.C. 1067, 18 Can. Ry. Cas. 287, reversing 13 D.L.R. 308, 48 Can. S.C. R. 98, 15 Can. Ry. Cas. 237, 4 W.W.R. 649.

HIGHWAY CROSSED BY RAILWAY — RAILWAY GRADE CROSSING FUND.

Where an application was made by a local improvement district for a bridge carrying the highway over railway tracks, and the limits of an adjoining city were afterwards extended so that the highway became wholly within the city limits, the Board decided that the district should not bear any portion of the cost of such bridge, that the city should contribute $5,000 to the cost for that portion of the bridge which crosses the through tracks of the railway company, who must bear the whole cost of extending the bridge across their yard, 20 per cent of the cost of the whole bridge to be paid out of the railway grade crossing fund and the balance by the railway company.

Saskatchewan Local Improvement District No. 161 v. C.P.R. Co., 14 Can. Ry. Cas. 337.

SEPARATION OF GRADES—STEAM RAILWAY AND ELECTRIC STREET RAILWAY—APPORTIONMENT OF COST.

Upon an application by a municipality for an order to carry four streets over the intersecting tracks of a steam railway company, two of these streets being occupied by the tracks of an electric street railway, the Board decided that the cost be apportioned as follows: For the streets not occupied by the electric railway, the steam railway to contribute 75 per cent, and the municipality 25 per cent of the cost; for the streets occupied by the electric railway, the steam railway to contribute 60 per cent, the electric railway 20 per cent, and the municipality 20 per cent of the cost, with contributions in three cases from the railway grade crossing fund of 20 per cent, up to $5,000, such cost to include the cost of depressing the tracks of the steam railway, and damages to its lands exclusive of the right-of-way.

Vancouver v. Great Northern and B.C. Elec. R. Co., 14 Can. Ry. Cas. 333.

(§ II B—19)—ALTERING GRADE—DAMAGES —REMEDY—ARBITRATION.

For damages to property by altering the grade of a street under a valid order of the Board, to alter a grade crossing, the remedy is by arbitration proceedings under the Railway Act, 1906, not by an action against the railway company acting under the order.

Brant v. C.P.R. Co., 30 D.L.R. 782, 36 O.L.R. 619, 20 Can. Ry. Cas. 268.

RAILWAY CROSSED BY HIGHWAY—SUBWAY—PUBLIC HIGHWAY — NOT ESTABLISHED IN LAW—PUBLIC INTEREST—APPORTIONMENT OF COST—RAILWAY GRADE CROSSING FUND—RAILWAY ACT, S. 237.

In a city which was originally planned and laid out by a railway company without adequate provisions for highway crossings over its tracks, and which has grown to large proportions on both sides of the railway so that numerous crossings are necessary, and an existing highway crossing is found to be congested and dangerous, the Board may require the company to bear a part of the cost of carrying another de facto highway by means of a subway across the railway in order to relieve the congestion, notwithstanding that such last-mentioned highway has no legal existence where it crosses the tracks, and that the proposed subway construction therefore creates an entirely new public right of crossing [Regina v. C.P.R. Co., 11 Can. Ry. Cas. 165, followed.] As a general proposition, there is no objection to municipalities building subways at their own cost, if they desire to make the expenditure, provided they do not interfere with railway facilities, irrespective entirely of circumstances which would justify the Board ordering such action in the public interest under the Act.

Medicine Hat v. C.P.R. Co., 16 Can. Ry. Cas. 413.

SEPARATION OF GRADES—APPORTIONMENT OF COST—RAILWAY GRADE CROSSING FUND —VOLUME OF—TRAFFIC ON HIGHWAY AND RAILWAY — SENIOR AND JUNIOR RULE.

In apportioning the cost of separation of grades, the amount of traffic on the highway and railway respectively are more important factors than the question of seniority, and the senior and junior rule should not be given as much weight as in the case of one railway crossing another.

Ste. Anne de Bellevue and Senneville v. G.T.R. and C.P.R. Cos., 16 Can. Ry. Cas. 250.

SEPARATION OF GRADES—PUBLIC INTEREST—OVERHEAD AND LEVEL CROSSINGS — HIGHWAY—DIVERSION.

After closing and diverting a highway crossing over two railways on the level it is in the public interest that the Board should not order another highway to be opened across these railways for the convenience of a few landowners who are cut off from access to the diverted highway except by going some distance east to where the diverted road joins the old road by an overhead bridge.

Bush et al. v. G.T.R. and Campbellford, Lake Ontario & Western R. Cos., 16 Can. Ry. Cas. 437.

TRAFFIC — INTERCHANGE — FACILITY — "INTERESTED OR AFFECTED" — APPORTIONMENT OF COSTS—RAILWAY ACT, S. 59.

Where, upon the application of a municipality, the Board directs the construction of an interchange track, as a necessary facility for the handling of traffic, the applicant municipality will not be ordered to contribute any "portion of the costs of the work as being interested or affected" within the meaning of s. 59 of the Railway Act, 1906. [Re C.P.R. Co. and York, 27 O.R. 559, 25 A.R. (Ont.) 65, 1 Can. Ry. Cas. 36, 47; G.T.R. Co. v. Kingston, 8 Can. Ex. 349, 4 Can. Ry. Cas. 102; Ottawa Electric R. Co. v. Ottawa and Canada Atlantic R. Co. (Bank Street Crossing case), 37 Can. S.C. R. 354, 5 Can. Ry. Cas. 131; Toronto v. G.T.R. Co., 37 Can. S.C.R. 232, 5 Can. Ry. Cas. 138; G.T.R. Co. v. C.P.R. Co. and London (London Interswitching case), 6 Can. Ry. Cas. 327; G.T.R. Co. v. Cedar Dale, 7 Can. Ry. Cas. 73, at pp. 77, 78; Toronto v. C.P.R. Co., [1908] A.C. 54, 7 Can. Ry. Cas. 282; Carleton v. Ottawa, 9 Can. Ry. Cas. 154; B.C. Elec. R. Co. v. Vancouver Victoria & Eastern R. & Nav. Co., [1914] A.C. 1067, 18 Can. Ry. Cas. 287; Toronto R. Co. v. C.P.R. Co. and Toronto (Avenue Road Subway case), 53 Can. S.C.R. 222, 20 Can. Ry. Cas. 280, followed.]

Thorold v. Grand Trunk and Niagara, St. Catharines & Toronto R. Cos., 24 Can. Ry. Cas. 21.

(§ II B—20) — RAILWAY AND TRAFFIC BRIDGES—MAINTENANCE.

The Board has no jurisdiction to decide a dispute between a municipality and a railway company as to which of them is liable for the repair and maintenance of a combined railway and traffic bridge, which ends on railway property, on both sides of a river, and whose approaches run over a municipal highway; the matter is entirely between the railway company and the provincial authorities, who aided in the construction of the bridge. The usual rule as to a combined railway and traffic bridge, apart from special circumstances, is that the railway company is responsible for railway structures and the municipality for structures handed over to it for municipal and highway purposes.

Assiniboia v. C.N.R. Co., 14 Can. Ry. Cas. 365, 23 W.L.R. 596.

LOCATION — PRIORITY — OVERHEAD BRIDGE —CROSSING—SENIORITY.

C.N.R. Co. v. C.P.R. Co., 11 Can. Ry. Cas. 432.

(§ II B—21)—FARM CROSSINGS — REOPENING—RESERVATIONS—RAILWAY ACT, S. 252.

Prior to the passing of the Railway Act, of 1888, there was no right to a farm crossing unless it was specifically covered in the conveyance from the land owner to the railway, and to retain it, successors in title must have it explicitly reserved in the conveyances to them. [Midland R. Co. v. Gribble, 2 Ch. D. 129, 827; Toronto, Hamilton & Buffalo R. Co. v. Simpson Brick Co., 17 O.L.R. 632, 8 Can. Ry. Cas. 464, followed.]

Hillhouse v. C.P.R. Co., 20 D.L.R. 907, 17 Can. Ry. Cas. 427.

PRIVATE OR FARM CROSSINGS—CULVERT FOR FRESHETS — SPECIFIC PERFORMANCE — DAMAGES.

An agreement by a railway company with the landowner from whom it purchased a right-of-way and as part consideration therefor to build a culvert so as not to obstruct freshet overflows which benefited his land, may be the subject of a decree for specific performance and the landowner's remedy is not one in damages only if the location and character of the culvert required are capable of precise ascertainment. A verbal agreement to construct a culvert so as not to obstruct a freshet overflow which was of benefit to the party conveying the right-of-way may be shewn notwithstanding a release contained in the conveyance of all claims for severance and depreciation arising out of the taking or out of the "construction, maintenance and operation" of the railway; such release does not absolve the railway from liability in respect of its failure to use such means to prevent damage to the landowner as are reasonably possible consistently with the proper construction, maintenance and operation of the railway.

Whitcomb v. St. John & Quebec R. Co., 18 D.L.R. 558, 43 N.B.R. 42, 14 E.L.R. 281.

FARM CROSSINGS—RELEASE OF SEVERANCE CLAIM BY LANDOWNER.

Where a railway corporation buys a strip of land to be used as a right-of-way for a railway across a farm and takes with the deed of the strip the vendor's release of all claims for severance or depreciation without any reservation to the vendor of any right to cross the railway over such trip, the vendor is not entitled as of right upon the subsequent passing of a statute (B.C. 1911, c. 44, s. 167) directing the company to make farm crossings for "persons across whose lands the railway is carried" to compel the company to provide a crossing over the strip so conveyed.

Hounsome v. Vancouver Power Co., 9 D. L.R. 823, 18 B.C.R. 81, 15 Can. Ry. Cas. 69, 23 W.L.R. 167 and 404.

CONVEYANCE—RIGHT-OF-WAY.

A provision in a deed of lands taken for right-of-way by a railway company, that the consideration is to include full compensation and indemnity for all damages or injury to the property by reason of the railway, does not constitute a relinquishment of the right to a farm crossing over the railway lands.

Lusty v. Pere Marquette R. Co., 21 Can. Ry. Cas. 93.

EXPROPRIATION — CONTRACT — SERVITUDE —VALUE.

Apart from any statute the suppliant was entitled, under indenture with the Crown, to a crossing from one part of his farm to another. The land expropriated from the suppliant having been converted into a railway yard with, at the date of the trial, eighteen tracks, it became impossible to give the crossing contracted for. Held, it having become practically impossible to give the crossing and to exercise such servitude, the suppliant was declared entitled to the value thereof, upon releasing and discharging the Crown from the obligation of constructing the same.

Fontaine v. The King, 38 D.L.R. 622, 16 Can. Ex. 199.

The judgment of Clute, J., 24 O.L.R. 206, was affirmed, on the ground that the plaintiff's right to an undergrade crossing had been established as an easement by continuous user for 20 years.

Leslie v. Pere Marquette R. Co., 13 Can. Ry. Cas. 228, 25 O.L.R. 326.

CROSSING IN THE NATURE OF A FARM CROSSING—ACCESS TO HIGHWAY.

The Board granted a crossing in the nature of a farm crossing from the applicants' lands to a highway upon condition that all expenses of construction and maintenance be borne by the applicants and that gates be established, which must be kept closed on both sides of the railway. [New v. Toronto, Hamilton & Buffalo R. Co., 8 Can. Ry. Cas. 50, followed.]

Richards v. G.T.R. Co., 14 Can. Ry. Cas. 329.

AGREEMENT WITH LANDOWNER — JURISDICTION—CONDITIONS—RAILWAY ACT, S. 252.

The Board is unwilling to disturb agreements between railway companies and landowners as to farm crossings, to be provided, but it is not bound by such an agreement if in contravention of the Railway Act, 1906, or for other reasons void or voidable, and will in a proper case override it in order to see that the Railway Act is followed and a proper and convenient crossing given. When an agreement between a railway company and a landowner specifies a level crossing, and it appears that the company has paid larger compensation in order to avoid the construction of an under-crossing, the Board if it afterwards orders an under-crossing, notwithstanding the agreement, may insist that the parties be restored to their original position, and may require the owner as a condition of the order, to give security for the return of such part of the compensation already paid him as shall represent the excess over the compensation properly payable, having in view the improved facilities, such compensation to be determined by arbitration if necessary.

Ray v. C.N.R. Co., 16 Can. Ry. Cas. 276.

LANDS — TAKING — COMPENSATION — ARBITRATION — LIVE STOCK OR CATTLE PASS.

Upon an application, by a landowner (after receiving compensation for land taken for right-of-way) for a cattle pass, the Board ordered that the pass be built upon condition that the money received from the company be returned, and in case of disagreement that the compensation be determined by arbitration under the Railway Act. In view of the inconvenience caused upon farms in which live stock is kept amounting in some cases to the equivalent of a capital investment of $1,200, railway companies should be willing to give a live stock or cattle pass where possible.

Wilson v. Canadian Northern Ontario R. Co., 16 Can. Ry. Cas. 270.

FARM CROSSING — MAINTENANCE — CLIMATIC CONDITIONS.

A railway company is not obliged during the winter season to keep snow on a level farm crossing during mild weather, to meet a climatic condition entirely controlled by the elements.

Sagala v. C.P.R. Co., 24 Can. Ry. Cas. 386.

Application under ss. 252, 253 of the Railway Act, 1906, directing the respondent to construct a farm crossing for the proper enjoyment by the applicant of his land on the north side of the railway. The applicant's farm of 72 acres was a subdivision of a larger farm provided with a crossing, but was worked as a separate farm only, upon its being acquired by the applicant, thus requiring a crossing to join the two portions of the farm. The practice of the Board has not been uniform, but not infrequently the entire cost of making a farm crossing has been imposed upon the railway company, especially in the Province of Quebec and Eastern Ontario, the facts and circumstances, especially the size of the farms being considered in each case. It was held, that the respondent should be directed by agreement to construct at its own expense a farm crossing for the applicant upon the dividing line between him and his neighbour.

Riddell v. G.T.R. Co., 13 Can. Ry. Cas. 216, 22 O.W.R. 331.

FARM CROSSING — OVERHEAD — AT GRADE—AGREEMENT—APPORTIONMENT OF COSTS — RELEASE — LANDS — SEVERANCE—DAMAGES.

When the landowner has received a liberal price for his land taken for the railway right-of-way, released the company by agreement from all claims for damages to the remainder by reason of severance, and been given a farm crossing at grade, the Board, although not bound by private agreements, will not grant an overhead farm crossing at a more suitable location unless the owner agrees to bear a portion of the cost. [Re Cockerline and Guelph & Goderich R. Co., 5 Can. Ry. Cas. 313, Lusty

v. Pere Marquette R. Co., 21 Can. Ry. Cas. 93, Lalande v. C.N.R. Co., 21 Can. Ry. Cas. 194, followed.]

Atkinson v. Vancouver, Victoria & Eastern R. Co., 24 Can. Ry. Cas. 378.

(§ II B—21a)—ANIMALS AT LARGE KILLED ON TRACK—NEGLIGENCE OR WILFUL ACT OR OMISSION OF OWNER—ABSENCE OF CATTLE-GUARDS—LIABILITY OF RAILWAY COMPANY.

Where animals at large through the negligence or wilful act or omission of the owner stray on to the right-of-way of a railway company and are there injured or killed, the company is not liable in damages, under s. 294, sub-s. 5 of the Railway Act, 1906, and the absence of cattle-guards does not render the company liable even where it is under a statutory duty to maintain them. [Clayton v. Can. Nor. Ry. Co., 7 W.L.R. 721, followed.]

Durie v. C.P.R. Co., 30 W.L.R. 768.

PRIVATE OR FARM CROSSINGS.

The Act, 43 & 44 Vict., c. 43, s. 16, sub-ss. 1 and 2 (Que.), now R.S.Q. 1909, art. 6606, obliges railway companies to construct and maintain crossings upon their roads, especially where they traverse farm lands in order to establish communication between the parts so severed. This obligation exists as well in respect to roads already constructed as to those to be constructed and the crossings of the former are legal servitudes of passage for benefit of the lands on which they are found. Therefore, the companies cannot interfere with the use of the crossings by so enlarging the right-of-way as to render access to them more steep and difficult and must answer in damages for injury resulting from doing so.

Drolet v. C.P.R. Co., 44 Que. S.C. 86.

The farm crossings which railway companies are obliged to provide for the convenience of the owners of the lands the railway runs through constitute a legal servitude and such owners are not obliged to establish a title thereto. When a company has once provided such crossings as it considers necessary it cannot close up any of them on the ground that those left are sufficient. The Board has no jurisdiction to declare an existing crossing unnecessary and authorize it to be closed up.

Saindou v. Temiscouata R. Co., 41 Que. S.C. 337.

SEVERANCE OF FARM—CATTLE-PASS—AGREEMENT WITH LANDOWNER—CULVERT—SUBSTITUTION OF EMBANKMENT.

Oatman v. G.T.R. Co., 12 Can. Ry. Cas. 521, 2 O.W.N. 21.

SEVERANCE OF FARM—UNDERGRADE CROSSING—CONVEYANCE OF RIGHT OF WAY BY LANDOWNER—MAINTENANCE OF CROSSING.

Leslie v. Pere Marquette R. Co., 24 O.L.R. 206, 19 O.W.R. 613.

(§ 11 B—22)—CROSSING NAVIGABLE WATERS—ROUTE AND LOCATION PLANS—APPROVAL—DEMOLITION OF WORKS.

Where a railway company, in the professed exercise of its powers as a railway company, and without the approval of the route by the Minister and of the location plans and works by the Board has constructed a solid filling across navigable waters, the Board, under the provisions of ss. 230, 233, coupled with the sub-ss. (h) and (i) of s. 30 of the Railway Act, 1906, has jurisdiction to order the demolition of the works so constructed.

G.T.P.R. Co. v. Rochester, 15 Can. Ry. Cas. 306, 48 Can. S.C.R. 238, affirming Rochester v. G.T.P.R. Co., 13 Can. Ry. Cas. 421.

FENCES—RIGHT-OF-WAY—NAVIGABLE RIVER—OBLIGATION — OBSTRUCTION — RAILWAY ACT, SS. 230, 254—9 & 10 ED. VII c. 50 (C.) s. 5—1 & 2 GEO. V. c. 22 (C.) s. 9, (4, 5).

Under s. 254 of the Railway Act, 1906, the respondent is only obliged to maintain right-of-way fences turned in to the track at each end of the bridge over the Souris river, a stream on which timber may be floated; therefore, under s. 230 the respondent is prohibited from placing fences, which would amount to an obstruction across the river.

Abrey v. C.P.R. Co., 23 Can. Ry. Cas. 17.

(§ II B—23)—OBSTRUCTION OF STREET CROSSING—STANDING CARS—OPERATION OF GATES.

To justify conviction of a railway company under s. 394 of the Railway Act 1906, for obstructing a street crossing by allowing cars to stand across the street, it must be shewn by the prosecution that the obstruction was wilful, and where the crossing was protected by gates and the only evidence was of the times when the gates remained closed against street traffic for periods in excess of five minutes, a conviction should be quashed where it was not shewn that any one train or car caused the obstruction nor was it shewn that the delay was not attributable to the gateman rather than to the trainmen; s. 394 does not apply to obstruction caused by the gateman's neglect at a street crossing.

R. v. G.T.R. Co., 18 D.L.R. 323, 23 Can. Cr. Cas. 80, 18 Can. Ry. Cas. 74.

C. FENCES.

(§ II C—25)—FENCES—RAILWAY ACT—TWO CONTIGUOUS PARALLEL LINES—PRIVATE LANDS—RESPONSIBILITY—APPORTIONMENT OF—JOINT TORT-FEASORS.

The provisions of s. 254 of the Railway Act, 1906, as to fencing the right-of-way, apply so as to require a fence between two contiguous parallel lines of different railway companies, and default in maintaining it may involve both in responsibility for the killing of cattle straying upon the track

because of a defect in the railway fencing adjacent to private lands.

Legault v. Montreal Terra Cotta Co., 20 D.L.R. 388.

RIGHT TO FENCE RIGHT-OF-WAY—INTERFERENCE WITH ACCESS TO SPRING.

A railway company which, in constructing its line and fencing in its right-of-way pursuant to its statutory right so to do, thereby interfered with plaintiff's access to a spring on the premises of another railway which he was permitted to use as a mere licensee, is not liable to him for damages for such interference.

Ball v. Sydney & Louisburg R. Co., 9 D.L.R. 148, 46 N.S.R. 507.

DUTY TO FENCE RIGHT-OF-WAY—ORDER OF BOARD OF RAILWAY COMMISSIONERS—LIMITATIONS OF ORDER AS TO PARTICULAR LOCALITIES.

Re Nutana and C.N.R. Co., 7 D.L.R. 888, 21 W.L.R. 380, 14 Can. Ry. Cas. 11.

A railway company which fails to maintain such fences and gates as required by the Provincial or Dominion Railway Acts commits a breach of duty and will as a result be presumed responsible for any damages caused to animals escaping on to its right of way unless it can rebut absolutely the statutory presumption that it is responsible for the killing of the animals on the track.

Rowe v. Quebec Central R. Co., 3 D.L.R. 175, 41 Que. S.C. 517.

FENCES—ANIMALS KILLED.

There is no liability upon a railway company to fence where the locality is one in which the lands on either side are not enclosed and either settled or improved. Railway Act, 1906, s. 254.

Krenzenbeck v. C.N.R. Co., 14 Can. Ry. Cas. 226.

ORDERS — RELIEVING — REQUIRING — EXTENSION OF TIME—RAILWAY ACT, S. 254 (4); 1 & 2 GEO. V. C. 22, S. 9.

The obligation to fence being imposed by statute, and not, in the first place, by order of the Board, the Board will not extend the time for complying with a specific order requiring fencing, but will preferably cancel its orders on the subject, and leave all parties to the operation of the Railway Act.

Re Fencing at Savona, B.C., 16 Can. Ry. Cas. 195, 26 W.L.R. 909.

STANDARD OF—STATUTORY OBLIGATIONS.

The statutory obligation imposed upon railway companies to provide fences which would prevent cattle and other animals from getting on the railway was a sufficient protection to the public and that it was, therefore, inadvisable for the Board to prescribe any standard fence.

Re Standard Railway Fences, 29 W.L.R. 452.

Railway companies which do not maintain their fences and gates in the condition required by law are guilty of negligence and liable for the loss of animals which get on the right of way and are killed there.

Bouchard v. Quebec Railway, Light & Power Co., 41 Que. S.C. 385.

INJURY TO CATTLE STRAYING FROM RIGHT OF WAY—RAILWAY ACT (ALTA.) 1907, C. 8, S. 145.

The Railway Act of Alberta limits the duty of railways as to fencing to the prevention of animals from injury by trains, etc., and does not impose the duty of erecting boundary fences to prevent animals from straying from the right-of-way of the railway to adjoining lands.

Philip v. Canadian North-Western R. Co., 6 W.W.R. 1220, 28 W.L.R. 451.

D. OPERATION.

Fires, leased road, see Crown, II—20.

(§ II D—30)—NEGLIGENCE—FIXED SIGNAL—SWITCHSTAND.

A switch stand is not a fixed signal within the meaning of the railway rules and regulations, and is governed by different rules; an engineer is not guilty of negligence in passing a red light on a switch stand, although compelled by the railway rules to stop where such light is shewn as a fixed signal. The words "must know" in r. 401 do not import knowledge acquired by use of the engineer's own eyes to the exclusion of every other source of knowledge, however reliable.

C.P.R. v. Walker, 43 D.L.R. 698, 23 Can. Ry. Cas. 399, 57 Can. S.C.R. 493, [1918] 3 W.W.R. 781, affirming 40 D.L.R. 547, 23 Can. Ry. Cas. 390, 11 S.L.R. 192, [1918] 2 W.W.R. 336.

DERAILMENT OF CAR—EFFECT OF, IN NEGLIGENCE CASES—HOW WAIVED.

Although proof of derailment of a railway car and its resultant injury generally establishes a prima facie case of negligence against the defendant company in a personal injury action, yet the plaintiff who goes further and undertakes without success to shew specifically the cause of such derailment thereby waives the prima facie case upon which he might otherwise have relied.

Curry v. Sandwich, Windsor & Amherstburg Ry. Co., 18 D.L.R. 685, 7 O.W.N. 140, 19 Can. Ry. Cas. 210.

COAL COMPANIES—DEFECTIVE APPLIANCES.

A coal company which operates wholly on its own lands in connection with its mines a railway, and on it carries passengers and freight, may properly be found negligent in operating its cars with a "link and pin" coupling long after the general introduction of safer and better methods, although the company may not be subject to the Railway Act, s. 264.

Cook v. Canadian Collieries, 21 D.L.R. 215, 21 B.C.R. 64, 30 W.L.R. 750, 8 W.W.R. 91.

DUTY OF ENGINEER TO LOOK AND WARN—SPEED—JOINT OPERATION.

An engineer in charge of a locomotive is not obliged constantly to look forward to

see if there is anyone or anything on the track, and he may occupy himself, while the train is in motion, in making repairs to his engine if he has given the warnings required by law at crossings and other places. Where there is no statutory regulation as to the speed of a railway train it cannot be taken into consideration to determine the cause of an accident. A railway company which grants to another company the right of running over its line and its joint operation is liable for the consequences of accidents which occur on it.

Collin v. G.T.R. Co., 48 Que. S.C. 106.

CROWN — LEVEL CROSSING — GOVERNMENT RAILWAY ACT—GROSS NEGLIGENCE.

Where the Minister of the Crown's officer in the exercise of his discretion decides not to make a viaduct or put gates across a highway, it is not for the court to say that the Crown was guilty of negligence, even where the crossing was a very dangerous one. [Harris v. King, 9 Can. Ex. 209, followed.]

Lucas v. The King, 18 Can. Ex. 281.

ENGINE MOVING BACKWARDS—PROXIMATE CAUSE.

The fact that a locomotive engine has been moved backwards on a line of railway may constitute a fault; but in order to make the owner responsible for the results of an accident happening under such conditions it is necessary for the injured person to establish the causal connection between the fault and the occurrence of the accident.

Davis v. Julien, 25 Que. K.B. 35.

(§ II D—31)—OPERATION—SUNDAY LAWS—EFFECT OF PROVINCIAL ACT ON STREET RAILWAY COMPANY INCORPORATED BY DOMINION PARLIAMENT.

Kerley v. London & Lake Erie Transportation Co., 13 D.L.R. 365, 28 O.L.R. 606, 15 Can. Ry. Cas. 337, reversing 6 D.L.R. 189, 22 O.W.R. 646, 26 O.L.R. 588, 14 Can. Ry. Cas. 111.

(§ II D—32)—DUTY TO OPEN VESTIBULE DOORS AT STATIONS.

It is the duty of a railway company operating a vestibuled passenger train to open the vestibule door of the day coach at which passengers may expect to alight at their points of destination, or to direct the passengers as to the mode of exit, so that they may get off the train while it is standing at the station.

McDougall v. G.T.R. Co., 8 D.L.R. 271, 27 O.L.R. 369, 4 O.W.N. 363, 23 O.W.R. 364.

SECTION MEN—LENGTH OF SECTIONS—NUMBER OF MEN TO BE EMPLOYED.

Re Section Men, 12 Can. Ry. Cas. 375.

(§ II D—35)—GOVERNMENT RAILWAY ACT, FENCING — DAMAGES — NEGLIGENCE — EVIDENCE, WEIGHING OF — PROXIMATE CAUSE.

Where a person approaching a level railway crossing, which he had frequently crossed before and the dangers of which were known to him, does so without proper caution and care, and is struck by an oncoming train, his own actions being the sole and proximate cause of the accident, his claim for damages cannot be maintained. It does not become the duty of the Crown to fence, under ss. 22, 23 of the Government Railways Act, until asked to do so by adjoining proprietors. In order to succeed in an action for damages against the Crown, under sub-s. f, s. 20, Exchequer Court Act, as amended by 9 & 10 Edw. VII., c. 19, proof must be made that an officer or servant of the Crown has been guilty of negligence whilst acting within the scope of his duties, which negligence was the cause of the accident.

McCann v. The King, 49 D.L.R. 179, 19 Can. Ex. 203.

NEGLIGENCE—UNCOVERED SWITCH RODS—FINDINGS.

A finding by a jury of negligence by permitting switch-rods to be uncovered will not be upheld when the evidence is that the practice universally followed on this continent was observed, and no evidence was given that covering was practicable.

Mallory v. Winnipeg Joint Terminals, 29 D.L.R. 20, 53 Can. S.C.R. 323, 10 W.W.R. 929, 20 Can. Ry. Cas. 382, affirming 22 D.L.R. 448, 25 Man. L.R. 456, 18 Can. Ry. Cas. 277, 31 W.L.R. 473, 8 W.W.R. 853.

INJURIES TO PERSON ON TRACK—GOVERNMENT RAILWAY—LIABILITY.

Where B. went upon a track contrary to s. 70 of the Government Railways Act, and was struck by a train and the engine-driver had complied with all statutory requirements as to whistle and bell, and did not see B. on the track; the only duty cast upon the engine-driver was to abstain from wilfully injuring B., and, as he had applied the emergency brakes as soon as he saw B. on the track, he had done all he could to avoid the accident, and there was no negligence attributable to him.

Brochu v. The King, 15 Can. Ex. 50.

(§ II D—36)—INJURY TO TRESPASSEE—PROXIMATE CAUSE.

A railway company may be liable for injury to a trespasser upon the right-of-way in breach of s. 408 of the Railway Act, 1906, if the engine-driver neglected to apply the emergency brakes at the time he became aware of the danger of accident when he first noticed deceased attempting to cross the tracks.

C.P.R. Co. v. Hinrich, 15 D.L.R. 472, 48 Can. S.C.R. 557, 5 W.W.R. 1088, 16 Can. Ry. Cas. 303, 36 W.L.R. 702, affirming reversal of 12 D.L.R. 367, 15 Can. Ry. Cas. 393, 18 B.C.R. 518, 3 W.W.R. 709, 26 W.L.R. 702.

TRESPASSERS.

A brakeman who was employed by a railway company other than the defendant, cannot recover for injuries sustained by being struck by a train where, without the knowledge or leave of the defendant, he was in its yard looking for cars that might be delivered to his master in due course, so

as to, for his own convenience, expedite their disposal, when received, since no breach of any duty owed him by the defendant was the cause of his injury; nor can he recover where, for purposes of his own, he was in the defendants' yard, by being struck by a train that gave all statutory warnings of its approach, where the plaintiff stated immediately after the accident that he saw the train coming but supposed that it was on a track different from that near which he was standing and where no peculiar circumstances are shewn to require a lessening of speed in the yard below that permitted by statute.

Cunningham v. Michigan Central R. Co., 4 D.L.R. 221, 14 Can. Ry. Cas. 96, 22 O.W.R. 481.

LIABILITY — CROSSING — CONTRAVENTION —NEGLIGENCE—C. C. ART. 1053—SECTION REV. [1906] C. 37, ARTS. 408-409.

No person has a right to pass or walk upon a railway track (except the employees of the company attached to the services of the railway). A person who crosses a railway track at a place where there is no public road or crossing is a trespasser, and has no recourse against the railway company if having also neglected all precaution he is struck by one of its locomotives. It does not make any difference that in crossing this track he is making use of a crossing which the public has been accustomed to use habitually to shorten the distance, though the company was always opposed to this practice.

Ladurantaye v. The G.T.R. Co., 55 Que. S.C. 48.

ENGINE MOVING BACKWARDS IN RAILWAY YARD — NEGLIGENCE — TRESPASSER — RIGHT OF ACTION.

Skulak v. C.N.R. Co., 20 Man. L.R. 242, 15 W.L.R. 699.

INEFFICIENT HEAD-LIGHT ON SNOW-PLOUGH—ABSENCE OF STATUTORY SIGNALS—EXCESSIVE SPEED.

Zuvelt v. C.P.R. Co., 23 O.L.R. 602, 12 Can. Ry. Cas. 420, 19 O.W.R. 77.

TRESPASSER—NEW TRIAL—DAMAGES EXCESSIVE.

C.P.R. Co. v. Lloyd Brown, 12 Can. Ry. Cas. 228.

NEGLIGENCE—INJURY TO TRESPASSER.

G.T.R. Co. v. Barnett, 12 Can. Ry. Cas. 205, 27 T.L.R. 359.

(§ II D—37)—LICENSEES AND PERMISSIVE USERS OF RIGHT OF WAY.

Where one is injured by the want of repair of a road in the station yard of a railway company, and the road is one which is used by the public openly and constantly as a road for teams, and there is no notice or other indication that it is not intended to be so used, the fact that the company has provided another road in good repair which might have been used, is no defence, in the absence of contributory negligence, to an action for damages for such injuries.

Thompson v. G.T.R. Co., 5 D.L.R. 145, 3 O.W.N. 1392, 14 Can. Ry. Cas. 99, 22 O.W.R. 524.

A railway company will be liable in damages for injuries suffered by a person who whilst attempting to cross the tracks to reach an adjoining roadway or whilst walking along the tracks with this end in view is struck by a train moving backwards (or engine backing up) when no one has been placed at the forward end of the train to warn persons at the crossings or along the tracks.

G.T.R. Co. v. McSween, 2 D.L.R. 874.

LICENSEES AND PERMISSIVE USERS OF RIGHT-OF-WAY.

Where a railway company owning a tramway line leading to their railway station constantly permits the public to walk on the tracks of the tramway line without interference, it owes a duty to exercise reasonable care in the operation of the tramway to avoid running down a person walking on the tracks, to or from the station, as such circumstances create a leave and license to him to so use the tracks.

Andrews v. B.C. Elec. R. Co., 9 D.L.R. 566, 18 B.C.R. 25, 15 Can. Ry. Cas. 75, 23 W.L.R. 14, 3 W.W.R. 714.

PERMISSIVE USER OF RIGHT-OF-WAY—CONTRACTOR PLACING GRAVEL AT HIGHWAY CROSSING—WORKMEN'S COMPENSATION.

The placing of gravel at a highway crossing is not work "in the way of" a railway company's business, so as to make the latter liable under the Workmen's Compensation Act (Alta.) for an injury to an employee of its contractor for such work, although the accident arose out of the operation of a train.

Ringwood v. G.T.P.R. Co., 17 D.L.R. 202, 7 A.L.R. 226, 28 W.L.R. 263, 6 W. W. R. 942.

OPERATION—INJURY TO EMPLOYEE OF CONTRACTOR WITH RAILWAY.

A railway company is liable for injury to a fencing contractor's employee while at work in a car, caused by a negligently violent coupling of cars by the company's employees.

Walker v. C.N.R. Co., and Ideal Fence Co., 11 D.L.R. 363, 6 S.L.R. 166. [Reversed on other grounds, 15 D.L.R. 118, 6 S.L.R. 403, 26 W.L.R. 137, 5 W.W.R. 754.]

(§ II D—38)—LOOKOUT—SIGNALS.

A number of railway cars which are connected and are forced backward by the concussion made in coupling will constitute a "train" before getting under way in a forward direction, and where there is a statutory obligation to station a brakeman on the last car of a train moving reversely, the railway must station the brakeman on the car last coupled, although the reverse motion is used only in the operation of taking on that car. [Hollinger v. C.P.R., 20 A.R. (Ont.) 244, 250, approved.]

Helson v. Morrisey, Fernie & Michel R.

Co., 1 D.L.R. 33, 19 W.L.R. 835, 17 B.C.R. 65, 1 W.W.R. 470.

(§ II D—60)—Accidents at crossings—excessive speed.

An instruction to the jury, in an action for injuries sustained by a collision at a highway crossing, that it was negligence to run a train through a thickly settled portion of a town or village at more than ten miles an hour, is erroneous, unless qualified by stating in effect the exceptions contained in s. 275 of the Railway Act, 1906, permitting a greater rate of speed where the crossing is protected in accordance with an order of the Board or other competent authority. [G.T.R. Co. v. McKay, 34 Can. S.C.R. 81, 3 Can. Ry. Cas. 52, followed.]

Bell v. G.T.R. Co., 14 D.L.R. 279, 29 O.L.R. 247.

Liability for—Previous accident.

By reason of s. 275 of the Railway Act, 1906, as to the making of reports and inspection of accident occurring at railway crossings, that part of the section added by 8-9 Edw. VII. c. 32, prohibiting a speed of more than 10 miles an hour by trains at certain crossings not protected to the satisfaction of the railway commission where accidents resulting in bodily injury or death had previously occurred, must be held to be limited in the latter respect to accidents of which the railway company is fixed with notice by reason of physical impact occasioning the same or by reason of the train employees actually becoming aware of the accident so as to report it; a previous accident by a horse taking fright at a passing train after passing over the crossing will not bring the sub-s. (4) into operation where it was not observed by the railway employees so as to call upon them to make a report.

Bell v. G.T.R. Co., 14 D.L.R. 279, 29 O.L.R. 247.

(§ II D—70)—Injury to animals—Owner's negligence.

Where it is shewn that animals were at large, that they got upon railway property, and were injured thereon, not at an intersection with the highway, the railway company is liable under the Railway Act 1906, (s. 294), unless it can prove that the case falls within the provisions of s. 295, or that the animals got at large through the negligence or wilful act or omission of the owner. An owner cannot be held guilty of negligence in allowing his animals to run at large where a valid by-law exists permitting him to do so. [Greenlaw v. C.N.R. Co., 12 D.L.R. 402, followed.]

Koch v. G.T.P. Branch Lines Co., 32 D.L.R. 393, 21 Can. Ry. Cas. 136, 10 S.L.R. 35, [1917] 1 W.W.R. 1120, reversing 9 S.L.R. 256, 34 W.L.R. 876.

Injury to animals at large—Owner's negligence.

Bugg v. C.N.R. Co., 36 D.L.R. 776, [1917] 3 W.W.R. 458.

Animals—Farm crossing—Swing gates.

Section 295 of the Railway Act 1906, provides that "no person whose horses . . . are killed or injured by any train shall have any right of action against any company in respect of such horses . . . being killed or injured, if the same were so killed or injured by reason of any person (a) for whose use any farm crossing is furnished failing to keep the gates at each side of the railway closed when not in use." This section is no defence to an action for damages if the gates when erected would not swing, and the hinges and fastenings have not been maintained as required by s. 254 and have become useless.

Prouse v. C.N.R. Co., 42 D.L.R. 159, 29 Man. L.R. 16, 23 Can. Ry. Cas. 247, [1918] 2 W.W.R. 845.

Animals at large—Negligence—Wilful act.

Section 294 of the Railway Act, 1906, as amended by 9-10 Edw. VII. c. 50, s. 8, means that if animals are allowed by their owner to be at large within one-half mile of the intersection of the railway and a highway at level, the owner takes the risk upon himself of any damages which may be caused to or by them upon the intersection, and if such damages are caused to the animals, not upon the intersection but upon the railway property beyond it, the company would be liable, unless it established that the animals got at large through the negligence or wilful act or omission of the owner or his agent.

Anderson v. C.N.R. Co., 43 D.L.R. 255, 57 Can. S.C.R. 134, [1918] 3 W.W.R. 107, 23 Can. Ry. Cas. 243, affirming 35 D.L.R. 473, 10 S.L.R. 325 at 334, 33 D.L.R. 418, [1917] 2 W.W.R. 602, 10 S.L.R. 325.

Where the by-laws of a municipality permit the running at large of animals, it is neither negligence nor a wilful act or omission within the meaning of s. 294 (4) of the Railway Act 1906, for the owner to allow them to run at large, but if such animals are allowed to be at large within one-half mile of the intersection of the railway and a highway at rail level, the owner takes the risk of any damages that may be caused to them upon the intersection, and if damage is caused to such animals, not upon the intersection, but upon the railway property beyond it, the railway company will be liable, unless it is established that the animals got at large through the negligence or wilful act or omission of the owner or his agent. [Anderson v. C. N.R. Co., 35 D.L.R. 473, followed.]

Fraser v. C.N.R. Co. 43 D.L.R. 562, 23 Can. Ry. Cas. 250, 29 Man. L.R. 221, [1918] 3 W.W.R. 962.

The expression "wilful act or omission" has a meaning distinguishable from "negligence," in that the former denotes a deliberate and conscious intention; hence animals on the lands of new settlers, which are kept together by means of tethering one of the

oxen and which escape as a result of the ox releasing himself from the fastening, are not at large through the "wilful act or omission of the owner," within the meaning of s. 294 (4) of the Railway Act, 1906, (amended by 9-10 Edw. VII. 1910, c. 50, s. 8), and entitles the owner to recover for their being killed or injured on the right-of-way of a railway company. [Parks v. C.N. R. Co., 14 Can. Ry. Cas. 247, followed.]

Waite v. G.T.P.R. Co. 27 D.L.R. 549, 11 A.L.R. 260, 34 W.L.R. 92, 320, 10 W.W.R. 486.

INJURIES TO ANIMALS—MUNICIPAL BY-LAW —ENACTMENT BY IMPLICATION—NEGLIGENCE OF OWNER.

A municipal by-law which restrains animals from running at large for a certain number of hours of the day does not give rise to an enactment by implication permitting them to run at large during the remaining hours of the day in derogation of the common law duty of the owner to keep the animals from his neighbour's land, and there can be no recovery when they are killed on the right of way of a railway company, if the animals are at large through the negligence of the owner within the meaning of subs. 4, of s. 294, of the Railway Act, 1906, as amended by s. 8, c. 50, 9-10 Edw. VII. [Greenlaw v. C.N.R. Co., 12 D. L.R. 402, 23 Man. L.R. 410, distinguished; Watt v. Drysdale, 17 Man. L.R. 15, followed.]

Doble v. C.N.R. Co. 27 D.L.R. 115, 26 Man. L.R. 286, 19 Can. Ry. Cas. 312, 34 W. L.R. 298, 10 W.W.R. 427.

ANIMALS ON TRACKS—ENGINEER'S DUTY.

Prima facie there is no duty on the engineer operating a railway train who discovers stray animals in danger on the right-of-way over which he is passing to stop his train for the purpose of driving such animals from the track so as to save them from injury.

Sporle v. G.T.P.R. Co., 17 D.L.R. 367, 7 A.L.R. 84, 17 Can. Ry. Cas. 71, 28 W.L.R. 271, 6 W.W.R. 827.

ANIMALS AT LARGE—DEFECTIVE FENCE—STATUTORY DUTY TO REPAIR.

A railway company having been incorporated under Quebec statute and never having been declared to exist for the general benefit of Canada, or to come under the provisions of the Dominion statute, is only obliged to build and keep in repair such fences as were required for the protection of the animals belonging to the adjoining owner, or of those who were rightly occupying the adjoining land.

Dodier v. Quebec Central R. Co., 23 D.L.R. 667, 47 Que. S.C. 186.

HORSES AT LARGE THROUGH WILFUL ACT OF OWNER—WANT OF CATTLE GUARDS.

It is made an absolute ground of defence under s. 294, subs. 4, of the Railway Act, 1906, to an action against the railway for value of stray horses killed on its right-of-way at a place which was not a crossing that the horses got at large through the wilful act or omission of the owner, such as turning the horses out to run at large without the authority of a municipal by-law, and such statutory defence is not displaced by shewing that the horses must have got upon the railway tracks at a railway crossing where the railway had neglected to maintain cattle guards as required by s. 254 of the amendment of 1911, (c. 22). [Sporle v. G.T.P.R. Co., 17 D.L.R. 367; Clayton v. C.N.R. Co., 17 Man. L.R. 426, 435, applied; Greenlaw v. C.N.R. Co., 12 D. L.R. 402, 15 Can. Ry. Cas. 329, 23 Man. L. R. 410, distinguished.]

Early v. C.N.R. Co., 2 D.L.R. 413, 8 S.L.R. 27, 19 Can. Ry. Cas. 316, 30 W.L.R. 878, 8 W.W.R. 480.

INJURIES TO ANIMALS ON TRACKS BY TRAINS.

The evident purpose of Parliament to deal with the whole question of a railway company's liability for injury to animals at large by the provisions of s. 294 of the Railway Act, 1906, as amended, constitutes such s. 294 a specific code laying down a general statutory liability and providing a special defence, thereby precluding the plaintiff, in such cases, from resting liability upon a breach of s. 254 read with the general provisions of s. 427. [Clayton v. C.N.R. Co., 7 Can. Ry. Cas. 355, applied.]

Sporle v. G.T.P.R. Co., 17 D.L.R. 367, 7 A.L.R. 84, 17 Can. Ry. Cas. 71, 28 W.L.R. 271, 6 W.W.R. 827.

LIABILITY OF RAILWAYS FOR DAMAGES—KILLING HORSE ON TRACK—ANIMAL "AT LARGE."

Where a horse which had been turned out to pasture on unfenced range lands adjoining a railway took fright on being driven into camp by the owner's employee and escaped from his control and was killed by a train, the owner has no right of action against the railway company under s. 294, subs. 4, of the Railway Act, 1906 (as amended 9 & 10 Edw. VII., c. 50, s. 8), for, if he had the landowner's permission to pasture on the lands, the horse while thereon was not "at large" and if he had not such permission, the horse was put "at large" by the plaintiff's wilful act in pasturing the horse there within the exception of the enactment.

Hupp v. C.P.R. Co., 16 D.L.R. 343, 6 W.W.R. 385, 27 W.L.R. 398, 17 Can. Ry. Cas. 66, 20 B.C.R. 49.

A railway company operating under and subject to the Railway Act, 1906, is liable for killing horses at large upon the railway line, unless the railway company establishes under s. 294 (4), that the animals got at large through the negligence or wilful act of the owner or his agent or the custodian of such animals or his agent, or unless the circumstances as to the manner in which the horses came to be at large are

within the special exceptions from liability stated in ss. 294, 295 of the Act.

Rogers v. G.T.P.R. Co., 2 D.L.R. 683, 22 Man. L.R. 349, 21 W.L.R. 222.

ANIMALS AT LARGE—DAMAGES—NEGLIGENCE OR WILFUL ACT OR OMISSION OF OWNER—UNENCLOSED LANDS—RAILWAY ACT, S. 294 (4).

Where a horse got at large from unenclosed lands by reason of the negligence of its owner in not properly confining it he cannot recover damages for its loss, although the animal wanders a considerable distance before getting upon the right-of-way of the defendant. [Becker v. C.P. Ry. Co., 7 Can. Ry. Cas. 29, followed.]

Wallace v. G.T.R. Co., 17 Can. Ry. Cas. 64.

The plaintiff sued for damages for the loss of a horse killed upon the defendants' track by one of their cars. The horse was admittedly a trespasser. Held that the defendants were not liable for the only negligence found by the jury, viz., that the motorman should have seen the horse on the track in time to enable him to stop the car. [G.T.R. Co. v. Barnett, [1911] A.C. 361, followed.] Judgment of the County Court of Essex reversed.

Bondy v. Sandwich, Windsor & Amherstburg, R. Co., 24 O.L.R. 409, 13 Can. Ry. Cas. 57.

PROTECTION OF HIGHWAY CROSSING.

Prior v. C.P.R. Co., 25 O.W.R. 163.

A railway company is not liable for injuries to animals from a farm adjacent to the line of railway, which are not at large and which are killed on the permanent way, except where the plaintiff alleges and proves that the company has been guilty of negligence in the performance of duties imposed upon it by ss. 254, 255 of the Railway Act, 1906. The accident which happened was of the nature coming within ss. 254, 255 of the Act and not under s. 294 which renders the company responsible unless it shews by evidence that the animal was at large only on account of the neglect or voluntary act of its owner.

Payette v. Canadian Northern Quebec R., 50 Que. S.C. 64.

The effect of a municipal by-law which permits animals to run at large "except as prescribed or restricted by law or by this by-law or other by-laws of the municipality," is to leave the case of an animal killed by a train within half a mile of the intersection of a highway with a railway within the operation of subs. 1, s. 294, Railway Act, 1906.

Block v. Can. North. Pac. R. Co., 10 W.W. R. 1228.

Cattle running at large on the range are lawfully at large, and, if the cattle are killed on a railway track, the railway company is liable under s. 295 of the Railway Act, 1906.

Bardgett v. C.P.R. Co., 10 W.W.R. 810.

RAILWAY—ANIMALS KILLED ON TRACK—LIABILITY—RAILWAY ACT, S. 294 (4)—ONUS—EVIDENCE.

Foster v. C.P.R. Co., 19 W.L.R. 623.

(§ II D—71)—INJURY TO ANIMALS—DUTY TO FENCE.

Section 294 of the Railway Act, 1906, must be read with reference to conditions of s. 254, and where there is no obligation to fence there can be no liability for injury to cattle, whether "at large" or "at home;" but where there is an order compelling railway companies in general to fence, a special order partly relieving a railway company from such duty at certain portions of the locality in question does not relieve the company from liability, in the absence of evidence as to where the animals got upon the railway. [Higgins v. C.P.R. Co., 9 Can. Ry. Cas. 34, followed; Parks v. C.N.R. Co., 14 Can. Ry. Cas. 247, disapproved.]

Waite v. G.T.P.R. Co., 27 D.L.R. 549, 11 A.L.R. 260, 34 W.L.R. 92, 320, 10 W.W.R. 486.

The word "negligence" in s. 294 (4) of the Railway Act, 1906, (as amended by 9-10 Edw. VII., c. 50, s. 8), is not used in the sense generally attributed to it in common law. An owner is not necessarily negligent because he leaves a large number of cattle near a railway in charge of one man. In considering the alleged negligence of the owner, the absence of a fence which the railway company was legally liable to erect should not be taken into account.

Quast v. G.T.P.R. Co., 28 D.L.R. 343, 9 A. L.R. 496, 34 W.L.R. 540, 10 W.W.R. 671.

LACK OF PROPER FENCE—ANIMALS AT LARGE THROUGH OWNER'S NEGLIGENCE.

The fact that the owner of an animal turns it out to pasture on his own land beside a railway track which a company had not fenced as required by law, does not shew that the animal was at large through the negligence or wilful act of the owner so as to relieve the company from liability under s. 294 (4) of the Railway Act, 1906, for injuries inflicted on it while on the right-of-way the company's omission to construct a fence did not deprive the adjoining owner of the right to turn his animals out to pasture on his own land. [McLeod v. C.N.R. Co., 18 O.L.R. 616, 9 Can. Ry. Cas. 39, followed.]

Palo v. C.N.R. Co., 14 D.L.R. 902, 29 O. L.R. 413, 25 O.W.R. 165, 16 Can. Ry. Cas. 1.

KILLING ANIMALS—DEFECTIVE FENCE—ANIMALS AT LARGE UNDER BY-LAW.

Cattle turned out to graze on the highways as authorized by a municipal by-law are not "at large through the negligence or wilful act or omission of the owner" so as to relieve a railway company, under s. 294 (4) of the Railway Act, 1906, as amended by 10 Edw. VII. c. 50, s. 8, from liability for running down animals that came upon its right-of-way at a place other than a highway crossing, by reason of defects in the

fencing which the railway company was under a statutory obligation to maintain.

Greenlaw v. C.N.R. Co., 12 D.L.R. 402, 15 Can. Ry. Cas. 329, 23 Man. L.R. 410, 24 W.L.R. 569, 4 W.W.R. 847.

Action for the value of two horses alleged to have been killed by one of the company's trains through its neglect to fence its right of way at the place in question. The horses escaped from the pasture field by reason of the defective fence (slash fence) with which it was enclosed strayed on to the unfenced right of way of the railway company and were killed by a passing train. It was held (1) that, under subs. 4 of s. 237 (now 294) of the Railway Act, 1903, the defendant escaped liability through the wilful act or omission of the owner of the animals in question by having a defective fence. (2) That, therefore, the exception in subs. 4 of s. 254, relieving a railway company from fencing did not need to be decided. [Bourassa v. C.P.R. Co., 30 Que. S.C. 385, 7 Can. Ry. Cas. 41, followed.]

Renaud v. C.P.R. Co., 13 Can. Ry. Cas. 358.

CATTLE "AT LARGE"—THE RAILWAY ACT, S. 295.

Cattle turned out upon a road allowance so that they can range upon an open section must be said to be "at large," and a railway company, even though their cattle-guards or fences are negligently constructed, are not liable for injuries thereto.

Fleming v. C.P.R. Co., 7 W.W.R. 525.

UP-KEEP OF FENCES ALONG RIGHT-OF-WAY—ANIMALS KILLED WHILE WANDERING ON TRACKS.

Railway companies who do not maintain their fences and gates in the condition provided by law, are at fault and liable for the loss of animals who thereby gain access to the tracks and are killed.

Bouchard v. Quebec R. Light & Power Co., 41 Que. S.C. 385, 14 Can. Ry. Cas. 241.

ANIMALS AT LARGE—WILFUL ACT OR OMISSION OF OWNER—DEFECTIVE FENCES.

Action to recover the value of cattle found killed on the defendant's railway. The plaintiff's cattle escaped by knocking down or jumping over a fence of insufficient strength and height from one pasture field to another, and from there got through the highway fence part of which was constructed of brush with poles; thence along the highway, got over the cattle guards at the crossing and were killed by a passing train. The plaintiff's son admitted that said cattle had got out to the highway more than once through the fences which he had fixed at different times in different places after they had got out:—Held, that the cattle got at large through the wilful act or omission of the plaintiff by reason of his fences both of the pasture field and at the highway being insufficient and insecure and he cannot recover their value from the defendant.

Wilkinson v. G.T.R. Co., 14 Can. Ry. Cas. 236.

LACK OF FENCE—ORDER EXCUSING FROM FENCING.

Re Cherbo and C.P.R. Co., 23 W.L.R. 602.

ANIMALS KILLED ON TRACK—NEGLIGENCE—NEGLECT TO FENCE—PROXIMATE CAUSE—RAILWAY ACT, R.S.C. 1906, c. 37, ss. 254, 255, 295, 427—AMENDING ACT, 9 AND 10 EDW. VII. c. 50, ss. 5, 9.

Behan v. C.P.R. Co., 7 O.W.N. 238.

FARM FENCES.

The owner of farm property who fails to maintain his line fence is responsible for the loss of animals which, passing through a breach, stray upon a railway track and are killed. When the accident is due, at the same time, to the want of repair in the fence between his farm and the rights-of-way of two railway companies parallel to each other and with no division between them, one of which companies is obliged to maintain the fence and the other owns the right-of-way on which the animals were killed, he has his recourse in warranty against both.

Legault v. Montreal Terra Cotta Co., 43 Que. S.C. 15.

LIABILITY FOR ANIMALS KILLED ON TRACK—NEGLIGENCE OR WILFUL ACT OF OWNER.

Parks v. C.N.R. Co., 21 Man. L.R. 103, 18 W.L.R. 118.

ANIMALS KILLED ON TRACK—DEFECTIVE FENCE—SWING-GATE.

Dolsen v. C.P.R. Co., 12 Can. Ry. Cas. 264.

(§ II D—72)—HORSE KILLED ON RAILWAY—GATE TO RIGHT-OF-WAY BROKEN—FASTENED BY ROPE—PROPER CHAIN GONE—DUTY OF RAILWAY—RAILWAY ACT.

It is the statutory duty of a railway company under s. 254 of the Railway Act, 1906, to maintain proper fastenings on gates opening on its right-of-way. Evidence shewing a lack of the proper fastenings establishes a breach of this duty. [Dunsford v. Michigan Central, 20 A.R. (Ont.) 577, followed.]

G.T.P.R. Co. v. Austed, 49 D.L.R. 519, [1919] 3 W.W.R. 1045.

CATTLE-GUARDS — GATES — "UNUSED HIGHWAY"—RAILWAY ACT.

The Railway Act, 1906, does not forbid, either by s. 254 or otherwise, the erection of a farm crossing in lieu of cattleguards at a road allowance which is unused as a highway and is in fact used as farm land, and where a railway company and an adjoining farm owner concur in so treating an "unused highway" the farm owner is bound under s. 255 to keep the gates on each side of the railway closed when not in use, and damage to the owner's animals through his own neglect to perform such statutory duty is not recoverable from the railway company no negligence on the part of those in charge of the train being shewn.

Brook v. C.P.R. Co., 18 D.L.R. 184, 24 Man. L.R. 716, 29 W.L.R. 557, 7 W.W.R. 356, 18 Can. Ry. Cas. 78.

CATTLE GUARDS—ONUS ON DEFENDANT.

Under s. 294 of the Railway Act, 1906,

as amended by 9-10 Edw. VII c. 50, s. 8, imposing a liability on a railway company for injuries to animals "at large" on its right-of-way, the onus of proving negligence on the part of the owner of the animal in allowing a horse to be "at large" is upon the railway company.

Stitt v. C.N.R.Co., 10 D.L.R. 544, 23 Man. L.R. 43, 15 Can. Ry. Cas. 333, 23 W.L.R. 641, 3 W.W.R. 1116.

INJURY TO ANIMAL AT LARGE—FARM CROSSING—GATES.

An animal to be "at large," under the terms of s. 294 of the Railway Act, 1906, must not be in its own pasture, but must be on a highway. Where a horse, being on its own pasture, escapes through a gate in the fence of a farm crossing, thus securing access to the line of a railway, and gets killed, in the absence of any evidence to shew that the gate was not in good order, or, in the absence of any evidence of any other fault on the part of the railway, the owner of the animal has no recourse against the company, as his horse was not "at large," and the law imposed upon him the duty to keep the gate closed.

De Soles v. C.P.R. Co., 48 Que. S.C. 158.

ANIMAL KILLED ON TRACK — HIGHWAY CROSSING — INSUFFICIENT CATTLE-GUARDS—RAILWAY ACT.

Clare v. C.N.R. Co., 17 W.L.R. 536.

(§ II D—75)—FIRES—LIABILITY OF RAILROAD FOR.

One in possession of timber which he has wrongfully taken to his limits from government lands has a sufficient possessory title to maintain an action for their destruction by fires caused by sparks from locomotives in violation of ss. 297-8 of the Railway Act 1906, amended by 1-2 Geo. V. 1911, c. 22 s. 10).

Dutton v. C.N.R. Co., 30 D.L.R. 250, 26 Man. L.R. 493, 34 W.L.R. 881, 21 Can. Ry. Cas. 294, 10 W.W.R. 1006, affirming except as to damages, 23 D.L.R. 43, 31 W.L.R. 367.

ORIGIN—NEGLIGENCE—ONUS.

Section 297 of the Railway Act, 1906, which requires railway companies to keep the right-of-way free from dead grass, weeds and unnecessary combustible matter, applies only to a line of railway under operation, not whilst it is under construction; to charge a company with common law negligence, while constructing a railway, for causing fires by sparks escaping from locomotives, and from burning logs and rubbish necessary for clearing the right-of-way, the onus is upon the plaintiff to prove that the fire originated from the sparks, and that the defendant was guilty of negligence in setting out the fire or allowing it to escape. A person lighting a fire is not bound to prevent injury in all events, but only that injury shall not occur through his negligence.

Margach v. Mackenzie, Mann & Co., 28 D.L.R. 1, 9 A.L.R. 548, 20 Can. Ry. Cas. 427, 34 W.L.R. 565, 10 W.W.R. 679, affirming 32 W.L.R. 162.

FIRE STARTING ON RIGHT-OF-WAY—BREACH OF STATUTORY DUTY TO KEEP FREE FROM COMBUSTIBLES.

Since an absolute duty is imposed on a railway company by R.S.N.S. 1900, c. 91, to at all times keep its right-of-way where it passes through woods, clear from all combustible material, such as bushes, grass and fern, it is answerable for damages caused an adjoining land owner by fire started in an accumulation of combustible material on its right-of-way, by sparks from a locomotive.

Halifax and South Western R. Co. v. Schwartz, 11 D.L.R. 790, 49 C.L.J. 307, 47 Can. S.C.R. 590, 15 Can. Ry. Cas. 186, affirming 4 D.L.R. 691, 14 Can. Ry. Cas. 85, 46 N.S.R. 20.

FIRES — ORIGIN FROM LOCOMOTIVE — INFERENCE.

[Supplementary to the report contained in 14 D.L.R. 840.]

C.P.R. Co. v. Kerr, 16 D.L.R. 191, 26 W.L.R. 380, 5 W.W.R. 782, 49 Can. S.C.R. 33.

ORIGIN FROM LOCOMOTIVE—INFERENCE.

The fact that no fire was seen at or near a railway track until a few minutes after the passing of a railway locomotive which had not been recently inspected, justifies an inference, where no other cause seemed probable, that the fire originated from sparks from such engine, so as to fix the railway with liability under s. 298 of the Railway Act, 1906.

C.P.R. Co. v. Kerr, 14 D.L.R. 840, 16 Can. Ry. Cas. 25, 49 Can. S.C.R. 25, 26 W.L.R. 580, 27 W.L.R. 248, 5 W.W.R. 782, 16 D. L.R. 191.

LOCOMOTIVE OF ANOTHER COMPANY WITH RUNNING RIGHTS.

If the operating railway company contracts to give another railway company concurrent running rights over its line, it must be taken to be "making use of" the locomotive of the company having such running rights within the meaning of s. 298 of the Railway Act, 1906, s. 298, so as to fix the granting company with liability for damage caused by sparks from a locomotive of the other company while using the line of the granting company.

Fredette v. G.T.R. Co., 15 D.L.R. 131, 44 Que. S.C. 508.

Where, from the testimony, the inference is strong that sparks from a locomotive started a fire at a point off a railway company's right-of-way, where, to the knowledge of the company's servants, the fire smouldered for nearly a month, and then, fanned by a high wind, it spread, jumped across a river and destroyed standing timber belonging to the plaintiff, the company is properly held liable therefor under s. 298 of the Railway Act, 1906.

Farquharson v. C.P.R. Co., 3 D.L.R. 258, 20 W.L.R. 914, 15 Can. Ry. Cas. 190, 2 W. W.R. 165.

Under c. 91 of R.S.N.S. 1900, which requires a railway to clear from off the sides

of its roadway, where it passes through woods, all combustible material, it is answerable for the value of property adjacent to its roadway that was destroyed by fire which was started on the roadway by sparks from engines, in an accumulation of dried grass, ferns, bushes, and turf.

Schwartz v. Halifax & South Western R. Co., 4 D.L.R. 691, 46 N.S.R. 20, 14 Can. Ry. Cas. 85.

FIRES—LACK OF SAFETY APPLIANCES.

The Railway Act, 1906, s. 298, places the onus on the railway company of shewing that modern and efficient appliances were used on the locomotive to prevent the sparks from same causing fires in property adjacent to the railway in order to claim the benefit of the limitation of $5,000, which is made applicable by that section in that contingency if the company has not otherwise been guilty of negligence. Noncompliance with the requirements of s. 297 of the Railway Act, 1906, which requires the company to keep its right-of-way free from dead, dry grass and weeds and other unnecessary combustible matter is negligence on the part of the railway company. [Blue v. Red Mountain R. Co., [1909] A.C. 361, 9 Can. Ry. Cas. 140, followed.] Where a timber license from the Department of the Interior stipulated that the licensee should dispose of the tree tops, branches and other debris, of the lumbering operations in accordance with the directions of the department, so as to minimize the danger of fire, but it is not shewn that any directions were given by the department in that respect, the failure of the lumberman, cutting timber by virtue of such license, to so dispose of the debris is not attributable to him as contributory negligence in an action against the railway company for the destruction of his logs by fire caused by sparks from the locomotive.

Dutton v. C.N.R. Co. 23 D.L.R. 43, 31 W. L.R. 367, 19 Can. Ry. Cas. 72.

FIRES—LIMITATION OF ACTION—DUTIES UNDER PROVINCIAL STATUTE.

The Railway Act, 1906, (Can.) s. 306, prescribing a time limitation for actions for fires resulting from the construction and operation of railways, does not in any wise diminish or affect liabilities arising out of a breach of statutory duty under a provincial statute regulating the prevention of fires.

Greer v. C.P.R. Co., 23 D.L.R. 337, 51 Can. S.C.R. 338, 19 Can. Ry. Cas. 58, affirming 19 D.L.R. 140, 32 O.L.R. 104.

FIRES—ORIGINATING CAUSE.

In the absence of evidence of any other probable source, evidence that three locomotives of a defendant railway company passed the spot where a fire originated about the time of the fire, is evidence from which a jury might not improbably infer that the fire was caused by sparks emitted from one of these locomotives.

Hearn v. Nelson, 8 W.W.R. 99.

FIRES—PROOF OF CAUSES.

Where the plaintiff does not prove that the fire which did the damage complained of was the same fire which it was found originated from a spark from one of the defendant's engines, he cannot recover. [Clark v. Ward, 13 W.L.R. 83, followed.]

Margach v. Mackenzie & Mann, 32 W.L.R. 162.

FIRE—DESTRUCTION OF PROPERTY—CONTROL OF ENGINE AT TIME OF ESCAPE OF FIRE —LIABILITY OF RAILWAY COMPANY FOR ACT OF SERVANT—SCOPE OF EMPLOYMENT — EVIDENCE — CORROBORATION — ONUS—FINDINGS OF JURY.

Conway v. Dennis Canadian Co., 8 O.W. N. 142.

DESTRUCTION OF TIMBER BY FIRE — ACTION FOR DAMAGES—STATUTORY LIMITATION OF AMOUNT RECOVERABLE—ISSUE—DIRECTED — NEGLIGENCE—ORDER STAYING PROCEEDINGS PENDING TRIAL OF ISSUE—RAILWAY ACT, S. 298.

To determine the proportion of loss by fire which an owner is entitled to recover from a railway company having regard to s. 298 of the Railway Act, 1906, the court may order the trial of an issue to determine, first, whether the fire causing the damage resulted from the negligence of the company, and second, whether any, and if so, what claims exist for loss caused to other persons by the same fire.

Fawcett v. C.P.R. Co., 17 Can. Ry. Cas. 313, 6 O.W.N. 634.

NEGLIGENCE—SPREADING OF FIRE ON WINDY DAY—DESTRUCTION OF BUILDING—CIRCUMSTANTIAL EVIDENCE.

Goulet v. Canadian Northern Ontario R. Co., 10 O.W.N. 271.

FIRE CAUSED BY SPARKS FROM ENGINE—NEGLIGENCE—EVIDENCE.

Willox v. Michigan Central R. Co., 11 O. W.N. 15, 145.

FIRE FROM LOCOMOTIVE ENGINE—DESTRUCTION OF PROPERTY—CONTROL OF ENGINE AT TIME OF ESCAPE OF FIRE—LIABILITY OF RAILWAY COMPANY — EVIDENCE — FINDINGS OF JURY—ONTARIO RAILWAY ACT, R.S.O. 1914, c. 185, s. 139.

Conway v. Dennis Canadian Co., 7 O.W.N. 236.

III. Accidents at crossings.

(§ III—45)—CHARACTER OF CROSSING — TRESPASSERS.

The fact that a roadway used as a transmission line for the conveyance of employees, over which public travel has been forbidden, is extensively used by the public, does not necessarily constitute it a public highway so as to charge a railway company with the statutory duty to give warning at highway crossings, and in the absence of evidence that the locomotive engineer had seen a vehicle approaching the crossing, the railway company cannot be held responsible for the collision of a train with a trespassing vehicle at such crossing. [Royle v. C.

N.R. Co., 14 Man. L.R. 275; G.T.R. Co. v. Anderson, 28 Can. S.C.R. 541; G.T.R. Co. v. Barnett, [1911] A.C. 361, followed.]

De Vries v. C.P.R., 27 D.L.R. 20, 20 Can. Ry. Cas. 375, 26 Man. L.R. 156, 33 W.L.R. 827, 10 W.W.R. 85.

OBSTRUCTING VIEW, COLLISION WITH AUTOMOBILE.

A railway company that permits the end of a string of freight cars to project into a highway for some time, in violation of s. 279 of the Railway Act, 1906, so as to obstruct the public view of approaching trains, is liable for a collision between an engine and an automobile driven by the plaintiff who, although he exercised due care, was unable, because of such obstruction to see the engine in time to avoid the collision.

Campbell v. C.N.R. Co., 12 D.L.R. 272, 23 Man. L.R. 385, 15 Can. Ry. Cas. 357, 24 W. L.R. 447, 4 W.W.R. 914.

INJURY TO PEDESTRIAN AT CROSSING—EVIDENCE—FINDINGS OF JURY.

Jaroshinsky v. G.T.R. Co., 31 D.L.R. 531, 37 O.L.R. 111.

HIGHWAY CROSSING—SPEED—NOT "THICKLY PEOPLED."

The locality in which an accident occurred by a collision with a railway train not being "thickly peopled," s. 275 of the Railway Act, 1906, does not apply.

Minor v. G.T.R. Co., 35 D.L.R. 106, 38 O.L.R. 646.

EXCESSIVE SPEED—ULTIMATE NEGLIGENCE.

The findings of a Trial Judge that an injury to a person by a moving train at a highway crossing was caused by operating the train at an excessive rate of speed, which could have been avoided by a slackening of the speed immediately upon seeing the person, will not be interfered with on appeal: the crossing being in a thickly peopled portion of the city the onus was upon the railway company to shew its compliance with s. 275 (3) of the Railway Act, 1906, as amended 1909, c. 31, s. 13. [B.C. Elec. R. Co. v. Loach, 23 D.L.R. 4, [1916] 1 A.C. 719, applied.]

Critchley v. C.N.R. Co., 34 D.L.R. 245, 12 A.L.R. 522, [1917] 2 W.W.R. 538.

LEVEL HIGHWAY CROSSING—DESTRUCTION OF VEHICLE BY TRAIN—INJURY TO PERSON IN VEHICLE — NEGLIGENCE — CONTRIBUTORY NEGLIGENCE—FINDINGS OF JURY—DAMAGES.

London v. G.T.R. Co.: Summers v. G.T. R. Co., 18 Can. Ry. Cas. 174, 6 O.W.N. 494.

GOVERNMENTAL RAILWAY — OMISSION BY RAILWAY EMPLOYEES TO COMPLY WITH REQUIREMENTS — GOVERNMENT RAILWAYS ACT, S. 37—FAUTE COMMUNE.

B., the suppliant, was driving a horse along a road crossed by the Intercolonial railway. He was followed by his son, who was also driving. The view of the track was obstructed by wood-piles. After passing the wood-piles B. looked to the southwest to see if any train was coming, but did not look in the opposite direction. When B. was crossing the track he heard the signal of the train coming from the northeast. B., by urging his horse, was just able to clear the train, but the boy was unable to stop his horse and sleigh. The train struck them, killing the horse, smashing the sleigh, and severely injuring the suppliant's son. The train hands had omitted to sound the whistle and ring the bell on the approach to the crossing as provided by s. 37 of the Governmental Railways Act:—Held, that the proximate cause of the accident was the negligent omission of the railway employees to comply with the provisions of the said section; but the conduct of B. in not looking both ways before entering upon the track amounted to negligence, it was a case justifying the application of the doctrine of faute commune under the law of Quebec. That upon the facts the suppliant was entitled to recover such damages as might be fixed, having regard to the extent and nature of the negligence of the respective parties.

Brillant v. The King, 15 Can. Ex. 42.

INJURY TO PERSON AND VEHICLE CROSSING TRACKS — NEGLIGENCE — EXCESSIVE SPEED OF TRAIN—EVIDENCE.

Minor v. G.T.R. Co., 11 O.W.N. 164.

NEGLIGENCE — TWO TRAINS PASSING EACH OTHER—LEVEL CROSSING—NO EYE WITNESSES OF ACCIDENT—MAN FOUND DEAD ON TRACK.

Griffith v. G.T.R. Co., 19 O.W.R. 53, affirming 17 O.W.R. 509.

(§ III—46)—UNREASONABLE AND UNLAWFUL USE OF HIGHWAY — LEAVING CAR STANDING IN HIGHWAY AT CROSSING.

Weaver v. C.N.R. Co., 17 W.L.R. 265.

CAR LYING ON CROSSING—FRIGHTENING OF PLAINTIFF'S HORSE.

Weaver v. C.N.R. Co., 4 S.L.R. 201.

(§ III—47) — QUESTIONS SUBMITTED TO JURY — FINDINGS — EVIDENCE — INTERPRETATION OF FINDINGS—AUTHORIZED ACT—NEGLIGENCE IN PERFORMING.

About 10 p. m. a farmer was found on the tracks badly injured with his foot caught in a "split switch" and died soon afterwards. No one saw the accident. The jury found that the death was caused by the defendants' negligence in having a split switch on a public highway and they found against contributory negligence. The court held that there was evidence to go to the jury on the question of negligence, and in basing their conclusion on a consideration of that evidence, the jury were not usurping the jurisdiction of the Board. The finding was not in the nature of a direction as to what the protection to the public should be, but a finding that from the kind and manner of construction of the switch, it was dangerous to persons using the highway, and that those responsible for its presence on the highway were negligent if it was the cause of injury. Also that an authorized act must be done not only in a

reasonable way and without negligence, but there is the additional obligation upon one exercising a statutory or authorized power not to extend that power. Whatever were the rights which the defendants acquired in respect of the highway they did not extend to or include the erection and maintenance of the split switch.

Brunelle v. G.T.R. Co., 44 D.L.R. 48, 43 O.L.R. 220, 23 Can. Ry. Cas. 348.

(§ III—49) — PRIVATE DRIVEWAY — COLLISION — WITH VEHICLE — EXCESSIVE SPEED—WARNINGS.

The operating of an electric car at an excessive rate of speed and the failure to give proper warnings while approaching a private driveway crossing constitutes negligence at common law which renders the company answerable for injuries to a vehicular traveler resulting from a collision at the crossing. [G.T.R. Co. v. McKay, 34 Can. S.C.R. 81; Bell v. G.T.R. Co., 15 D.L.R. 874, 48 Can. S.C.R. 561, distinguished.]

Gowland v. H.G. & B. Elec. R. Co., 24 D.L.R. 49, 33 O.L.R. 372, 19 Can. Ry. Cas. 214.

PRIVATE CROSSINGS—DUTY OF PROTECTION.

A railway company which allows the public to travel in its cars at a place where the road is situated upon private property, owes the public there the same measure of protection as where the cars traverse the streets.

Noel v. Quebec R.L.H. & P. Co., 48 Que. S.C. 130.

(§ III—50)—LOOKOUT—BACKING ENGINE —GIVING WARNING OF APPROACH.

It is not necessary that a person about to cross a railway track at a street crossing should have actually heard the warning given by an employee standing on the tender of a backing locomotive, in order to relieve a railway company of the duty imposed on it by s. 276 of the Railway Act, 1906, in running trains not headed by an engine moving forward in the ordinary manner over a level crossing to have a man stationed on that part of the train then foremost, in order to warn persons standing on or about to cross the tracks; since the warning required is only such that, if given in time to avoid danger, it ought to have been apprehended by a person in possession of ordinary faculties, in a reasonably sound, active and alert condition.

G.T.R. Co. v. McAlpine, 13 D.L.R. 618, [1913] A.C. 838, 13 E.L.R. 187.

SIGNALS—FAILURE TO GIVE—RINGING BELL —INSTRUCTIONS.

In an action for injuries sustained at a highway crossing by being struck by a train an instruction to the jury that the law requires the whistle of the engine to be sounded more than 80 rods away (which was done near another crossing more than 80 rods distant), and that the evidence shewed that the bell was not rung for the latter crossing, is erroneous, and entitles the railway company to a new trial, where the failure to ring the bell was the only negligence on which a verdict for the plaintiff could be sustained, and the jury stated that they "believed that the bell was not ringing continuously," such answer being too ambiguous to sustain the verdict.

Bell v. G.T.R. Co., 14 D.L.R. 279, 29 O.L.R. 247.

SIGNALS—FAILURE TO LOOK—SNOWSTORM.

Failure to ring the bell and blow the whistle while a train is approaching in a snowstorm within 550 feet of a highway, although there is no statutory duty to blow the whistle, may justify a jury's finding of negligence in an action for injuries to a vehicular traveler on the highway; the jury's finding negativing contributory negligence, because of the plaintiff's failure to look, cannot be disregarded by the Trial Judge, particularly when the vision was obstructed by the snowstorm.

Gray v. Wabash R. Co., 28 D.L.R. 244, 35 O.L.R. 510, 20 Can. Ry. Cas. 391.

SIGNALS AND WARNINGS — INCOMPETENT BRAKEMAN.

The statutory duty under s. 276 of the Railway Act, 1906, to warn persons crossing or about to cross the track of the approach of a train backing up across the street is one for the nonobservance of which the railway company may be liable in damages for an accident resulting from the failure of the brakeman to give sufficient warning with the air whistle at the rear of the train; the placing in charge of the rear end of the train when moving reversely upon level crossings in a town of a brakeman unacquainted with the conditions existing near the crossing which would interfere with persons seeing the approaching train and without knowledge of where the crossing was, is in itself negligence for which the company is liable.

Mitchell v. G.T.R. Co., 22 D.L.R. 804, 18 Can. Ry. Cas. 188. [Affirmed in 8 O.W.N. 300.]

LOOKOUT—SIGNALS.

Action for damages for the death of C. on the ground that it was due to the negligence of the company. The accident happened about 7 p. m. on a winter's day said to be somewhat dark, while a wagon in which the respondent was simply a passenger was being driven across the tracks at the intersection of the highway. Three acts of negligence were found by the jury, to which they attributed the accident:—(1) Absence of warning signboard required by the Railway Act at highway crossings. (2) Excessive grade in highway approaching crossing. (3) Failure to give statutory signals, and negativing contributory negligence. Held, affirming the judgments of the Trial Judge, the Divisional Court and the Court of Appeal for Ontario, in favour of the respondent for damages with costs.

Pere Marquette R. Co. v. Crouch, 13 Can. Ry. Cas. 247, 22 O.W.R. 333.

An action for damages for death of one G., run down by the defendants' train, while crossing a public highway. The train gave no warning either by whistle or bell. Another train was passing upon the other track in the opposite direction at the same time, which gave the necessary signals. No one saw the accident. The jury found that the accident was caused by the violation of the statutory duty to whistle and ring the bell, and negatived contributory negligence. The Trial Judge entered judgment for plaintiff for $2,000 and costs, as awarded by the jury. The Court of Appeal dismissed the defendants' appeal with costs.

Griffith v. G.T.R. Co., 13 Can. Ry. Cas. 287, 21 O.W.R. 305.

SIGNALMAN—HIRING BY ONE COMPANY AND PAYMENT BY THE OTHER—LIABILITY.

The C.P.R. Co. was held liable in damages for the death of its servant the fireman, because it was alone responsible for the negligence of the signalman, who, at the time of the accident, while adjusting the points and giving the signals for its train was, to be regarded as a person in its employment. The whole circumstances of the employment must be looked at and the real effect of the actual relation existing must not be lost sight of in deference to a formula about hiring and paying.

Pattison v. C.P.R. Co., 14 Can. Ry. Cas 401, 24 O.L.R. 482.

AUTOMATIC BELL ALARM.

In the absence of statutory requirement, failure on the part of a railway company to maintain an automatic bell alarm at a railway crossing is not negligence. [G.T.R. Co. v. McKay, 34 Can. S.C.R. 81, applied.]

Moore v. B.C. Elec. R. Co., 22 B.C.R. 504, 34 W.L.R. 469.

LIGHTING—RAILWAY AND TEAFFIC BRIDGE—VOLUME OF TRAFFIC—VEHICULAR AND PEDESTRIAN—PUBLIC INTEREST — REVENUE—TOLLS—RAILWAY SUBSIDY ACT, 63-64 VICT. C. 8.

The Board will exercise jurisdiction to require a railway company to provide proper lighting for and approaches to a railway bridge upon which provision is made for vehicular and pedestrian traffic, for the use of which bridge tolls are charged, and toward whose construction assistance was given under the Dominion Subsidy Act (1900), 63-64 Vict. c. 8.

Mahon v. G.T.R. Co., 16 Can. Ry. Cas. 268.

HAND CAR — SIGNAL — HORSES — CONTRIBUTORY NEGLIGENCE.

Although small hand-cars used for working on railways are not provided with any alarm signal, and although the Railway Act and the rules of the Board do not call for any, yet, as these hand-cars are not bound to stop at crossings, their drivers must signal their approach, either to avoid a collision or to enable the driver of a horse approaching the railway to watch his horse and to master it in time. Although the omission of giving such signal is an act of negligence rendering the railway company liable in the event of an accident, it is not so when a passerby, the victim of the accident, saw the hand-car coming and nevertheless took upon himself to cross the railway.

Lemieux v. Langevin, 54 Que. S.C. 542.

(§ III—51) — CROSSING — SIGNALS — CITY STREETS—SHUNTING ENGINE.

The requirement of s. 274 of the Railway Act, 1906, that a train on approaching a highway crossing shall sound its whistle when at least 80 rods therefrom is not applicable to an engine engaged in shunting cars in a city yard, which at no time was more than 100 yards distant from a street crossing.

G.T.R. Co. v. McAlpine, 13 D.L.R. 618, [1913] A.C. 838, 13 E.L.R. 187.

SIGNALS AND FLAGMEN—YARD TRAIN.

Section 251 of the Railway Act, 1906, under which a man must be stationed on the last car to give warning of the train's approach when it is moving reversely in a city, town or village, applies to a work train operating on the surface wholly within the plant of a company subject to the Act, situate in a city, town or village as well as to cases where the streets of the municipality are crossed by the train moving backwards. [McMullin v. N.S. Steel Co., 39 Can. S.C.R. 593, applied.]

Campbell v. Nova Scotia Steel & Coal Co., 22 D.L.R. 885, 48 N.S.R. 540. [Affirmed, 35 D.L.R. 800.]

(§ III—55)—ENTERING BETWEEN GATES—CONTRIBUTORY NEGLIGENCE — WANT OF WARNINGS AND FLAGMEN.

Where the erection of gates at a level highway crossing is not authorized nor required by an order of the Board, the lowering of the gates is but a warning to persons desiring to cross the tracks that it is dangerous to do so, and the entry of a person upon the portion of the highway between the gates, when the gates are down, is not as a matter of law or per se negligence, as disentitling him to recover damages for injuries sustained by him while upon that portion of the highway, by reason of the negligence and breach of duty of the railway company as to signals and warnings.

Garside v. G.T.R. Co., 23 D.L.R. 463, 33 O.L.R. 388, 18 Can. Ry. Cas. 272. [Affirmed by Can. Sup. Ct., Dec. 29, 1915, unreported.]

WATCHMEN OF GATES MAINTAINED BY COMPANY AND MUNICIPALITY—NEGLIGENCE OF—LIABILITY OF MUNICIPALITY.

A highway crossing the tracks of two railway companies, the Board made an order for the installation of gates to be operated by watchmen. One of the railway companies was directed to install the gates, and the cost was divided between the municipality and the two companies in cer-

tain proportions. The cost of maintenance was divided the same way. An accident having been occasioned by the negligence of one of the watchmen appointed by the company having the conduct of the work, an application was made by the other company, whose engine caused the accident, to have the damage paid by the company appointing the watchman, or to provide as to division of responsibility for accidents due to the negligence of the watchman. Held, that the watchman should be regarded as the agent of the company, whose trains or engines do the damage, and the municipality should not be responsible for any damages caused by the negligence of the watchman.

Re Royce Ave. Crossing (Toronto), 32 W.L.R. 227.

FLAGMEN—GATES.

The Board ordered that a watchman should be employed from 1st May to 1st October for the first year, to see if he would afford proper protection to the public crossing a railway at a public highway. Township to pay 15% of the cost and the G.T.R. Co. 85%; H.G. & B. Elec. R. Co. to pay nothing.

Grimsby Beach Amusement Co. v. G.T. and Hamilton, Grimsby & Beamsville Elec. R. Cos., 13 Can. Ry. Cas. 138, 22 O.W.R. 258.

IV. Contributory negligence.

See Negligence; Street Railways; Carriers.

(§ IV—85)—INJURY TO PERSON ON TRACK—CONTRIBUTORY NEGLIGENCE.

A railway company is not answerable for the death of a person who, in possession of his faculties of seeing and hearing, walks along a railway track without looking for an approaching train which he could have seen by the exercise of the most ordinary care.

Henrich v. C.P.R. Co., 12 D.L.R. 367, 15 Can. Ry. Cas. 393, 18 B.C.R. 578, 3 W.W.R. 709. On appeal this judgment set aside and judgment entered for $6,000. Taken to Supreme Court of Canada and appeal dismissed, 15 D.L.R. 472, 16 Can. Ry. Cas. 303, 48 Can. S.C.R. 557, 5 W.W.R. 1088, 26 W.L.R. 702. [See § II D—36, ante, p. 3836.]

(§ IV—86)—INJURY TO PERSON ON TRACK—LICENSEE—ASSUMPTION OF RISK.

A licensee who walks along a railway track assumes all risk of injury from being struck by trains.

Henrich v. C.P.R. Co., 12 D.L.R. 367, 15 Can. Ry. Cas. 393, 18 B.C.R. 578, 3 W.W.R. 709. [Reversed, see this title § II D—36, ante, p. 3836.]

(§ IV—87)—TRESPASSERS—DEATH OF SERVANT—LINEMAN RUN OVER BY ENGINE OF ANOTHER RAILWAY COMPANY—WORKMEN'S COMPENSATION FOR INJURIES ACT—CONFORMING TO ORDERS OF SUPERIOR—ABSENCE OF WARNING.

Sharpe v. C.P.R. Co., 19 D.L.R. 889, 7 O.W.N. 167, 33 O.L.R. 402.

(§ IV—91)—"LOOK AND LISTEN" DOCTRINE—CROSSING THE TRACKS.

Whether or not a person about to cross a railway track should have looked more than once to see if he could make the crossing in safety is a question of fact to be passed upon by the jury in the particular circumstances of each case.

MacKenzie v. B.C. Elec. R. Co., 15 D.L.R. 530, 19 B.C.R. 1, 16 Can. Ry. Cas. 337, 26 W.L.R. 577, 5 W.W.R. 1112.

ACCIDENT AT CROSSING—FAILURE TO STOP, LOOK AND LISTEN—DUTY OF PERSON ABOUT TO CROSS TRACK.

The duty incumbent on a person who is about to cross a railway track at a highway crossing at grade to look for moving trains is not satisfied by merely looking both ways on approaching the tracks; he must look again just before crossing.

G.T.R. Co. v. McAlpine, 13 D.L.R. 618, [1913] A.C. 838, 13 E.L.R. 187.

COLLISION WITH AUTOMOBILE — DUTY OF DRIVER TO STOP, LOOK AND LISTEN.

It is not contributory negligence to drive an automobile across a railway track at a speed of eight miles an hour at a public highway crossing, although the plaintiff knew that trains and engines were liable to pass at any time, where, by reason of cars negligently left projecting into the highway it was impossible for him to discover the approach of an engine, although the statutory signals were given, where the plaintiff and those riding with him looked and listened before going upon the track without hearing the engine, which was traveling "light."

Campbell v. C.N.R. Co., 12 D.L.R. 272, 23 Man. L.R. 385, 15 Can. Ry. Cas. 357, 24 W.L.R. 447, 4 W.W.R. 914, reversing 9 D.L.R. 777, 15 Can. Ry. Cas. 31, 3 W.W.R. 874, 23 W.L.R. 156.

FAILURE TO STOP, LOOK OR LISTEN.

It is a matter of common sense that a person about to pass over a railway crossing upon a level should look to see whether or not a train is approaching. The driver of a train approaching the crossing is entitled to rely upon such person using due care and stopping before reaching the track. He is not bound to anticipate negligence on the part of the person approaching the track and guard against it beforehand. He is only bound, where he has notice of the negligence, to take the ordinary means of evading its consequences. Where deceased, driving a carriage, attempted to cross the track of the defendant company without looking to see whether a train was approaching, or the direction from which the train was coming, the finding of the jury to the effect that deceased should have stopped a short distance from the track and made sure that there was no danger from trains, indicates that the efficient proximate cause of the accident was her not stopping, and that such cause was in force at the time of the accident.

Morrison v. Dominion Iron & Steel Co., 45 N.S.R. 406.

INJURY TO THE PERSON—CROSSING—RECKLESS CONDUCT OF DRIVER OF VEHICLE.

Parent v. The King, 13 Can. Ex. 93.

(§ IV—98)—CONTRIBUTORY NEGLIGENCE—AT CROSSINGS—RIDING WITH ANOTHER.

A person being given a gratuitous ride on a wagon and sitting beside the driver is under no duty on approaching the crossing of an electric railway to use extraordinary care as to the approach of cars; and on his being killed in a collision with a car not seen by either of them, an action on behalf of his family against the electric railway for damages for his death is not defeated by a finding that the deceased was negligent in not taking "extraordinary precautions to see that the road was clear," in view of further findings of excessive speed by the railway and that the railway motorman could have stopped the car and have avoided the accident had it not been for the defective brakes which the railway negligently maintained as part of the car equipment.

Loach v. B.C. Elec. R. Co., 16 D.L.R. 245, 27 W.L.R. 407, 6 W.W.R. 322, 17 Can. Ry. Cas. 21, 19 B.C.R. 177.

ACCIDENT AT CROSSING—RIDING WITH ANOTHER.

Contributory negligence of the person who had hired the vehicle and was himself driving it, is not attributable to the passenger who is riding with him in the vehicle and who has no control over same, in answer to the latter's action for damages against the railway, under the Fatal Accidents Act, (Ont.) where the passenger jumped from the vehicle when a collision seemed imminent and was killed and the accident was due to the company's neglect of its statutory duty under s. 276 of the Railway Act, Can., to give warning of the approach of the train moving reversely over a level crossing.

Mitchell v. G.T.R. Co., 22 D.L.R. 804, 18 Can. Ry. Cas. 188. [Affirmed in 8 O.W.N. 300.]

(§ IV—100)—INJURIES TO MINORS—LIABILITY TO MINORS—"STEALING RIDE" ON COW-CATCHER—EVIDENCE—NONSUIT.

Wallace v. C.P.R. Co., 6 D.L.R. 864, 23 O.W.R. 99.

(§ IV—105)—INJURIES TO ANIMALS—CONTRIBUTORY NEGLIGENCE—ONUS.

Under the provisions of sub-ss. 4 and 5 of s. 294 of the Railway Act, 1906, the onus of establishing that horses were at large through the negligence of their owner or custodian, is upon the railway company seeking to avoid liability for their getting upon the right-of-way and being run down by a train.

Mayes v. G.T.P.R. Co., 14 D.L.R. 70, 16 Can. Ry. Cas. 9, 6 A.L.R. 396, 25 W.L.R. 503, 5 W.W.R. 212.

INJURIES TO ANIMALS.

Where animals are killed while on the property of a railway company, and there being no evidence of the existence of any highway, the burden was on the defendants, under s. 294 of the Railway Act, 1906, to shew that the animals were at large through the negligence or wilful act of omission of the owner; and they had satisfied this onus by shewing from the plaintiff's own evidence, that when the horses were let out of the stable they could go anywhere they wished—that no restraint was imposed on them, and no care taken to see that they did not go directly to the railway track. Whether cattle are "at large" or no, depends upon whether they are under restraint or control, quite irrespective of whether they are on their owner's lands or not. Review of the authorities: If, however, the animals were not "at large" in this case, s. 294 did not apply, and the plaintiff had no cause of action because the defendants were under no liability to fence. Semble, that, upon the evidence, the injury might have been averted by more care on the part of the defendant's servants; but that was immaterial because the defendants owed no duty in respect of cattle trespassing on their property in the circumstances of this case. The defendants, in addition to pleading "not guilty by statute," pleaded a number of other defences, but no leave to do so having been obtained, they were not considered, r. 113, Judicature Act. The statement of defence was also insufficient in not stating the sections of the special Act relied on; but an amendment was permitted in this respect.

Krenzenbeck v. C.N.R. Co., 14 Can. Ry. Cas. 226.

V. Diversion or obstruction of water.

See Waters.

Provincial drain crossing line of Dominion railway, see Drains and Sewers, II—10.

(§ V—115)—OBSTRUCTIONS OF WATER—CULVERT—NEGLIGENCE—DAMAGES.

A railway company is liable for the negligent manner of building a culvert placed in an embankment constructed for the railway if the culvert was not deep enough to carry the water where there had previously been a natural watercourse.

McCrimmon v. B.C. Elec. R. Co., 20 D.L.R. 834, 22 B.C.R. 76, 29 W.L.R. 517, 7 W.W.R. 137.

DRAINAGE—ADJOINING LANDS—DAMAGES.

The Board exercising the statutory power contained in s. 250 (2) of the Railway Act, 1906, to order a railway to construct a drain under its tracks for the benefit of an adjoining owner and to fix the terms and conditions, may order the work done by the railway at its own expense where the owner could have easily drained his land but for the railway intersecting the same; the statutory obligation so cast upon the rail-

way will remain notwithstanding the landowner's release in the conveyance of land for the right-of-way, of his claim for damages by reason of the exercise of the railway company's powers.

Denholm v. Guelph & Goderich R. Co., 22 D.L.R. 535.

FAILURE TO REPAIR DITCHES—ACTION FOR DAMAGES—ORDER OF BOARD.

It is not necessary before bringing an action for damages against a railway company, for failure to keep its ditches in repair, to place the company en demeure to make the repair nor to obtain an order from the Board to that effect.

Sénécal v. G.T.R., 48 Que. S.C. 496.

DRAINAGE — JURISDICTION — APPROVAL — RAILWAY ACT, s. 251.

By s. 251 of the Railway Act, 1906, before drainage works can be constructed on railway lands, the Board must be satisfied that the proposed works are sufficient and proper for railway operation and for the safety of the traveling public, and must approve the plans of such works.

Tilbury v. G.T.R. Co., 16 Can. Ry. Cas. 246.

EMBANKMENT—BRIDGE—INJURY TO PROPERTY BELOW BY FLOODING—EVIDENCE—TRIAL—JURY—STATEMENTS OF COUNSEL—PREJUDICE—DAMAGES.

Sullivan v. C.N.R. Co., 14 O.W.N. 93.

OBSTRUCTION OF DRAINS AND DITCHES—INUNDATION—RAILWAY COMMISSION.

Although s. 250 of the Railway Act, 1906, gives exclusive jurisdiction to the Railway Commission to compel a company to make drainage works deemed necessary, one who suffers damages on account of the negligence of a railway company to carry out drainage works which the law required is not compelled to apply to the Railway Commission to have the works declared insufficient, before claiming damages in the civil courts. The compensation for expropriation granted to an owner of land under cultivation for all damages which he might suffer on account of the construction and laying out of a railway only covers damages which result from the construction of the railway, under the conditions provided for by the Act, and not those which result from the culpable negligence of the company to maintain ditches and drains sufficient to drain the lands divided by the construction of the way.

Canadian Northern Quebec R. Co. v. Desmarais, 27 Que. K.B. 509.

VI. Insolvency and sale of railway.

(§ VI—120)—AGREEMENTS—VALIDATION—JURISDICTION—EX POST FACTO ORDERS—RAILWAY ACT, s. 361.

Where a railway company entered into agreements for the purchase of the assets, stock and franchises of other railway companies, and subsequently became insolvent, the Board has no jurisdiction, under s. 361, of the Railway Act, 1906, to recommend such agreements for validation.

Re Central R. Co. Agreements, 24 Can Ry. Cas. 117.

(§ VI—120) — RECEIVER — RAILWAY — APPOINTMENT AT INSTANCE OF SECOND MORTGAGEE — POSITION OF RECEIVER — MORTGAGEE'S BAILIFF—RIGHTS OF FIRST MORTGAGEE—APPLICATION FOR LEAVE TO APPEAL FROM ORDER APPOINTING RECEIVER—LEAVE TO TAKE PROCEEDINGS TO DISPLACE RECEIVER — RETENTION OF MOTION—APPEAL.

Trusts & Guarantee Co. v. Grand Valley R. Co., 5 O.W.N. 848, 25 O.W.R. 795 and 6 O.W.N. 113, 26 O.W.R. 159.

SALE OF A RAILWAY TO A COMPANY BY ITS PROMOTERS—PURCHASE AUTHORIZED BY ITS INCORPORATING ACT — PROMOTERS THE ONLY SHAREHOLDERS.

Att'y-Gen'l for Canada v. Standard Trust Co. of New York, [1911] A.C. 498.

VII. Acquisition by government.

(§ VII—140) — "SUBSIDIES" — "ACTUAL COST" — INTEREST AND CHARGES ON BONDS.

The court was required to fix the value of certain railways to be acquired by the Crown under the provisions of 6 & 7 Geo. V. c. 22. By s. 2 of such statute it was provided that the consideration to be paid for each of the said railways should be the value as determined by the Exchequer Court of Canada, "said value to be the actual cost of the said railways, less subsidies and less depreciation, but not to exceed $4,349,000, exclusive of outstanding bonded indebtedness, which is to be assumed by the government, but not to exceed in all $2,500,000." Held, that the word "subsidies" in the above section did not relate only to those granted by the Dominion Government but extended to any subsidies granted by the provincial government to the railways in question. The court in finding the "actual cost" ought not to proceed as if the matter were an accounting between the directors of the railways and the shareholders. The duty of the court was to ascertain the value of the railways as between vendor and purchaser, and that value must be taken to be the actual cost of the railways less subsidies and less depreciation. Interest on bonds issued by the company and moneys paid on the flotation of bonds during the period of construction of the railways could not be included in "actual cost" as the term was used in the statute.

Att'y-Gen'l of Canada v. Quebec & Saguenay R. Co., 41 D.L.R. 576, 23 Can. Ry. Cas. 310, 17 Can. Ex. 306.

RAPE.

As to evidence in prosecution for, generally, see Evidence.

See also Witnesses.

AGAINST IMBECILES — PROOF OF NONMARRIAGE.

Upon a charge of unlawful carnal knowledge of a woman under Cr. Code, s. 298, the fact that the woman was not the wife of the accused may be inferred from the difference in the respective surnames appearing upon the evidence at the trial. [R. v. Mullen (No. 2), 18 Can. Cr. Cas. 80, applied.] If the evidence in support of a charge of unlawful carnal knowledge of a woman without her consent shews that the latter was in such a condition of imbecility that the jury might reasonably find that she was incapable of giving her consent to the act, a verdict of guilty will not be disturbed. [R. v. Fletcher, 8 Cox C.C. 131, applied.]

The King v. Walebek, 10 D.L.R. 522, 21 Can. Cr. Cas. 130, 6 S.L.R. 225, 23 W.L.R. 931.

PROVING THAT WOMAN NOT THE WIFE OF ACCUSED—NAMES NOT SIMILAR.

The King v. Mullen, 18 Can. Cr. Cas. 80.

RATES.

See Carriers; Telegraphs; Telephones; Railway Board.

RATIFICATION.

By infant, see Infants.
Of agent's acts, see Principal and Agent.

REAL ESTATE AGENTS.

See Brokers, II.; Principal and Agent.

REAL PROPERTY.

See Public Lands; Mines and Minerals; Land Titles; Vendor and Purchaser; Fixtures; Easements; Adverse Possession.
Nature of estate, see Deeds; Wills; Mortgage.
Indian lands, see Indians.

RECEIVERS.

I. APPOINTMENT; REMOVAL.
A. In general; jurisdiction.
B. In what cases.
II. POWERS, LIABILITIES, PROPERTY, AND CONTROL.
III. CLAIMS AGAINST; PRIORITIES; RECEIVER'S CERTIFICATES.
IV. ACTIONS AND REMEDIES.
V. EXPENSES OF RECEIVERSHIP; COMPENSATION.
VI. FOREIGN AND ANCILLARY RECEIVERS.
VII. SALES BY RECEIVER; RIGHTS OF PURCHASER.

Liquidators, assignees, see Assignment for Creditors: Companies, VI.
To enforce declaration of right, see Judgment, VI—255.
Validity of instruments against, registration, see Sale, I C—16.
Powers of foreign receiver, see Conflict of Laws.

Annotations.

Appointment of receivers and trustees in charge of enemy companies and firms during war: 23 D.L.R. 375, 379.

When appointed: 18 D.L.R. 5.

A treatise on the Canadian 1920 Bankruptcy Act appears in 53 D.L.R.

I. Appointment; removal.

A. IN GENERAL; JURISDICTION.

(§ I A—1)—NATURE OF OFFICE—REPRESENTATIVE CAPACITY.

A receiver appointed by the court is an officer of the court, and represents neither the plaintiff nor the defendant.

Trusts & Guarantee Co. v. Grand Valley R. Co., 24 D.L.R. 171, 34 O.L.R. 87.

APPOINTMENT—REMOVAL—JURISDICTION.

A breach of trust is a sufficient ground for the interference of the court by the appointment of a receiver.

Grand Council Provincial Workmen's Assn. v. McPherson, 8 D.L.R. 672, 46 N.S.R. 417, 12 E.L.R. 229. [Affirmed, 16 D.L.R. 853, 50 Can. S.C.R. 157.]

APPOINTMENT—JURISDICTION OF JUDGE IN CHAMBERS—SCOPE OF—ORIGINAL AND APPELLATE POWERS OF SUPREME COURT.

Powell v. North Saskatchewan Lands Co., 20 D.L.R. 967, 7 W.W.R. 686, 7 S.L.R. 967, 30 W.L.R. 201.

MOTION FOR RECEIVER — AFFIDAVIT IN ANSWER.

Goldblatt v. Dominion Salvage & Wrecking Co., 11 O.W.N. 419.

MOTION TO CONTINUE RECEIVER—EVIDENCE—PREJUDICE.

Orpen v. Mackie, 11 O.W.N. 270.

APPOINTMENT AS TO DECEDENT'S ESTATE — MISCONDUCT OF EXECUTOR.

A receiver of a decedent's estate may be appointed where the executor has been guilty of misconduct or has improperly managed the estate, or has been guilty of a breach of duty.

Re Beaird, 9 D.L.R. 842, 4 O.W.N. 720, 23 O.W.R. 955.

B. IN WHAT CASES.

(§ I B—10)—COURT JUSTIFIED IN GRANTING INJUNCTION—INJUNCTION INEFFECTIVE—MAY APPOINT RECEIVER.

Where the circumstances are such as to justify the court in granting an injunction against the disposition of goods, and where it is made to appear that an injunction is likely to be ineffective, the court may appoint a receiver to take actual possession of the goods.

Kay v. Ratz, 44 D.L.R. 145, 14 A.L.R. 72, [1918] 3 W.W.R. 885.

PARTNERSHIPS—DISCRETION AS TO APPOINTMENTS.

In partnership actions, the court has power, although reluctantly exercised, to appoint a receiver at any stage of the action for sufficient cause; but no such appointment will be ordered because of a failure to comply with the court's direction to pay into a named bank all money received in

connection with the partnership business, particularly where such neglect was due to a misunderstanding, before allowing an opportunity to remedy such neglect.

Merriam v. Kenderline Realty Co., 25 D.L.R. 375, 34 O.L.R. 563.

[Note.—The court was, by special leave, moved by counsel for the defendant to vary the minutes of this judgment, on the ground of mistake in the admissions of counsel. The court allowed the applicant company a further period of 2 weeks to pay into the bank of sum improperly retained by the company; and, the company making default, a receiver was appointed on Dec. 1, 1915.]

APPLICATION FOR RECEIVERSHIP ORDER — BUSINESS AND PROPERTY OF MARRIED WOMAN—JUDGMENT OBTAINED AGAINST HUSBAND—ABSENCE OF FRAUD.

Walker v. Brown, 8 O.W.N. 484.

APPOINTMENT OF CONSERVING PROPERTY PENDENTE LITE—POWER OF JUDGE IN CHAMBERS.

Pending the disposition of the same in an action a Judge in Chambers or a Master has no power to make an order appointing a receiver to conserve property.

Latourneau v. Christie, 20 D.L.R. 965, 7 W.W.R. 152.

(§ I B—11) — PARTNERSHIP — RECEIVER — INJUNCTION — DISSOLUTION NOT SOUGHT — MISCONDUCT NOT PROVED — INTERIM ORDER VACATED WITHOUT PREJUDICE TO FRESH LITIGATION.

Busch v. Keighley, 17 O.W.N. 28.

(§ I B—12)—EQUITABLE MORTGAGE — ENFORCEMENT.

An equitable mortgagee is entitled to the appointment of a receiver of the rents and profits of the mortgaged property for the purpose of enforcing his security.

Union Bank v. Engen, 33 D.L.R. 435, 10 S.L.R. 185, [1917] 2 W.W.R. 395, affirming 31 D.L.R. 575, [1917] 1 W.W.R. 271.

EQUITABLE EXECUTION—RENTS OF LAND—INTEREST OF LIFE TENANT — PAYMENTS FOR TAXES AND REPAIRS.

Small v. Cadow, 12 O.W.N. 409.

APPOINTMENT IN FORECLOSURE ACTIONS — PARTIES—MOTIONS AND ORDERS.

Britsch v. Piper, 25 D.L.R. 861, 9 W.W.R. 641, 33 W.L.R. 46.

(§ I B—14)—EQUITABLE EXECUTION.

A judgment creditor may be appointed receiver without remuneration and without security, of the legacy left to his judgment debtor, and an injunction order may be granted to restrain the debtor from dealing with the legacy to the prejudice of the judgment creditor.

Gilroy v. Conn, 1 D.L.R. 580, 3 O.W.N. 899, 21 O.W.R. 526.

II. Powers, liabilities, property, and control.

(§ II—15) — POWERS AND LIABILITIES — DEBENTURE-HOLDERS — ACTION — POWER TO CONTINUE BUSINESS.

The authority of a receiver appointed in a debenture-holders' action in respect of a company's manufacturing business is limited by the terms of the order appointing him and he is neither an agent of the debenture-holders to pledge their credit, nor the company's agent so as to be under the company's control. Where the possession of a manufacturing undertaking and its assets are given by order of the court in a debenture-holders' action to receivers and managers appointed by the court for the express purpose of continuing and carrying on the business, subsisting contracts with customers for the manufacture and supply of merchandise by the company to such customers are not thereby terminated. [Reid v. Explosives Co. Ltd., 19 Q.B.D. 265, distinguished.]

Parsons v. Sovereign Bank, 9 D.L.R. 476, [1913] A.C. 160, reversing 24 O.L.R. 387.

(§ II—18) — PARTNERSHIP — AFFAIRS IN HANDS OF RECEIVER — SALE OF BOOK-DEBTS—ACTION AGAINST PURCHASER FOR PRICE — INCOMPLETE CONTRACT — ASSENT OF RECEIVER HELD.

Brandon v. Braden, 9 O.W.N. 77.

(§ II—21)—DEBENTURE-HOLDERS' ACTION—USING COMPANY'S NAME.

Where receivers and managers have been appointed by the court in a debenture-holders' action brought for sale of the undertaking and liberty has been given the receiver to continue the business, they may use the name and exercise the powers of the corporation for the fulfilment of contracts current at the time of their appointment and made in the ordinary course of the company's business. [Moss Steamship Co. v. Whinney, [1912] A.C. 254, distinguished.]

Parsons v. Sovereign Bank, 9 D.L.R. 476, [1913] A.C. 160.

III. Claims against; priorities; receiver's certificates.

(§ III—25)—CLAIMS AGAINST—PRIORITIES—RECEIVER'S CERTIFICATE.

Claims for personal injuries and for damage to property against a railroad company prior to the appointment of a receiver by the Exchequer Court of Canada and claims for construction or repair work, court costs, counsel fees and advertising during the 6 months' period prior to the receivership must be submitted to the Exchequer Court upon their merits, so that creditors may be allowed to shew cause before any authorization is given the receiver to compromise such claims.

Re American Brake-Shoe & Foundry Co. and Pere Marquette R. Co., 8 D.L.R. 873, 14 Can. Ex. 105, 11 E.L.R. 455.

(§ III—27) — PRIORITIES — CONTRACTING COMPANY—RIGHT TO USE PLANT ON DEFAULT.

Where a receiver and manager of a contracting company has been appointed at the instance of a creditor holding a floating charge by way of mortgage over its assets, and a direction has been given by the court that such receiver take possession of such assets, a summary order to the receiver to deliver up to a municipal corporation the material and plant used in the construction of works for the municipality is properly refused where the right of the municipality to possession depends on a notice purporting to terminate the contract, given after the creditor mortgagee had taken possession of the materials and plant under the floating charge, and the respective rights and priorities of the parties have yet to be determined.

Bank of Montreal v. Westholme Lumber Co., 12 D.L.R. 286, 18 B.C.R. 65, 24 W.L.R. 444.

IV. Actions and remedies.

(§ IV—30)—ACTIONS BY.

A receiver is not competent to take an action, which the person on whose behalf he is acting, could not have taken.

Sellick v. Hayward, 24 B.C.R. 125, [1917] 2 W.W.R. 803.

(§ IV—31)—ACTION AGAINST LIQUIDATOR OF COMPANY FOR WAGES — NECESSITY FOR LEAVE OF COURT — QUESTION OF LAW — DETERMINATION BY DIVISION COURT JUDGE—RIGHT TO REVIEW—MOTION FOR PROHIBITION—COSTS.

Re Knickerbocker v. Union Trust Co., 9 O.W.N. 52.

ACTIONS AGAINST—NEGLIGENCE—LEAVE OF COURT.

A receiver, being an officer of the court, cannot be sued without leave in a separate action in respect of acts done in discharge of his office.

Stephens v. Royal Trust Co., 25 B.C.R. 77.

(§ IV—33)—RIGHT OF ACTION BY RECEIVER.

A judgment creditor appointed receiver of his judgment debtor's legacy, and wishing to contest the executor's claim that the legacy is to be set off against advances which the testator had made to the debtor may be granted leave to contest such claim of the executors in the name of the judgment debtor on indemnifying him against costs.

Gilroy v. Conn, 1 D.L.R. 580, 3 O.W.N. 899, 21 O.W.R. 526.

SALE OF GOODS PURCHASED BY DEFENDANT—DISPOSITION OF PROCEEDS — PAYMENT INTO COURT — REFERENCE FOR ASCERTAINMENT OF PERSONS ENTITLED — CREDITORS—INJUNCTION.

Postmaster-General of Canada v. Chana Elieff, 17 O.W.N. 172.

V. Expenses of receivership; compensation.

(§ V—42) — COMMISSIONS — COLLECTIONS AND SECURITIES.

An allowance of 5 per cent of the total cash receipts and securities is a fair remuneration to a receiver, and though the receiver paid 10 per cent commission on collections out of the estate, he is nevertheless entitled to remuneration on those collections.

Campbell v. Arndt, 24 D.L.R. 699, 8 S.L.R. 320, 32 W.L.R. 240, 9 W.W.R. 57.

HEARING OF RECEIVER'S ACCOUNT — REPRESENTATION AT — RIGHTS OF BONDHOLDERS.

A receiver appointed on behalf of a mortgagee of the assets and undertakings of a railway company does not constitute a representation of the interests of bondholders upon the passing of accounts and fixing his remuneration; nor is that defect cured by the appointment of a solicitor, who is also a bondholder, to represent their interests where his appointment lapses upon his taking office as judge prior to the hearing, even though the latter procured other counsel to appear for him, and the court, upon a proper certification of the proceedings, will reopen the question at the instance of the bondholders for the purpose of a rehearing.

Trusts & Guarantee Co. v. Grand Valley R. Co., 24 D.L.R. 171, 34 O.L.R. 87.

RECEIVING STOLEN PROPERTY.

PRESUMPTION FROM RECENT POSSESSION—REASONABLE EXPLANATION AS AFFECTING ONUS OF PROOF.

When the Crown has established such facts on a charge of receiving as, without more, will justify the judge trying the case without a jury in finding the accused guilty, the accused is not entitled to an acquittal unless he satisfies the onus then cast upon him, not to prove his innocence or honesty, but merely to raise a reasonable doubt of guilt. If a party is in possession of stolen property recently after the stealing, it lies on him to account for his possession and if he fails to account for it satisfactorily, he is reasonably presumed to have come by it dishonestly, but it depends on the surrounding circumstances whether he is guilty of receiving or stealing. The reasonableness of the explanation is one for the jury or for the judge trying the charge without a jury, and depends not merely on the accused's statement but also upon the time and the manner of its being made and his conduct as consistent or inconsistent with it, as to which the failure of the accused to testify in support of his explanation might properly be taken into consideration by the jury or the judge as the case may be.

R. v. Scott, 31 Can. Cr. Cas. 399, 14 A.L.R. 439, [1919] 2 W.W.R. 227.

ATTEMPTING TO RECEIVE STOLEN MONEY—KNOWLEDGE OF ACCUSED THAT MONEY WAS STOLEN — EVIDENCE — INFERENCE FROM FACTS—TRIAL AND CONVICTION BY JUDGE SITTING WITHOUT A JURY.

R. v. Shorthall, 12 O.W.N. 94, 28 Can. Cr. Cas. 98.

INDICTMENT FOR THEFT AND RECEIVING.

The same person cannot be convicted both of the theft and of receiving unless he had parted with the stolen article, as by selling it, and had afterwards received it.

R. v. Carmichael, 26 Can. Cr. Cas. 443, 22 B.C.R. 375.

SUBSTITUTION BY OWNER ON LEARNING FROM SERVANT OF INTENT TO STEAL.

The defendant cannot be convicted for receiving stolen property, knowing it to have been stolen, where a Master, upon being informed by his servant that the defendant had asked the servant to steal and deliver to him a barrel of whisky belonging to his Master, substituted a barrel of water therefor, which, at the direction of the Master, the servant delivered to the defendant, as there was no theft thereof on the part of the servant.

The King v. Montgomery, 17 Can. Cr. Cas. 233.

INFORMATION OMITTING TO CHARGE KNOWLEDGE.

The King v. Leschinski, 19 Can. Cr. Cas. 199.

RECOGNIZANCE.

See Bail and Recognizance.

RECORDS AND REGISTRY.

See Registry Laws.

I. IN GENERAL.

II. JUDICIAL RECORDS.

III. RECORDS OF TITLE OR OWNERSHIP.

- A. In general; what may be recorded.
- B. Requisites and sufficiency of record.
- C. Necessity of recording; effect of failure; reliance upon records.
- D. As notice; effect of recording.

I. In general.

(§ I—1)—PUBLIC REGISTERS — PROCEDURE IN CORRECTING CIVIL REGISTERS.

The law allows correction of registers when an error has been committed, for example when by clerical error the wrong name has been inserted, or when the name of one of the witnesses or the name of the father or the mother has not been correctly inserted. Also when, at the time of the presentation of an infant to be baptized, they have wholly omitted to write in the register the usual entry. But it is not in the power of the court to order any congregation whatever to insert in the registers a false declaration, namely that a certain child had been presented for baptism and enrollment on a certain date. So doing would be falsifying the registers.

In re Robinson, 25 Rev. de Jur. 64, 25 Rev. Leg. 61.

ERROR IN DESCRIPTION OF PROPERTY.

An error in the description of property in a municipal valuation roll, by giving it a wrong cadastral number, is an informality that will avail as a ground of defence to an action for taxes, only if shewn to have caused a substantial injustice. Art. 16 M.C.

Cowansville v. Noyes, 39 Que. S.C. 311.

II. Judicial records.

(§ II—6)—RECORD OF CONVICTION.

The filing by a stipendiary magistrate of a warrant and conviction with a city clerk instead of the clerk of the peace, to be kept among the records of the general or quarter sessions of the peace, as required by s. 793 Cr. Code, where there is no such court in the province or officer thereof with whom they may be filed, does not terminate the right of the magistrate to amend the conviction or substitute a new and correct one therefor at any time before the defective one has been quashed.

The King v. Sarah Smith, 19 Can. Cr. Cas. 253.

III. Records of title or ownership.

A. IN GENERAL; WHAT MAY BE RECORDED.

(§ III A—10)—WHAT MAY BE RECORDED—EXPROPRIATION BY-LAW.

A by-law providing for the expropriation of land may be registered under s. 2 of the Registry Act (Ont.), 10 Edw. VII., c. 60, R.S.O. 1914, c. 124.

Grimshaw v. Toronto, 13 D.L.R. 247, 28 O.L.R. 512.

Where a registrar of land titles in Alberta has registered as of a certain date an instrument received by him prior to such date, and gives as his reason the complicated description of the lands mentioned in the instrument and the time involved in examining the same, the court will order the date of registration to be changed to the date of the receipt of the instrument, notwithstanding that, since the date of receipt but before the date of registration a caveat has been registered in respect of a transaction prior to the date of the instrument in question, the only question for decision in such case is whether the instrument was registered as of its proper date, and the court will not inquire whether the instrument should, in fact, have been registered at all, or how the equities stand between the parties.

Bank of Hamilton v. McAllister, 7 D.L.R. 460, 5 A.L.R. 385, 22 W.L.R. 849, 3 W.W.R. 141.

WHAT MAY BE RECORDED—MORTGAGES—EFFECT OF FALSE AFFIDAVIT.

Nichols & Shepard Co. v. Skedanuk, 13 D.L.R. 892, 6 A.L.R. 368, 25 W.L.R. 453, 5 W.W.R. 118, reversing 11 D.L.R. 199, 4 W.W.R. 587, 24 W.L.R. 184.

TRUSTS—PURCHASE OF LANDS BY AGENT—EQUITY OF PRINCIPAL.

The registry laws giving priority to a

later instrument if the former instrument affecting the land has not been registered, have no application to the equity of a principal in the land purchased in the agent's name, which does not admit of registry.

Miller v. Halifax Power Co., 24 D.L.R. 29, 48 N.S.R. 370.

DISCRETION OF REGISTRAR—FOREIGN POWER OF ATTORNEY—VALIDITY OF EXECUTION.

The court will not interfere with the registrar's exercise of discretion under s. 80 (1) of the Land Registry Act in refusing to register a certified copy of a power of attorney executed in another jurisdiction not in conformity, as to acknowledgment and proof of execution, with the requirements of the Land Registry Act and the Power of Attorney Act.

Re Land Registry Act and Clancy, 25 D.L.R. 536, 21 B.C.R. 1.

SUPPLEMENTARY DEED—POWER OF ATTORNEY.

It is not necessary to register the powers of attorney, authorizations and other documents referred to in a deed, the third party being obliged to take cognizance of them. The Registry Acts only require the mention in the memorandum of the nature of the right or the amount of the sum due, and not the conditions on which the debt will be exigible the third party being obliged to take cognizance of them. It is not necessary to register the supplementary deed annexed to a deed for a loan in which supplementary deed are found the conditions that the whole debt will become exigible if the borrower upon hypothec does not make known to the lender every change in the property hypothecated or makes default in payment of any instalment of interest as it becomes due.

Legault v. Drouin, 47 Que. S.C. 538.

PROMISE OF SALE—LAPSING.

Under C.C. (Que.) (arts 1476, 1478), a promise of sale, unless accompanied by actual possession, is not equivalent to a sale, and conveys no ownership so as to permit of registration under arts. 2098, 2100; it will lapse altogether under a clause in favour of the vendor that it should cease to be binding in the event of title not being perfected within a certain time.

Greaves v. Cadieux, 33 D.L.R. 584, 50 Que. S.C. 361.

DONATION INTER VIVOS.

A contract of donation inter vivos is perfect without registration as between the donor and the donee. The registration of a deed of donation inter vivos is not necessary to permit a donee to acquire the title to an immovable by prescription.

Gravel v. Pare, 51 Que S.C. 430.

PRIORITY—JUDGMENT—MORTGAGE.

A judgment registered in the Land Registry Office on an application made after the date of the execution of a mortgage by the judgment debtor, but before the application for the registration of such mortgage, takes priority, by virtue of s. 73 of the Land Registry Act, R.S.B.C. 1911, c. 127, over the mortgage. [Jellett v. Wilkie, 26 Can. S.C.R. 282; Entwistle v. Lenz, 14 B.C.R. 51, distinguished.]

Bank of Hamilton v. Hartery [1917] 3 W.W.R. 964, 25 B.C.R. 150.

REGISTRATION OF CROWN GRANT—LEASE OR CHARGE.

Re Canadian Explosives and Land Registry Act, 39 D.L.R. 764, [1918] 1 W.W.R. 399.

SUPPLEMENTARY DEED—HYPOTHEC — THIRD PARTIES—INSOLVENCY.

Third parties cannot be bound by a stipulation in a supplementary deed fixing another period for the payment of a debt than the period mentioned in an hypothecary obligation, unless that second deed is registered. A creditor may take a personal action against his debtor and an hypothecary action against the third party in possession of the property, although the supplementary deed has not been registered, if the debtor has become insolvent, and such right is under art. 1092, C.C. (Que). It is not necessary to have the above mentioned supplementary deed registered.

Larcher v. Kydd, 27 Que. K.B. 321.

RECORDS OF TITLE.

Under the Land Titles Act a document, the purpose of which is to charge land with a debt or loan, is a mortgage, and to be effective must be in the form provided by the Act. A document not complying with the statutory form of mortgage, can not be registered as a mortgage. The definition of "encumbrance" given in the interpretation clauses of the Act does not apply to the statutory encumbrance provided in s. 98, but the encumbrance there provided for is an instrument intended to create a charge upon land other than by way of debt or loan. An instrument, purporting to charge the land with a debt or loan, is not an encumbrance, and while in the form of an encumbrance, can not be registered as such. A document is objectionable and incapable of being registered when it contains a covenant to give a mortgage, but is not in form J or to like effect, as provided by the Act, the provisions of the Act being mandatory, and the use of the words "or to like effect" permitting only the inclusion of covenants, terms or remedies not affecting the substance of the form, and the inclusion of the covenant referred to, giving greater rights than those of a simple encumbrance, made the whole incapable of registration.

Rumely v. Registrar of Saskatoon Land Registration District, 4 S.L.R. 466.

(§ III A—11)—RESCISSION OF REGISTRATION—PROOF OF OWNERSHIP.

A person who demands that the registration of an immoveable should be expunged from the registry must prove that he is owner of the immoveable, and his action will be dismissed if the property belongs to his wife.

Trudel v. Marquette, 24 Que. K.B. 279.

CANCELLATION OF UNLAWFUL REGISTRATION OF A DEED.

The rules concerning the fear of eviction, the delay to have it disappear, which apply to the action to cancel a sale, do not apply to the action to cancel the unlawful registration of a deed, or of a promise of sale, as in the present case, not susceptible of registration.

Bercovitz v. Pearson, 23 Que. K.B. 323.

SPECIFIC PERFORMANCE — POSSESSORY TITLE —FAILURE TO REGISTER — PRIORITY OF REGISTRATION—NOTICE—FRAUD.

Chapman v. Edwards, 16 B.C.R. 334, 19 W.L.R. 266.

DEED—PRIORITY—FRAUD — KNOWLEDGE OF PREVIOUS GRANT.

Goulding v. Slezinger, 16 W.L.R. 666.

OBLIGATION TO RESTORE PROPERTY OF ANOTHER — HOLDER OF TITLE THROUGH ERROR.

Greece v. Greece, 39 Que. S.C. 233.

B. REQUISITES AND SUFFICIENCY OF RECORD.

(§ III B—15) — REQUISITES AND SUFFICIENCY—DEPOSIT OF MORTGAGE WITH REGISTRAR—PRIORITIES.

The mere deposit of a mortgage with the registrar of titles, although he did not endorse thereon a certificate as to the day and hour of registration as required by s. 50 of the Manitoba Registry Act, R.S.M. c. 150, amounts, under s. 49 of the Act, to a registration of the instrument so as to give it priority over a subsequently executed deed conveying the encumbered land to a purchaser for value, who did not have notice of the existence of the mortgage, although a certificate of registration in compliance with the Act was endorsed on the deed prior to the endorsement of a similar certificate on the mortgage.

Siemens v. Dirks, 14 D.L.R. 149, 23 Man. L.R. 581, 25 W.L.R. 633, 5 W.W.R. 252, reversing 1 D.L.R. 757, 2 W.W.R. 110, 20 W.L.R. 768.

DEEDS—REQUISITES—CONSIDERATION.

In order that a deed may be operative under the Registry Act it must be founded on a valuable consideration; a mere recital of such payment in the deed is not enough, and to overcome it it is necessary to prove valuable consideration and absence of notice. (R.S.N.S. 1900, c. 137, s. 15.)

Miller v. Halifax Power Co., 24 D.L.R. 29, 48 N.S.R. 370.

DEED OF DONATION INTER VIVOS—OMISSIONS —HYPOTHECARY RIGHTS.

In the registration of a deed of donation inter vivos the omission of the following words, "and the accomplishment of the other obligations above mentioned," in a clause creating a hypothec to guarantee the payments imposed by the donation does not affect this registration nor the hypothecary rights of the parties, because it does not fall within any essential provision which should be stated in a schedule or in a certificate of the registrar.

Drouin v. Gaudet, 48 Que. S.C. 137.

(§ III B—16)—WHEN REGISTRATION COMPLETE—FAILURE OF REGISTRAR TO ENTER ON RECORD.

Kirby v. McIntosh, 14 D.L.R. 698, 25 W. L.R. 889.

(§ III B—17)—B.C. LAND REGISTRY ACT (1906)—AGREEMENTS OF SIMILAR DATE —REGISTRATION OF AT DIFFERENT TIMES —EASEMENT—PRIORITIES.

Goddard v. Slingerland, 16 B.C.R. 329.

C. NECESSITY OF RECORDING; EFFECT OF FAILURE; RELIANCE UPON RECORDS.

(§ III C—20)—NECESSITY OF RECORDING— EFFECT OF FAILURE.

The business of a real estate agent may be carried on by a sole proprietor, without incorporation, using as his business style a company name or designation without registering a declaration of such company name under the Partnership Act (Alta.) 1908, c. 5. The business of buying and selling real estate on his own account may be carried on by a sole proprietor, without incorporation, using as his business style, a company name or designation without registering a declaration of such company name under the Act.

Lambert v. Munns, 7 D.L.R. 264, 4 A.L.R. 187, 1 W.W.R. 718.

(§ III C—21)—AS AGAINST CREDITORS AND SUBSEQUENT PURCHASERS.

The requirement of R.S.S. 1909, c. 45, relating to the registration of lien notes and conditional sale agreements, does not, by the express provisions of s. 11 thereof, apply to the resale by a vendor under such a note or agreement, upon a vendee's default, of goods or chattels of the value of $15 or over, which have the name of the vendor, who has an office in Saskatchewan, stamped thereon or affixed thereto.

Great West Life Ass'ce Co. v. Leib, 4 D.L.R. 392, 5 S.L.R. 332, 21 W.L.R. 877, 2 W.W.R. 781.

A sale of a stack of hay is invalid against an execution creditor under s. 3 of the Bills of Sale and Chattel Mortgage Act, R.S.M. 1902, c. 11, providing that every unregistered sale must be accompanied by an immediate delivery followed by an actual and continual change of possession, where the sale was made by the owner of the hay giving it and some cash in payment of an overdue note of his, held by the buyer, who permitted the hay to remain on the premises occupied by the seller where it was seized on execution by the creditor under a judgment obtained after the sale.

Conn v. Hawes, 4 D.L.R. 4, 21 W.L.R. 622, 22 Man. L.R. 464, 2 W.W.R. 598.

FAILURE TO REGISTER SUBDIVISION PLAN.

A purchaser buying under a registered plan without notice of a prior unregistered plan shewing streets and roads, and under which leases were granted of which he had

no notice, is entitled to the protection of the Registry Act (Ont.), and is not bound by the prior plan.

Peake v. Mitchell, 10 D.L.R. 140, 24 O.W. R. 291, 4 O.W.N. 988.

EFFECT OF REGISTRY—NOTICE—RIGHTS OF SUBSEQUENT PURCHASERS.

To disentitle a party from insisting in equity on a legal priority acquired under a registry law, actual notice is required; after such notice it would be a fraud for the party who had bought with notice to claim the benefit of the registry law as against the unregistered claim of which he had notice. [Ross v. Hunter, 7 Can. S.C.R. 289 followed.]

Tom Gung v. Fong Lee, 22 D.L.R. 809, 48 N.S.R. 317.

(§ III C—24)—NOTICE DEHORS RECORD—VENDOR AND PURCHASER—NOTICE OF UNREGISTERED INSTRUMENT—TIME.

A purchaser without notice of a prior unregistered instrument affecting the lands will take title free from the unregistered instrument although he received notice thereof between the date on which he completed the purchase and the date on which he registered the conveyance to himself under the Registry Act (Ont.) 1910, 10 Edw. VII. c. 60. [Millar v. Smith, 23 U.C.C.P. 47, distinguished.]

Peebles v. Hyslop, 19 D.L.R. 654, 30 O.L.R. 511.

NOTICE DEHORS RECORD — PRIORITIES — MORTGAGES.

The time of "actual notice" to be regarded under the Registry Act, Ont., 10 Edw. VII. c. 60, s. 71, as displacing priority of registration, is the time at which and before which an interest in the land is being acquired; actual notice of two prior mortgages at the time of taking an assignment of a mortgage third in point of time will prevent the assignee acquiring priority over the second mortgage registered after the registration of the third mortgage so assigned, where the original mortgagee under the third mortgage also had notice of the second mortgage when he took the third. [Mackeecknie v. Mackeecknie, 7 Gr. 23, applied.]

Heney v. Kerr, 19 D.L.R. 597, 30 O.L.R. 506.

D. AS NOTICE; EFFECT OF RECORDING.

(§ III D—30)—AS NOTICE—EFFECT OF RECORDING—ACTUAL NOTICE, EFFECT OF.

Section 104 of the Land Registry Act, R.S.B.C. c. 107, does not operate to establish a title in a registered owner as against the equitable interest of a purchaser in possession of whose claim the registered owner had notice on acquiring the property. [Chapman v. Edwards, 16 B.C.R. 334, applied.]

Dominion Trust v. Masterton, 20 D.L. R. 305, 20 B.C.R. 289, 29 W.L.R. 837, 7 W.W.R. 953.

SUBSTITUTION—SALE UNDER EXECUTION—TITLE.

A judgment creditor, who becomes the purchaser at a sheriff's sale of land under execution against an institute subsequent to the registration of the substitution, the will creating the substitution not having been registered before an abandonment by the institute, does not require a superior real right to the land as against the rights of the substitute.

Leroux v. McIntosh, 26 D.L.R. 677, 52 Can. S.C.R. 1, affirming, except as to amount, 19 Rev. Leg. 444.

GRANTEE UNDER QUIT CLAIM DEED AS BONA FIDE PURCHASER—PRIORITY TO PREVIOUS UNREGISTERED LIEN.

Under the Registry Act a grantee under a registered quit claim deed without notice, who holds the land as trustee for the payment of certain claims, stands in the position of a bona fide purchaser and has a prior right over a previous agreement by the grantor to give a mortgage and specifically charging the land with a lien inoperative under s. 7 of the Lien Notes Act, R.S.M. c. 115. [Stark v. Stephenson, 7 Man. L.R. 381, followed.]

Waterloo Mfg. Co. v. Barnard, 25 D.L.R. 605, 25 Man. L.R. 817, 9 W.W.R. 870, 33 W.L.R. 223, affirming 9 W.W.R. 177, 32 W. L.R. 447.

APPLICATION TO REGISTER LAND AGREEMENT AND ASSIGNMENT — NOTICE TO ONE FILING MECHANIC'S LIEN.

A., as security for a loan, received from B. a conveyance in fee simple of lands, subject to an agreement for sale. A. also received, by way of separate document, an assignment of the agreement for sale, containing the usual vendor's covenants. A. then filed for registration on one application the agreement for sale and assignment, and this was not disposed of until after the sale hereinafter mentioned. A short while afterwards, mechanics' liens were filed against these lands: action was taken, judgment secured, and the lands sold to C. A. was not made a party to the action, was not brought in on the reference as to the title, and had no notice of the proceedings until several months after the sale. The registrar of the court, by inadvertence, omitted to make any mention of A.'s application for registration, although there was produced to him on the reference a certificate of encumbrance on which the application was noted. A.'s application was cancelled by the District Registrar some time after the above sale, on the ground that as the vendor was registered in fee, they could not register the vendor's assignment of the agreement. A. now sued C. for title to the land:—Held, that as C. had been negligent in not searching the records of the Land Registry office, notice could be imputed to

him, even though the District Registrar had rejected A.'s application.

National Mortgage Co. v. Rolston, 8 W.W.R. 630.

KNOWLEDGE OF UNREGISTERED RIGHT — RIGHT OF SUBSEQUENT PURCHASER.

Knowledge acquired of an unregistered right belonging to a third party and subject to the formality of registration cannot prejudice the rights of one who has since acquired it for value.

Doyle v. Couture, 48 Que. S.C. 124.

KNOWLEDGE OF UNREGISTERED RIGHT.

One who has only an apparent title, founded on mistake, cannot set up such title and its registration to dispossess the real owner of whose unregistered rights he has knowledge. The object of art. 2085, C.C. (Que.) is to protect one who has acquired property for value and by a registered title but not one who wishes to profit by an error in order to appropriate to himself another's property.

Sirois v. Levasseur, 50 Que. S.C. 465.

DEED—SUPPLEMENTARY AGREEMENT.

Third parties cannot be affected by an agreement, between the parties to an unregistered deed, fixing another date than that mentioned in a registered deed as the time when the payment under an obligation will become exigible.

Drouin v. Legault, 25 Que. K.B. 74.

(§ III D—31)—RECORDS AS NOTICE TO SUBSEQUENT PURCHASERS.

A purchaser of land takes with notice of the existence of a contract for its sale made by his vendor, where, at the time of purchase, an application to register such agreement, as well as the agreement itself, was on file in the land registry office.

Mills v. Marriott, 3 D.L.R. 266, 20 W.L.R. 917, 17 B.C.R. 171, 2 W.W.R. 150.

RECORDS AS NOTICE TO SUBSEQUENT PURCHASERS—SCOPE OF NOTICE.

Where an agreement of sale of land is duly registered in the registry office by the purchaser, the notice thereby imputed to a subsequent purchaser of the same land is construed as covering the prior purchaser's full rights.

Strathy v. Stephens, 15 D.L.R. 125, 29 O.L.R. 383.

REGISTRATION—AS NOTICE TO SUBSEQUENT PURCHASERS.

The principle on which registry laws proceed is that an opportunity is afforded to examine the title, and a person acquiring land ought to see if there is anything registered against such land, and for that purpose he is assumed to make a complete search in the registry office. [Trust and Loan Co. v. Shaw, 16 Gr. 446, applied.]

Robinson v. Holmes, 17 D.L.R. 372, 5 W.W.R. 1143.

REGISTRATION OF SUPPLEMENTARY DOCUMENT TO DEED — NOTICE TO SUBSEQUENT PURCHASER—HYPOTHEC.

It is necessary to register the supplementary document mentioned in a deed as being annexed thereto when such document contains important clauses the knowledge of which is essential for the protection of a third party. But when in such supplementary document not registered there is found a condition that the borrower upon hypothec must make known to the lender every change in the property hypothecated under penalty of the entire debt becoming exigible, a person subsequently acquiring the property is not bound by such clause and can resist an hypothecary action.

Richer v. Horlick, 47 Que. S.C. 540.

REDEMPTION.

See Mortgage; Vendor and Purchaser; Taxes.

Redemption of mortgage—Limitation of Action, 36 D.L.R. 15.

RE-ENTRY.

See Landlord and Tenant.

REFERENCE.

(§ I—1)—WHEN NECESSARY OR PROPER GENERALLY.

In an action to recover instalments of purchase money due on a contract for the sale of lands the vendee is entitled to a reference, and to have the vendor's title manifested before being ordered to pay any of the instalments.

McIlvenna v. Goss, 3 D.L.R. 690, 21 W.L.R. 180, 2 W.W.R. 285.

MOTION FOR ORDER TO TAKE ACCOUNTS—ONT. C.R. 645.

Land Owners v. Boland, 6 D.L.R. 902, 23 O.W.R. 265.

TORT—ACCOUNT—JUDICATURE ACT.

Where the tort has been waived by the plaintiff in an action for water wrongfully and fraudulently taken, the wrongdoer being called upon to pay the value of the water taken, the whole question in dispute consisting of matters of account, an order referring the whole action to the official referee for trial is properly made under s. 65 (c) of the Judicature Act, R.S.O. 1914, c. 56.

Oshawa Board of Water Commissioners v. Robson Leather Co., 43 D.L.R. 89, 42 O.L.R. 635.

TO EXPERTS—QUEBEC PRACTICE.

When a cause is referred to experts it disappears from the roll of cases inscribed for enquête and hearing on the merits. A reinscription is then necessary to enable the court to be seized anew of the cause, and this reinscription being a useful proceeding it will effect an interruption of peremption.

Mantha v. Hamelin, 14 Que. P.R. 369.

(§ I—3)—What included in order for.

In an action for an instalment of purchase money due on a contract for the sale of lands the court will order a reference to ascertain what right or interest was held therein by the vendor, who, at the time and immediately before the commencement of the action, was in actual possession thereof, and under what right he holds, as well as what taxes are outstanding against it; and also require the vendor to produce all documents and writings in his possession that shew his title or interest therein; and that upon the filing of the report of the registrar either party may apply for such judgment as he may deem himself entitled to.

Mellvenna v. Goss, 3 D.L.R. 690, 21 W.L.R. 180, 2 W.W.R. 285.

(§ I—4)—Powers of referee.

The clerk of a court cannot, upon a reference to him to ascertain the plaintiff's damages, consider the question of the liability of the defendant in the action, since that was settled by the order of reference.

Lavallee v. C.N.R. Co., 4 D.L.R. 376, 20 W.L.R. 547, 4 A.L.R. 245; 1 W.W.R. 913.

The report of the clerk of the court on a reference to him of the account of a receiver in an action for the dissolution of a partnership, must shew particularly: (1) the cash, (2) the outstanding assets, (3) the partnership liabilities, distinguishing between secured and unsecured, and those admitted, proved or disputed, (4) the individual liability of each partner for partnership debts, (5) the account between each partner and the firm, (6) the accounts of the receivers and of any auditor appointed to take the partnership accounts, (7) the interest of either partner in a mortgage on partnership land, and (8) the specific charges against the interest of each.

Henderson v. McGinn, 5 D.L.R. 205, 21 W.L.R. 397, 2 W.W.R. 360.

Powers of referee—Directing further accounting.

If in a partnership action in which both partners were equally responsible for the method of keeping the accounts, plaintiff partner files the firm's balance sheet, verified by an auditor, or other satisfactory evidence, the plaintiff's case is prima facie proved, and, if the evidence is not answered by the defendant partner, it is the duty of the Master hearing the reference to proceed with the reference without ordering the plaintiff to produce further accounts, saving the Master's right to order the production of such further accounts as he may find necessary as the reference proceeds.

Haney v. Miller, 10 D.L.R. 212, 4 O.W.N. 992, 24 O.W.R. 354.

Powers of Master—Findings—What report should contain—Special findings.

Neal v. Rogers, 19 O.W.R. 873, 2 O.W.N. 1482, affirming 19 O.W.R. 132, 2 O.W.N. 1107.

Report and findings.

Where mortgage accounts are the basis of a Master's report, involving the marshalling of assets as between senior and junior mortgages, and the sale of part of an incumbered estate with various equities set up by defendant purchasers, the facts upon which the Master proceeds should be set out in his report so that in case of appeal all necessary material may be before the court.

Home Buildings & Savings Assn. v. Pringle, 7 D.L.R. 20, 4 O.W.N. 128, 23 O.W.R. 137.

Survey—Experts' report—Time for delivery.

A report by experts will be set aside, upon motion, if it is delivered in court 14 months after the date fixed by the judge, and if there has not been an extension of time.

Beauchamp v. Beaudry, 15 Que. P.R. 311.

(§ I—7)—Recommitment.

If the clerk of a court, on a reference to ascertain the plaintiff's damages, misconceiving his duty, hears evidence and, determining that the defendant was not liable, refuses to assess damages in the plaintiff's favour, the Supreme Court of Alberta may, on an application to vary the clerk's report, direct him to proceed with the assessment of damages.

Lavalle v. C.N.R. Co., 4 D.L.R. 376, 20 W.L.R. 547, 4 A.L.R. 245, 1 W.W.R. 913.

Report—Motion to confirm—Motion to set aside—Powers of judge—Motion for judgment—Reference back.

Marson v. G.T.P.R. Co., 17 W.L.R. 693.

(§ I—8)—Reopening in Master's office charges withdrawn at trial—Report of accountant—Conclusiveness.

Wood v. Brodie, 4 O.W.N. 1190, 24 O.W.R. 505.

Finding of Master—Appeal—Conflicting evidence—When Master's finding may be disturbed.

Banfield v. Toronto R. Co., 19 O.W.R. 536, 2 O.W.N. 1344.

Time to appeal—Jurisdiction of Master-in-Ordinary—Judgment of a foreign court as proof—Terms.

Re Pittsburg Cobalt Co. and Robbins, 19 O.W.R. 535, 2 O.W.N. 1295.

(§ I—9)—Character of land—Title.

A bare question of fact regarding the character of land is not a question of title, such a question if pleaded as a defence might be specially referred to the Master for enquiry, but would not be included on a general reference as to title.

C.P.R. v. Blunt, 42 D.L.R. 624, 13 A.L.R. 554, [1918] 3 W.W.R. 219.

(§ I—10)—Appointment of expert—Expert's report—Form of oath—Notice to parties.

The form of oath in sch. F. C.C.P. is not absolute, and an oath containing its essential statements is valid. A party who was present, without any objection, at the examination made by the expert appointed by the court cannot, later, allege insufficiency of notice. If the court has appointed an expert whose report has been homologated, the reopening of the inquest will not be allowed unless for serious reasons.

Edward v. Cournoyer, 16 Que. P.R. 294.

REFORMATION OF INSTRUMENTS.

See also Judgment, I G.

(§ I—1)—Contract for sale of land—Mistake.

Where, in drafting a contract for the sale of land, the purchaser and his solicitor testified that the latter omitted a stipulation to the effect that the purchaser might encumber the lands to a certain amount in priority to a mortgage given for a portion of the purchase money, and the latter instrument contained a condition to that effect, the contract will be reformed so as to include such conditions, notwithstanding the vendor denied all knowledge of such understanding, as she had nothing to do with the transaction, which was managed entirely by her husband, who had since died.

Kling v. Lyng, 12 D.L.R. 1, 4 O.W.N. 1422, 24 O.W.R. 738.

For mistake—Statute of Frauds.

The Statute of Frauds is not available as a defence against the rectification of an executed agreement on the ground of fraud or mistake clearly shewn, although the antecedent contract was one which the Statute of Frauds required to be in writing and it was by word of mouth only. [Re Boulter, 4 Ch. D. 241, applied.]

Fordham v. Hall, 17 D.L.R. 695, 20 B.C.R. 562, 27 W.L.R. 908, 6 W.W.R. 769.

Smith v. Raney, 16 D.L.R. 868, 6 O.W.N. 55, 25 O.W.R. 888.

Wrong description of property—Mutual mistake—Rectification—Review on appeal.

Hart v. Boutillier, 28 D.L.R. 791, 50 N.S.R. 211.

Mistake—Evidence in variance with contract—Admissibility.

In the absence of a case made out of rectification of a document by reason of mistake, evidence is not admissible to shew that the writing intended to be complete in itself does not express the real agreement.

Bible v. Croasdale, 24 D.L.R. 763, 9 A.L.R. 133, 8 W.W.R. 497.

Description—Boundary line—Mistake—Evidence—Trespass—Injunction.

Fraser v. Woods, 2 D.L.R. 909, 3 O.W.N. 1194, 21 O.W.R. 972.

Where the conveyance of the northern portion of a lot of land, lying on the south side of a street and having for its western boundary another street crossing the first street at an angle greater than a right angle, erroneously made the southern line of the portion sold run parallel to the street the lot faced instead of a fence and the line thereof continued running at right angles to the other street, as the parties intended, thus excluding a portion of the lot intended to be conveyed, and afterwards the owner transferred the southern part of the lot by a conveyance describing its northern boundary to be the south line of the land first conveyed and the grantee in the second deed admitted that she had bought only to the fence, the first deed will be so reformed as to make the fence and its line produced the boundary line between two parcels. [Russell v. Davey, 6 Gr. (Ont.) 165, and Utterson Lumber Co. v. Rennie, 21 Can. S.C.R. 218, applied.]

McCabe v. McCullough, 3 D.L.R. 55, 3 O.W.N. 836, 21 O.W.R. 685.

Assignments of lease—Knowledge of assignees of mistake—Reformation of assignments.

Empire Limestone Co. v. Carroll, 2 D.L.R. 907, 3 O.W.N. 1159.

Where the true agreement between landlord and tenant is shewn to have been that the fixtures should become the property of the landlord at the expiration of the term, but the lease does not express that agreement, the landlord is entitled to reformation of the lease, and, after the expiration of the term, even though no claim for reformation has been made, the equitable title to the fixtures is in the landlord.

Tew v. O'Hearn, 3 D.L.R. 446, 3 O.W.N. 1116.

For mistake.

Where a lease describes the premises demised as being lot 7 in block 150, according to plan Q2, whereas the true description should be "lot 7, block 152," an action lies to reform the lease.

Pigeon v. Preston, 8 D.L.R. 126, 3 W.W.R. 694, 22 W.L.R. 894.

Deed—Mistake as to quantity of land—Rectification — Vesting order — Wife's inchoate dower right—Payment by vendor of value if wife refuses to bar.

Myerscough v. Day, 10 O.W.N. 124.

Lease—Mistake.

In order to rectify a mistake in the drawing up of a lease, the party seeking rectification must produce clear and unambiguous evidence that the mistake was mutual.

Johnston v. Finch, 23 B.C.R. 472.

Contract — Construction—Reformation — "Site of the work" — Cost of transporting material.

Wallberg v. Jenckes Machine Co., 4 O.W.N. 1188.

(§ I—2)—Vendor and purchaser—Agreement for sale of land—Claim for reformation — Evidence — Relief against forfeiture—Payment of purchase-money—Extension of time.

Dannangelo v. Mazza, 6 O.W.N. 396, 7 O.W.N. 99.

Vendor and purchaser—Agreement for sale of land—Written memorandum—Omission of material terms—Consensus ad idem not arrived at—Duress—Claim for reformation of agreement—Conflict of evidence—Findings of fact of trial Judge.

Parent v. Charlebois 6 O.W.N. 706.

Life insurance—Action on tontine policy—Clerical error in re-issuing policy—Policy rectified accordingly.

Harley v. Canada Life Ass'ce Co., 3 O.W.N. 67, 20 O.W.R. 54.

Agreement as to strip of land—Action to set aside—Declaration as to true line.

Parent v. Latimer, 2 O.W.N. 1159, 19 O.W.R. 461, affirming 17 O.W.R. 368.

Bill of sale or mortgage—Transaction one of sale not of mortgage.

Coons v. Elvin, 19 O.W.R. 722.

No fraud or mala fides alleged—Lease rectified.

Peterson Lake, Silver Cobalt Mining Co. v. Nova Scotia Silver Cobalt Mining Co., 19 O.W.R. 43, 2 O.W.N. 970.

Sale of bakery — Purchase price and mode of paying same disputed—Agreement rectified.

Strothers v. Taylor, 19 O.W.R. 789, 2 O.W.N. 1435.

REGISTRY LAWS.

See Land Titles; Mechanics' Liens; Bills of Sale; Chattel Mortgage.

Conditional sale, see Sale.

As to filing mechanic's lien, see Mechanics' Liens.

Recording conditional sale, see Sale.

As to bills of sale, see Bills of Sale; Chattel Mortgage.

Registration under Land Titles Acts, see Land Titles; Judgment; Execution.

Annotations.

Land Titles Act; Registry Act; caveats; notice: 33 D.L.R. 9.

Registrability of hiring, lease, or conditional sale of chattels: 32 D.L.R. 566.

As to forfeiture of land for taxes, see Taxes, III E—140.

Of conditional sale, lien note, see Sale, I C—16.

Registration of company mortgages or charges, see Companies, IV C—55.

Applicability of Registry Act depending on date of instrument, see Evidence, XI A—761.

See also Records and Registry Laws.

RELEASE.

I. In general.
II. What included in effect
A. In general.
B. What included in.
III. Validity; setting aside.

See Accord and Satisfaction; I—7; Compromise and Settlement, I—4.

I. In general.

(§ I—1)—Improvident release—Damages fixed—Parties not on equal terms.

Gissing v. Eaton, 2 O.W.N. 1022, 19 O.W.R. 939.

II. What included in effect.

B. What included in.

(§ II B—11)—Claim for personal injuries — Effect of release — Subsequent death from injuries.

The right of action given by the Families Compensation Act, R.S.B.C. c. 82, to a legal representative or dependant of a deceased person for damages for injuries resulting in the death of such person through the alleged negligence of the defendants, may be barred by a valid instrument of releases executed by the deceased.

Trawford v. B.C. Elec. R. Co., 9 D.L.R. 817, 18 B.C.R. 132, 15 Can. Ry. Cas. 39, 23 W.L.R. 175, 4 W.W.R. 150.

Action for damages for personal injuries — Settlement after action brought — Validity — Payment of money—Receipt.

Elmer v. Crothers, 7 O.W.N. 83.

(§ II B—12)—Right to damages—Railway injuring adjoining property.

A release of all damages which the landowner conveying a strip of land for a railway right-of-way may sustain "by reason of the construction and operation of the railway" and which does not specifically cover injuries due to the company's negligence, will not prevent a recovery for damages occasioned to the adjoining lands of the grantor by blasting operations conducted by the construction contractor, in respect of which the railway company in letting the contract was negligent in imposing no precautions for protecting the adjoining land.

Vancouver Power Co. v. Hounsome, 19 D.L.R. 200, 49 Can. S.C.R. 430, affirming 9 D.L.R. 823, 18 B.C.R. 81, 15 Can. Ry. Cas. 69, 23 W.L.R. 167 and 404, 3 W.W.R. 953.

Right to damages.

Where a vendor of a portion of land for the construction of a railway renounces the right to damages which may result therefrom, the renunciation only extends to those damages which are the necessary consequence of the work and not to those which can be avoided.

Marcotte v. Davis, 3 D.L.R. 851.

Right to damages.

A contract which involves the loss of a right is strictly construed. Therefore, the reservation, by the owner of land who per-

mits it to be taken for railway purposes, of his recourse for possible damages resulting from the obstruction or closing of a way of access to the River St. Lawrence is not affected by the agreement in the sale he makes, on the same day, to the company of the same land that the price "shall include all damages . . . for the passage of the railway . . . over the land above sold."

Desmeules v. Quebec & Saguenay R. Co., 43 Que. S.C. 150.

III. Validity; setting aside.

(§ III—15)—CLAIM FOR DAMAGES FOR NEGLIGENCE—INJURY TO RAILWAY SERVANT—VALIDITY OF RELEASE—ALTERNATIVE CLAIM FOR DAMAGES FOR BREACH OF CONTRACT TO EMPLOY PLAINTIFF—EVIDENCE—DISMISSAL OF ACTION—COSTS.

Baker v. G.T.R. Co. 11 O.W.N. 248.

SETTLEMENT OF ESTATE—RELEASE—BINDING AGREEMENT—EVIDENCE.

Wetmore v. Martin, 11 O.W.N. 296.

(§ III—17)—SETTING ASIDE—ACTION FOR NEGLIGENCE CAUSING PERSONAL INJURIES—DEFENCE OF RELEASE UNDER SEAL—PAYMENT OF SMALL SUM AND EXECUTION OF DOCUMENT OF RELEASE.

Arkles v. G.T.R. Co., 5 O.W.N. 462.

RELIGIOUS SOCIETIES.

I. INCORPORATION; CHANGE OF NAME.
II. CHANGE OF CONSTITUTION OR DOCTRINE.
A. Constitution.
B. Doctrine.
III. TITLE TO, OR CONTROL OF, PROPERTY.
A. In general.
B. Church identity.
C. Rights of majority and minority.
IV. PASTORS.
V. OFFICERS.
VI. EXPULSION OR EXCOMMUNICATION.
VII. CONTRACTS.
VIII. DELEGATION OF POWER.
IX. POWER OF ECCLESIASTICAL TRIBUNALS.

Annotation.

See Religions.

Libel and slander in church matters: 21 D.L.R. 71.

I. Incorporation; change of name.

(§ I—1)—WESLEYAN METHODIST FOREIGN MISSIONS—NAME OF SOCIETY CHANGED—EVIDENCE OF IDENTITY OF OBJECT.

Re Edwards, 2 O.W.N. 765, 18 O.W.R. 678.

II. Change of constitution or doctrine.

(§ II—5)—INCORPORATION—CANCELLATION FOR CAUSE—INQUIRY.

The authority of the Lieut. Governor-in-Council (Alta.), to cancel the incorporation of a congregation for "cause" (N.W.T. Ord. c. 38, s. 25), is subject to the implied condition that a fair and impartial inquiry shall previously be held.

Greek Catholic Church v. McKinnon, 28 D.L.R. 509, 34 W.L.R. 933, 10 W.W.R. 1222.

III. Title to, or control of, property.

A. In general.

(§ III A—20)—TITLE TO OR CONTROL OF PROPERTY.

The control of the property in a church will be appropriated to the use of those members of the congregation who adhere to the original creed of its founders, they being more properly the cestuis que trustent of the trustee than those who have departed from the original founders' religious principles, so that where a congregation become dissentient among themselves, the nature of the original institution must alone guide the court in deciding between the parties. [Free Church of Scotland v. Overtoun, [1904] A. C. 515, 643; Attorney-General v. Pearson, 3 Mer. 353, 400, 36 E.R. 135, 150, applied.]

Stein v. Hauser, 15 D.L.R. 223, 6 S.L.R. 383, 26 W.L.R. 452, 5 W.W.R. 971.

CONTROL OF CHURCH PROPERTY—MORTGAGE—POWERS OF TRUSTEES.

Re Lutheran Church of Hamilton, 24 D. L.R. 879, 34 O.L.R. 228.

RIGHTS IN CHURCH PEWS.

When a church ceases to be used as such or is destroyed, and is replaced by a new one, the grantees of pews have no right in the new church to the pews corresponding to those they were occupying in the old one. The contracts, by virtue of which they were occupying those pews in the old church come to an end through the destruction of the thing which was their object: and no distinction has to be made between the deeds of concession for life or of concession in consideration of an annual rent. The allotment by a vestry board to the grantees in the new church of pews corresponding to those occupied by them in the old church is illegal and null. All the pews of a new church, with the exception of the patronal pew, if one is established, must be conceded anew by auction, according to the tenure in force in the parish.

Houde v. Ste. Croix, 49 Que. S.C. 106.

(§ III A—21)—CONVEYANCES TO—CHURCH LANDS ACT—INSURANCE.

Even though the form set forth in s. 1 of the Church Lands Act, R.S.M. 1913, c. 31, is not exactly followed, the statute applies to land conveyed to trustees and their successors and assigns in trust for a church congregation, if the name of the church or congregation is set forth in the conveyance; the trustees, though not a corporation, may hold the land and may procure the insurance of buildings on the land. It was held that the form set forth in the Act must be strictly followed.

Trustees of Greek Catholic Ruthenian Church v. Portage La Prairie Farmers' Mutual Ins. Co., 31 D.L.R. 33, [1917] 1 W. W.R. 249, reversing 33 W.L.R. 338.

C. Rights of majority and minority.

(§ III C—30)—RIGHTS OF MAJORITY AND MINORITY.

The trustees of a church cannot be com-

pelled to transfer the church property to a majority of the congregation where a majority have seceded from the religious principles of the original founders and joined a different sect; the trustees may in such case transfer the property in accordance with a resolution of the members of the congregation adhering to the original doctrines, and the fact that a considerable part of the debt on the church has been paid since dissentions arose, but before the actual severance took place, will not assist the secessionists in an action to set aside such transfer.

Stein v. Hauser, 15 D.L.R. 223, 6 S.L.R. 383, 26 W.L.R. 452, 5 W.W.R. 971.

IV. Pastors.

(§IV—35)—RECTOR—RECORDS OF VESTRY—PRODUCTION.

A rector (curé), as depositary of records of the vestry of a parish, is obliged to deliver copies or extracts therefrom, on requisition to that effect, to persons who may be entitled to them, but he may refuse to permit physical examination of the records or the making of searches therein.

Lebel v. Guy, 50 Que. S.C. 296.

V. Officers.

(§ V—40)—PAROCHIAL LAW—ELECTION OF CHURCH WARDENS—ASSEMBLY OF THE PARISH — RESIGNATION—ACCEPTANCE —NOTICE OF SERMON—SUFFICIENCY—FINDING A SUBSTITUTE C.C.P. ART. 987 —R.S.Q. (1909) ART. 3438, 4386.

An election of church wardens in a parish assembly is void if the election was not preceded by the notice as established by custom and by law in the parish. The 30 days to replace a church warden who has resigned, mentioned in s. ref. (1909), R.S.Q. 1909, art. 4836, is computed from the acceptance of the resignation by the assembly of the parish.

Desrochers v. Jolicoeur, 25 Rev. Leg. 41.

VI. Expulsion or excommunication.

(§ VI—45)— REINSTATEMENT BY COURT.

The Church possesses material property which gives the court jurisdiction to adjudicate upon the civil rights of the members thereof as members of a society possessing property, and may therefore review the regularity of the expulsion of a member and order the restoration of his rights. [Pinke v. Bornhold, 8 O.L.R. 575, disapproved; Gray v. Christian Assn., 137 Mass. 329; Can. R. Assn. v. Pammenter, 180 Mass. 418, applied.]

Patillo v. Cummings, 24 D.L.R. 775.

INTERLOCUTORY INJUNCTION— RIGHT OF EXPELLED MEMBER OF RELIGIOUS BODY TO APPLY.

Where the plaintiff, a member of the board of directors of the defendant corporation was suspended from membership for infringement of the rules but, he and his family were still permitted to attend services. Held, that the plaintiff's application for an interlocutory injunction restraining the defendant from interfering with his rights as a member of the defendant corporation must fail. The object of an interlocutory or interim injunction is to preserve matters in statuo quo until the case can be tried, and to protect the party applying from irreparable injury.

Cohen v. Congregation of Hazen Avenue Synagogue, 46 N.B.R. 152.

VII. Contracts.

(§ VII—50)—BUILDING CONTRACT—POWERS OF PRIEST AND BISHOP—CORPORATE SEAL.

An agreement for the erection of a church, entered into by a priest on behalf of the parish, with knowledge thereof by the bishop, will be presumed to have been executed with the authority of the latter, and is binding upon the ecclesiastical corporation; the contract being entered into under proper authority and for the necessary carrying out of its corporate purposes, cannot be attacked for the want of the corporate seal, particularly after the contract had been executed.

Purdy & Henderson Co. v. St Patrick, 37 D.L.R. 642, 12 A.L.R. 263, [1917] 3 W.W.R. 710, varying [1917] 1 W.W.R. 1416.

CHURCH—DEPOSITION OF BISHOP BY CONFERENCE—BISHOP CONTINUING TO ACT—INJUNCTION TILL TRIAL OF ACTION TO DETERMINE RIGHTS.

Holiness Movement Church in Canada v. Horner, 13 O.W.N. 29, reversing 12 O.W.N. 387.

MALICIOUS ARREST —ASSAULT—EVIDENCE FOR JURY—FINDINGS OF JURY—LIABILITY OF ROMAN CATHOLIC EPISCOPAL CORPORATION—CORPORATION SOLE—INCORPORATING ACT, 7 & 8 VICT. (CAN.) CH. 82, SEC. 6—DAMAGES—COSTS.

Basil v. Spratt, 44 O.L.R. 155, 13 O.W.N. 249.

PERSONAL LIABILITY OF MAJORITY AUTHORIZING — RIGHTS OF DISSENTING MINORITY.

Where the majority of the members of an unincorporated church congregation, by resolution at a meeting at which the contractor, a member of the congregation, was present, authorize a contract to be entered into by trustees on their behalf and a minority dissent, the individual members of the majority must be taken to have recognized the element of personal liability and are personally liable to the contractor, but the individual dissentients are not, it being held in the circumstances that the knowledge of their dissent must have been in the contractor's mind when he undertook the work.

Rohl v. Pfaffenroth, 31 W.L.R. 197.

GOODS SOLD TO CHURCH — LIABILITY OF BOARD OF TRUSTEES.

An action for price of lumber sold defendant:—Held, on the evidence, that there was no promise to pay by the board

of trustees or any one authorized by them on their behalf. Action dismissed.

Rogers Lumber Yards v. Methodist Church of Brock, 31 W.L.R. 547.

IX. Power of Ecclesiastical tribunals.

(§ IX—60) — PARISHIONERS — VESTRY — EXTRAORDINARY EXPENSES — CHURCH BUILDING.

The construction of a church is an obligation of the parish which is bound to provide the expenses necessary for public worship. It has the right to be previously consulted, to discuss and decide itself, at a meeting of the parishioners, the question whether or not the church should be built. The vestry, although a corporation, has merely the powers of administration as the agent of the parishioners. Even at a meeting of the old and new churchwardens, the vestry cannot be authorized to incur extraordinary expenses without the consent of the freeholders, such as the construction of a church, even though it is intended to proceed in part only in the first place by the construction of a basement.

Bélanger v. Rector and Churchwardens of St. Arsène, 50 Que. S.C. 193.

REMAINDERS.

See Wills, III.

REMEDIES.

See Action; Pleading.

For enforcing liability of stockholder, see Companies.

In case of fraud, see Fraud and Deceit; Fraudulent Conveyances.

Of insured, see Insurance.

For nuisance, see Nuisances.

Of parties to sale, see Sale; Vendor and Purchaser; Specific Performance.

For workmen's compensation for injuries, see Master and Servant, V.

For death, see Death.

REMOVAL OF CAUSES.

See Courts; Venue; Appeal.

I. RIGHT OF.
- A. In general.
- B. On ground of citizenship.
- C. For prejudice or local influence.

II. PROCEDURE.
- A. In general.
- B. Time for removal.

I. Right of.

A. IN GENERAL.

(§ I A—1)—ORDER WITHOUT JURISDICTION AB INITIO—NULLITY—FORMAL DECLARATION.

Although a judicial order issued in the face of an entire want of jurisdiction ab initio (as distinct from an erroneous exercise of jurisdiction), being a mere nullity, need not, strictly speaking, be set aside to avoid giving effect to its provisions, yet the better practice is formally to declare its nullity in order to restore the rights of parties on the record. Where, after trial and judgment in a County Court (Man.) action, the judge, through inadvertence, and without jurisdiction enters an order transferring the proceedings to the King's Bench, such order is a mere nullity and ought to be disregarded. [McLeod v. Noble, 28 O.R. 528, applied.]

McInnes v. Nordquist, 13 D.L.R. 725, 25 W.L.R. 422, 23 Man. L.R. 815, 5 W.W.R. 95.

RIGHT TO—COUNTY COURT ACTION—JUDGMENT IN—DELIVERY OF COUNTERCLAIM ORDERED—TRANSFER TO ANOTHER COUNTRY—DISCRETION OF COURT—CON. R. 255.

Berthold & Jennings Lumber Co. v. Holton Lumber Co., 4 O.W.N. 458. [Affirmed, 4 O.W.N. 523, 23 O.W.R. 839.]

(§ I A—2) — ACTION INVOLVING VALIDITY OF WILL — REMOVAL FROM SURROGATE COURT TO KING'S BENCH.

Where there are circumstances which prima facie shew that a strict investigation should be made of all the facts surrounding the making of an alleged will before admitting it to probate, the cause should be removed from the Surrogate Court to the Court of King's Bench, as the latter court possesses an ampler and a more effective machinery for such investigation.

Jones v. Momberg, Re L. Jones, 21 D.L.R. 863, 25 Man. L.R. 504, 8 W.W.R. 1059, 31 W.L.R. 633.

COUNTY COURTS—TRANSFER OF ACTION TO SUPREME COURT OF ONTARIO—GROUNDS FOR—PRACTICE—COUNTY COURTS ACT, R.S.O. 1914, c. 59, ss. 29, 30.

McConnell v. Toronto, 7 O.W.N. 745.

DIVISION COURT—ORDER TRANSFERRING ACTION AFTER JUDGMENT — JURISDICTION —DIVISION COURTS ACT, R.S.O. 1914, c. 63, s. 79 — JUDGMENT SUMMONS — "ACTION"—TRANSCRIPT OF JUDGMENT —SECTION 188.

Standard Bank v. Ellis, 9 O.W.N. 177.

ACTION FOR PENALTY—BREACH OF BY-LAW GRANTING A PRIVILEGE FOR YEARS—RIGHTS IN FUTURE RIGHTS.

Quebec & Levis Ferry Co. v. Bernier, 20 Que. K.B. 372.

COUNTY COURTS—REMOVAL OF ACTION INTO HIGH COURT — APPLICATION AFTER JUDGMENT.

Roche v. Allan, 23 O.L.R. 478, 18 O.W.R. 749.

II. Procedure.

A. IN GENERAL.

(§ II A—20)—REMOVAL TO SUPREME COURT —JURISDICTION OF LOCAL MASTER.

Robin Hood Mills v. Mitchell, 24 D.L.R. 896, 7 S.L.R. 163, 8 W.W.R. 564.

NOTICES.

When the record is transferred from one district to another upon a declinatory motion, notice of the presentation of an exception to the form must be given within

three days from the date of the filing of the record in the new district.

Bernier v. Leboeuf, 15 Que. P.R. 22.

(§ II A—22)—Questions of title to land—Application, how intituled.

Where a plaintiff pleads trespass to lands and the defence raises a question of title, that is no reason why the action should not be brought in a District Court. An application to transfer an action from the District to the Supreme Court should be intituled "In the Supreme Court."

McRadu v. Lumber Mfg. Yards, 9 W.W.R. 633.

Judicial district—Transfer.

When a foreign defendant is illegally summoned before a judicial district, he may by declinatory exception ask that the record be referred to the court of one of the places where the whole or part of his property is situated, and the plaintiff, having sued before a court which was manifestly without jurisdiction, has lost his option between the districts which would otherwise have jurisdiction.

Germain v. Shives Lumber Co., 12 Que. P.R. 252.

RENEWAL.

Of promissory note, see Bills and Notes.

Of mortgage, see Mortgage; Chattel Mortgage.

Of writ, see Execution.

Annotation.

Promissory note—Effect of renewal on original note, 2 D.L.R. 816.

Lease—Covenant for renewal, 3 D.L.R. 12.

RENT.

See Landlord and Tenant; Mortgage.

REPAIRS.

See Highways; Railways; Bridges; Landlord and Tenant.

Annotation.

Law of obligation of tenants to repair: 52 D.L.R. 1.

REPEAL.

See Statutes.

Of by-law, see Municipal Corporations.

REPLEVIN.

I. In general.

II. Procedure.

Malicious prosecution against one who wrongfully institutes, see Malicious Prosecution.

Obstructing execution of process in, see Obstructing Justice.

Suit by purchaser upon implied warranty where goods purchased are taken from him by replevin, see Sale.

Set off in, see Set-off and Counterclaim.

I. In general.

War relief Act—Possession of goods.

The words "now in his possession" in the War Relief Act, 1915 (Man. 5 Geo. V., c. 88, as amended by 6 Geo. V. c. 122), referring to property exempted from recovery in any action or proceeding, mean in the possession of a volunteer when he enlists, and becomes entitled to the benefit of the Act; not property which he possessed at the date of the Act, but has ceased to possess at the time of his enlistment.

Burns v. Rogers, 30 D.L.R. 656, 27 Man. L.R. 250, [1917] 1 W.W.R. 129.

For what—Promissory note.

A promissory note is a chattel and subject to replevin under the County Courts Act, R.S.M. c. 44, s. 222, by the party entitled to the possession.

Wilton v. Manitoba Independent Oil, 25 D.L.R. 243, 25 Man. L.R. 628, 32 W.L.R. 465, 9 W.W.R. 202.

Exchange of lands for chattels—Owner of land replevying chattels—Premature action — Amendment — Specific performance—Costs.

Spectar v. Cluthe, 9 O.W.N. 201.

II. Procedure.

Sufficiency of affidavit — Means of knowledge of agent of corporation —Omission of word "limited."

Dalhousie Lumber Co. v. Walker, 30 D.L.R. 498, 44 N.B.R. 81.

Affidavit and order.

Where a writ of replevin for recovery of a team of horses was issued upon affidavits never actually sworn to, an application in Chambers to set aside the writ will be allowed but an order to restore the personal property seized under it cannot be issued in Chambers in the absence of statutory provision.

Chew v. Crockett, 6 D.L.R. 368, 22 W.L.R. 119, 3 W.W.R. 32.

Security under rules—Damages.

A plaintiff who replevies goods and gives the security required under rr. 469, 472 (Alta.) undertakes an obligation to pay such damages as the defendant may suffer if the plaintiff fails to establish his claim.

Shewczuk v. Breeko, 39 D.L.R. 588, 13 A.L.R. 234, [1918] 1 W.W.R. 639.

Rule 359—Security—Rule 362—Jurisdiction of Master in Chambers.

Stock v. Meyers, 14 O.W.N. 361.

Injunction — Receiver — Time—Possession.

In an action brought to recover certain goods alleged to have been sold to the plaintiff and for damages, a replevin order and an injunction against the selling of the goods, an order was made which restrained the defendant from disposing of the goods, authorized the plaintiff to pay into court a certain sum of money in lieu of the bond required upon issue of a replevin order, and, this being done, directed the sheriff to take the goods and hold them until the issues in the action were

determined. Held, that the order was in effect a receiver order and was justified, although the action was begun and the order made before the time when the plaintiff was to be entitled to possession had arrived.

Kay v. Ratz, 44 D.L.R. 145, 14 A.L.R. 72, [1918] 3 W.W.R. 885.

BOND.

Where, owing to the omission of certain words in the condition, a replevin bond was defective, the court, in view of the property having been returned, refused to set aside the bond, but ordered it to be amended.

Hall v. Slocomb, 11 E.L.R. 125.

CON. RR. 1068, 1070 — REPLEVIN — UNDETERMINED LIABILITY FOR USE AND OCCUPATION.

Ryan v. Fraser, 19 O.W.R. 700, 2 O.W.N. 1386.

SHIP SEIZED UNDER JUDGMENT FOR SEAMEN'S WAGES.

Horwood v. Nicholson, 9 E.L.R. 309.

REPLY.

See Pleading.

REPUDIATION.

See Contracts; Sale; Vendor and Purchaser; Infants.

Of subscription for shares, see Companies.

REQUETE CIVILE (Quebec).

See Judgment, VII.

RESCISSION.

See Contracts, V.; Sale, III.; Vendor and Purchaser.

RES JUDICATA.

See Judgment, II.

RESPONDEAT SUPERIOR.

See Master and Servant; Principal and Agent.

RESTRAINT OF TRADE.

See Contracts, III.; Monopoly.

RESULTING TRUST.

See Trusts.

REVENDICATION (Que.).

See also Trover.

LIABILITY—EFFECT OF SUIT OR RECOVERY.

The owner who brings an action of revendication to recover a team of horses left in the possession of the defendant by the person by whom they had been hired from the owner, and who accepts in settlement of suit the costs and a sum of money in full value of the said property which thus passes to the defendant, does not thereby waive his right to the value of the use of the property during the interval between the institution of the suit and the settlement thereof, and has an action against the defendant to recover the same.

O'Brien v. Maloney, 1 D.L.R. 760.

ACTION—JURISDICTION—PASTURAGE AGREEMENT—RIGHT OF RETENTION.

In a revendication action the jurisdiction of the Superior Court is determined by the amount at which the article sold is valued in the declaration. And when the plaintiff restricts himself to revendicating the article on which he claims a right of retention, and of which he claims to have been illegally dispossessed without asking that the defendant pay the debt due to him, the court cannot give judgment outside of the conclusions, and the only question to solve is that of deciding whether the plaintiff possesses the right of retention which he claims. An agreement for pasturage of a horse is, from its nature, a lease which includes an obligation by the lessor to procure for the lessee the enjoyment of the pasturage required for feeding of the horse, and by the lessee an obligation to pay the rent or price of such enjoyment; such agreement gives the lessee authority to drive his horse into the pasturage, to leave it there to graze, and to go and seek it as he likes, but does not take away from him any right of possession of his horse, and does not give any to the lessor. A right of retention can only result from the law, or an express stipulation in the contract; it cannot be presumed, or based upon simple reasons of equity.

Paquette v. Beauvais, 24 Rev. de Jur. 428.

POSSESSION OF MOVABLE.

Seizure in revendication may be exercised against one who claims to be owner of a movable although it may be in the possession of another person when the latter claims no right of property in the movable.

Belisle v. Paliquin 52 Que. S.C. 346.

TITLE OF OWNER—AFFIDAVIT—SERVICE.

A seizure in revendication will not be dismissed on exception to the form because the plaintiff did not set out the title by virtue of which he claims to be owner of the goods seized. An affidavit which indicates the business premises of the deponent complies with the requirements of the law. Failure to serve or to leave with the prothonotary, for the defendant, a copy of the affidavit supporting a seizure in revendication is a good ground for an exception to the form if the failure is not remedied.

Liverman v. Romero 18 Que. P.R. 231.

AFFIDAVIT—SERVICE —ADDRESS—EXCEPTION TO FORM.

If an exception to the form is taken to a seizure in revendication based upon the fact that the copy of the affidavit on the faith of which it was issued was not served on the defendant or left for him with the prothonotary, the plaintiff will be given a certain time to enable him to serve such affidavit, the costs of the exception to be paid by him

in any event. The fact that the maker of the affidavit, styling himself "of the defendant company domiciled at Montreal," does not give his address is not a ground for dismissing a seizure in revendication on an exception to the form.

Legare Gadbois Auto v. Clermont, 18 Que. P.R. 154.

DILATORY EXCEPTION—PARTIES.

A saisie—revendication is a conservatory measure which can be taken by one or several of the owners of the property revendicated and a dilatory exception to add the other owners as parties will be dismissed.

Beaulieu v. Moquin, 18 Que. P.R. 181.

REVIEW.

See Appeal.
Of assessments, see Taxes, III.
Of award, see Arbitration.

REVIVOR.

See Abatement and Revivor; Execution.

RIGHT OF WAY.

See Easements; Railways; Expropriation.

RIVERS.

See Waters; Fisheries.

RULES OF COURT.

AMENDMENT OF—POWERS OF JUDGES—REDRAFTING.

Under r. 713 of the Alberta rules the judges of the Supreme Court are "authorized to alter and amend any rules of court or tariff of costs or fees for the time being in force or make additional rules or tariffs." This rule includes the redrafting of a rule in entirely different language if what is done is in reality merely an alteration.

McIntyre v. Alberta Pacific Grain Co., 43 D.L.R. 682, 14 A.L.R. 373, [1918] 3 W.W.R. 906.

CHIEF OBJECT OF—SECONDARY PURPOSES.

Rules of procedure are for the convenience of litigants and the court and the advancement of justice, and should not be invoked to perpetuate a wrong.

Mackell v. Ottawa Separate School Trustees, 18 D.L.R. 456, 26 O.W.R. 809.

PRACTICE—SHERIFF—POUNDAGE ON WRIT OF POSSESSION—WRIT OF EXECUTION—RULES, APPENDIX M, SCHEDULE 4 (38)—SCALE OF FEES TO SHERIFF.

Where a sheriff has executed a writ of possession, he is entitled to poundage on the yearly rental value of the premises to which possession is given, which is the "sum made" within the meaning of item 38 of schedule No 4 of Appendix M. to the Supreme Court Rules, 1912.

Bell v. Nicholls; Ex parte Richards, 26 B.C.R. 102.

PRACTICE — COSTS — STATUTES — RETROACTIVITY.

During the pendency of an action the rules of court with respect to costs were amended, whereby a new tariff of costs was substituted, coming into force Feb. 1, 1919. Held, that the new tariff applied only to the services rendered from and after the date upon which it came into force.

Royal Bank v. Bawlf, 12 S.L.R. 264, [1919] 2 W.W.R. 361, overruling judgment of Rimmer, D.C.J.

REPORT—SETTLEMENT OF BY MASTER, IN ABSENCE OF DEFENDANTS AND WITHOUT NOTICE TO THEM—R. 424—REPORT SET ASIDE.

Richardson v. McCaffrey, 17 O.W.N. 78.

COMPANY—WINDING-UP UNDER DOMINION ACT—ORDER OF JUDGE IN COURT—MOTION FOR LEAVE TO APPEAL FROM—INAPPLICABILITY OF R. 507—APPLICATION OF S. 101 OF R.S.C. 1906, C. 144—OTHER CASES OF SIMILAR NATURE—AMOUNT INVOLVED—IMPORTANCE OF CASE—LEAVE GRANTED.

Re Bailey Cobalt Mines, 17 O.W.N. 228

APPEAL—MOTION FOR LEAVE TO APPEAL FROM ORDER OF JUDGE IN CHAMBERS—R. 507—NOTICE OF MOTION CONTAINING SCANDALOUS MATTER—REMOVAL FROM FILES.

Ontario Motor Car Co. v. Gray, 17 O.W.N. 237.

PRACTICE — DECLARATORY DECREE — ONLY GRANTED WHERE CONSEQUENTIAL RELIEF POSSIBLE.

Rule 25, subs. (e) of the Kings Bench Act does not make any radical change in the rules and practice of the court. It only applies to cases where plaintiff is entitled to relief consequent upon the declaration. The court will not make a declaratory decree simply, without directing any relief to plaintiff, as it is barren of practical results.

McCutcheon v. Wardrop, [1919] 1 W.W.R. 925.

APPEAL—NOTES OF TRIAL JUDGE.

On appeal being constituted, but not before, the trial judge must produce his notes.

Bouskill v. Williams, [1919] 2 W.W.R. 546.

VACATION — DIVORCE TRIAL — APPLICATION FOR DIRECTIONS—PRACTICE.

Aubin v. Aubin, [1919] 3 W.W.R. 312.

PRACTICE — RULES — REGISTRAR'S CERTIFICATE—CONFIRMATION UNNECESSARY.

Milne v. Central Okanagan Lands, [1919] 1 W.W.R. 720.

SALE.

I. WHAT CONSTITUTES; VALIDITY; EFFECT.
  A. In general.
  B. Passing of title; delivery.
  C. Conditional sales.
  D. Acceptance; retention.
II. WARRANTY.
  A. In general.

B. By description.
C. Of quality; genuineness or fitness.
D. Effect of inspection; or opportunity to inspect.
III. Rights and remedies of parties.
A. In general.
B. Lien for price; stoppage in transitu.
C. Rescission.
D. Rights of bona fide purchasers.
IV. Bulk sales.
Registration of bills of sale, see Bills of Sale; Chattel Mortgage.
Mortgagor's power of, see Chattel Mortgage; Mortgage.
Construction of contract for generally, see Contracts, II.
Of corporate stock, see Companies.
Measure of damages, see Damages, III.
Of liquors, see Intoxicating Liquors.
When dealing with infants, see Infants.
Judicial sale, see Judicial Sale; Executions; Mortgage.
For taxes, see Taxes, III.
Of land, see Vendor and Purchaser.
As to specific performance, see Specific Performance.

Annotations.

Rescission of contract for fraud and damages for deceit: 32 D.L.R. 216.

Acceptance and retention of goods sold: 43 D.L.R. 165.

Of property by pledgor, see Pledge, II—B.

I. What constitutes; validity; effect.

A. In general.

As affected by agency, see Principal and Agent, II A—6.

As affected by Cr. Code, grain futures, see Gaming, I—5.

Criminal restraint of trade, see Contracts, III E—275; Monopoly and Combinations.

Violation of statute, Farm Implements Act, remedies, see Contracts, III G—295.

Of grain, rights of seller, see Partnership, III—14.

(§ I A—1)—Sale or agency—Onus.

In an action for the price of goods, the burden of proof is upon the plaintiff to shew that the goods delivered were intended as a sale and not merely for the purpose of resale under agency.

Cowie v. Robins, 27 D.L.R. 502, 9 S.L.R. 191, 34 W.L.R. 245, 10 W.W.R. 287.

Illegality of sale—Steam Boilers Act.

Where a traction engine is not constructed in accordance with the Steam Boilers Act (R.S.S. 1911, c. 22, s. 19), but the affidavit of the proper officer of the company states that it has been constructed in accordance with the plans required, and owing to the nature of the defect, it is not discovered by the inspector of steam boilers, and the reduction in pressure required by regulation 1 of the Department of Public Works has consequently not been made, and, therefore, neither the statute nor the regulations having been complied with, the sale of such engine is wholly illegal and cannot be enforced. [Cope v. Rowlands, 2 M & W. 149, applied.]

Haug v. Murdoch, 26 D.L.R. 200, 9 S.L.R. 56, 33 W.L.R. 442, 9 W.W.R. 1064, reversing 25 D.L.R. 666, 32 W.L.R. 572, 9 W.W.R. 474.

Validity — Noncompliance with Steam Boilers Act (R.S.S. 1909, c. 22, s. 15) —Inspection certificate.

Swanson v. Merrett, 27 D.L.R. 785, 9 S.L.R. 101, 33 W.L.R. 745, 9 W.W.R. 1268.

What constitutes — Neither chattels nor evidence of contract delivered— Effect—"Mere intention" to effect an illegal object.

A declaration by the original owner of chattels that he had sold and by the alleged purchaser that he had purchased such chattels, falls short of an actual assignment of the property in the goods where there was no delivery of either documents or chattels to the alleged purchaser, nor was such want of formality cured by a "mere intention" to effect an illegal object.

Sanders v. Hedman, 18 D.L.R. 481, 29 W.L.R. 460, 7 W.W.R. 133.

Bulk Sales Act—"Liquor license and stock-in-trade"—Hotel furniture.

The sale of a liquor license and stock-in-trade is within the Bulk Sales Act, 1910–11, c. 38, but it is a condition precedent to setting aside the sale that the purchaser must have paid some part of the purchase money or have delivered some security therefor to the vendor, without taking the steps provided in the Act for the protection of the creditors; the attacking party fails if the purchase money remained still available for the creditors. The furniture of an hotel cannot be considered goods, wares or merchandise ordinarily the subject of trade and commerce so as to come within the Bulk Sales Act (Sask.) 1910–11, c. 38.

Barthels v. Sloane, 19 D.L.R. 547, 7 S.L.R. 376, 30 W.L.R. 101.

Delivery with invoices for "goods sold," effect of—Abortive negotiations for agency contract.

Where plaintiffs proposed that defendant act as their agent in running a store and the plaintiffs supplied the defendant with goods, but subsequently the parties failed to reach an agreement in regard to the terms of a written contract of agency which had been drawn up, but the plaintiffs still kept supplying goods to the defendant sending him weekly invoices indicating that they were for goods "sold" to the defendant with the charge carried out, and which invoices were signed by the defendant, the course of the dealing between the parties is that of seller and buyer rather than that of principal and agent.

Gallagher v. Freedman, 10 D.L.R. 436, 23 W.L.R. 389.

Installation of machinery—Work and labour.

A verbal agreement for the sale and in-

stallation of an oil burning plant which involves the work of ripping out an old plant and affixing to the freehold the substituted equipment is a contract for work and labour and not for goods sold and delivered, which is not governed by the provisions of the Sale of Goods Act (B.C.). [Lee v. Griffin, 1 B. & S. 272, applied.]

British American Paint Co. v. Fogh, 24 D.L.R. 61, 22 B.C.R. 97, 32 W.L.R. 142, 8 W.W.R. 1331.

CONSTRUCTION OF ELECTRIC SIGN.

A contract by which a company undertakes to make and set up a complete electrical sign for a fixed price, is a sale and not a contract for the hiring of services.

Macey Sign Co. v. Routtenberg, 48 Que. S.C. 346.

TRANSFER OF LITIGIOUS RIGHTS—DISCHARGING MUNICIPALITY FROM LIABILITY—TAXES ILLEGALLY IMPOSED.

A transfer by a person of all rights, actions and claims against a municipality for repayment of taxes illegally and irregularly imposed upon immovable properties and paid by him, is a sale of litigious rights permitting to the municipality to be relieved of liability in the manner provided by art. 1582 C.C. (Que.).

McCarthy v. Hull, 24 Que. K.B. 191.

SALE BY INTERVENTION—WHEN ACCEPTED BY PRINCIPAL.

In the sale by intervention of an agent the vendor is not sufficiently put en demeure if an actual offer of the price agreed upon within the delay given to the agent for affecting the sale is not given to him.

Henry v. Beaulieu, 47 Que. S.C. 458.

IN GENERAL.

The plaintiffs submitted a written proposal to defendant to supply and erect in operating order in the basement of defendant's theatre, on foundations supplied by defendant, an engine, generator and switchboard for a sum mentioned. The proposal embodied specifications for the engine describing an "Ideal" engine in language evidently that of the manufacturers as follows: "The Ideal engine is particularly adapted to direct connected work on account of its perfect balance, quiet running." The proposal was accepted by defendant who had previously selected the kind of engine he wanted from a number of different kinds mentioned in the preliminary discussions. The plaintiffs performed the contract, but the engine could not be made to run quietly enough to satisfy the defendant as the noise was heard in the auditorium above. Held, that the bargain was not a sale of goods but a contract for work and materials and that there was no warranty that the engine would be "quiet running" but only a recommendation of the type of engine chosen for the work required. The clause was general in its terms and had not in view any particular use of the engine. [Chalmers v. Harding, 17 L.T. 571, followed.]

Allis Chalmers, Bullock v. Walker, 21 Man. L.R. 770, 15 W.L.R. 357.

CONTRACT—ACTION FOR PRICE OF GOODS ALLEGED TO HAVE BEEN SOLD AND DELIVERED — EVIDENCE — FAILURE TO ESTABLISH SALE—COUNTERCLAIM—COSTS.

Jasperson v. Selkirk, 15 O.W.N. 348.

CONTRACT — BROKERS — SALE OF COMPANY-SHARES—DISPUTE AS TO SHARE OF PROFITS—ASCERTAINMENT OF NET AMOUNT REALIZED FROM SALE—SALE BY DEFENDANTS TO EMPLOYEE AND RESALE BY HIM — BONA FIDE SALE — ACCOUNTING ON BASIS OF PRICE REALIZED UPON FIRST SALE.

Meldrum v. Martens, 17 O.W.N. 119.

OF PARTNERSHIP RIGHTS.

When an offer is made by one of three members of a firm, to the other two, to buy them out, or to sell them "his rights in said business" for a specified sum and the latter alternative is accepted by them, there is a completed contract of sale by the proposer to the acceptors. It covers the seller's share of all the assets of the firm and includes moneys in excess of $500, deposited to its credit, at the time, in a bank, a third of which the seller claims to be his under the following clause in the articles of partnership: "profits are to be divided monthly as soon as the partnership has to its credit at the bank a surplus of $500."

School v. Sophketes, 44 Que. S.C. 404.

INSOLVENCY—REVENDICATION.

If a merchant sends to a tailor a quantity of cloth saying, "You will pay me as fast as you sell it," it is not a sale but a mandate to sell on commission; upon insolvency of the merchant the curator may, by seizure in revendication, compel the tailor to return the goods.

Lapierre v. Beaudry, 49 Que. S.C. 399.

AGREEMENT OF SALE—DELIVERY.

Under art. 1478, C.C. (Que.) a promise of sale is not equivalent to a sale unless it is accompanied by delivery and actual possession; this rule applies not only to a promise which is unilateral but also to one which is bilateral.

Greaves v. Cadieux, 50 Que. S.C. 361.

LITIGIOUS RIGHTS—BILL OF COSTS.

The assignment of a bill of costs in a contested case by an attorney ad litem, to another attorney who has been substituted for him, is not a sale of litigious rights.

Millette v. Mayer, 50 Que. S.C. 312.

MISTAKE AS TO PRICE—NULLITY.

Price is an essential element of the contract of sale; consequently, when the parties have failed to agree upon the price there has been no sale. Where the seller has parted with his property by reason of a mistake as to price he has the right to revendicate it without asking the rescission of the contract of sale.

Martineau v. Plante, 50 Que. S.C. 102.

GOODS OF THIRD PERSON—COMMERCIAL OR CIVIL CONTRACT.

The exceptions to the nullity of the sale of a thing which does not belong to the seller, contained in arts. 1488–9, C.C. (Que.) should be strictly interpreted. When a dealer in automobiles sells one to a non-trader, and takes from him another machine in part payment, the contract made by the dealer is commercial and that by the non-trader is purely civil. If a nontrading vendor is only the hirer of a machine which had been seized in revendication by the owner, the purchaser, although a trader in such matters, does not fall within the exceptions mentioned in arts. 1488–9.

Themens v. McLaughlin Carriage Co., 49 Que. S.C. 393.

OF THINGS SUBJECT TO LIEN.

A sale of things subject to a lien may be ordered provided the purchaser, before taking possession, fully disinterests the lien holder.

Gingras v. Maher, 19 Que. P.R. 230.

FARM MACHINERY — WRITTEN AGREEMENT FOR SALE NOT IN NAME OF REAL VENDOR —THEREFORE NO WRITTEN AGREEMENT IN FORM A. UNDER THE FARM IMPLEMENT ACT—PURCHASER ENTITLED TO RETURN OF PURCHASE-PRICE.

The defendant sold to plaintiff a tractor, but the written agreement purported to be made between the M.Coy. and plaintiff, whereas the M.Coy. had nothing to do with the sale. The court, therefore, found that there was no agreement in form A. under the Farm Implement Act between the vendor and purchaser for the sale and judgment was given to plaintiff for return of the purchase-price less the profits made by him with the machine, the defendant to have repossession.

Taylor v. Jones, [1919] 2 W.W.R. 789.

FARM MACHINERY—THE FARM IMPLEMENT ACT, SASK. 1915, C. 28—OMISSION FROM CONTRACT OF SALE OF WARRANTY CLAUSE REQUIRED BY ACT—CONTRACT INVALID—REPAYMENT AND DELIVERY UP OF NOTES TO PURCHASER AND REPOSSESSION BY VENDOR.

Under the Farm Implement Act, c. 28, (Sask.), there must be inserted in a contract for sale of a "large implement" the clause that "the vendor warrants that the said machinery is well made and of good materials," without which clause the contract is invalid. Where by mistake the vendors omitted this in their form of contract, judgment was given the purchaser declaring the agreement invalid and cancelling same and for delivery up of the notes given by the purchaser and repayment to him of the amount paid under the contract; upon payment as aforesaid and costs the vendors to have possession of the machinery. Rectification was refused because the evidence did not show that both parties intended the contract to be something other than it was.

Frost v. La Compagnie des Jardin, [1919] 2 W.W.R. 457.

CONTRACT—ENTERED INTO ON SUNDAY—VALIDITY.

A contract for the sale and delivery of goods entered into on Sunday is null and void as being in contravention of the Act to Prevent the Profanation of the Lord's Day (R.S.S. 1909, c. 69). One who has taken delivery of goods sold under a void contract must either return the goods or pay for them.

Schuman v. Drab, 49 D.L.R. 57, 12 S.L.R. 409, [1919] 3 W.W.R. 588.

GOODS ORDERED FROM THIRD PARTY AND SUPPLIED BY MISTAKE BY PLAINTIFF—KNOWLEDGE OF DEFENDANT BEFORE USING OR DISPOSING OF THE GOODS.

Ackerman v. Morrison, 9 E.L.R. 307, affirming 9 E.L.R. 198.

SALE OF GOODS—AGENCY—CONTRACT WITH SEAMEN ON DEFENDANT'S SHIP—GUARANTEE—BAILMENT.

Levine v. Sebastian, 9 E.L.R. 311.

(§ I A—2)—WHAT PASSES AS APPURTENANT.

Upon an agreement to sell a hotel premises and contents as a going concern at a fixed price to which was to be added the invoice cost price of the liquors on hand, the contract will be presumed to include quantities of wood and ice kept on the hotel premises and also the food supplies.

Blomquist v. Tymchorak, 6 D.L.R. 337, 22 W.L.R. 205. [Affirmed, 10 D.L.R. 822, 23 W.L.R. 662.]

EFFECT—WHAT PASSES AS APPURTENANCE—SALE OF MINE — RESERVATION OF "EARNINGS" TILL DELIVERY OF POSSESSION—WHAT WITHIN—COAL STORED—CASH AND BOOK DEBTS.

In a contract for the sale in præsenti of a controlling interest in a colliery company of which the vendor had possession and control de facto, a reservation to the latter of the "earnings of the properties" up to the time of closing the sale, taken in conjunction with the vendor's covenant to keep the property intact in the meantime, does not operate to enable the vendor to retain coal and coke in hand at the date of the contract, nor cash and book debts then belonging to the colliery company; the "earnings" in such case are what the vendor can in the interim make by operating, manufacturing and trading in the ordinary way of business so far as the purchaser's consent can authorize him to do so, the vendor paying all the expenses of operation and upkeep and keeping for himself all the moneys representing the proceeds of coal mined, sold, and shipped during the period.

Canadian Collieries v. Dunsmuir; Dunsmuir v. Canadian Collieries, 20 D.L.R. 877.

varying 13 D.L.R. 793, 18 B.C.R. 583, 25 W.L.R. 130.

B. Passing of title: delivery.

(§ I B—5)—Delivery—Time for—Silence of order as to time.

Shipment of goods within a reasonable time is sufficient where the written order for their purchase is silent as to the time of delivery.

Moore v. Canadian Fairbanks Co., 14 D.L.R. 49, 41 N.B.R. 485, 13 E.L.R. 517.

Delivery — Standing timber — Severance — Effect — Passing of title — Delivery — Sufficiency of — Retention of vendor's lien.

Where a bargain and sale is completed with respect to goods, and everything to be done on the part of the seller before the property should pass has been performed, then the property in the goods vests in the purchaser, although the vendor still retains his lien, the price of the goods not having been paid. [Sweeting v. Turner, L.R. 7 Q.B. 313, and Tarling v. Baxter, 6 B. & C. 360, applied.] On a sale of a quantity of logs of stated dimensions to be taken out of the seller's standing timber by the buyer by which the latter acquired the right to cut all the timber of a suitable class upon the land, the severance from the freehold makes the cut timber chattels. [McGregor v. McNeil, 32 U.C.C.P. 538, followed.]

McGregor v. Whalen, 20 D.L.R. 489, 31 O.L.R. 543.

Passing of property — Executory contract—Appropriation from stock.

Where an order is given for goods with an implied assent to appropriation by the seller to fill the order, the contract is an executory one of bargain and sale until the appropriation has actually been made, and property in the goods does not pass before appropriation so as to support an action for goods sold and delivered if the buyer countermands the order.

Sells v. Thomson, 17 D.L.R. 737, 19 B.C. R. 400, 27 W.L.R. 901, 6 W.W.R. 731.

Passing of title—Delivery—Grain storage ticket—Presumptions, how rebutted.

The presumption raised by the taking of a grain storage ticket in the shipper's own name that he intended to retain the right of disposal and that the property in the goods did not pass, may be rebutted by evidence shewing that he did not intend to retain any control or interest in the property represented by the storage ticket of an elevator company, but did intend that the whole property in the goods should pass to another having an equitable claim thereto of which he gave the elevator company notice.

Standard Trust Co. v. Karst, 20 D.L.R. 10, 7 S.L.R. 290, 7 W.W.R. 762, 30 W.L.R. 191.

Passing of title—New company to take over business.

Title to farm machinery purchased by the plaintiff and his associates never vested in a subsequently incorporated company, which was to take over their business, where the plaintiff, after the incorporation of the company, on being compelled to pay for the machinery received an assignment from his associates and the seller of the machinery of all their interest therein, and nothing was ever done to transfer title to the company; and the plaintiff may recover the machinery from one claiming title through the company.

Reid v. Moore, 16 D.L.R. 561, 7 S.L.R. 69, 6 W.W.R. 765, 27 W.L.R. 616, affirming 12 D.L.R. 193, 24 W.L.R. 575.

Passing of title—Performance—Delivery of different kind of article.

An agreement for the sale of an engine with a condition that it should be of a stipulated type and power is not carried out or performed by the seller merely furnishing an engine of a different type and power. [Wallis v. Pratt, [1911] A.C. 394, at 396, applied.]

Alabastine Co. v. Canada Producer & Gas Engine Co., 17 D.L.R. 813, 30 O.L.R. 394, affirming 8 D.L.R. 405, 23 O.W.R. 841.

Grain—Delivery—"Buyer's option."

In a sale of grain deliverable at the "buyer's option," the seller is under no duty to procure cars for loading the grain before the option had been exercised.

Strong v. Heuer, 35 D.L.R. 396, [1917] 2 W.W.R. 764, 12 A.L.R. 173, affirming [1917] 2 W.W.R. 27.

Grain — Delivery — Time and place — Duty as to cars—Tender—Repudiation for nonacceptance — New trial—Newly discovered evidence.

Strong v. Lahd, 35 D.L.R. 400, 12 A.L.R. 199, [1917] 2 W.W.R. 769.

Grain — Place of delivery — "Basis in store at"—Sufficiency of memorandum — Sales of Goods Ordinance (Alta.), ss. 6, 28—Canada Grain Act, 1912, c. 27.

Calgary Grain Co. v. Nordness, 35 D.L.R. 794, 12 A.L.R. 203, [1917] 2 W.W.R. 713.

Grain — Place of delivery — "Basis in store at"—Sufficiency of memorandum — Sales of Goods Ordinance (Alta.).

Calgary Grain Co. v. Liddle, 35 D.L.R. 797, 12 A.L.R. 188, [1917] 2 W.W.R. 717.

Immediate — Vesting of property — Destruction—Burden of loss.

Where there is an immediate sale and nothing remains to be done by the vendor as between him and the vendee, the property in the thing sold vests in the vendee and all the consequences resulting from the vesting follow, one of which is that if it is destroyed the loss falls on the vendee. The note of the buyer imports also an immediate, perfect, absolute agreement for sale.

Held, that a contract for the sale of certain straw and hay, the purchaser agreeing not to "use" the straw until it was paid for, was a contract for an immediate sale, and the property in the goods passed immediately to the vendee who must suffer the loss, it having been subsequently destroyed.

Lea v. Tangye, 49 D.L.R. 52, [1919] 3 W.W.R. 533.

GOODS NOT SPECIFIED OR ASCERTAINED.

A contract for the sale of 1,200 bushels of wheat, which may be complied with by the delivery of any 1,200 bushels of wheat, is not a sale of any specific or ascertained wheat; s. 18 of the Sale of Goods Act (Sask.) applies, and no property in the goods is transferred to the buyer, unless and until the goods are ascertained.

Zaiser v. Jesske, 43 D.L.R. 223, 11 S.L.R. 462, [1918] 3 W.W.R. 757.

PURCHASE PRICE—RIGHT TO REFUND.

A purchaser of goods who has paid the purchase price agreed upon, and for which he has received full consideration, has no further interest in such purchase price. The refusal of the vendor to accept a portion of the purchase price which he has agreed might be charged by the agent making the sale, does not entitle the purchaser to a refund of this amount, as having been paid for a particular purpose which has failed.

Devall v. Gorman, 42 D.L.R. 573, 13 A.L.R. 557, [1918] 3 W.W.R. 221. [Reversed, 45 D.L.R. 654, 58 Can. S.C.R. 289, [1919] 1 W.W.R. 836.]

SALE OF ANOTHER'S PROPERTY — STOLEN GOODS—ATTACHMENT.

The depository of merchandise who is surreptitiously dispossessed by a person taking the name of the depositor, and who sells these stolen goods to a third person, has a right to an attachment against him. The rules of exception to the nullity of the sale of the thing stolen, contained in arts. 1488 to 1490 of C.C. (Que.), ought to be interpreted strictly and with limitation. It is sound legal doctrine that any contract or bargain may take on the character of commerciality as to one of the contracting parties and non-commerciality as to the other party; and in this case the contract is not commercial in the meaning of arts. 1488, 1489, 1490, relating to the sale of the thing stolen. Article 1489 applies only to one who exercises his trade publicly, ostensibly and habitually in the locality where he is known and the fact of occasionally selling effects at the place of business of the purchasers cannot constitute this occasional vendor "a trader dealing in similar articles." The meaning of the word "stolen" in art. 1489 should not be interpreted restrictively so as to be absolutely within the limits of the definitions of the authors of criminal law, but it should be largely extended; and it is sufficient that the lawful possessor be dispossessed of the thing fraudulently, by one who wrongfully appropriated it, in order that the latter's act may constitute a theft.

Charron v. Walker, 54 Que. S.C. 439.

DELIVERY—DUTY OF SELLER.

In the absence of a counter agreement the seller is not bound to send or carry the goods to the buyer; he does all that he is bound to do by leaving or placing the goods at the buyer's disposal so that the latter is able to remove them.

Hertle v. Jenny, 22 D.L.R. 742, 49 N.S.R. 6.

DELIVERY AND ACCEPTANCE — GIVING IN PAYMENT.

Giving in payment is not an act of commerce intrinsically, but it may become so by reason of the status of the parties. Thus, when a giving in payment is set up by a trader against a nontrader, it cannot be proved by witnesses. The exception contained in art. 2260, par. 5, C.C. (Que.), which says that a sale of movables between a trader and a person who is not, is always considered to be a commercial sale, is limited to the sale, and like every exception cannot be extended. Now, according to art. 1592, C.C. (Que.), a giving in payment is not a sale, and is only equivalent to a sale when there has been delivery. When a purchaser takes possession of goods that he claims to have purchased notwithstanding the prohibition of the owner there has been neither delivery nor acceptance of these goods.

Lortie v. Marien, 47 Que. S.C. 255.

PASSING OF TITLE—WHEAT IN ELEVATOR—PURCHASE PRICE NOT PAID—DESTRUCTION BY FIRE—VENDOR'S LOSS.

Richardson v. Georgian Bay Milling & Power Co., 25 O.W.R. 441.

CONTRACT—FORMATION—SALE OF GOODS—CORRESPONDENCE—FAILURE TO ARRIVE AT CONCLUDED BARGAIN OR CONSENSUS AD IDEM — EVIDENCE — FINDINGS OF TRIAL JUDGE—APPEAL.

Jackson v. Hawley, 7 O.W.N. 300.

SALE OF GOODS—SHIPMENT OF CARLOAD OF FRESH FRUIT FROM DISTANT PLACE—DELIVERY F.O.B. AT PLACE OF SHIPMENT—DELAY OF CARRIERS AND NEGLECT TO ICE CAR—FRUIT ARRIVING IN OVERRIPE CONDITION—LOSS UPON RESALE BY PURCHASER — ATTEMPT TO MAKE VENDOR RESPONSIBLE — NO NEGLECT SHEWN—NO IMPLIED WARRANTY OR CONDITION—RISK OF TRANSIT—EVIDENCE—CORRESPONDENCE — INVOICE — TERMS OF SALE—EXPRESS EXEMPTION OF VENDOR—LIABILITY OF CARRIERS.

Atlantic Fruit Co. v. Oke, 16 O.W.N. 121.

SALE OF GOODS—CONTRACT—PART PERFORMANCE—BREACH—DAMAGES FOR NONDELIVERY OF PART OF GOODS — ORDER ACCEPTED BY AGENTS—RATIFICATION BY VENDORS — THIRD PARTY CLAIM — AGENTS' COMMISSION—COSTS.

Toronto Furniture Co. v. Devon Lumber Co., 17 O.W.N. 42.

PASSING OF TITLE.

A sale of stolen property is void, and the owner has a right to an action for revendication against a purchaser in good faith who retains possession of it, without being obliged to reimburse him the price he paid for it.

Lapointe v. Charlebois, 42 Que. S.C. 57.

PASSING OF TITLE—DELIVERY.

It is incumbent on the buyer to ascertain the quantity and quality of the thing, on taking delivery at the time and place agreed upon. Hence, in the case of the sale of a crop of tobacco, where delivery was to be made at S., evidence of its quantity and quality when delivered there will outweigh that of quantity and quality found subsequently at the city of Montreal.

Piquette v. Landry, 44 Que. S.C. 517.

DISTINCTION BETWEEN SALE AND PROMISE OF SALE—VIOLATION OF PROMISE NOT FOLLOWED BY POSSESSION—THIRD PARTY PURCHASER BY REGISTERED TITLE—ADVOCATE'S AUTHORITY—FORMS OF JUDICIAL ADMISSION—REVOCATION OF ADMISSION—C.C. QUE. 1027, 1065, 1472, 1476, 1477, 1478—C.C.P. 3, 251, 286–290, 316, 359–372, 527–531, 1177.

A distinction must be made concerning a sale, as to the effects between:—(a) Its pollicitation, i.e., a promise not followed by an acceptance. (b) Such a promise after acceptance, but without any obligation to buy, which is then called unilateral. (c) A promise of sale accompanied by the one of purchase, which is then called synallagmatic. (d) A promise of sale followed by possession, which corresponds to a sale. (e) The sale itself. A sale, and a promise of sale followed by possession alone imply the transfer of property; a violation of the other promises may only give rise to an action in damages, accompanied or not by an action to obtain the title, and subject to the rules of registration, in the case of several titles of acquisition to the same property. A promise of sale which does not transfer the ownership is of no value against a third person who has acquired it by a valid title, duly registered.

Cousineau v. Gagnon, 23 Que. K.B. 309.

RECOVERY OF PRICES—OMISSION TO ALLEGE DELIVERY—BILATERAL CONTRACT—CORRELATIVE ALLEGATIONS—C.C. ART. 1203—C.C.P. ART. 123.

A vendor who sues for the price of sale, should allege and prove delivery of the goods sold, for the fulfillment of his obligation to deliver is an essential condition of his right to the price.

The plaintiff cannot amend or complete his statement of claim by his reply to the defence. Thus a vendor who claims the price of goods sold, without alleging delivery in his statement of claim, cannot plead delivery in his reply.

Royal Paper Box Co. v. Drummondville Matches, 56 Que. S.C. 259.

SALE—DELIVERY — DEMAND — CANCELLATION OF SALE—C.C. (QUE.) ARTS. 1067, 1543, 1544.

A vendor has not made a proper demand on a purchaser to pay the purchase price in making his representative understand that he wished to be paid before making delivery. When some hay is to be delivered as soon as the purchaser can furnish the wagons to take it away, there is no demand to the purchaser to accept delivery of the hay when the wagons are ready to receive it. The vendor must make a proper demand on the purchaser. The vendor in default of making a demand on the purchaser to take the hay, cannot consider the sale as broken off and resell the hay to another purchaser. The damages which a purchaser can obtain from a vendor, who has made default in delivery of goods sold, is the difference between the contract price and the market price at the time when the goods should have been delivered. When in a sale of goods, the vendor is not a merchant and the purchaser is one, oral evidence is admitted in favor of the vendor.

Laberge v. Lepage, 56 Que. S.C. 207.

HAY — WEIGHING — OWNERSHIP — SEIZURE—RESALES—C.C. ART. 1474.

A sale of articles described as in bulk, but to be sold by weight, as the sale of all the hay which one finds in a barn at 813 ton, is only complete after the hay has been weighed; up to that time the buyer has no absolute ownership and cannot seize and resell it.

Hurley v. Gamache, 25 Rev. Leg. 432.

SALE—CATTLE—REFUSAL BY PURCHASER TO PAY FOR CATTLE DELIVERED—NOT JUSTIFYING VENDOR IN REFUSING DELIVERY OF BALANCE — MEASURE OF DAMAGES FOR FAILURE TO DELIVER.

The purchasers under a contract for sale of cattle, fearing that the vendor was not going to continue delivery according to his contract, refused to pay for cattle already delivered, although such payment was due under the contract. This was held in the circumstances not to amount to a repudiation of the whole contract and therefore not to justify refusal of the vendor to deliver the balance of the cattle. [Principle as settled in Mersey Steel & Iron Co. v. Naylor, 9 App. Cas. 434, applied.] The measure of the purchaser's damages for such nondelivery was held to be the difference between the contract price and the current price at the time when the cattle should have been delivered; and was not limited to the amount required to make up to the purchasers the profit to

them on a certain resale which they had made of the cattle; it not having been known to the parties when the contract was made that the purchasers were buying for such resale. Where the contract was for sale of "about" certain specified numbers of steers, the evidence showing that the word "about" was thus used because it was not certain that the vendor would have exactly that number and it was intended to leave room for a possible small shortage but it appeared that the vendor had the steers necessary to make the balance up to the numbers contracted for before the last day for delivery under the contract, he was held liable to be charged with the same. A delivery of 201 head was held to satisfy a contract to sell "between two to three hundred cows." Where the cattle were sold by weight the average weight of classes actually delivered was accepted as the basis of damage for certain cattle not delivered.

Yeast v. Knight, [1919] 2 W.W.R. 467.

SALE OF GOODS—CARGO OF COAL—EXPENSES OF DISCHARGING CARGO—LIABILITY FOR.

Lehigh Valley Coal Co. v. King, 9 E.L.R. 42.

GOODS SHIPPED ON CONSIGNMENT—ASSIGNMENT—PROPERTY VESTED IN SELLER—OUTSTANDING ACCOUNTS.

Western Canada Flour Mills v. Middleboro, 19 O.W.R. 722, 2 O.W.N. 1379.

(§ I B—6)—INSPECTION.

A provision in a contract for the sale of logs that they are to be delivered and safely boomed in cove and notice given that the driving operations had ceased for the time being and inspection of them had been made and found satisfactory, creates conditions precedent to be complied with to the passing of the property in the logs.

Boehner v. Smith, 26 D.L.R. 511, 49 N.S. R. 435.

BY SAMPLE.

The property in goods passes when the seller and buyer intend it shall pass—an order for goods after inspecting samples is not necessarily a "sale by sample." The property in goods so ordered, and sent by carrier, addressed to the buyer, passes upon the delivery to the carrier.

Re Faulkners, 38 D.L.R. 84, 40 O.L.R. 75, affirming 12 O.W.N. 50.

OF GOODS—GOVERNMENT INSPECTION—DE FACTO OFFICER—RECOVERY BACK OF PURCHASE PRICE.

Under a contract which provides for the sale of goods to be "Government inspected," the purchaser may recover back the purchase price which he has been obliged to pay in order to get possession of the goods, where the inspection was not made by a Government inspector, but by an assistant appointed by an inspector who had no power to make such appointment and so did not comply with the inspection stipulated for in the contract. The de facto doctrine has no application to such a case.

Fawcett v. Hatfield, 50 D.L.R. 322, reversing 31 D.L.R. 498, 44 N.B.R. 339.

RIGHT OF INSPECTION.

Where goods are sold through a broker, and the seller undertakes to deliver goods of a particular quality to a carrier to be forwarded to the buyer at a distant place, to be paid for on arrival, the right of inspection continues till the goods arrive and are accepted at their ultimate destination, namely, the buyer's warehouse. [Thomson v. Dyment, 13 Can. S.C.R. 303, distinguished.]

Thames Canning Co. v. Eckardt, 23 D.L.R. 805, 34 O.L.R. 72.

SALE OF GOODS—ACTION FOR PRICE—WRITTEN AGREEMENT—ABSENCE OF EXPRESS WARRANTY—CAVEAT EMPTOR—SALE OF SPECIFIC ARTICLE OR ARTICLE OF SPECIFIED CLASS—DOUBTFUL DESCRIPTION—PAROL EVIDENCE TO EXPLAIN—RIGHT TO INSPECT AND REJECT—PROVISION OF AGREEMENT THAT PROPERTY NOT TO PASS TILL PAYMENT—EVIDENCE JUSTIFYING REJECTION—FINDING OF TRIAL JUDGE—APPEAL.

Butler v. Dunlop, 8 O.W.N. 162.

SALE OF GOODS—CONTRACT—PLACE OF PAYMENT—BREACH IN ONTARIO—JURISDICTION OF ONTARIO COURT—RIGHT TO REJECT GOODS—INSPECTION—DELIVERY TO CARRIER—STATUTE OF FRAUDS—LEAVE TO SET UP BY AMENDMENT—MEMORANDUM IN WRITING—CORRESPONDENCE—ACCEPTANCE BEFORE REPUDIATION.

Slowman v. Brenton, 8 O.W.N. 477.

(§ I B—7)—DELIVERY TO CARRIER—SHIPMENT F.O.B.—BILL OF LADING ATTACHED TO DRAFT—PASSING OF TITLE.

The title to goods delivered to a carrier under an order for shipment f.o.b. and shipped in the name of the seller, with a draft for the purchase price attached to the bill of lading, which was sent a bank with instructions to deliver the bill of lading to the purchaser only on payment, does not pass to the latter until the condition is fulfilled or the purchaser offers to fulfill it, and demands the bill of lading. [Scott v. Melady, 27 A.R. (Ont.) 193; and Graham v. Laird Co., 20 O.L.R. 11, followed.] The refusal of the defendant, after judgment in his favour in an action on a draft for the value of goods shipped to him, which he had refused to accept because of a shortage, to consent to the delivery to the plaintiff of the bill of lading out of court, does not amount to a claim by the defendant to the bill, or to the goods represented by it.

Vipond v. Sisco, 14 D.L.R. 129, 29 O.L.R. 200.

DELIVERY TO CARRIER.

Delivery to a carrier of the goods contracted for, to be shipped by a method

different from that provided by the contract, is not such a delivery as is contemplated by s. 31 of the Sale of Goods Act, R.S.S. c. 147. Where goods sold by the plaintiffs to the defendant were, by the contract made between the parties, to be shipped by freight, and were delivered by the plaintiffs to a railway company to be shipped by express to the defendant, and were not in fact delivered:—Held, that the defendant was not liable for the price of the goods. The fact that the goods were shipped by a faster means of transportation, which might be for the benefit of the defendant, but without his knowledge or consent, could not change the rights of the parties under the contract.

McGowan Cigar Co. v. O'Flynn, 19 W.L.R. 877.

DELIVERY TO CARRIER.

A sale of things by weight, number or measure is not perfected until they have been weighed, counted or measured. Where an order for goods is sent from Montreal to a firm at Naples (Italy), to be delivered f.o.b. to an express company, the buyer's agent there, the goods become the property of the buyer at the moment of the delivery, and they remain at his own risk in transitu.

Vipond v. Montefusco, 26 Que. K.B. 490.

OBLIGATIONS OF VENDOR—DELIVERY F.O.B.—DEFECTIVE RAILWAY CARRIAGE—DAMAGES IN TRANSIT—C.C. ARTS. 1472, 1492, 1495.

A vendor of goods or merchandise, who in making delivery on a railway carriage, conforms to the agreement usually made with his purchaser, f.o.b. at a designated point, is not responsible for damages sustained by the goods in the course of the journey by reason of the defective state of the carriage. In procuring a carriage for the vendor to take charge of the goods, according to the terms of the above agreement the railway company constitutes itself the agent of the buyer; and it is against the company alone that the latter has any right of action in a case of damages to the goods in transitu.

Montreal Abattoirs Co. v. Murphy, 56 Que. S.C. 405.

SALE OF GOODS—RESALE BY BUYER—PURCHASE-PRICE CLAIMED BY BOTH SELLER AND BUYER—QUESTION WHETHER PROPERTY PASSED TO BUYER—DELIVERY TO CARRIER—INTENTION.

Frontier Coal Co. v. Pennsylvania Central Coal Co., 16 O.W.N. 239.

(§ I B—8)—APPROPRIATION—BILL OF LADING—LIABILITY FOR LOSS.

A shipper of goods who has the bills of lading made to his own order, and attached to a draft drawn upon the purchaser through a bank, for delivery to the purchaser upon payment of the draft, does not thereby appropriate the goods so as to vest the property in the purchaser, and the seller is therefore liable to pay the amount of any loss or damage to the goods during transit, if the purchaser has paid the price of the goods at the time of shipment.

Prairie City Oil Co. v. Stewart Munn & Co., 32 D.L.R. 141, 51 Que. S.C. 141.

(§ I B—9)—SUFFICIENCY OF DELIVERY.

Where a contract for the sale of goods is an entire one and the vendor withholds any of the goods and chattels included, the purchaser need not accept delivery of the remaining portion, but may repudiate the agreement and recover back any money paid on account of the purchase-price.

Blomquist v. Tymchorak, 6 D.L.R. 337, 22 W.L.R. 205. [Affirmed, 10 D.L.R. 822, 23 W.L.R. 662.]

OF WOOD SLABS — DELIVERY AT WHARF — USAGE OR CUSTOM—EXPENSE OF LOADING—WOOD NOT IN ACCORDANCE WITH CONTRACT — FINDING OF JURY — EVIDENCE—APPEAL.

Myers v. Gibbon, 48 D.L.R. 744.

PASSING OF TITLE—SUFFICIENCY OF DELIVERY.

Title to a quantity of grain stored in a grain elevator will pass from the seller to the buyer, where it appears that the buyer had made several purchases of grain from the seller, who carried a stock of grain in the elevator, by placing several orders through the elevator agent and then accepting a draft drawn by the seller for the purchase price each time a purchase was made, the seller in each instance executing an order on the elevator agent requesting him to deliver to the buyer the amount of grain purchased, and where it appears that the grain remained in the elevator subject to the buyer's right to remove any part of it at any time, and that some of the grain had been actually withdrawn by him, notwithstanding that no separation of the grain sold had ever been made from the rest of the grain belonging to the seller and that the elevator agent was not employed by the seller to make such sales, but the parties acted through him as a matter of convenience.

Inglis v. Richardson, 14 D.L.R. 137, 29 O.L.R. 229, reversing on other grounds 10 D.L.R. 158.

DELIVERY—SUFFICIENCY.

Under a contract to sell building materials with freight prepaid to the place of delivery, there was no delivery of materials, where the buyer refused to receive them, because the railway company held the shipments for freight charges and duty, and he was not furnished with any invoice of the shipments.

Western Planing Mills Co. v. Eaton, 11 D.L.R. 325, 24 W.L.R. 411.

PASSING OF TITLE—DELIVERY—SUFFICIENCY—ASCERTAINMENT.

Under s. 18 of the Sale of Goods Act, R.S.S. 1909, c. 147, a buyer for value of one-half of the grain to be grown on the seller's land is not, as against execution creditors, vested with any property in such

grain until his portion shall have been ascertained by a division and setting aside of the specific portion which the buyer is to receive.

Kidd v. Docherty, 16 D.L.R. 525, 7 S.L.R. 137, 27 W.L.R. 636, 6 W.W.R. 310.

SUFFICIENCY OF DELIVERY—FRAUD—REMITTING CASE FOR RETRIAL.

Johnson v. Chomyszyn, 27 D.L.R. 786, 34 W.L.R. 389.

CONSTRUCTIVE DELIVERY—GOODS IN POSSESSION OF THIRD PARTY.

Where there is a sale of goods which at the time of the sale are not in the possession of the vendor, but in the possession of a third party, and that party is made aware of the sale and consents to the goods remaining in his possession as the goods of the vendee, that is sufficient actual change of possession to support the sale.

Scharf v. Dillabough, 22 D.L.R. 569, 8 W.W.R. 221, 30 W.L.R. 846.

CONSTRUCTIVE DELIVERY—GOODS IN POSSESSION OF THIRD PERSON.

Possession is acquired not only by corporeal delivery, but also by an actual and implied delivery when the purchaser takes possession of the thing sold with consent of the vendor, even when there was no contact with the thing itself. Thus one who purchases a horse in possession of a third party and notifies the latter of his purchase and asks him to keep the horse for him sufficiently takes possession of it.

Mailloux v. Beaudry, 48 Que. S.C. 9.

SALE OF BOAT—SUFFICIENCY OF DELIVERY.

Upon the sale of a boat, delivery thereof is inferred immediately upon payment of part of the purchase price, particularly where the buyer is permitted to use the boat without any objection by the seller.

Losier v. Mallay, 24 D.L.R. 315, 43 N.B. R. 364.

SUFFICIENCY OF DELIVERY — BULK QUANTITIES.

When a certain quantity of movables is sold to furnish a house, the sale is that of an entire quantity, and delivery is only complete when the last movable is delivered.

Valiquette v. Gagnon, 48 Que. S.C. 442.

GOODS NOT APPROPRIATED AT TIME OF PURCHASE—CANCELLATION.

The defendant having at the solicitude of the plaintiff's agent signed a contract for the purchase of certain volumes on the instalment plan, the goods at the time of the purchase not being in a deliverable state, and not being actually appropriated to the contract, the defendants on the same day, by letter, cancelled the order:—Held, that the implied assent to an appropriation of the goods was withdrawn by the letter of cancellation, and that the plaintiffs could not thereafter convert the executory contract into an executed one. [Sells v. Thomson Stationery Co., 27 W.L.R. 903, followed.]

Publishers Assn. v. Rowland, 32 W.L.R. 646.

PERISHABLE GOODS—DELIVERY TO AGENT OF PURCHASER FOR CARRIAGE — INSTRUCTIONS AS TO PRESERVATION IN CARRIAGE —DUTY OF VENDORS—GOODS RENDERED USELESS BY NEGLIGENCE OF PURCHASER'S AGENT—LIABILITY FOR LOSS.

Van Zonnefeld v. Gilchrist, 8 O.W.N. 4.

DELIVERY OF GOODS IN EXCESS OF REQUIREMENTS OF VENDEE—BAILMENT OR SALE —INSOLVENCY OF VENDEE—CONTEST BETWEEN VENDOR AND ASSIGNEE FOR CREDITORS.

McArthur Irwin Co. v. Gausby, 11 O.W.N. 93.

DELIVERY OF PART — GIVING PROMISSORY NOTE FOR TOTAL PRICE.

Fuller v. Holland, 9 E.L.R. 110.

(§ I B—10)—POSTPONEMENT OF DELIVERY —CONSENT.

A postponement of the time of delivery, whether at the instance of the seller or of the buyer of the goods, to which the other party assents, has not the effect of abrogating the contract.

Western Canada Flour Mills Co. v. Crown Bakery, 21 D.L.R. 641, 32 W.L.R. 179.

BREACH OF CONTRACT — NONDELIVERY—GOODS IN STORAGE—FAILURE OF VENDOR TO DELIVER WAREHOUSE RECEIPT.

Checkik v. Price, 18 W.L.R. 253.

(§ I B—11)—PLACE OR TIME OF DELIVERY.

Where the time for the delivery of a piano was omitted from an order therefor, it is deliverable within a reasonable time after the date of the order.

Heintzman v. Rundle, 4 D.L.R. 688, 5 S.L.R. 121, 20 W.L.R. 202.

TIME FOR DELIVERY.

A contract to sell a building contractor materials for railway stations, delivery to be made at the places where the materials were to be used, implies an obligation on the seller's part to deliver within a reasonable time, regardless of any car shortage on the carrying railroads.

Western Planing Mills Co. v. Eaton, 11 D.L.R. 325, 24 W.L.R. 411.

TIME OF DELIVERY—DELAY—REFUSAL TO ACCEPT.

Phipps v. Freeland, 25 D.L.R. 858, 32 W.L.R. 365.

APPROPRIATION—REASONABLE TIME.

Inspection, measuring and branding of logs under a contract of sale is a sufficient appropriation to pass the property in the whole cut so inspected and branded. Where no definite time for delivery appears to have been actually fixed, the law will imply a duty to deliver within a reasonable time.

White v. Greer, 30 D.L.R. 70, 36 O.L.R. 306.

MACHINERY—TITLE.

Under a contract of purchase, which en-

titles the purchaser to have machinery erected in good running order on his premises, under the superintendence of the vendor's expert, before he can be called upon to accept and pay for it, the property in the goods does not pass until this condition is complied with and if the machinery shipped in parts is lost in transit the loss falls on the vendor.

Hoe v. Foote, 40 D.L.R. 678, 53 Que. S.C. 430.

ANIMAL — TITLE — PROMISSORY NOTE—TRANSFEREE WITHOUT NOTICE.

Edgar v. Bahrs, 43 D.L.R. 372, 11 S.L.R. 457, [1918] 3 W.W.R. 817.

DELIVERY "ON CAR"—DUTY AS TO—GRAIN ACT.

In a sale of grain to be delivered "on car" it is the buyer's duty to furnish the car, and he must do so before he can sue for breach of contract for nondelivery of the grain.

Stuart v. Clarke, 36 D.L.R. 254, 11 A.L.R. 551, [1917] 2 W.W.R. 1049.

PLACE OF CONTRACT—SALE BY SAMPLE.

If a traveling salesman offers his goods to a customer who refuses to purchase without a sample, and upon such refusal the business house forwards the sample, upon examination of which the customer signs the order, the contract is complete at the place where the order is signed.

Lamontagne Co. v. Parsons, 18 Que. P.R. 313.

In a sale by a traveling salesman the contract is made at the place where the order is taken, and if the order requires ratification by the employer of the salesman such ratification will retroact to the day and place when and where the sale was made. Delivery is only an accessory to the sale and not an element in the constitution of the contract.

Gendreau v. Lavigne, 18 Que. P.R. 324.

CONTRACT — SALE OF GOODS — SHIPMENT AFTER TIME FIXED—REFUSAL TO ACCEPT —JUSTIFICATION—FINDINGS OF JURY—REASONABLE TIME—APPEAL—COSTS.

Patterson v. R. Bigley Mfg. Co., 17 O. W.N. 86.

PLACE OF DELIVERY—AGREEMENT.

The designation of a railway station as the address, after the signature to a contract, does not form an integral part of it and does not constitute an agreement as to the place of delivery. The purchaser cannot refuse to take away the goods which have been sent to another station equally far from his residence.

Carette Co. v. Nault, 49 Que. S.C. 510.

SALE OF GOODS—SHIPMENT BY RAIL—FAILURE TO DELIVER TO RAILWAY COMPANY —PLACE OF BREACH.

Where by a contract made in Montreal for sale and delivery of goods the vendor is to ship the goods to the purchaser at Edmonton, via C.P.R. and the purchaser is to pay the freight, the delivery of the goods to the railway company in Montreal for carriage to the purchaser in Edmonton is in the ordinary case a delivery to the purchaser, and the failure to do so is a breach of contract by the vendor in Quebec and not in Alberta.

Volansky Clothing Co. v. Bannockburn Clothing Co. [1919] 3 W.W.R. 913.

TERMS—PLACE OF DELIVERY.

A sale by a merchant in Quebec to a customer doing business in St. Hyacinthe, of goods payable at a rate per pound, with the stipulation that they should not "lose more than 2 per cent of their Invoiced weight on transit" is subject to the implied condition that delivery should be made at St. Hyacinthe.

Paradis v. Duclos, 20 Que. K.B. 97.

VARIANCE OF PLACE OF DELIVERY—MEASURE OF DAMAGES—QUANTUM MERUIT.

Vanscoyoc v. Simons, 3 A. L. R. 49.

(§ I B—12)—SALE F.O.B.—GOODS DAMAGED BY FROST—LIABILITY.

A frost severe enough to damage potatoes in transit by rail is to be treated as something out of the ordinary course, the risk of which must rest upon the buyer under a contract of sale f.o.b. at point of shipment, unless there is an indication of a contrary intention in the contract.

Mayhew v. Scott Fruit Co., 21 D.L.R. 54, 8 A.L.R. 66, 30 W.L.R. 466, 7 W.W.R. 1140.

(§ I B—13)—FAILURE TO COMPLY WITH TERMS—RESALE.

Where, by terms of sale of horses at an executor's sale, the purchaser was to furnish an approved note by a certain time, the fact that the executor told the purchaser that if the animals were left on his unoccupied farm they would be at the risk of the buyer, and that by the seller's direction the horses were put into a livery stable by the buyer, does not conclude the seller from claiming that title to the property did not pass where the buyer failed to furnish the note in time. Where, by the terms of an executor's sale settlement was to be made at once and the purchasers of a chattle agreed that they would furnish an acceptable note before the next evening, their failure to do so justifies a resale of the chattle by the executor where the title to the chattel did not pass to the purchaser.

Chew v. Crockett, 7 D.L.R. 730, 22 W.L.R. 384, 3 W.W.R. 225.

OF GOODS—FAILURE TO COMPLY WITH TERMS —RESALE—ACTION FOR BALANCE DUE —FORECLOSURE.

Advance Rumely Thresher Co. v. Cotton, 46 D.L.R. 696, [1919] 1 W.W.R. 914.

OF ANIMALS—MONEY PAID ON ACCOUNT—LAPSE OF TIME—PRESUMPTION OF ABANDONMENT—RESALE—DAMAGES.

When a party to a contract for the sale of goods has by his conduct, practically abandoned the same, he cannot succeed in an action for damages; the other party in the meantime having made a resale, nor can he

recover the money paid on account, unless he proves that such money is not a deposit [Howe v. Smith, 27 Ch. D. 89; Palmer v. Temple, 9 Ad. & El. 508, followed.]

Baldwin v. Brianger, 50 D.L.R. 540, [1920] 1 W.W.R. 216.

CONDITIONAL SALE — LIEN-NOTE — SEIZURE AND RESALE OF PROPERTY—SALE AT UNDERVALUE.

Boucher v. Lunn, 18 W.L.R. 694.

BREACH OF CONTRACT—LATE DELIVERY OF GOODS SOLD—MEASURE OF DAMAGES—INDEMNITY AGAINST LOSS.

Wertheim v. Chicoutimi Pulp Co.,[1911] A.C. 301.

C. CONDITIONAL SALES.

Registration of, see Chattel Mortgage.

(§ I C—15)—The sale of a restaurant license under deed of transfer stipulating that the purchaser will become proprietor thereof only when he has paid to the vendor all the instalments of price due, and that failure to make any of these payments will cause the assets sold to revert to the vendor, is a valid sale under suspensive condition.

Turgeon v. St. Charles, 7 D.L.R. 445, 22 Que. K.B. 58. [Reversed in 15 D.L.R. 298, 13 E.L.R. 521.]

There will be dismissal on the merits in an action for the recovery of the purchase price of a hay press, where it appears that the contract sued upon was not a sale, but was simply a promise of conditional sale, and that the machine in question was promptly returned, pursuant to a clause in the contract, containing a stipulation that the machine would be taken back by the vendor if the defendant could not make it work satisfactorily.

International Harvester Co. v. Ratelle, 17 Rev. de Jur. 458.

Where an unconditional written order was given for the purchase of a plow, accompanied by promissory notes for the price thereof, the purchaser cannot, in an action on the notes, shew that the sale was not an absolute and unconditional one, but that it was binding only in a certain event.

John Deere Plow Co. v. Shannon, 3 D.L.R. 746, 21 W.L.R. 192.

Where a conditional sale of goods is made subject to an express stipulation that in case of possession being retaken and the goods being resold on his default, he shall remain liable for any loss on a resale, the resumption of possession by the conditional vendor followed by a resale by him will not cancel or revoke the whole contract so as to relieve the conditional purchaser from the stipulation by which he became liable for the deficiency.

Gear-Scott v. Mitchell, 1 D.L.R. 283, 20 W.L.R. 6, 1 W.W.R. 762. [Affirmed, 8 D. L.R. 129, 22 Man. L.R. 474, 3 W.W.R. 19.]

The vendor of goods sold at auction, upon discovering that the accommodation signer to a lien note given for the purchase money, as the terms of sale required, had made false statements as to his solvency, may retake the goods from the vendee, where the latter failed to secure another satisfactory signer.

Bell v. Schultz, 4 D.L.R. 400, 5 S.L.R. 273, 21 W.L.R. 408, 2 W.W.R. 491.

CONDITIONAL SALES — REQUIREMENTS — INTENTION TO RETAIN OWNERSHIP—HOW TO BE SHEWN—POSSESSION.

It is necessary for a conditional vendor to clearly shew his retention of the ownership by the use of unequivocal provisions to that effect in the contract, so where the vendor of a motor car took from the purchaser a written promise to pay containing a clause that the car already in the purchaser's possession should "remain in the possession of owner until paid for," there is no effectual reservation of property as against a subpurchaser.

Harris v. Whitehead, 19 D.L.R. 722, 25 Man. L.R. 105, 30 W.L.R. 32, 7 W.W.R. 660.

CONDITIONAL SALE. — TAXING COLLATERAL CHATTEL MORTGAGE BESIDES LIEN NOTES.

The acceptance of a chattel mortgage by the conditional vendors covering all the conditional vendee's interest in the goods sold will not necessarily abrogate their rights reserved under the conditional sale agreement.

Campbell v. Heinka, 17 D.L.R. 586, 28 W.L.R. 297.

RECOVERY OF PURCHASE PRICE—THREATS.

Threatening the purchasers in a conditional sale of a chattel, with serious consequences if they use it, goes to the root of the contract and justifies the purchasers in regarding it as ended; the sellers cannot recover the purchase price.

Robert Bell Engine & Thresher Co. v. Farquharson, 39 D.L.R. 625, 11 S.L.R. 81, [1918] 1 W.W.R. 924.

AUTOMOBILE — CONDITIONAL SALE—INSURANCE—DESTRUCTION BY FIRE—RIGHTS OF PARTIES.

Coulombe v. Rouillard, 40 D.L.R. 749, 24 Rev. de Jur. 249.

LIEN-NOTE—DEFAULT IN PAYMENT OF INSTALMENTS—SEIZURE OF GOODS—SALE WITHIN 20 DAYS — NONCOMPLIANCE WITH CONDITIONAL SALES ACT, S. 8—CLAIM FOR DEFICIENCY—CONVERSION—NOMINAL DAMAGES—WAGES—EVIDENCE—FRAUD—COSTS.

Shannahan v. Brown, 13 O.W.N. 447.

LIEN OF — ALTERATION OF CHATTLE — REDEMPTION—RESCISSION.

The lien of a conditional vendor covers the chattel in its altered condition and its equipment, as a touring car when converted into a hearse. Where under an acceleration clause the whole sum becomes due in a case of default, the purchaser, to be entitled to his right of redemption under s. 32 of the Sales of Goods Act (R.S.B.C. 1911, c. 203), on payment of the "full amount then in arrear," must tender the whole amount; the vendor's refusal to surrender possession

upon a tender of the arrears does not amount to a repudiation of the contract.

B.C. Independent Undertakers v. Maritime Motor Car Co. 35 D.L.R. 551, [1917] 3 W.W.R. 22, 24 B.C.R. 305.

FIXTURE—MORTGAGE.

Under a deed of sale stipulating that the vendor shall remain the owner of the thing sold until paid for in full, the vendor remains the sole owner, and the buyer cannot legally immobilize the object purchased or grant a hypothec to a creditor.

Bernier v. Durand, 32 D.L.R. 768, 25 Que. K.B. 461.

CONVERSION — COLLATERAL SECURITY — MERGER.

One acquiring, by exchange, goods subject to a conditional sale is liable in conversion to the conditional vendor, notwithstanding that the proceeds of the transaction were used to reduce the liability under the original sale; the relation of the parties under the conditional sale is not altered by a mortgage to the conditional vendor, as collateral security, on the property given in exchange, and does not operate as a merger. (Court divided.)

Wenbourne v. Case, 35 D.L.R. 577 [1917] 2 W.W.R. 1262, affirming 34 D.L.R. 363, 12 A.L.R. 1.

LIEN NOTE—SUB-SALE—CONVERSION.

One who takes possession of goods held under a conditional sale, in the form of a registered lien note, is liable in conversion to the conditional vendor.

Wenbourne v. Case, 34 D.L.R. 363, [1917] 2 W.W.R. 150. [Affirmed in 35 D.L.R. 577, 12 A.L.R. 1, [1917] 2 W.W.R. 1260.]

"LIEN NOTE"— FARM IMPLEMENTS ACT — COMPLIANCE—PLEADING.

Where notes which are not lien notes have been taken prior to the passing of the Farm Implements Act, the Act does not apply. The "lien note" mentioned in ss. 16, 17 of the Act is not intended to embrace an order which contains a lien. A defendant relying on noncompliance with the provisions of the Act Respecting Lien Notes and Conditional Sales of Goods must affirmatively plead and prove the same.

Mount v. Holland, [1917] 1 W.W.R. 1188.

CONDITIONAL SALE OF GOODS—EXTENSION OF TIME FOR PAYMENT UNDER—AGREEMENT TO GIVE MORTGAGE ON HOMESTEAD IN CONSIDERATION OF — AGREEMENT VOID UNDER DOMINION LANDS ACT—FAILURE OF CONSIDERATION—RETAKING POSSESSION ON DEFAULT—RESALE—EFFECT OF, ON CONTRACT—RESALE BEFORE POSSESSION—NO NOTICE GIVEN—RESCISSION—RETURN OF MONEYS PAID—RIGHT OF PURCHASER TO — PLEADING — AMENDMENT BY WITHDRAWING ADMISSION.

Sawyer-Massey Co. v. Dagg, 4 S.L.R. 228, 18 W.L.R. 612.

CONDITIONAL SALE.

In a contract for conditional sale, reserving to the seller the right to possession of the property until payment, repossession and resale operates as a rescission unless such resale is expressly provided for in the contract. When the contract contains no provisions as to the manner in which the resale is to be made, the parties must be held to have had in contemplation the provisions of the statute in that regard and the resale must be considered as a resale within the meaning of the statute. When the goods were resold without the statutory conditions having been complied with, the resale was not as provided for in the contract and therefore operated as a rescission, and the plaintiffs could not recover.

American Abell Engine & Threshing Co. v. Weidenwilt, 4 S.L.R. 388.

LOSS—BY WHOM BORNE.

Where a chattel is sold under a lien not providing that the title, ownership and right of possession is to remain in the vendor until payment is made, and the subject-matter of the transaction is, before the time for payment, lost through no neglect on the part either of the vendor or purchaser, the loss must fall upon the vendor.

Sadywryk v. Achtemyczuk, 34 W.L.R. 502.

OF DEBENTURES SUBJECT TO APPROVAL OF SOLICITOR—BREACH.

Where a company buys the debentures of a municipality by wire, subject to the approval of its solicitor, it is a conditional sale; and the municipality is not responsible in damages if the sale does not take place, because the solicitor reported unfavourably.

Canada Investment v. Scotstown, 48 Que. S.C. 97.

RESALE BY CONDITIONAL PURCHASER WITH VENDOR'S ASSENT — WARRANTY — BREACH.

Goods sold under a conditional sale agreement were resold by the conditional purchaser to the defendants at a price larger than the amount due to the conditional vendor. The conditional vendor assented to the sale, and the defendants agreed to pay the the amount of the claim. Judgment was given in the conditional vendor's favour for the amount, and it was held that it was not concerned with the contention of the defendants that the conditional purchaser had given to them a guarantee as to the condition of the goods and that such guarantee had been broken.

Case v. Wrenshall, 30 W.L.R. 521.

RETENTION OF OWNERSHIP—IMMOVABLE BY DESTINATION—REVENDICATION.

To convert a moveable into an immoveable by destination by incorporating it in the immoveable it is necessary to be owner of the moveable and the immoveable. Thus, when a bar and wine cabinet are sold conditionally the vendor retaining the right of ownership until full payment is made and the purchaser places them permanently in his own hotel, the vendor has a right to

revendicate them as against even privileged or hypothecary creditors of the purchases.

Brasserie Champlain v. St. Roch Hotel, 47 Que. S.C. 113.

CONDITIONAL SALE OF MACHINE—PROVISION FOR SALE UPON DEFAULT OF PAYMENT AND APPLICATION OF PROCEEDS UPON PROMISSORY NOTE GIVEN FOR PRICE—LIABILITY OF PERSON ENDORSING AS SURETY—REPOSSESSION OF MACHINE BY VENDOR AND USE IN BUSINESS.

Crane v. Hoffman, 8 O.W.N. 500.

SALE OF GOODS—CONDITIONAL SALE—AGREEMENT—SEIZURE OF GOODS UNDER EXECUTION—PRETENDED SEIZURE BY ASSIGNEE OF VENDOR WHEN IN POSSESSION OF BAILIFF UNDER EXECUTION — CONDITIONAL SALES ACT, R. S. O. 1914 c. 136, S. 8—RETENTION OF GOODS FOR 20 DAYS —TENDER OF BALANCE DUE WITHIN THAT PERIOD—RIGHT TO POSSESSION—PRETENDED SALE—REPLEVIN—DAMAGES.

Stock v. Meyers, 16 O.W.N. 263.

CONDITIONAL—SALE IN NATURE OF A PLEDGE —ENDORSEMENT OF SELLER'S NOTES BY THE PURCHASER — CONSIDERATION OF THE SALE.

The vendor in a sale with the right of redemption on repayment of the price or consideration, the latter being the endorsement of his notes by the purchaser to a limited amount during 2 years (a sale in the nature of a pledge as security to the purchaser, with an express covenant that the right of redemption shall be subject to his full discharge from liability as endorser), cannot claim the right of redemption on the ground that when his note endorsed fell due, the discountng bank accepted, as a renewal, the note of a third party endorsed by the purchaser and surrendered the matured one to him. This may have ended the vendor's liability to the bank, but under the rule expressed in arts. 1171, 1173 C.C. (Que.) that novation cannot be implied, and that the delegation of a new debtor does not affect it unless the creditor expressly consents thereto, the juridical relation of the vendor and purchaser, under the deed of sale, continues the same, notwithstanding the renewal made as above stated.

De Saint-Aubin v. Binet, 22 Que. K.B. 664.

SEIZURE—CONDITIONAL SALE—CLAIM—RETENTION OF RIGHT OF PROPERTY — TRADERS—C.C. (QUE.) ARTS. 1487, 1488, 1489, 1490, 1599, 2265, 2268.

One who makes a conditional sale of moveables, and retains the right of property until payment, makes a sale on a suspensive condition. He has a right to claim them from a third party as long as he is not paid, unless the latter purchaser is protected by arts. 1488, 1489, 1490, C.C. (Que.) relating to the sale of the chattels of others. Thus the vendor of a cutter and of a buggy, with the right of retention of the property who sells them to a purchaser trading in carriages and harness equipment cannot reclaim them from a third party who has received them from the purchaser as a balance on an exchange of horses. When, in a conditional sale, the vendor stipulates that in default of payment, or in a case where the purchaser sells the chattel he will have a right to retake possession, he cannot do it without making a demand on the purchaser to pay. A merchant and a business agent are traders even outside of their commerciai affairs.

Legaré v. Sabourin, 25 Rev. Leg 439.

SALE "EN BLOC"—RETENTION OF RIGHT OF PROPERTY — CONDITIONAL SALE—AFFIDAVIT — C.C. (QUE.) ARTS. 1569A ET SEQ.

The owner of chattels under a conditional or suspensive sale i. e. retaining possession of the property, is bound, even if he sells them "en bloc," to furnish the affidavit mentioned in C.C. (Que.) arts. 1569b, 1569c.

Berard v. Berard, 25 Rev. Leg. 337.

SALE—RETENTION OF RIGHT OF PROPERTY—SECRET AGREEMENT—THIRD PARTY IN GOOD FAITH—FRAUD—ACQUIRED KNOWLEDGE.

A person who sells an automobile on instalments, retaining the right of property in the machine until payment, but who, nevertheless, gives the purchaser a writing stating that the sale is absolute and that the price has been paid, cannot then assert his right against a third party who has bought the auto in good faith. But it is otherwise if the third party knew or should have known the rights of the first vendor and has not been mistaken.

Russell Motor Co. v. Bastien, 56 Que. S.C. 347.

CONDITIONAL SALES—VENDOR REPOSSESSING AND SELLING WITHOUT NOTICE — THE CONDITIONAL SALES ORDINANCE, S. 8—RESCISSION OF CONTRACT — PREVIOUS JUDGMENT FOR PRICE MADE INEFFECTIVE.

If a vendor under a lien agreement (the terms of which give him a right to sell the property "at public or private sale") repossesses the property and sells without giving the notice to the buyer required by s. 8 of the Conditional Sales Ordinance this rescinds the contract, and a judgment recovered by the vendor for the price before such repossession thereby becomes ineffective. A transferee of land from the buyer may bring action to restrain its sale under an execution issued under such judgment and to have the execution removed from his title.

Blanchette v. Massey-Harris Co. [1919] 3 W.W.R. 870.

SALE OF GOODS—CONDITION OR WARRANTY—STATEMENT IN CONTRACT HELD A CONDITION ALTHOUGH CALLED A WARRANTY —WHETHER "SPECIFIC GOODS" WITHIN SALE OF GOODS ACT. 2 (14)—AGREEMENT RESCINDED.

Defendant sold a tractor to plaintiff. Plaintiff received it in January, worked with it for some time trying it out, made frequent complaints to defendant who sent

mechanics and others to try to make it satisfactory, and on Aug. 29 notified defendant that he rejected it. A clause in the contract, called a "warranty," stated what the engine would do for ploughing, which the jury found it would not do, and which statement induced plaintiff to enter into the contract. The jury also found that plaintiff did not accept the engine and thereby change any conditions to warranties. Held that the said clause was a condition, also that the goods in question were not "specific goods" within the meaning of the Sale of Goods Act. s. 2 (14) and the property had not passed to the buyer so that a breach of condition could only be treated as breach of warranty. On the findings of the jury judgment was given rescinding the agreement.

Boren v. Waterloo Boy Kerosene Tractor [1919] 1 W.W.R. 478.

(§ 1 C—16)—Necessity of recording conditional sale agreement.

Where the plaintiff sold an account register to a purchaser under a hiring and purchase agreement within the meaning of c. 42 of the Acts of Nova Scotia, 1907, and where such agreement was neither accompanied by an affidavit nor filed in the registry of deeds, the agreement, although valid as between the parties, is null and void as against the creditors, purchasers, and mortgagees claiming under the purchaser in question.

Dominion Register Co. v. Hall 11 D.L.R. 366, 47 N.S.R. 57, 12 E.L.R. 494, affirming 8 D.L.R 577.

Conditional sales—Recording—Filing—Foreign law district—Territorial limits of Bills of Sale Act.

The Bills of Sale Act (N.S.) does not apply to a conditional sale in another province of a horse afterwards taken into New Brunswick by the conditional purchaser and the conditional vendor may enforce his title in Nova Scotia against sub-purchasers.

Cormier v. Coster, 19 D.L.R. 701.

Registration—Copy of lien note—Sufficiency of affidavit.

Section 2 of the Hire Receipts and Conditional Sales of Goods Ordinance (Alta.), 1911, c. 44, requiring the registration of a true copy of the writing of sale, is sufficiently complied with as to the spirit and purpose of the statute, by registering true copies of the lien notes containing the usual provisions as to the retention of title by the vendor until payments are completed, though the original order on which the sale is based or a true copy thereof has not been registered; likewise sub. s. 3 of s. 2 which requires the agreement of sale or bailment, or a true copy thereof, to be accompanied by an affidavit, stating that it truly sets forth the terms, is substantially complied with by registering several such lien notes comprising the total amount to be paid, each note accompanied by the statutory affidavit and referring to the terms of the agreement as a whole, and is sufficient to charge a subsequent purchaser with notice thereof.

Wenbourne v. Case, 27 D.L.R. 379, 9 A.L.R. 285, 34 W.L.R. 265, 10 W.W.R. 183.

Lien note—Registration — Assignee—Receiver.

In the absence of a statutory provision to that effect, registration of a conditional sale or lien note is not necessary to render the instruments effective as against a receiver or an assignee for the benefit of creditors, and the goods may rightfully be claimed by the conditional vendor as against the receiver or assignee.

Canadian Equipment & Supply Co. v. Cushing, 37 D.L.R. 401, 12 A.L.R. 375, [1917] 3 W.W.R. 618.

Registration of renewals.

The amendment (by s. 8, c. 3, 1916) to the Conditional Sales Ordinance (c. 44, Con. Ord.), requiring the registration of lien agreements to be renewed, is not to be literally construed so as to nullify or cancel the agreement as between the parties thereto if a renewal be not filed.

Re Richard; Stuart Mfg. Co. and Whitaker, 11 A.L.R. 495, [1917] 2 W.W.R. 722.

Registration.

Contracts for sale of movables need not be registered to be effective except in the case required by law. Therefore the registration by a lessee, of the lease of the movable of another, cannot supply the defect in his title in respect to the property in the movable.

Witterman Co. v. Mongeau, 50 Que. S.C. 428.

Noncompliance with statute—Priority over distraining landlord.

The fact that a conditional sale agreement does not comply with the provisions of the Conditional Sales Ordinance does not disentitle the vendor from setting up a claim to the goods comprised in such agreement as against a landlord distraining for rent.

Re Osborne and Hudsons Bay Co., 8 W.W.R. 821.

(§ 1 C—17)—Conditional sales—Statutory requirements.

The provisions of s. 1 of the "Act respecting Lien Notes and Conditional Sales of Goods," R.S.S. 1909, c. 145, requiring registration, do not apply to an assignment to a third party of the interest in the goods of the original seller or bailor in good faith for valuable consideration, and neither under that Act (reading s. 11 with s. 1) nor on other grounds does such assignment require to be registered.

Reid v. Moore, 16 D.L.R. 561, 27 W.L.R. 616, 6 W.W.R. 765, 7 S.L.R. 69, affirming 12 D.L.R. 193.

Statutory requirements.

In order that a vendor may obtain protection thereunder, there must be a literal com-

pliance with the provisions of s. 1, c. 145, R.S.O. 1897, of the Conditional Sales Act, that sales of manufactured goods or chattels on condition that the title shall not pass, shall be valid only "as against a subsequent purchaser or mortgagees without notice in good faith for a valuable consideration . . . which, at the time possession is given to the bailee, have the name and address of the manufacturer, bailor or vendor . . . painted, printed, stamped or engraved thereon, or otherwise plainly attached thereto," and, under such Act the use of the synonymous words in lieu of the actual name of the manufacturer or vendor is not permissible. [Toronto Furnace Co. v. Ewing, 1 O.W.N. 467, 15 O.W.R. 381, followed.]

Ericsson Telephone Mfg. Co. v. Elk Lake Telephone & Telegraph Co., 4 D.L.R. 576, 3 O.W.N. 1309, 22 O.W.R. 161.

A vendor of goods or chattels of the value of $15 or over, who has an office in the province, and whose name is stamped thereon or affixed thereto, as required by s. 11, of c. 45, R.S.S. 1909, relating to lien notes and conditional sales, need not, upon the vendee's default in payment, give the vendee the notice of resale required by s. 8 of the Act, since by the express terms of s. 11, the Act is not applicable to sales of goods and chattels marked with the vendor's name.

Great West Life Ass'ce Co. v. Leib, 4 D.L.R. 392, 5 S.L.R. 332, 21 W.L.R. 877, 2 W.W.R. 781.

CONDITIONAL SALES — STATUTORY REQUIREMENTS.

Where goods are bought, under a conditional sale agreement, by a tenant who attached them to the freehold, under an agreement with his landlord that they were to remain attached and become the property of the landlord as part of the freehold, such goods, after the determination of the tenancy, cannot be taken by the original seller of the goods under his lien for the unpaid purchase price, if he has not filed the conditional sale agreement as provided by s. 28 of the Sale of Goods Act, R.S.B.C. 1911, c. 203, read with s. 29.

Hayward v. Lim Bang, 17 D.L.R. 760, 19 B.C.R. 381, 27 W.L.R. 922, 6 W.W.R. 891.

CONDITIONAL SALE OF GOODS — STATUTORY CONDITIONS AS TO RETAKING POSSESSION AND SELLING — NONCOMPLIANCE WITH ACT—ONUS OF PROOF—RIGHTS OF PARTIES.

A purchaser for whose benefit and protection the provisions of the Lien Notes and Conditional Sales of Goods Act (R.S.S. 1909 c. 145) were passed may waive the benefits thereof. Where the purchaser expressly sets up a failure on the part of the vendor to give the notice required by the Act (see 1910-11 c. 41, s. 16, amending s. 8) before selling the goods after retaking possession, the onus is on the vendor to prove that such notice was given, and failing to prove compliance with the Act he is not entitled to the balance of the purchase money.

Advance Rumely Thresher Co. v. Cotton, 47 D.L.R. 566, 12 S.L.R. 327, [1919] 2 W.W.R. 912. [Appeal to Supreme Court of Canada pending.]

TO DEFENDANTS—REPOSSESSION BY PLAINTIFF—RESALE—NONCOMPLIANCE WITH CONDITIONAL SALES ACT, R.S. SASK., 1909, C. 145—RESCISSION OF CONTRACT.

A party reselling goods under the Conditional Sales Act, R.S.S. 1909, c. 145, must comply with the provisions of this statute, otherwise their action in reselling amounts to a rescission of the contract; unless there are clauses in the contract operating as a distinct waiver of the provisions of the Act. [American Abell Engine & Threshing Co. v. Weiden Wilt, 4 S.L.R. 388; Advance Rumely Thresher Co. v. Cotton, 47 D.L.R. 566, followed.]

Advance Rumely Thresher Co. v. Dankert & Sandidge, 50 D.L.R. 144.

LIEN NOTE—AFFIDAVIT OF BONA FIDES—REGISTRATION.

A clause in an affidavit of bona fides required to be filed with a lien note, "that the copy of the within agreement truly sets forth the agreement between the parties mentioned therein, and that the agreement therein set forth is bona fides and not to protect the goods in question against the creditors of the said buyer or bailee," does not comply with s. 2 (3) of the Act respecting Lien Notes and Conditional Sales of Goods (R.S.S. 1909, c. 145), and the lien note cannot properly be registered, and therefore under s. 1 of the Act cannot be set up against judgments or executions against a purchaser or bailee.

Theatre Amusement Co. v. Squires, 43 D.L.R. 496, 11 S.L.R. 411, [1918] 3 W.W.R. 831.

REGISTRATION — DESCRIPTION OF GOODS — PROMISSORY NOTE.

In order to comply with subs. (2) of s. 2 of the Sale of Goods Amendment Act, 1916, which requires that chattels included in a conditional sale and agreement be so described "that they may be clearly identified." Held (affirming the decision of Lampman, Co. J.), that there must be such material on the face of the instrument as would indicate how the property may be identified if proper inquiries are instituted. Where a promissory note is taken as security contemporaneously with a hire receipt and the promissory note is not mentioned in the hire receipt, the hire receipt is not void by reason of nonregistration of the note.

Brandon v. Plimley, 24 B.C.R. 441, [1918] 1 W.W.R. 831.

(§ I C—18)—VENDOR'S NAME STAMPED OR AFFIXED.

The provision of s. 11 c. 45, of R.S.S. 1909, respecting lien notes and conditional sales, exempting from the operation of the Act as to recording the agreements, sales of

goods or chattels of the value of $15 or over, where the name of a vendor, who has an office in Saskatchewan, is plainly stamped thereon, or affixed thereto, is not limited in its operation to the original sale only, but applies as well to resales by the vendor upon the vendee's default in making payment therefor.

Great West Life Ass'ce Co. v. Leib, 4 D.L.R. 392, 5 S.L.R. 332, 21 W.L.R. 877, 2 W.W.R. 781.

CONDITIONAL SALES — VENDOR'S NAME, STAMPED OR AFFIXED—PLATE REMOVED BY PURCHASER—EFFECT—CONDITIONAL SALES ACT.

The removal of the manufacturer's name-plate, the affixing of which on a machine dispenses with the necessity of recording the conditional sale contract under the Conditional Sales Act (Ont.), will not, where the name-plate is taken off by the purchasing company, prevent enforcement of the seller's right on default to the possession and property in the machine as against sub-purchasers from them who were aware that the machine was supplied to their vendors by the manufacturer claiming the lien. [Wettlaufer v. Scott, 20 A.R. (Ont.) 652, followed.]

Canadian Westinghouse v. Murray Shoe, 20 D.L.R. 672.

CONDITIONAL SALE—VENDOR'S NAME DISPLAYED EFFECT—ASSIGNEE OF VENDOR.

The saving provisions of s. 11 of the Saskatchewan "Act respecting Lien Notes and Conditional Sales of Goods," R.S.S. 1909, c. 145, exempting from registration sales or bailments of certain manufactured goods on which the name of the manufacturer or vendor is displayed, will also exempt an assignee of such manufacturer or vendor.

Reid v. Moore, 16 D.L.R. 561, 7 S.L.R. 89, 27 W.L.R. 616, 6 W.W.R. 765.

VENDOR'S NAME STAMPED OR AFFIXED—CONDITIONAL SALE—ACTION BY VENDOR FOR CONVERSION.

Greer v. Armstrong, 24 O.W.R. 960.

CONDITIONAL SALE—NAME AFFIXED TO GOODS—RESALE BY PURCHASER—AGENCY OF PURCHASER.

Dominion Carriage Co. v. Wilson, 2 O.W.N. 214.

(§ I C—19)—VENDORS RETAKING POSSESSION — CONDITIONAL SALE — EFFECT OF RETAKING POSSESSION.

Donnelly v. Roberts, 7 D.L.R. 926, 22 W.L.R. 379.

REPOSSESSION—EXTENT OF RIGHT—MANUFACTURING PLANT — LIQUIDATOR — SET-OFF.

When a manufacturing plant, such as a brickyard, is sold to a company, and part of the purchase price is composed of the company's stocks and debentures, and the company afterwards went into liquidation, the seller, in exercising his right to repossession of the premises under the terms of the sale, is not entitled to articles manufactured by the company, or to those in process of manufacture, and they may be rightfully claimed by the company's liquidator as the property of the company; nor is he entitled to set-off against the claim of the liquidator the amount of the debentures transferred to him as part of the purchase price.

Crain v. Wade, 37 D.L.R. 412, 55 Can. S.C.R. 208, affirming 27 D.L.R. 179, 35 O.L.R. 402.

REPOSSESSION — DISCHARGE OF SURETY — IMPAIRMENT OF SECURITY.

The keeping and using of property repossessed by a conditional vendor instead of selling it and applying the proceeds toward the payment of a purchase price note, is an impairment of security which will discharge a guarantor from liability thereon.

Crain v. Hoffman, 37 D.L.R. 435, 55 Can. S.C.R. 219, affirming 27 D.L.R. 592.

REPOSSESSION.

The repossession by a seller in accordance with a provision therefor in an agreement for the sale of goods on deferred payments is not a rescission of the agreement and a bar to recovery of the purchase-price. [Sawyer v. Pringle, 18 A.R. (Ont.) 218 at p. 222; Peebles v. Johnson, 1 S.L.R. 523; Canadian Port Huron Co. v. Fairchild, 3 S.L.R. 228, followed.]

Nichols & Shepard Co. v. Chamberlain, [1918] 3 W.W.R. 308.

REPOSSESSION—NOTICE BY REGISTERED MAIL—PURCHASE BY VENDOR — COSTS—ACTION FOR DEFICIENCY.

The plaintiff, under the terms of a lien note executed by the defendant in his favour, repossessed a mare, the subject-matter of the note. The notice of intended sale required by R.S.S. (1909), c. 145, s. 8, was given by registered mail, and at the ensuing auction the plaintiff himself bid thereon and, being the highest bidder, became the purchaser. On the same day he resold the mare for the sum at which he had purchased, and after crediting the amount of the resale, less certain sums charged as expenses, the plaintiff brought action for the balance owing on the note. Held, that notwithstanding the fact that the defendant (buyer) was not absent, the statute did not require the notice of intended sale to be served personally, but that its service by registered mail was sufficient. [Vanstone v. Scott, 1 A.L.R. 462, 9 W.L.R. 257 followed]; that the plaintiff could not become the purchaser at the auction, that his position was the same as if there had been an abortive sale, and that his right under the note to sell by private sale was not affected; that [following McHugh v. Union Bank, [1913] A.C. 299, 10 D.L.R. 562] the plaintiff was entitled to retain reasonable and proper costs in respect of services not provided for by R.S.S. (1909), c. 51, but that the plaintiff was not entitled to any reim-

bursement for his own services but merely for his actual and necessary expenses.

Toth v. Hilkevics, 11 S.L.R. 95, [1918] 1 W.W.R. 905.

REPOSSESSION—MACHINERY — MECHANICS' LIEN — AFTER-ACQUIRED PROPERTY — EQUITABLE MORTGAGE—"MORTGAGEE"—SALE OF GOODS ACT.

An agreement between the vendor and purchaser of mineral claims that if mechanics' liens should be filed against the property the vendor should have the right to enter and "possess himself of all machinery, fittings . . . upon the mineral claims and to sell the same" and so recoup himself for any moneys paid by reason thereof, held to cover after-acquired property, and to constitute an equitable mortgage. The vendor under such an agreement is a "mortgagee" within the meaning of s. 28, Sale of Goods Act, R.S.B.C., c. 203.

Sullivan Machinery Co. v. Bank of Montreal, [1918] 3 W.W.R. 17.

REPOSSESSION—REPLACED CHATTELS—MORTGAGE.

Where by the terms of a contract of sale of personal chattels a lien is to be retained thereon in favour of the vendor until payment is made, such lien is not destroyed by any possession taken by the vendee authorized by the contract in the usual course of such business. Where by the terms of an agreement for the sale of cattle reserving a lien in favour of the vendor, the purchaser is given the right to sell cattle upon replacing them with other cattle of the same kind and value, and the purchaser replaces cattle sold by other cattle upon which he has given a chattel-mortgage to secure the purchase price, the lienholder is justified in resuming possession of the cattle.

Reyneurt v. Van Walleghem, 33 W.L.R. 336.

VENDOR RETAKING POSSESSION—RETENTION OF LIEN.

Where by the terms of a contract of sale of personal chattels, a lien is to be retained thereon in favour of the vendor until payment is made, such lien is not destroyed by any possession taken by the vendor authorized by the contract in the usual course of such business.

Reyneurt v. VanWalleghen, 9 W.W.R. 958, 33 W.L.R. 336.

VENDOR RETAKING POSSESSION—RESCISSION —RIGHT TO PURCHASE PRICE INSTALMENTS.

An agreement for the sale of a hotel business which reserves unto the vendor the title to the property until the purchase price is paid, does not operate as an absolute sale as to render it subject to rescission on default within the meaning of art. 1541 C.C. (Que.); nor will the commencement of an action for the repossession of the property, under the terms of the agreement, amount to a rescission as precluding the vendor, by virtue of art. 1541, from claiming the balance of the purchase price due under the contract.

St. Charles v. Monette, 47 Que. S.C. 164.

REPOSSESSION—WAIVER—RESTITUTION.

If in a conditional sale, the vendor allows the buyer to remain in possession of the goods, after maturity of several payments, and goes on accepting instalments, he is supposed to have made his option in favour of the latter right and have given up the property in the things sold. In such a case, his recourse is for the price of the goods and not to seize them for repossession. The seller could not, in any case, seize the goods without returning what he received as instalments, unless he specially alleges that it had been stipulated that such money would be in lieu of rent of the goods.

Levitt v. Lacasse, 49 Que. S.C. 329.

CONDITIONAL SALE — LIEN-NOTE — BILL OF SALE — AGREEMENT TO DELIVER UP — RIGHT TO TAKE POSSESSION UNDER LIEN-NOTE.

Lamont v. Olson, 18 W.L.R. 200.

CONDITIONAL SALE — DEFAULT — RE-POSSESSION OF GOODS — RE-SALE.

American-Abell Engine & Threshing Co. v. Weidenwilt, 19 W.L.R. 730.

D. ACCEPTANCE; RETENTION.

(§ I D—20)—OF GOODS—CONTRACT DELIVERY—ACCEPTANCE AND RETENTION — RESCISSION.

A contract for the purchase of "one Case 40 horse power gas engine" contained a clause: "In no event shall the purchaser have any claim whatever under the agreement against the vendor for any damages but only for the return of moneys paid and securities given and his claim for such shall only arise after he has returned the goods to the place where he received them." The court held that on the evidence the engine delivered and accepted by the purchaser was the engine described in the contract, that the purchaser was bound by the written contract, notwithstanding certain verbal representations that had been made by the vendor's agent, and that by paying a promissory note given in part payment, and by not returning the engine as required by the above clause, he had forfeited any right he might have had to rescission.

Case Threshing Machine Co. v. Mitten, 49 D.L.R. 30, [1919] 3 W.W.R. 601, reversing 44 D.L.R. 40, 12 S.L.R. 1, [1919] 1 W.W.R. 101, which held that the engine delivered was not the engine described in the contract.

ACCEPTANCE—ACTION FOR PRICE—DEFENCE.

A purchaser who makes no complaint to the vendor as to the quality of goods sold, until months after the goods have been accepted and paid for, although he has complained to an agent of the vendor, who has no authority except to receive orders, cannot set up such claim in an action for the purchase price of the goods.

Maritime Coal Railway & Power Co. v. Clark, 43 D.L.R. 158, 46 N.B.R. 1.

REPRESENTATIONS BY AGENT—RIGHT TO REJECT—AGENT'S AUTHORITY.

A purchaser having made known to the vendors the purpose for which he required a gas traction engine, so as to shew them that he was relying on their skill and ability to furnish him with one reasonably fit for his purpose, signed an order for "one of your Big Four 30 h.-p. gas traction engines." The agreement provided that the order was "made upon the express condition that" it "contains all the terms and conditions of the sale . . . and cannot in any manner be changed, altered or modified without the written consent of the officers" of the company. When the vendor's agent concluded a three days' trial of the engine, under the contract, the purchaser was not satisfied with its performance. The agent, however, represented that the engine would get better with wear and that if it was not right the company would make it right, and upon this representation the purchaser was induced to settle for the purchase-price. The court held, on the evidence, that the vendors did not deliver such an engine as was called for by the order, the one delivered being incapable of developing the rated horse-power, and the purchaser was justified in rejecting it. Also that the vendors, by their conduct, were estopped from denying the agent's authority to make the representations which he made.

Schofield v. Emerson Brantingham Implement Co., 43 D.L.R. 509, 57 Can. S.C.R. 203, [1918] 3 W.W.R. 434, reversing 38 D.L.R. 528, 11 S.L.R. 11, [1918] 1 W.W.R. 306. [Leave to appeal to Privy Council granted March 1919: leave rescinded, 51 D.L.R. 87.]

LUMBER IN ESSE — INSPECTION — CAVEAT EMPTOR.

The inspection of a quantity of lumber in esse at the time of the sale, followed by an acceptance of the shipment, brings into operation the rule of caveat emptor to exclude any implied warranties and settles all questions as to quality and quantity. [Towers v. Dominion Iron Co., 11 A.R. (Ont.) 315; Jones v. Just, L.R. 3 Q.B. 197, applied.]

Oldrieve v. Anderson Co., 27 D.L.R. 231, 35 O.L.R. 396.

MANUFACTURE AND SALE OF LUMBER—REFUSAL TO ACCEPT—DEFECTS—EVIDENCE—TIME OF DELIVERY—DAMAGES—RESALE OF LUMBER BY VENDORS—MODE OF SELLING—REFERENCE.

Owen Sound Lumber Co. v. Seaman Kent Co., 5 O.W.N. 861.

SALE OF GOODS — REFUSAL TO ACCEPT — BREACH OF CONTRACT—DAMAGES.

British Columbia Hop Co. v. St. Lawrence Brewery Co., 17 D.L.R. 856, affirming 6 O. W.N. 114.

ACCEPTANCE — RETENTION — "TRYING OUT" THE THING SOLD.

When a sale of personalty, not yet in existence or ascertained, is made with a condition that it shall, when existing or ascertained, possess certain qualities, the "trying out" of the thing sold after delivery covering a protected period does not constitute an acceptance against the buyer, where such "trying out" was, as understood by both parties, to be for the purpose if discovering whether or not it answered the conditions of the contract.

Alabastine Co. v. Canada Producer & Gas Engine Co., 17 D.L.R. 813, 30 O.L.R. 394, affirming 8 D.L.R. 405, 23 O.W.R. 841.

ACCEPTANCE — RETENTION—DILATORY COMPLAINT OF SHORTAGE AND UNFITNESS.

Lapse of time before making complaint of alleged shortage of or unfitness of goods sold and delivered, and the mixing of the goods with other similar goods by the buyer are elements to be considered as adversely affecting the credit to be given the evidence adduced for the buyer to sustain a defence based on such complaint.

Ironsides v. Vancouver Machinery Depot, 20 D.L.R. 195, 20 B.C.R. 427, 29 W.L.R. 781.

ACCEPTANCE—ASSISTING SELLER IN ARRANGING DELIVERY ON WORKS—DAMAGE IN UNLOADING.

Where a contract for the supply and installation of heavy machinery requires delivery on the works to be made by the seller, and provides that the seller shall be responsible for all damages until completion, and where the seller asks the buyer to have it unloaded and advise when men are to come to install same, the buyer who gratuitously undertakes to assist the seller by hiring a competent cartage company to do the unloading at the seller's expense is not responsible for damage to the machinery in the latter's handling of same, where there has been no negligence by the buyer himself.

John Inglis Co. v. Saskatoon, 15 D.L.R. 603, 26 W.L.R. 754.

In an action for the price of beer and ale sold the defendant, he is liable for the value of empty barrels not returned to the seller. Under a sale of a quantity of beer and ale "à mesure qu'elle se dispensera," ten months' time is a reasonable period in which to dispose of it, after which the seller may recover its value, where it is shewn that brewers do not guarantee the soundness of beer for more than one year.

Union Brewery v. Page, 5 D.L.R. 47, 18 Rev. de Jur. 95, 41 Que. S.C. 421.

ACCEPTANCE, RETENTION.

User of the thing sold as the buyer's property, the making of extensive repairs, alterations and improvements thereto, are acts of acquiescence to the sale and will bar any resolutory action, more especially when the defendant was never notified thereof.

Jacobsen v. Peltier, 3 D.L.R. 132, 42 Que. S.C. 35.

CONTRACT — DELIVERIES UNSATISFACTORY — CONTINUED ACCEPTANCE OF SHIPMENTS —EVIDENCE—RIGHTS OF PARTIES.

Dominion Lumber Co. v. Hodgson & King, 48 D.L.R. 712.

PRESUMPTION OF ACCEPTANCE.

The buyer of goods is liable because of his acceptance of same if he retained them after actual receipt of same for such a time as to lead to the presumption that he intended to take possession thereof as owner.

Duncan v. Pryce Jones, 22 D.L.R. 45.

EFFECT ON APPARENT AND LATENT DEFECTS.

A defect in the "flasher" of an electric sign consisting in the fact that it produces only a red light in place of producing simultaneously a red and white light is an apparent defect. The irregular placing of the interior wires of the sign is a latent defect, but the purchaser cannot complain of it eight months after its installation.

Macey Sign Co. v. Routtenberg, 48 Que. S.C. 346.

RIGHT TO RETURN GOODS AFTER INSPECTION—INFERIOR QUALITY.

When a purchaser has examined merchandise before buying, and has not objected to the price on account of its inferior quality, he cannot afterwards refuse to accept and pay for it on account of such inferiority; in such case the vendor is not a guarantor.

Martin v. Galibert, 47 Que. S.C. 181.

An order for a quantity of goods ordered by defendant through a broker from G, was by mistake filled from plaintiff's goods, which were stored in the same warehouse. Defendant, with full knowledge of the facts, having retained the goods and used them as his own, it was held, dismissing the appeal, that the law implied a promise on the part of defendant to accept the goods and to pay for them at the invoice price.

Ackerman v. Morrison, 45 N.S.R. 185, 9 E.L.R. 198, 307.

SALE OF GOODS—MACHINE RENTED TO DEFENDANT—SUBSEQUENT AGREEMENT FOR PURCHASE—PROOF OF BY ORAL EVIDENCE —STATUTE OF FRAUDS—GOODS IN POSSESSION OF PURCHASER—DELIVERY AND ACCEPTANCE — REPLEVIN — DAMAGES—RENT OF MACHINE—BALANCE DUE FOR PRICE—COSTS.

Burns Cement Gun Co. v. McLeod, 15 O.W.N. 296.

OF DEBTS.

The buyer of a debt who, after having accepted a first transfer, received from the same seller another one containing, in addition to the first, other claims against new debtors, and who instead of notifying the seller of his refusal to accept the second transfer keeps it in his possession during several years, and meanwhile proceeds to collect the debts from the two debtors, has thereby tacitly accepted the last transfer. Where a transfer of claims contains the debts of several debtors, and the buyer, without positively accepting, collects the debt of any one of the debtors, he accepts tacitly the whole transfer.

Mackay v. Temple Baptist Church, 25 Que. K.B. 417.

DELAY—WARRANTY—PATENT RIGHTS.

A delay of four months after the delivery of a machine is too long to refuse to accept it on account of defects. If considerable changes are made by a buyer to a machine sold and delivered, it amounts to an acceptance. Where a machine is bought in the United States, there is no warranty, on the part of the vendor, that it can be used in Canada as against any patent rights which might exist in this country.

Southern Can. Co. v. Whittal, 50 Que. S. C. 371.

SALE OF A STEAM ENGINE—EVIDENCE—FACT OF KEEPING THE ENGINE AND OF USING IT OUGHT TO BE HELD AGAINST THE DEFENDANT—C.C. 1012, 1720, 1721, 1722.

The fact that the defendant kept and used the steam engine in question, and moreover the admissions of the defence and the general facts set out by the evidence show the action to be well founded in right and in fact.

Lemire v. Bourque, 25 Rev. de Jur. 221.

USER—TESTING THRESHING ENGINE—REASONABLE TIME.

The receipt of an engine, the property therein not having passed, and user of it for threshing purposes for about 30 days, and the signing of an acknowledgment that an expert had spent a certain number of days in repairing it and had made it satisfactory, held, under the circumstances, not to constitute an acceptance. From August to spring cannot be regarded as an unreasonable time for the rejection of an engine, where the vendor by painting the engine has made inspection on the part of the purchaser at the time of delivery ineffective and has delayed the time of effective inspection until the spring, when the paint came off.

Hart-Parr Co. v. Jones, [1917] 2 W.W.R. 888.

COCONTRACTORS—ACTS OF ONE—ACCEPTANCE OF GOODS.

Imboult v. Crevier, 39 Que. S.C. 509.

ACCEPTANCE — DELAY IN REPUDIATING — WAIVER—DEFECTS IN ENGINE—BREACH OF WARRANTY.

Canadian-Fairbanks Co. v. Thompson, 17 W.L.R. 580.

DEFECTS—NOTICE—BREACH OF WARRANTIES.

Neiss v. Canadian Port Huron Co., 3 A. L.R. 245, 16 W.L.R. 542.

CONTRACT IN WRITING — PRINCIPAL AND AGENT—GOODS NOT ACCORDING TO SPECIFICATIONS—ACCEPTANCE.

Black v. Tyrer, 8 E.L.R. 1.

II. Warranty.

A. In general.

(§ II A—25)—Condition—Thing sold not in existence or ascertained.

When the subject-matter of a sale of personalty is not in existence, or not ascertained, at the time of the contract, and engagement that it shall, when existing or ascertained, possess certain qualities, is not a mere warranty, but a condition, going to the very identity of the thing sold.

Alabastine Co. v. Canada Producer & Gas Engine Co., 17 D.L.R. 813, 30 O.L.R. 394, affirming 8 D.L.R. 405, 23 O.W.R. 841.

Warranty—Sale and installation of machinery — Fuel consumption — Breach—Delay—Limitation of liability—Damages.

Baldwin v. Canada Foundry Co., 17 D. L.R. 834, 6 O.W.N. 346.

What amounts to.

An assertion by a lessor of farming lands who granted the use of a traction engine to his lessee, that the engine, which was essential to the working of the lands, was in good working order, amounts to a warranty, when made with the intention that the lessee, who did not have any special knowledge on the subject, should rely thereon.

Tocher v. Thompson, 15 D.L.R. 31, 23 Man. L.R. 707, 26 W.L.R. 288, 6 W.W.R. 793, 812.

Representations—Failure of consideration—Findings.

Whether there were representations by the seller from which the existence of a warranty could be deduced, or misrepresentation amounting to a failure of consideration, must be gathered from the totality of the evidence, and the jury's findings must be definite.

Robertson v. Norton, 30 D.L.R. 369, 44 N.B.R. 49.

Contract—Special clause—Meaning of.

A purchase contract containing the following clauses:—There are no representations, warranties or conditions, express or implied, statutory or otherwise, other than those herein contained, nor shall any agreement collateral hereto be binding upon vendor unless it is in writing hereupon or attached hereto and duly signed on behalf of vendor at its home office. No agent or employee of vendor is authorized to alter, amend or enlarge this contract in any particular. Such parts or portions of said goods as are not manufactured by or for vendor or are second-hand or rebuilt or repaired are not warranted expressly or impliedly by statute or otherwise. The warranty herein does not apply to second-hand or rebuilt machinery which it is agreed is not warranted. Held, in view of these clauses, that the purchaser could not recover for any alleged breach of implied warranty contained in a verbal agreement made during negotiations and before the contract was signed. [Schofield v. Emerson-Brantingham Implement Co., 38 D.L.R. 528, 11 S. L.R. 11, 43 D.L.R. 509, 57 Can. S.C.R. 265, distinguished.]

Advance Rumely Thresher Co. v. Keene, 47 D.L.R. 251, 12 S.L.R. 259, [1919] 2 W. W.R. 143.

Warranty or condition—Stipulation as to quality and packing—Food articles.

A buyer who contracts to purchase food articles of a certain quality to be packed in a certain manner purports a condition not a warranty, and he cannot be compelled to accept the articles not so packed or be liable for their contract price, unless from the conduct of the parties a new contract can be implied.

Thames Canning Co. v. Eckardt, 23 D. L.R. 805, 34 O.L.R. 72.

Good workmanship—Breach—Proximate cause—Onus.

In an action for breach of warranty that only the best workmanship and material will be used in the construction of boilers, the onus is upon the purchaser to establish that the leaks and cracks which rendered the boilers unfit to use were the direct and not the probable cause of bad workmanship. [Badcock v. Freeman, 21 A.R. (Ont.) 633; McArthur v. Dominion Cartridge Co., [1905] A.C. 72, distinguished.]

Grant's Spring Brewery Co. v. Leonard, 25 D.L.R. 217, 34 O.L.R. 429.

Warranty—Breach—Chattel mortgage—Conversion.

Weltz v. Hoy, 8 O.W.N. 620.

In an action for the recovery of the contract price for the sale of an engine and dynamos under an express or implied warranty that they will "run properly," the purchaser is entitled to recoup, or counterclaim the money paid on account of the purchase price with interest in the event of a breach of such warranty.

Canadian Gas, Power & Launches v. Orr, 46 Can. S.C.R. 636 affirming 23 O.L.R. 616.

Action for setting aside a sale—Defect of stubbornness—Its existence at the time of the sale—Burden of proof — Presumption — C.C. (Que.), art. 1238, 1522.

In an action to set aside the sale of a horse founded on the defect of stubbornness in the animal, the plaintiff must prove the existence of the defect at the moment of the sale, no presumption arises against the purchaser by the fact that the animal has shown this defect 8 days after the sale and since that time.

Houle v. de Grandpré, 55 Que. S.C. 214.

Farm Implement Act—Second-hand machinery—Ground for rejection.

Different considerations arise on a sale of second-hand machinery from those arising on a sale of new machinery. Consequently where, on the sale of a second-hand kerosene-burning engine by a farmer, a necessary attachment was without the knowledge of

the parties, missing, such defect did not warrant a rejection of the engine or a refusal to pay therefor, inasmuch as the missing part, while essential to the operation of the engine, was easily procurable at almost any place of business and very inexpensive, costing only a few cents. The provision of the Farm Implement Act (1915, c. 28) applies only to dealers in implements and not to a farmer making an isolated sale of a second-hand engine.

Robinson v. Burgeson, 11 S.L.R. 229, [1918] 2 W.W.R. 879.

FARM IMPLEMENT ACT—PAROL EVIDENCE—COLLATERAL AGREEMENT.

Quære, whether the Farm Implement Act, 1915, c. 28, applies to an individual sale by a farmer of a second-hand implement. Evidence is admissible to shew that a written contract for the sale of farm machinery was subject to collateral verbal agreements or conditions. [Brownsberger v. Harvey, 2 S. L.R. 481, followed.] On the sale of a farm engine of a stated horse-power the ability of the engine to develop such horse-power is a condition.

Case Threshing Machine Co. v. Welsh, [1918] 3 W.W.R. 57.

FARM MACHINERY—AMBIGUOUS DESCRIPTION—RATED POWER—NOTICE OF DEFECTS—ACCEPTANCE—SET-OFF.

The defendants agreed to purchase from the plaintiff an engine described as "One Case 40 Horse Power Case Gas Engine." The plaintiff delivered an engine which, however, failed to develop its rated horse-power when operated on kerosene, and when operated on gasoline burned an excessive quantity. Experts sent by the plaintiff to demonstrate the engine's ability instructed the defendants, upon the failure of the engine to operate on kerosene, to go ahead with their work on gasoline and that an expert more familiar with the kerosene type of engine would be procured and the engine made to operate on kerosene. The defendants accordingly proceeded to operate the engine on gasoline, but it consumed such an excessive quantity thereof that its operation was either altogether unprofitable or much less profitable than it should have been. The agreement provided that the purchaser should not be entitled to make any claim for breach of warranty unless he complied with certain provision as to the giving of notice of defects, and the defendants did not comply therewith. The plaintiff, failing to make the engine operate satisfactorily on kerosene, the defendants continued to keep and operate the engine on gasoline. In an action on promissory notes given for the purchase price, held that the description of the engine in the order was ambiguous, and that evidence was admissible to shew what type of engine was intended. That, on the evidence, the engine ordered was a kerosene-burning engine that would develop 40 horse-power, and that the vendors had failed to deliver such engine, and that such failure was a breach of condition to which the provision as to the giving of notice did not apply. That in any event the vendor, having in a manner not contemplated in the order undertaken by its own agents a test or demonstration, and thus acquired a more accurate knowledge of defects than could be contained in a written notice, the purpose for which the sending of notice was intended, had disappeared and the failure to send notice could not be set up. That the defendants were entitled to set off in reduction of the purchase-price the diminution in value of the engine delivered over that of the engine ordered. [Hart-Parr v. Wells, 11 S.L.R. 132, applied.]

Case Threshing Machine Co. v. Mitten, 11 S.L.R. 238. [Affirmed in 44 D.L.R. 40, 12 S.L.R. 1, [1919] 1 W.W.R. 101.]

FARM MACHINERY—"STRAW BURNER."

Where there has been a sale of a threshing engine with a "straw burner," the fact that the buyer has some trouble in burning straw therewith is not a ground for holding that he did not get a "straw burner."

Nichols & Shepard v. Chamberlain, [1918] 3 W.W.R. 308.

ANIMALS KNOWN TO BE DISEASED—DUTY TO WARN.

On a sale, without warranty, of an animal known to the seller to be affected with a certain contagious disease, there is no common-law duty upon the seller to warn the buyer of the disease, where the latter is reputed to be possessed of more than ordinary skill and knowledge in the treatment of animals, the disease in question is fairly common in the neighbourhood, the buyer knows that the animal is suffering from some complaint, although not the particular nature of it, and the buyer refuses to complete the sale until he has had the animal in his possession a certain time. [Ward v. Hobbs, 4 App. Cas. 13, followed; Urch v. Strathcona Horse Repository, 2 A.L.R. 183, and the interpretation therein put on Ward v. Hobbs differed from; Clarke v. Army and Navy Co-operative Society, [1903] 1 K.B. 155, distinguished.]

O'Mealey v. Swartz, [1918] 3 W.W.R. 98, 11 S.L.R. 376.

ACTION FOR PRICE — COUNTERCLAIM FOR FRAUDULENT MISREPRESENTATION AS TO VALUE—FRAUD OR WARRANTY NOT ESTABLISHED.

Gardner v. Merker, 44 D.L.R. 217, 43 O. L.R. 411.

SALE OF GOODS — FARM MACHINERY — ALLEGED VERBAL AGREEMENT ON SALE OF ENGINE UNDER WRITTEN CONTRACT.

An alleged verbal agreement on the sale of an engine was given effect to in view of the clause in the written contract of sale against any verbal agreement. [Advance Rumely Thresher Co. v. Keene, 47 D.L.R. 251, [1919] 2 W.W.R. 143, followed.]

Service v. Advance Rumely Thresher Co., [1919] 2 W.W.R. 646.

NEW AND SECOND-HAND ENGINE — QUALIFIED WARRANTY.

The difference between a new and a second-hand engine is a difference of kind and the delivery of the latter cannot be a compliance with an order for the former. It is not merely a difference of quality against which the purchaser must protect himself by obtaining a warranty. On a contract of sale the parties may stipulate that the rights or obligations which would otherwise attach to a sale should not apply to the sale in question, but a clause altering or limiting the effect of a contract for the sale of a specified article cannot be held to alter the subject-matter of the sale, nor to give the vendor a right to supply any article he may choose, unless clear language to that effect is used. An order for a specified engine is not any the less so, because the order contains a clause that the engine is not sold by description. A condition in the following words, "There are no representations, warranties or conditions, express or implied, statutory or otherwise other than those herein contained, nor shall any agreement collateral hereto be binding upon the vendor unless it is in writing hereupon or attached hereto and duly signed on behalf of the vendor as its said home office," applies only to the sale of a specified article and has no application until the article ordered has been delivered or an article different from that ordered has been delivered and accepted by the buyer in fulfilment of his orders.

Hart-Parr Co. v. Jones, [1917] 2 W.W.R. 888.

LATENT DEFECTS—HORSE.

Every latent defect which affects the usefulness of the thing sold constitutes a defect for which the contract may be rescinded. Chronic nephritis in a horse in such a defect. A vendor, making use of the warranty given to him by his auteur as to the character of the thing sold, makes this warranty his own and assumes original responsibility.

Audet v. Leroux, 52 Que. S.C. 291.

WARRANTY—MEASURE OF DAMAGES.

Beck v. Graham, 4 S.L.R. 22, 16 W.L.R. 291.

(§ II A—26)—EXPRESS.

Where a traction engine was sold upon the order of the buyer and upon the receipt thereof the seller shipped the engine and the order contained the warranties of the seller on its face and the seller's agent, without any knowledge on the part of his principal at the time the order was made or when the engine was shipped, gave the buyer, instead of a copy of the order, a somewhat similar document which had on its back warranties which, as far as they went, were practically the same as the ones in the order and the buyer was not told by the agent that it was a copy of his order and no fraud was practised upon him, and where it appeared that if the buyer had read it that he could not have avoided learning that it was no copy of the order, he was bound by his order and was not justified in considering the warranty in the instrument given him, the only express warranty, and ignoring the special provisions in the warranty clauses in the order signed by him which were not contained in the other document.

Lennox v. Goold, 5 D.L.R. 836, 5 S.L.R 228, 21 W.L.R. 918, 2 W.W.R. 829.

A notice of the failure of an engine to fulfil a warranty sent by the purchaser to the vendor at Winnipeg, and not to him by registered mail to Seaforth, as the contract of sale required, is not a sufficient compliance therewith.

Robert Bell Engine Co. v. Burke, 4 D.L.R. 342, 5 S.L.R. 75, 19 W.L.R. 934, 1 W.W.R. 707.

BREACH.

The representation by a seller of bees that they had been inspected and were clean and all right is a warranty that they are free from foul brood sufficient to permit a recovery for its breach.

McKay v. Davey, 12 D.L.R. 458, 28 O.L.R. 322.

EXPRESS WARRANTY — WHAT CONSTITUTES —HORSE.

An affirmation by the seller as to the character of goods made at the time of the sale thereof is a warranty provided it was so intended and was relied upon by the purchaser, e.g., that a horse was a good horse to pull and was 11 years old.

Winterburn v. Boon, 10 D.L.R. 621, 6 S.L.R. 177, 23 W.L.R. 556, 3 W.W.R. 1068.

STATEMENTS BY AUCTIONEER—REPRESENTATIONS—GOODS NOT AS REPRESENTED.

An affirmation by the vendor through his auctioneer at the time of sale is a warranty provided that it appears in evidence to be so intended; and on a breach of such warranty the purchaser is entitled to be indemnified for his loss. [Payne v. Lord Leconfield, 51 L.J.Q.B. 642; Heilbut Symons & Co. v. Buckleton, [1913] A.C. 30, followed.]

Kennedy v. Anderson, 50 D.L.R. 105.

SALE OF HORSES—EXPRESS OR IMPLIED.

Bastedo v. Young, 33 W.L.R. 25.

EXPRESS—WRITTEN WARRANTY—ORAL REPRESENTATIONS—DEFECT IN MACHINERY SOLD.

Harrison v. Knowles, 23 O.W.R. 672.

GASOLINE ENGINE—EXPRESS WARRANTY—BREACH OF WARRANTY—COUNTERCLAIM —DAMAGES.

Canadian Fairbanks Co. v. Thompson, 18 W.L.R. 658.

CONTRACT — FURNACE — DEFECTIVE CONSTRUCTION — CONDITION PRECEDENT — WARRANTY.

Crocket v. McKay, 9 E.L.R. 398.

MACHINERY — CONTRACT — EXPRESS WARRANTY — EXCLUSION OF OTHER WARRANTIES.

Manitoba Windmill & Pump Co. v. McLelland, 18 W.L.R. 680.

(§ II A—27) — SALE OF GOODS ACT (SASK.) — EFFECT OF EXPRESS WARRANTY.

Section 16 (1) of the Saskatchewan Sale of Goods Act, R.S.S. 1909, c. 147, relating to implied warranties on the sale of chattels, does not apply to a sale under an express warranty.

Massey-Harris Co. v. Elliott, 11 D.L.R. 632, 4 W.W.R. 134.

The warranty implied by law on the sale of a chattel is superseded by a guaranty in a written contract for the sale of an engine, that it was free from latent defects, and that it should, under certain fuel conditions, develop 50 horse-power, without varying more than 2 per cent in speed under differing load conditions.

Canada Producer & Gas Engine Co. v. Hatley Dairy, Light & Power Co., 4 D.L.R. 599, 22 Que. K.B. 12.

ACTION TO SET ASIDE A SALE—HIDDEN VICE —KICKING HORSE—C.C. QUE., ARTS. 1522, 1530.

A horse kicking in the stable is a hidden vice which the vendor should guarantee against. The purchaser has a right to return the horse and annul the sale.

Reeves v. Beauchamp, 25 Rev. Leg. 213.

An implied warranty on the sale of a chattel exists, where the contract of sale provides that it was not sold by description, and that there was no condition or warranty either general, express, or implied, other than the condition and warranties set forth therein.

Robert Bell Engine Co. v. Burke, 4 D.L.R. 342, 10 S.L.R. 75, 19 W.L.R. 934, 1 W.W.R. 707.

IMPLIED WARRANTY—PURCHASE OF SPECIFIED ANIMALS—BURDEN OF PROOF OF SHEWING THAT ANIMALS DELIVERED CORRESPONDS WITH THOSE PURCHASED — WHAT AMOUNTS TO ACCEPTANCE—REFUSAL TO ACCEPT—NOTICE OF.

Sherman v. Mabley, 7 D.L.R. 793, 2 W.W.R. 231.

ACTION FOR PRICE — DEFENCE — COUNTERCLAIM—APPEAL—COSTS.

Mannheimer v. Forman, 1 D.L.R. 898, 3 O.W.N. 523.

IMPLIED WARRANTY OF FITNESS—PURCHASE OF GLASS—ABSENCE OF ANY INSPECTION BEFORE DELIVERY — PURCHASER'S ASSUMPTION OF RISK—ALLEGED CUSTOM —SUFFICIENCY OF EVIDENCE TO ESTABLISH.

Lethbridge Sash & Door Co. v. Taylor, 7 D.L.R. 913, 3 W.W.R. 82.

Where an order for the purchase of a traction engine signed by the buyer upon the receipt of which the seller sent the engine, warranted that the engine would successfully operate a threshing outfit of the size and capacity usually operated successfully by an ordinary steam engine of the same actual brake horse-power and that the engine should develop a certain horse-power and if it did not, the seller was, by a clause in the warranty part of the order to be notified and given reasonable time to get to the engine and test it, and, if unable to make the engine develop such horse-power, to take it back and replace it with another or, in place of this, to refund any payments made on the condition that no further claim was to be made against the seller, and where the order in one of its warranty clauses stated that if the purchaser failed to make the engine work satisfactorily through improper management, inefficient operators, or neglect to observe the directions of the manufacturers, the purchaser was to keep the engine and to pay all necessary expense incurred by any man sent at his request to put the engine in condition for successful operations, a compliance by both parties with the above provisions of the order should operate as a determination of all controversies respecting the subject-matter, and, therefore, in an action by the buyer for breaches of the warranties in the order set out above and for the breach of the implied warranty arising under par. 1 of s. 16, R.S.S. 1909, c. 147, providing that there shall be an implied condition in sale of goods that if the particular purpose for which they are required is made known to the seller thus shewing that the buyer relied on the seller's judgment and if the goods are those which the seller sells in his business, in which action it was found by the Trial Judge that the only breach of warranty the evidence shewed under the Act aforesaid, or under the order of purchase, was that the engine did not furnish the horse-power stipulated and in consequence did not successfully operate a threshing outfit according to the first warranty set forth above, no recovery can be had by the buyer on claims for breach of warranty, or by the seller on a counterclaim for the services of the experts to make the engine work properly where the evidence did not sufficiently shew that the buyer failed to make the engine do satisfactory work through improper management or inefficient operators as alleged in the counterclaim.

Lennox v. Goold, 5 D.L.R. 836, 5 S.L.R. 228, 21 W.L.R. 918, 2 W.W.R. 829.

An auctioneer who sells goods, not as principal, but as auctioneer only, though not naming his principal then present and in possession of the goods, does not, without more, warrant the title to the goods sold; he does no more than engage that he is in fact instructed and authorized by his principal to sell. [Wood v. Baxter, 49 L.T.N.S. 45, followed.]

Trapp v. Prescott, 5 D.L.R. 183, 17 B.C. R. 298, 21 W.L.R. 521, 2 W.W.R. 650. [Affirmed, 18 D.L.R. 794, 50 Can. S.C.R. 263, 7 W.W.R. 634.]

IMPLIED.

A representation by a seller that a cow was "due to calve" on a certain day, does not amount to a warranty that the cow was "in calf;" all that the expression imports is a representation that the cow had been bred to a bull at a time from which it was expected the cow would calve on the day specified.

Wilson v. Shaver, 8 D.L.R. 627, 27 O.L.R. 218.

STATED CONDITIONS AND WARRANTIES EXCLUDE IMPLIED WARRANTY, WHEN.

A stipulation in the agreement to sell a tractor engine that it is sold subject to the stated conditions and warranties and no other excludes any claim upon the basis of an implied warranty. [Sawyer-Massey v. Ritchie, 43 Can. S.C.R. 614, followed.]

Hutchins v. Gas Traction Co., 20 D.L.R. 204, 30 W.L.R. 288.

IMPLIED WARRANTY—PROVISION AGAINST—HOW CONSTRUED.

The implied warranty that on a sale of personalty the thing sold shall be reasonably fit and proper for the purpose for which it was designed, cannot be evaded by the seller inserting a provision in the contract of sale whose language does not clearly deprive the buyer of the benefit of the implied provision, especially where the inserted clause appears on its face to have a distinctly different function.

Alabastine Co. v. Canada Producer & Gas Engine Co., 17 D.L.R. 813, 30 O.L.R. 394, affirming 8 D.L.R. 405, 23 O.W.R. 841, 30 O.L.R. 394.

IMPLIED WARRANTY — FITNESS OF MACHINERY — NEW AGREEMENT — BREACHES PRIOR TO NEW CONTRACT—RELINQUISHMENT OF RIGHTS UNDER FORMER AGREEMENT.

Sawyer & Massey Co. v. Ritchie, 43 Can. S.C.R. 614.

WARRANTY—IMPLIED CONDITION.

Clark v. Waterloo Mfg. Co., 20 Man. L.R. 289, 16 W.L.R. 53.

SALE BY DESCRIPTION—IMPLIED CONDITION.

Mason & Risch Co. v. Mooney, 19 W.L.R. 733.

SALES—RAILWAY TIES—CONDITION AS TO STANDARD SIZE—PREVIOUS DEALING.

Hallisey v. Musgrave, 44 N.S.R. 413.

MANUFACTURE AND SALE OF SPECIFIC ARTICLES—SALE BY DESCRIPTION—IMPLIED WARRANTY.

Ontario Sewer Pipe Co. v. Macdonald, 2 O.W.N. 483.

B. By description.

(§ II B—30)—WARRANTY—FULFILMENT.

A contract for the sale of a portable engine is not fulfilled by furnishing an engine that, by reason of its construction, is not portable.

Massey-Harris Co. v. Elliott, 11 D.L.R. 632, 4 W.W.R. 134.

Where a motor car company advertised a car for sale "that never goes lame, backed by a five years' guarantee;" and the sale is made under an agreement to supply a written guarantee, but without any definition of the scope of guarantee in the agreement of sale, the presumption is that the warranty is to be in accordance with the advertisement.

Middleton v. Black, 2 D.L.R. 209, 21 W.L.R. 249.

"NEW 1912 CARS"—FRAUD.

Oriental Transfer Co. v. Winton Motor Car Co., 20 D.L.R. 953.

SPECIFIC GOODS — WARRANTY AND CONDITION—BREACH—DAMAGES.

Where, under s. 50 of the Sale of Goods Act (c. 203, R.S.B.C.), acceptance is inferred after the lapse of a reasonable time for the rejection of goods, a breach of condition entitling to the right of repudiation, particularly in a sale of specific goods, may be treated as a breach of warranty under s. 19, which will entitle the buyer under s. 67 to further damages in consequence thereof in addition to the extinction or diminution of the price. [Poulton v. Lattimore, 9 B. & S. 259, followed.]

British American Paint Co. v. Fogh, 24 D.L.R. 61, 22 B.C.R. 97, 32 W.L.R. 142, 8 W.W.R. 1331.

"GELDING"—"RIGGOT."

An agreement for sale being for a "gelding," there is an implied condition that the subject of the sale shall be the "gelding" of horse-dealing commerce; this condition is not complied with by the delivery of a "riggot," although both parties honestly believed at the time of sale that it was a gelding and in a proper action the purchaser is entitled to damages.

Twaites v. Morrison, 43 D.L.R. 73, 14 A.L.R. 8, [1918] 3 W.W.R. 349.

SALE OF GOODS—ACTION FOR PRICE—WRITTEN AGREEMENT—STATUTE OF FRAUDS—SALE BY SAMPLE—FINDINGS OF FACT AS TO QUALITY — CONDITION AS TO CLEANNESS — COUNTERCLAIM — GOODS STORED FOR PURCHASER — PLEDGE BY VENDOR.

Klengon v. Goodall, 6 O.W.N. 674.

"AGAINST ALL DEFECTS," MEANING OF.

One who in an agreement for swapping horses acts as owner of the horse he exchanges as well as contracting party, will not be allowed, in an action for resiliation, to claim that the horse was not his and that he was acting for a third party. In such an agreement the warranty "against all defects" means a warranty that the horse is free from all defects concealed or apparent, maladies of every kind and

from anything which would make it unfit for use.

Fortier v. Tanguay, 44 Que. S.C. 440.

The admission, on examination as a witness, by the seller, as to a mare that he knew it was bought for breeding purposes, and that he had represented it to the purchaser as being from eight to nine years old, but without warranty, is a commencement of proof in writing which entitles the purchaser to give oral evidence of the warranty of the vendor that the mare was of the age mentioned. The representations by the vendor, as admitted by himself, were such as to lead the purchaser into error on a material element in the sale and, therefore, to make it void.

Boulanger v. Fortier, 41 Que. S.C. 389.

(§ II B—31)—SCREENED COAL.

A contract for the delivery of "screened coal" is carried out by the delivery of coal properly screened at the mine, although owing to the soft and friable nature of the coal more slack is produced in transit than would be produced from coal from other mines.

Maritime Coal, Railway & Power Co. v. Clark, 43 D.L.R. 158, 46 N.B.R. 1.

TRADE DESIGNATION.

On a contract for the supply of a certain quantity of a factory product, under its trade name (e.g., waxed splits of leather), to a dealer in the same trade, there is a presumption that the contract is for goods of a quality which will answer the trade designation under which they were sold, and the vendor is liable, as for breach of warranty, in respect of any portion which is so inferior in grade, either from a defect in the material itself or in the process of manufacture, as not to be merchantable goods under the trade designation.

Schrader v. Robson Leather Co., 3 D.L.R. 838, 3 O.W.N. 962.

C. OF QUALITY, GENUINENESS, OR FITNESS.

(§ II C—35)—BY SAMPLE.

A contract made by correspondence for a carload of specified articles of a specified grade "to be the same size and quality as samples submitted" is a sale by sample, and not a sale of a quality or grade.

Lachute Shuttle Co. v. Frothingham, 8 D.L.R. 417, 22 Que. K.B. 1.

Where "seed flax" is sold by sample and the buyer would require an intricate analysis and test by a Government official in order to detect the presence of noxious mustard seed in the sample, the onus is not on the buyer to make a test involving such unreasonable trouble, and upon injury resulting to the buyer's land from "seed flax" contaminated with noxious mustard seed, the seller may be held in damages for same, without the Government test.

Carlstadt Development Co. v. Alberta Pacific Elevator Co., 7 D.L.R. 200, 4 A.L.R. 366, 21 W.L.R. 433, 2 W.W.R. 404.

Where a quantity of fruit purchased by a dealer from the grower for export to the English market and re-sale at a profit was discovered upon inspection not to be of the grades and quality contracted for, the buyer has the right either to reject the lot and to go into the market and replace the fruit in accordance with the contract grade, and hold the vendor responsible for the difference between the contract price and the market price; or he may retain the fruit, relying on the warranty or description of grade, and recover the loss sustained based on the market price at the time of the discovery of the fraudulent packing as compared with the contract price.

Graham v. Bigelow, 3 D.L.R. 404, 11 E.L.R. 114, 46 N.S.R. 116. [Affirmed, 15 D.L.R. 294, 13 E.L.R. 565.]

Where a dealer in motor cars contracts to supply a car which shall be in all respects (except upholstering) the same as a certain car previously sold to a specified third party, the seller is bound to furnish a car duplicating such sample in appearance, equipment, and method of construction, and as efficient and satisfactory in operation, and in all other respects as good, as the sample, with the qualification mentioned as to upholstering, there being in the circumstances an implied warranty that the car should be fit for use in the manner in which such a car ordinarily would be used. [Drummond v. Van Ingen, 12 A.C. 284; Mody v. Gregson, L.R. 4 Ex. 49; Randall v. Newson, 2 Q.B.D. 102, applied.]

Trethewey v. Moyes, 8 D.L.R. 280, 4 O.W.N. 445, 23 O.W.R. 563.

Where a manufacturer or dealer contracts to supply an article which he manufactures or produces, or in which he deals, to be applied to a particular purpose, so that the buyer trusts to the judgment or skill of the manufacturer or dealer, there is in that case an implied term or warranty that it shall be reasonably fit and proper for the purpose for which it was designed. [Canadian Gas Power & Launches v. Orr, 23 O.L.R. 616, applied.] Where the plaintiff bought from the defendant an engine with a distinct understanding as to the purpose for which the engine was to be used, that it was to be applied to a particular purpose which required particular qualities, and the defendants represented to the plaintiffs that they could supply the engine required, and the plaintiff trusted to the defendant's judgment and skill in doing so; there is in such a contract an implied term or warranty that the article shall be reasonably fit and proper for the purpose for which it was designed; and the fact that upon the engine shewing defects from time to time the plaintiff and the defendant for several months made joint efforts to put it into running order does not estop the purchaser from insisting upon the warranty against inherent defect and weakness. Where dealers sell

an engine with an implied warranty as to fitness for a particular purpose, with certain provisions in the contract for replacing defective parts, such provisions have not the effect of impairing the obligations of the implied warranty but are in law considered as quite distinct therefrom. [Canadian Gas Power & Launches v. Orr, 23 O.L.R. 616, 26 Can. S.C.R. 614, followed; Sawyer & Massey Co. v. Ritchie, 43 Can. S.C.R. 614, distinguished.]

Alabastine Co. v. Canada Producer & Gas Engine Co., 8 D.L.R. 405, 30 O.L.R. 394, 23 O.W.R. 841.

A defence that the failure of machinery to work satisfactorily was due to its ill-usage by the vendee in not properly oiling it, fails, where it is shewn that oil was properly applied, but by reason of a concealed defect in workmanship, it did not reach the proper bearing surface.

Canada Producer & Gas Engine Co. v. Hatley Dairy, Light & Power Co., 4 D.L.R. 599, 22 Que. K.B. 12.

IMPLIED WARRANTY—FITNESS FOR SPECIFIC PURPOSE—SELLER'S SKILL NOT RELIED ON.

The provisions of clause 1 of s. 16 of the Sales of Goods Ordinance, c. 39, Con. Ord. 1898, to the effect that there is an implied warranty that goods sold for a particular purpose shall be reasonably fit for such purpose, does not apply where the defects complained of were discovered by the buyer at the time of the delivery and the goods were retained by him without objection, the defects complained of being entirely within his own knowledge, since the provisions of clause 1 apply only where the buyer relies upon the seller's skill and judgment.

Henningsen Produce Co. v. Poggiolli, 11 D.L.R. 182, 23 W.L.R. 871, 4 W.W.R. 179.

DEFECT IN QUALITY—DAMAGES—EFFECT OF RESALE.

A purchaser of goods is not deprived of his right to set up a counterclaim by reason of a defective condition of some of the goods, in an action by the seller against him for the contract price, merely because the purchaser made no attempt to settle with persons to whom he had resold part of the goods claimed to be defective, although he had been requested to do so by the seller.

Berry v. McKenzie, 10 D.L.R. 641, 6 A.L.R. 17, 23 W.L.R. 886, 4 W.W.R. 438.

IMPLIED WARRANTY—FITNESS FOR PURPOSE.

Millett v. Silver, 16 D.L.R. 870, 13 E.L.R. 577.

OF FITNESS.

A warranty that an engine was "capable of doing good work" is not a warranty that it was "capable of filling silos," a work requiring greater power than the engine was warranted to have.

Caldwell v. Cockshutt Plow Co., 18 D.L.R. 722, 30 O.L.R. 244.

OF FITNESS—PURCHASER'S OWN JUDGMENT AND SKILL—EFFECT.

The implied warranty that a machine sold by a manufacturer or dealer shall be fit for the particular purpose for which it is to be used, does not import that the machine will accomplish the purchaser's purpose, where the purchaser has relied on his own judgment and skill rather than the vendor's advice. [Shepard v. Pybus (1842), 3 M. & G. 868, followed.]

Hopkins v. Jannison, 18 D.L.R. 88, 30 O. L.R. 305.

IMPLIED WARRANTY OF FITNESS — CAVEAT EMPTOR.

There is no implied warranty of fitness in a sale of machinery not manufactured by the seller, and after the goods have been inspected, in the absence of any fraudulent concealment, the rule of caveat emptor applies.

Robertson v. Norton, 30 D.L.R. 369, 44 N.B.R. 49.

WARRANTY IMPLIED AS TO QUALITY—MANUFACTURER'S OBLIGATION TO SUPPLY NEW COMMODITY.

Prima facie a person sending an order for an engine to the manufacturer thereof is entitled to receive an engine new in all its parts, and the manufacturer's noncompliance in this respect (although as to parts of small value compared with the price of the engine) may vitiate the contract.

Haug v. Baade, 15 D.L.R. 520, 7 S.L.R. 47, 26 W.L.R. 750.

Prima facie a person sending an order for an engine to the manufacturer thereof is entitled to receive a new engine, and where the seller varies the implied warranty in this respect by representing that the engine delivered in response to the order has not been used except for "a little use on the fair ground," the alleged variance will be strictly construed. [See also Haug v. Baade, 15 D.L.R. 520.]

Haug v. Blair, 16 D.L.R. 22, 27 W.L.R. 61.

SOUNDNESS OF ANIMAL—PROMISE TO GIVE WARRANTY—BREACH.

Since equity looks upon that as done which should have been done, it is of no importance where, in a sale of an animal the seller promises to give a written warranty of soundness, that the warranty is not deduced in writing and a malformation of the animal's foot constitutes an unsoundness which will render the seller liable for breach of the warranty, if such unsoundness was existent at the time of the sale, although the purchaser had heard from others that the animal was unsound. [Head v. Tattersall, L.R. 7 Ex. 7, applied.]

Cameron v. McIntyre, 26 D.L.R. 638, 35 O.L.R. 206.

TRACTOR — ASSIGNEE — ACTION TO RECOVER PURCHASE PRICE—WARRANTY—FAILURE OF ENGINE TO DO WORK REQUIRED—UNDERTAKING BY VENDOR—DEFECTIVE ENGINE—RETENTION—EVIDENCE.

Mager v. Baird Ranch & Co. 48 D.L.R. 724, [1919] 3 W.W.R. 428.

BY SAMPLE—DELIVERY—ACCEPTANCE—OBLIGATIONS.

Pauss v. Wright, 40 D.L.R. 156, 53 Que. S.C. 375.

WARRANTY OR CONDITION — QUALITY — INSPECTION.

A representation that a car-load of hay is all of a particular quality is a condition, not only a warranty, and a purchaser is justified in refusing the hay upon discovery that it is not of the quality represented, notwithstanding that after partially examining it in the car he took delivery, and resold it, the inferiority not being apparent until the hay was unloaded.

Niagara Grain & Feed Co. v. Reno, 32 D. L.R. 576, 38 O.L.R. 159.

IMPLIED WARRANTY AS TO FITNESS—BREACH —FARM MACHINERY ACT.

Neuman v. International Harvester Co., 37 D.L.R. 766.

FARM MACHINERY — STATUTORY REQUIREMENTS AS TO BOILERS—NONCOMPLIANCE WITH.

Regulation 1 of the Department of Public Works, issued under s. 19 of the Steam Boilers Act, R.S.S., c. 22, controls and forms part of the specifications set forth in the regulations, and shews that an absolute compliance with the regulations is not required by the department, and that a sale could be made of engines which do not strictly comply with the regulation, and the effect is, not to prohibit the sale, but to penalize the engine by reducing the pressure allowed, and consequently does not render any sale void on that account.

Haug v. Murdock, 25 D.L.R. 666, 32 W. L.R. 572, 9 W.W.R. 574. [Reversed in 26 D.L.R. 200, 9 S.L.R. 56, 9 W.W.R. 1064.]

SALE OF YACHT—CONDITION AS TO QUALITY — SEAWORTHINESS — NONFULFILMENT —RESCISSION—RETURN OF MONEY PAID AND PROMISSORY NOTES GIVEN—DAMAGES—RETURN OF GOODS.

Donovan v. Whitesides, 8 O.W.N. 483, 9 O.W.N. 60.

IMPLIED WARRANTY OF FITNESS FOR SPECIAL PURPOSE—GOODS SUPPLIED NOT AS CONTRACTED FOR — REFUSAL TO ACCEPT — PROMISSORY NOTE GIVEN FOR PART OF PRICE—ACTION ON—DISMISSAL—COUNTERCLAIM—RECOVERY OF MONEYS PAID—DAMAGES.

Watson Carriage Co. v. Auto-Transportation Co., 9 O.W.N. 245.

INFERIOR QUALITY—ACTION BY VENDEE FOR DAMAGES—FRUIT PACKED IN BASKETS—CHARGE OF "FACING"—FAILURE TO PROVE—FRUIT SALES ACT, R.S.O. 1914, C. 225, S. 2—EVIDENCE—"ORCHARD-RUN."

Scott v. Fisher, 14 O.W.N. 217.

SOUNDNESS OF ANIMAL.

The written statement of a veterinary surgeon, read at the public sale of a mare, "that he had the mare under his care for abscess caused by strangles, but that she would soon be cured without difficulty," only expresses the opinion of the veterinary surgeon and does not constitute a warranty by the vendor.

Poupart v. Beaudin, 24 Rev. Leg. 149.

ANIMAL—LATENT DEFECT.

Intermittent lameness is a latent and redhibitory defect. The exchange of a horse suffering from such lameness, due to a hard tumor on the horse's shank, when the owner declares to the party with whom he makes the exchange that such lameness is accidental and curable is void and may be set aside.

Rochon v. Lavigne, 24 Rev. Leg. 112.

A mare inclined to become frightened and unmanageable has a latent defect which renders the sale of such an animal void.

Charron v. Longtin, 24 Rev. Leg. 109.

GRAIN SOLD BY SAMPLE—CONSIGNMENT TO ORDER OF BANK—PROPERTY PASSING ON ACCEPTANCE OF DRAFT—APPROPRIATION TO CONTRACT OF PARTICULAR CAR-LOAD SPECIFIED IN BILL OF LADING—FAILURE TO DELIVER GRAIN—RECOVERY BY BUYER OF AMOUNT PAID—WRONG CAR-LOAD DELIVERED BY REASON OF MISTAKE AS TO NUMBER OF CAR—CAR-LOAD ACTUALLY DELIVERED IN DAMAGED CONDITION—RIGHT OF REJECTION—NOTICE.

McPherson v. Niagara Grain & Feed Co., 15 O.W.N. 385.

CONTRACT—SUPPLY OF LATHS—"MILL RUN" —QUALITY OF LATHS SHIPPED—REFUSAL OF PURCHASERS TO ACCEPT—EVIDENCE — ONUS — DESCRIPTION — COUNTERCLAIM—DAMAGES.

Bartram & Ball v. Bishopric Wall Board Co., 17 O.W.N. 45.

CONTRACT FOR SALE OF MOTOR-TRUCK—ACTION BY PURCHASERS TO RESCIND ON THE GROUND OF FRAUD AND MISREPRESENTATION—EVIDENCE—FINDINGS OF FACT OF TRIAL JUDGE—TRUCK NOT AS REPRESENTED—FAILURE TO PROVE FRAUD—ASSIGNMENT OF CONTRACT BY VENDORS—ASSIGNEES NOT MADE PARTIES TO ACTION —FAILURE OF CLAIM FOR RESCISSION—AMENDMENT OF STATEMENT OF CLAIM—IMPLIED WARRANTY OF FITNESS—SALE BY DESCRIPTION—CONDITION TREATED AS WARRANTY — BREACH — DAMAGES — COSTS.

Horrocks v. Signal Motor Truck Co., 16 O.W.N. 132. [Affirmed, 17 O.W.N. 1.]

CONTRACT FOR SALE OF MOTOR-TRUCK — KNOWLEDGE OF VENDOR OF PURPOSE FOR WHICH TRUCK INTENDED—ARTICLE DELIVERED NOT REASONABLY FIT FOR PURPOSE—FINDING OF TRIAL JUDGE ON EVIDENCE—TRUCKS SOLD BY MANUFACTURER AS OF HIS OWN MANUFACTURE—TRUCK ACTUALLY MANUFACTURED BY ANOTHER — IMPLIED WARRANTY — PROPERTY NOT PASSING TILL PAYMENT IN FULL—RIGHT OF PURCHASER TO RESCIND CONTRACT, PAYMENT IN FULL NOT HAVING BEEN MADE.

The plaintiff bought from the defendants, a manufacturing company, a motortruck for use in the plaintiffs' business of carriers. The defendants were informed of the purpose for which the truck was required and the character of the work it would be put to, and they knew the character of the highways upon which it was to be used. The contract was in writing. The truck was described in the writing as a "Sawyer-Massey motor-truck." The price was $5,600, $1,000 of which was paid in cash the balance was payable by instalments, for which the plaintiffs gave promissory notes. Each note, in addition to identifying the contract of sale and the subject-matter, provided that "the article for which this note is given shall remain the property of Sawyer-Massey Co. until all notes or renewals given in settlement are paid in full:"—Held, in an action for rescission of the contract, that the defendants must be regarded as having undertaken to furnish a truck suitable for the plaintiffs' purposes. [Bristol Tramways etc. Carriage Co. v. Fiat Motors, [1910] 2 K.B. 831; Canadian Gas Power & Launches v. Orr, 23 O.L.R. 616, and Alabastine Co. v. Canada Producer & Gas Engine Co., 30 O. L.R. 394, followed.] It appeared in evidence that the truck sold was not manufactured by the defendants, but was built for them by another company, and sold under the "Sawyer-Massey" name:—Held, that, in the absence from the contract of specific words to the contrary, there is an implied warranty, in the nature of a condition or undertaking, where the vendor is a manufacturer, that the goods are of his manufacture. [Johnson v. Raylton, 7 Q.B.D. 438, followed.] And held, that there was a breach of this warranty or condition, the truck not being in any proper sense a "Sawyer-Massey motor-truck." Judgment was given in favour of the plaintiffs declaring the contract rescinded and directing the return of the money paid and delivery up of the promissory notes in the defendants' hands.

Randall v. Sawyer-Massey Co., 43 O.L.R. 602.

Plaintiff sued defendant to recover the price of a gasoline engine sold to defendant. It appeared that defendant had given an order for an engine warranted to be well made of good material and durable, and which stated that there were no conditions or warranties in connection with the sale other than as set out therein. The order was also expressed to be subject to the right of the defendant to cancel before a certain date if he found an engine that suited him better. On this reservation being brought to the attention of the company's sales manager he wrote the defendant specifying the qualities of the engine, comparing it with other engines, and guaranteeing it to develop 25 horse power, although nominally rated at 20 horse power, and as a result of this letter the defendant purchased the engine. The engine would not develop 25 horse power nor 20 horse power, and was unable to do the work for which it was procured, and the defendant returned it. The learned trial judge gave judgment for the plaintiff for the amount of its claim, and for the defendant by way of damages for his counterclaim for the full amount of the sale price, treating the matter as if there had been a total failure of consideration. On appeal it was held, the letter written by the company sales manager is a subsequent agreement by the company for the purpose of inducing the defendant to purchase, and the provision in the order excluding all warranties other than therein expressed could apply only to what had taken place up to that time, and did not affect any subsequent warranties, and consequently the warranty was binding upon the plaintiff company. (2) That the breach of warranty complained of being that contained in the letter as to the ability of the engine to do certain work, and not of the warranty of quality contained in the order, the defendant had no right to return the engine, as provided in the original order, and obtain an award on the basis of entire failure of consideration, but was entitled only to damages on the basis of the difference in value between the article delivered and the value of an article of the quality represented in the letter.

The Manitoba Windmill and Pump Co., v. McLelland, 4 S.L.R. 500.

Plaintiff sold defendant a gasoline engine guaranteed to be made of good material and in a workmanlike manner. The defendant accepted the machine and employed three different men having ordinary experience in operating such engines to operate it, but none of these men could get it to work. The company gave, it was found, no evidence which shewed that the failure of the defendant to operate the engine was due to any fault of the defendant. The Trial Judge gave judgment for the plaintiff for the price of the machine, but allowed the defendant on counterclaim by way of damages the whole price of the engine. On appeal it was held, that the meaning of the warranty in question was not that the various parts of the engine were made in a workmanlike manner, but that the engine as a whole was made in a workmanlike manner; that is, that when completed it could be operated. (2) That such a warranty is not satisfied by shewing that the

engine could be operated by experts, but must be so constructed that it can be operated by any person possessing the skill and knowledge necessarily possessed by the average operator. (3) The defendant having shewn that the engine could not be operated by the average operator, the onus was cast on the plaintiffs of shewing that the machine was in proper shape when delivered, and this not having been done the defendant was entitled to damages on breach of warranty.

Canadian Fairbanks Co. v. Thompson, 4 S.L.R. 475.

"HEALTHY AND CLEAN"—REDHIBITORY DEFECT.

The sale of a mare made with warranty against any concealed defect or illness not perceptible on a medical examination by the veterinary does not cover defects which could be discovered by attempting to drive the mare, such as those of kicking, baulking, or stubbornness of an unbroken mare. The words "healthy and clean" signify only exemption from redhibitory defects.

Wizer v. Bonnami, 49 Que. S.C. 170.

ACTION FOR PRICE OF ENGINE SOLD—DEFECTS—ORAL REPRESENTATION OF AGENT OF VENDOR—PROVISIONS OF WRITTEN AGREEMENT—NOTICE OF DEFECTS—IMPUTED KNOWLEDGE OF CONTENTS OF WRITTEN AGREEMENT.

White v. Hobbs, 5 O.W.N. 659.

SALE OF ANIMALS—WARRANTY—BREACH—EVIDENCE—PREPONDERANCE OF TESTIMONY—RETURN OF HORSE—DAMAGES—PURCHASE-PRICE AND EXPENSES—ANTICIPATED PROFITS—REMOTENESS.

Wood v. Anderson, 7 O.W.N. 101.

CONTRACT—SALE AND INSTALLATION OF GAS ENGINE AND PRODUCER PLANT—GUARANTEE AS TO FUEL CONSUMPTION AND AS TO LOSS OWING TO FAILURE OF PLANT—BREACH—DELAY IN INSTALLATION—LIMITATION OF LIABILITY—CONSEQUENTIAL DAMAGES—CONSTRUCTION OF CONTRACT—DEFECTS IN MATERIAL AND WORKMANSHIP—PRINCIPLE UPON WHICH DAMAGES ALLOWED—REFERENCE TO ASSESS DAMAGES—COSTS.

Baldwin v. Canada Foundry Co., 6 O.W.N. 152.

WARRANTY OF FITNESS AND GENUINENESS—MOTOR TRUCK—BREACH OF WARRANTY—DAMAGES.

Defendants sold a motor truck to plaintiffs, whose purchasing agent knew nothing about motor trucks, on the representation that it was a "three-ton Mack truck" and that it was so rated, while, in fact, the said truck was classified by its maker as a two-ton truck:—Held, that the plaintiffs were entitled to damages for breach of warranty, the issue being not whether a new truck would carry three-ton loads for a period of several months without breaking down, but whether it was, in the judgment of those skilled in the manufacture of trucks, capable of doing and maintaining that for a period which could be considered the life of the truck.

Victoria Saanich Motor Transportation Co. v. Wood Motor Co., 20 B.C.R. 537, 29 W.L.R. 904.

Plaintiffs approached defendant with a view to selling him a piano, and defendant stated that the piano which he had in mind to purchase was one manufactured by the Heintzman Co., known as "The Classic." They stated they had a piano of that description which they could sell at a lower price, and stated that it was of the same quality as "The Classic" manufactured by the Heintzman Co. The defendant then gave the order and they shipped to him a piano manufactured by them, and called "The Classic," which the defendant refused to accept. It was shewn that the Heintzman piano was a high-grade piano, while the one shipped was a low-grade piano. In an action for the price it was held, that the sale was one by description, and there was an implied condition that the goods should answer that description, and, as the piano shipped did not answer that description, the defendant was entitled to refuse to take delivery.

Mason & Risch Co. v. Mooney, 4 S.L.R. 303.

Plaintiff, being desirous of securing flax for seed, heard that defendant had seed flax for sale, and went to him with a view to purchasing. He inquired of defendant whether such seed was clean and free from noxious weeds and mustard, and was assured that it was. Plaintiff, therefore, as it was found, on the strength of such representation, purchased from defendant sufficient seed for the land to be sown. When the crop came up, it was found to be full of mustard, a very noxious weed. It was found that the crop had been deteriorated by at least 25 per cent by reason of this mustard, and that to eradicate it, the land would require to be summer-fallowed during the two succeeding seasons. The plaintiff also relied on the provision of c. 128 R.S.C. and the Noxious Weeds Act of Saskatchewan, prohibiting the sale of unclean grain. It was held, that it was the intention of the parties that the representations made by defendant at the time of sale should form part of the contract, and what took place constituted a warranty. (2) That the seed sold did not comply with the warranty, whereby the plaintiff suffered damage, for which he was entitled to recover, the damage sustained being that which would naturally flow in the ordinary course of things from the defendant's act. (3) The damage contemplated in this case would be the amount of injury which would ordinarily flow from a breach under the special circumstances made known at the time of sale, and which would be injury to crop, loss of crop and injury to land. (4) In assessing such damages, the injury to crop by reason of loss occasioned by the growth of mustard should be allowed, and also the loss of the

use of the land for the following year, when it would require to be summer-fallowed, the fair rental of the land being the basis of such damage. (5) Chapter 128 R.S.C. did not assist the plaintiff, as flax was not mentioned in that Act, nor did it apply to sales by a farmer at his own granary. (6) That the provisions of the Noxious Weeds Act of Saskatchewan, prohibiting the sale of unclean grain gave no cause of action to the plaintiff, that statute being passed for the benefit of the general public, and had nothing to do with the private bargains of individuals.

Nargang v. Kirby, 4 S.L.R. 306, 18 W.L.R. 625.

CONTRACT — BRICK-MAKING PLANT — SALE AND INSTALLATION—CERTAIN CAPACITY REQUIRED — TEST—COMPANY — ACTION —STATUS—APPEAL—REHEARING — B. C. STATS. 1917, c. 10, s. 2 (3).

A contract for the sale and installation of a brick-making plant provided that the final payments therefor should be made within certain periods after the plant was completed and had been demonstrated to be of a capacity of 17,000 good merchantable bricks in 10 hours or 34,000 merchantable bricks in a day of 20 hours. It appeared from the evidence that the presses have to be worked 6 or 7 hours to produce the necessary quantity of unbaked bricks to fill the retort in which they are hardened by steam, so that when the plant is started the hardening section of it must remain idle for 6 or 7 hours. An action for the balance of the purchase price was dismissed on the ground that it had not been demonstrated the plant was of the required capacity. Held, that in making a test of the capacity of the plant allowance must be made for the initial time required to produce the necessary quantity of unbaked bricks to fill the retort and that the time for the test should then start when both sections of the plant are working continuously.

Komnick System Sandstone Brick Machinery Co. v. B.C. Pressed Brick Co., 26 B.C.R. 191, [1919] 1 W.W.R. 645, reversing judgment of Clement, J.

COAL—SPECIAL PURPOSE—IMPLIED WARRANTY OF FITNESS—PURCHASER SELECTING AND MIXING GRADES—WARRANTY NOT APPLYING.

Plaintiff sold defendant a certain quantity of lump coal, subsequently together a certain quantity of lump coal and a certain quantity of slack coal. The first consignment, after sale, was lost at sea but defendant received and used the balance. The court found on the evidence that plaintiff was aware that the coal was intended for a special use, viz., for steaming purposes. In giving the order for the coal, defendant made his own selection of grades. Lump coal is a superior, slack coal an inferior, quality. They were used by defendant in mixture. Through the loss of the first consignment the mixture was depreciated in quality. The coal as used failed to fulfil the purpose intended. On defendant claiming on an implied warranty of fitness it was held that, though if plaintiff had simply sold for steaming purposes a certain quantity of coal, or possibly if the order for the lump coal or slack coal had been given and filled separately, and the coal used separately, there would have been an implied warranty of fitness for the purpose intended, such warranty did not apply where the two grades were (by direction of defendant) shipped, and used, together.

Western Fuel Co. v. Rainy River Pulp & Paper Co., [1919] 1 W.W.R. 323.

GOODS ORDERED FOR SPECIFIC PURPOSE—DESCRIPTION—QUALITY—RIGHT TO REJECT.

Brownlie v. Sydney Cement Co., 45 N.S.R. 90, 9 E.L.R. 149.

WARRANTY — FITNESS OF MACHINERY — WAIVER—NOTICE.

Sawyer & Massey Co. v. Ferguson, 20 Man. L.R. 451, 16 W.L.R. 667.

MANUFACTURED ARTICLES — WRITTEN CONTRACT—IMPLIED CONDITION AS TO FITNESS—COLLATERAL CONTRACT.

Canadian Gas Power & Launches v. Orr, 23 O.L.R. 616, 19 O.W.R. 235. [Affirmed 46 Can. S.C.R. 636.]

(§ II C—36)—SEED.

Where grain is sold as "seed flax" by sample and the seed delivered does not correspond with the sample, the delivery being contaminated with noxious mustard seed, the seller may be held in damages under s. 17 (2) (c) of the Sale of Goods Ordinance N.W.T. Ordinances (Alta.) 1911, c. 39, although the buyer may have omitted to examine the goods delivered but relied upon his warranty and examination of the sample. Where a contract is made for the sale of goods by description there is, under s. 16, subs. 1, of the Sale of Goods Ordinance N.W.T. Ordinances (Alta.) 1911, c. 39, an implied condition that the goods were reasonably fit for the purpose intended; and if, by acceptance of the goods, this implied condition were waived, and reduced to a warranty only, such warranty would be covered by s. 13 of the same Ordinance. Where grain is sold as "seed flax" and it was at the time of sale contaminated with noxious mustard seed, the seller may be held in damages for a breach of warranty under s. 16 (1) of the Sale of Goods Ordinance, N.W.T. Ordinances (Atla.) 1911, c. 39, on the ground that the seed was not reasonably fit for the purpose for which it was intended. Where a contract is made for the sale of goods by sample there is under s. 17 (b) of the Sale of Goods Ordinance (Alta.) 1911, c. 39, an implied condition that the bulk should correspond to the sample.

Carlstadt Development Co. v. Alberta Pacific Elevator Co., 7 D.L.R. 200, 4 A.L.R. 366, 21 W.L.R. 433, 2 W.W.R. 404.

SEED—DAMAGES.

A seller of flax seed, for seeding purposes, who supplied seed infected with wild mustard, is liable to the buyer for the loss occasioned thereby.

Wright v. Nelson, 35 D.L.R. 603, 11 A. L.R. 567, [1917] 2 W.W.R. 708.

CLOVER SEED—"CLEAN AND CLEAR OF FOUL SEED"—EVIDENCE—FINDINGS OF JURY—QUALIFIED WARRANTY—GOVERNMENT STANDARD—SEED CONTROL ACT, 1 & 2 GEO. V. c. 23, s. 8 (D.)

Byrnes v. Symington, 12 O.W.N. 107.

Plaintiffs, being desirous of purchasing flax for the purpose of seed, approached defendant, who dealt in flax, with a view of purchasing. They told defendant that they required the flax for seed, and asked if he could supply them. The defendant stated that he would give them what he could from his granary, but that he had a mortgage on some flax to be delivered later, and they could have that if they were satisfied with it. On this other flax being brought in, the plaintiffs examined it, and, on being asked how they liked it, stated it was all right and they would take it. They now alleged the flax to be unfit for seed, and that by reason thereof they lost the crop which they should have had during that season, alleging that, in buying, they relied on the defendant's skill and judgment to supply flax reasonably fit for the purpose required, it was held, that while the purpose for which the flax was required was made known, in order to raise an implied warranty of fitness, there must be evidence that the buyer relied on the seller's skill and judgment, and from the circumstances of this case no such implied warranty could be found.

Ordway et al. v. Olson, 4 S.L.R. 343.

SALE OF GOODS—FLAX SEED—REPUDIATION—DAMAGES FOR BREACH—QUESTION AS TO QUALITY OF SEED.

Major v. Turner, 20 O.W.R. 570.

(§ II C—37)—FITNESS FOR BREEDING.

A sale of a stallion cannot be rescinded by the purchaser because of the animal's vicious disposition where the evidence shewed that it had been quiet and gentle while the vendor owned it, except on one occasion when it attacked him, of which the vendor told the purchaser before the sale, though subsequently the horse became entirely unmanageable and dangerous.

McPherson v. Faris, 5 D.L.R. 385, 4 A. L.R. 373, 21 W.L.R. 654, 2 W.W.R. 643.

PEDIGREE—FITNESS FOR BREEDING—DAMAGE—QUANTUM.

That a mare was sold as standard-bred with a pedigree but no pedigree was furnished by the seller as agreed, is ground for awarding damages to the buyer for the diminished value because of the absence of the pedigree; but notice to the seller is not to be implied from such circumstance that the buyer was purchasing for breeding purposes; nor can damage be awarded in respect of lost profits because of the buyer's inability to register the mare's colts, where the buyer had not informed the seller that he was buying for breeding purposes. [Sapwell v. Bass, [1910] 2 K.B. 486, and Hadley v. Baxendale, 9 Ex. 341, applied.]

Steinacker v. Squire, 19 D.L.R. 434, 30 O.L.R. 149.

WARRANTY—FOXES—FITNESS FOR BREEDING—INTERPRETATION.

On the sale of a pair of black foxes for breeding purposes with an undertaking to make an exchange should the buyer "fail to get a good black male from either pair mated" to other foxes owned by the buyer, there is merely a warranty that the quality of the foxes were such that as the result of breeding in the manner specified in the contract one good black male would be found among the progeny; there is no undertaking to insure the lives of the foxes and there is no right on the part of the buyer to demand another male when the female of the pair died and the male was successfully mated, but the progeny were destroyed by the mother fox before they could be removed from the kennel.

Baird v. Clark, 19 D.L.R. 762, 7 O.W.N. 535, 8 O.W.N. 113.

STALLION—FITNESS AS FOAL-GETTER.

Where an agreement for the sale of a stallion stipulates that in the event of its deficiency within a fixed period as a foal-getter, a substitute stallion will be furnished in exchange by the seller, provided certain stated particulars (customary and reasonable) shall be recorded and furnished by the buyer, such particulars will be construed strictly as a condition precedent to the special remedy so stipulated, and the seller's omission to furnish the usual printed tally sheet for the record does not impair his right to insist upon the condition. [First National Bank v. Matson, 2 A.L.R. 249, distinguished.]

Elgin City Banking Co. v. Mawhinney, 17 D.L.R. 577.

STIPULATION AS TO BREED—MIXED BREEDS.

An agreement stipulating the sale of foxes "purchased by the vendor from C. Dalton and W.R. Oulton in 1911," does not entitle the buyer to demand the delivery of foxes of the Dalton breed alone.

Coffin v. Gillies, 24 D.L.R. 317, 51 Can. S.C.R. 539, affirming 7 O.W.N. 354, which reversed 6 O.W.N. 643.

HIGH GRADE SEAL COAT.

Representing a coat to be a "high grade Alaska seal coat" constitutes a warranty as to the quality of the fur and not of the makeup of the coat, which will entitle the buyer to recover the difference in value if the coat turns out to be of a medium grade only.

Laleune v. Fairweather, 25 D.L.R. 23, 25 Man. L.R. 783, 32 W.L.R. 917, 9 W.W.R. 567.

FRAUD—WARRANTY.

Brothers v. McGrath, 1 D.L.R. 916, 3 O. W.N. 806

SALE OF HORSE—GUARANTEE—APPARENT DEFECTS—CORROBORATIVE EVIDENCE—C.C. (QUE.), 1012—C.C.P. 327, 359.

When the direct evidence of the extent of the guarantee given at a sale by a vendor to a purchaser of a horse is contradicted, and inconsistent, it is the duty of the court to look into the other evidence for corroboration.

Jutras v. Boivert, 25 Rev. de Jur. 155.

(§ II C—39)—IMPLIED WARRANTY—MERCHANTABLE ARTICLE—BUYER'S KNOWLEDGE.

The implied warranty of merchantableness in clause 2 of s. 16 of the Sales of Goods Ordinance, c. 39, Can. Ord. 1898, is negatived where the buyer makes an examination of the goods on its delivery and, though found to be defective, fails to reject them.

Henningsen Produce Co. v. Poggiolli, 11 D.L.R. 182, 23 W.L.R. 871, 4 W.W.R. 179.

D. EFFECT OF INSPECTION; OR OPPORTUNITY TO INSPECT.

(§ II D—40) — MACHINE — INSPECTION —NOTICE OF DEFECTIVE WORKING.

Steven v. Dick, 16 D.L.R. 860, 27 W.L.R. 578.

OPPORTUNITY TO INSPECT — PURCHASE OF GROWING HAY—REFUSAL TO ACCEPT DELIVERY — OPPORTUNITY GIVEN PURCHASER TO INSPECT—PASSING OF PROPERTY—IMPLIED WARRANTY—JUDICIAL DISCRETION AS TO AWARDING INTEREST.

Garcis v. Watson, 7 D.L.R. 791, 2 W.W. R. 238.

The unloading of such merchandise as shovel handles by the buyer and taking them into his store, where it is shewn that inspection in the cars would not be practicable, and would entail payment of demurrage or storage charges, does not constitute acceptance of the goods, where, after examination of the goods and discovery of defects, the buyer promptly notifies the seller of his refusal to accept them; under such circumstances the buyer need not bring a redhibitory action under art. 1530 C.C. (Que.), but can bring an action for rescission of contract for nonfulfilment of the vendor's obligation (art. 1065), and therefore the buyer is not obliged to bring suit immediately.

Lachute Shuttle Co. v. Frothingham, 8 D.L.R. 417, 22 Que. K.B. 1.

F.O.B.—REFUSAL OF INSPECTION—LIABILITY.

In a sale of goods f.o.b. subject to inspection, the seller's refusal, after the goods have been shipped, to guarantee the buyer against any loss he might suffer on a resale owing to inferior quality, is not a refusal to permit inspection and the buyer's nonacceptance of the goods on the ground of such refusal renders him liable to the seller for damages for nonacceptance.

Morrison v. Morrow, 30 D.L.R. 350, 36 O.L.R. 400.

OF GOODS BY SAMPLE—OPPORTUNITY TO INSPECT — ACCEPTANCE OF GOODS — IMPLIED WARRANTY—GOODS NOT UP TO SAMPLE—RESCISSION OF CONTRACT—DAMAGES.

In a contract for sale by sample the following conditions are implied: (1) that the bulk shall correspond with the sample in quality; (2) that the buyer shall have a reasonable opportunity of comparing the bulk with the sample; (3) that the goods shall be free from any defect rendering them unmerchantable, which would not be apparent on reasonable examination of the sample. If, after an opportunity is afforded to the buyer to compare the bulk with the sample, he proceeds to take the goods into his possession or deals with them, he will not be allowed to repudiate the bargain in toto and claim that the property has never passed but he is driven to rely upon the implied warranty, the condition becoming a warranty on change of ownership, for the breach of which compensation can be sought only in damages.

Hallam v. Bainton, 48 D.L.R. 120, 45 O. L.R. 483.

DAMAGED AUTOMOBILE—NONDISCLOSURE.

On the sale of a chattel (e.g. an automobile), where there was nondisclosure by the seller of the fact that the chattel had been damaged and the damages repaired, although the chattel could still be classed as new, as represented to be, but nothing was done by the seller to induce the buyer not to avail himself of the means of knowledge within his reach, the buyer who accepts the chattel without investigation will be denied damages in respect of such nondisclosure where no material damage had resulted to the chattel so as to make it any less valuable after being repaired, particularly where it was found that such nondisclosure was not designed. [New Brunswick v. Conybeare, 9 H.L.C. 711, 742, applied; Addison v. Ottawa Taxicab Co., 16 D.L.R. 318, distinguished.]

Lee v. Chapin, 23 D.L.R. 697, 8 W.W.R. 436, 31 W.L.R. 113. [Affirmed in 25 D.L.R. 299, 9 A.L.R. 74, 9 W.W.R. 228, 32 W.L.R. 509.]

IDENTITY OF ENGINE ORDERED—DIFFERENCE IN QUALITY—CAVEAT EMPTOR.

Where an engine is identically of the same make as the one ordered, the difference between a new engine and an old engine is a difference in quality and not in kind, and any warranty in respect thereof is excluded by the terms of the agreement. The defendant having ordered the identical engine that was shipped to him, he was not entitled to any other engine, and was not justified in refusing to accept delivery or to make settlement, but such engine was nevertheless subject to the warranties con-

tained in the original agreement, and as the Trial Judge's judgment was to the effect that there was a breach of warranty, there should either be a new trial on that question, or a reference to ascertain the amount the defendant would be entitled to set off against the plaintiff's claim. The engine delivered not being new in all its parts, differed in kind and not simply in quality from the engine which was ordered, and within the contemplation of all parties to the agreement; and the warranties in the agreement would only become operative as against the defendant when an engine of the kind contemplated by the parties had been furnished; the inspection made by the defendant of the engine was of such a casual nature that the doctrine of "caveat emptor" had no application. The parties had appropriated in fulfillment of the contract, or more correctly, in substitution for the engine ordered, the engine which was inspected by the defendant and shipped to him, and there being no express warranty with respect to that particular engine, the defendant could not now say that it failed to fulfil any warranty expressed or implied contained in the original agreement.

Haug v. Baade, 8 S.L.R. 126.

REJECTION BY PURCHASER.

The sale of a system of lighting by gasoline, made on the condition that it will give satisfaction, gives the purchaser the right to give notice to the vendor of his refusal to accept it, and in such case the latter is obliged to remove it. The purchaser is not obliged to give the vendor the reasons for his refusal, nor to submit them to the court.

Stonehouse v. Valiquette, 47 Que. S.C. 308.

DUTY TO EXAMINE—AGENT—LIABILITY.

One who buys hay for another and does not inform the vendor, letting him believe it is for himself, is personally liable. A purchaser should examine the thing sold on taking possession, and his default in doing so prevents him afterwards from complaining of apparent defects which it may have.

Dumaine v. Comeau, 24 Rev. Leg. 105.

INSPECTION.

In an action for breach of a contract of sale of oats by the vendee refusing to accept delivery on the allegation that the oats were unmerchantable, it appeared that there was no express warranty of quality by the seller, that the seller had not grown them, had not been guilty of any fraud, and that the vendee might have inspected the oats at the time of entering into the contract had he so desired:—Held, that the case was one to which the maxim caveat emptor applied, that vendee had no right to refuse acceptance of the oats, and was liable in damages for breach of contract.

Mathieson v. Tremblay, 12 E.L.R. 79.

MANUFACTURE AND DELIVERY OF LUMBER—SHIPMENT—PAYMENT FOR LUMBER DELIVERED—INSPECTION OF LUMBER—INTEREST.

Olds v. Owen Sound Lumber Co., 6 O.W. N. 241.

SALE OF HAY—APPARENT DEFECTS—C.C. (QUE.) 1522, 1523—OPPORTUNITY TO INSPECT.

The seller is not bound by reason of defects which, at the time of the sale, are apparent and which the buyer might have known of himself. If a buyer purchases hay, with the intention of reshipping it to a foreign country, it is his duty to examine it at the time of delivery, or at least before reshipping, and if he neglects so to do and such hay is reshipped, the vendor, in the absence of fraud on his part, cannot be held responsible for defects which may have accrued after delivery, or which, if they had in effect really existed at the time of delivery, might have been detected by the buyer, by a mere external inspection of such hay.

Hushion v. Denault, 20 Rev. de Jur. 277.

WARRANTY — APPARENT DEFECTS — C.C. QUE. 1523.

A purchaser has no recourse against a vendor for apparent defects, the existence of which the purchaser has been able to find out himself. A person who has purchased artificial stone, and who complains that, at the time of the sale, the stone was of bad quality, being too green and badly manufactured, will have his action dismissed, as the defect which he claims is an apparent defect which he might have noticed at the time of the delivery.

Marcotte v. Montreal Concrete Tile, 46 Que. S.C. 483.

WARRANTY OF SOUNDNESS NOT FULFILLED—NONACCEPTANCE — PURCHASE BEFORE ARRIVAL OF GOODS AT PLACE OF ACCEPTANCE AND BEFORE LEARNING CONDITION OF GOODS OPENING UP CAR AND ATTEMPTING TO SELL—EQUIVALENT TO ACCEPTANCE — STILL ENTITLED TO ACTION FOR BREACH OF WARRANTY—COURT REFORMING PLEADINGS TO ENABLE COUNTERCLAIM FOR BREACH OF WARRANTY.

Defendant company purchased potatoes from plaintiff which the court found did not fulfill an express warranty as to soundness in the contract. As to car No. 3, plaintiffs' action for price failed as defendant had on its arrival at defendants' warehouse (where under the contract acceptance was to take place) and before ascertaining its condition and wiring nonacceptance, opened up the car and attempted to sell the contents and was held to have thus accepted the goods. [Parker v. Palmer, 4 B. & Ald. 387 followed.] But defendant could still bring action for breach of warranty. And as defendant had counterclaimed in the same action for breach of warranty in connection with car No. 2,

purchased and shipped under the same contract, which counterclaim was held to be well founded, the court reformed the pleadings by amending the counterclaim to extend it to the car No. 4 and directed reference as to damages on the counterclaim as amended.

Symonds v. Clark Fruit & Produce Co., [1919] 1 W.W.R. 587.

WARRANTY—MATERIALS SELECTED BY THE OWNER AND HIS ARCHITECT.

Reid v. Birks, 39 Que. S.C. 133.

E. TEST AND DEMONSTRATION.

(§ II E—44)—WRITTEN NOTICE OF DEFECTIVE WORKING OF MACHINE.

Written notice by the buyer of the defective working of an engine in pursuance of his contract of purchase, required as a condition to the buyer's right to return the engine for breach of warranty, may be waived by the seller sending out an employee to remedy the defects after the time for giving such written notice had expired.

Massey-Harris Co. v. Elliott, 11 D.L.R. 632, 4 W.W.R. 134.

ENGINE—WARRANTY—HORSE-POWER.

A clause in a contract for the purchase of an engine requiring notice to be given in case of any defect in "workmanship or material" does not apply to a warranty that the engine will develop certain horse-power, but only to the warranty that it is well made and of good material.

Hart-Parr v. Wells, 43 D.L.R. 686, 57 Can. S.C.R. 344, [1918] 3 W.W.R. 776, affirming 40 D.L.R. 169, 11 S.L.R. 132, [1918] 2 W.W.R. 239.

WARRANTY—APPROVAL OF THIRD PARTY.

Where the defendant agreed to return the price of an automobile sold the plaintiff, which proved defective, if it were not pronounced satisfactory by a designated person by a certain day, the money must be refunded where the car did not work to the latter's satisfaction at that time; the vendor has no right to demand that it be returned for further repair and to have a further submission and test of same on a subsequent day by the person designated.

Sauermann v. E.M.F. Co., 12 D.L.R. 191, 24 O.W.R. 779, affirming 4 O.W.N. 1137.

The purchaser of a drill outfit cannot escape liability on notes given for the price thereof by shewing that a verbal agreement had not been carried out whereby the seller was to send him an expert driller at its expense to assist in digging the first well, and to remain until the first well was completed, and that, if such were not done, the notes were to be void.

Ontario Wind Engine & Pump Co. v. Eldred, 2 D.L.R. 270, 5 S.L.R. 194, 20 W.L.R. 697, 2 W.W.R. 60.

Where machinery is sold with a warranty that it shall work to the satisfaction of the purchaser, it is the duty of the seller to thoroughly test it, under conditions similar to those in which it is to be used before delivering the machine to the purchaser.

Bonin v. Ontario Wind Engine & Pump Co., 6 D.L.R. 785, 18 Rev. de Jur. 446.

Where a contract for the purpose of a gas producer, a gas engine, and an air compressor for starting it, provided that the vendor should for one year replace, free of charge, all defective parts; that the vendee could not reject the plant except for failure to develop the power guaranteed, and that the machinery should be tested at the vendor's factory; and the vendee was, by the terms of the contract, "urged to be present at the final test," the vendee is not concluded by a shop test of which he was not notified and which he did not attend, since such test was intended as an additional inducement to purchase, and not to put a vendee in a position of having irrevocably committed himself to the purchase on the test proving satisfactory.

Canada Producer & Gas Engine Co. v. Hatley Dairy, Light & Power Co., 4 D.L.R. 599, 22 Que. K.B. 12.

Action for price of a hot air furnace installed by plaintiff in defendant's house on the stipulation that it should be installed on trial, and if not found satisfactory to be taken away, and a new one put in its place:—Held, that upon the evidence the condition had not been complied with, and the defendant was not liable for the price of the furnace installed.

Bell v. Robertson, 12 E.L.R. 414.

SUPPLY OF HAY TO DOMINION GOVERNMENT —HAY REJECTED AS NOT UP TO STANDARD.

Poirier v. The King, 9 E.L.R. 375.

IMPLIED WARRANTY OF FITNESS—EXERCISE OF JUDGMENT BY PURCHASER.

The plaintiffs sued for damages for breach of an implied warranty, upon the sale of flax by the defendants to them, that the flax was fit for seed:—Held, on the evidence, that the action failed because the plaintiffs purchased the flax on their own judgment, and because they failed to establish that it was not reasonably fit for seeding purposes.

Ordway v. Olsen, 18 W.L.R. 171.

III. Rights and remedies of parties.

A. IN GENERAL.

Liability of manufacturer or seller for accident resulting from structural defects, see Automobiles, III A—160.

Specific performance of sale of shares, see Contracts, I C—29; Parties, II A—87.

Pleading breach of warranty as set-off to note, see Pleading, VI—355.

(§ III A—45)—SALE OF BUSINESS—STOCK IN-TRADE—MUTUAL MISTAKE IN COMPUTING AMOUNTS — RIGHTS AND REMEDIES OF PARTIES.

Whitaker v. Rumble, 45 D.L.R. 745, 14 A.L.R. 348, [1919] 1 W.W.R. 1026.

SHARES—DEFENCES—SALE OF GOODS ACT.

Where an agreement for the sale of shares of stock is absolute and unconditional, it is no defence to an action on a promissory note for the purchase price thereof, that the plaintiff agreed to obtain the shares from a party to whom he hypothecated them and failed to do so, or that the note was delivered on condition that it be subject to the approval of the pledgee who refused to accept it, if the plaintiff can otherwise be required to give title to those shares; the Sale of Goods Ordinance (Alta.) does not apply to a sale of company shares, as under s. 2 (1) of the Ordinance the word "goods" does not include choses in action, and, therefore, the liability for a refusal to pay the purchase price note is not to be fixed by the statutory measure of damages for breach of contract of sale.

David v. Dow, 27 D.L.R. 689, 9 A.L.R. 499, 34 W.L.R. 666, 10 W.W.R. 674.

CAVEAT EMPTOR.

An elevator operator, though he is required to receive all grain offered and to give either storage receipts or cash purchase tickets therefor, under the provisions of subss. (1) and (2) of s. 157 of the Grain Act (Alta.), is not protected by the provisions of that Act in buying grain, where he knew that such grain was under seizure by one claiming a lien under the Thresher's Lien Ordinance (Alta.) and where he failed to make proper enquiries as to the right of the vendor to sell the same; the Grain Act, under the circumstances merely protecting the elevator operator from liability for receiving the same.

Prinneveau v. Morden, 11 D.L.R. 272, 6 A.L.R. 52, 24 W.L.R. 268, 4 W.W.R. 637.

SUPPLY OF MACHINERY AND PLANT—ABATEMENT OF PRICE — SEVERAL ISSUES OF FACTS—FINDINGS OF TRIAL JUDGE—COSTS.

Allis-Chalmers-Bullock v. Algoma Power Co., 6 O.W.N. 240.

SALE OF TIMBER—DELAY IN DELIVERY—INSPECTION—TIME OF SHIPMENT—EVIDENCE—CUSTOM OF TRADE.

Canada Pine Lumber Co. v. McCall, 6 O.W.N. 483.

SALE OF VALUABLE ANIMALS—SELECTION BY VENDOR—FAILURE TO DELIVER—CONSTRUCTION OF AGREEMENT—"AND"—"OR"—ACTION FOR BREACH OF CONTRACT.

Coffin v. Gillies, 7 O.W.N. 354, reversing 6 O.W.N. 643. [Affirmed, 24 D.L.R. 317, 51 Can. S.C.R. 539.]

SALE OF MOTOR CAR — SECOND-HAND CAR TAKEN IN PART PAYMENT — CREDIT OF FIXED AMOUNT, TO BE INCREASED WHEN SECOND-HAND CAR SOLD—REFUSAL OF OFFER TO BUY CAR — EVIDENCE — CONSTRUCTION OF AGREEMENT—FINDING OF TRIAL JUDGE—REVERSAL OF APPEAL.

Ramsay v. Crooks, 6 O.W.N. 180.

SALE OF AUTOMOBILE—REFUND OF PRICE—RETURN OF VEHICLE PUT IN AS PART OF PRICE.

Sauermann v. E.M.F. Co., 4 O.W.N. 1137, 1370, 24 O.W.R. 415, 637.

SALE—LICENSE—REVOCATION OF CONTRACT—ACCOUNT—INTERPRETATION OF CONTRACT—C.C. ART. 1013, 1071, 1472.

If an amount has been paid on the price of sale and the buyer refuses to execute his contract, the seller can keep what he has received. The following contract: "M. A. binds himself to pay to Mr. Durand the sum of $1650 for the goodwill only of the license for the sale of spirituous liquors," is not a sale of the license itself, but of the privilege which it gave the owner of the license to have it renewed.

Archambault v. Durand, 25 Rev. Leg. 288.

(§ III A—50)—GOODS TO BE PROCURED—PROMISSORY NOTE.

One who sells goods to be procured from another, or sells for that other, and receives in his own name a promissory note in payment, is not an indorsee for value without notice of the promissory note so given him.

Robertson v. Norton, 30 D.L.R. 369, 44 N.B.R. 49.

OPTION—RETENTION OF GOODS—REMEDY—DETINUE.

An option to a purchaser to keep the containers of the sold merchandise at a fixed price is, when exercised, a sale, enforceable in an action for goods sold and delivered, and not in detinue.

Canadian Oil Cos. v. Margeson, 35 D.L.R. 298, 51 N.S.R. 331.

REMEDY FOR NONACCEPTANCE—RESALE.

Johnston v. Salmon, 36 D.L.R. 796, [1917] 2 W.W.R. 644.

TIMBER—FORFEITURE OF PRICE UPON NONCOMPLETION OF CONTRACT — ACCEPTANCE.

Dunlap v. Devine, 36 D.L.R. 385, 51 N.S.R. 110.

BROKER—OPTION—LAPSE OF TIME—QUANTUM MERUIT.

At the expiration of the time limit in an option agreement with a broker, the owner is entitled to consider the matter at an end, unless the broker can shew either that there was an entirely new agreement, or that the terms of the old option were either by express agreement, or by implication continued until the sale was effected, he can only recover on the basis of a quantum meruit.

Ackles v. Beatty, 40 D.L.R. 130, 52 N.S.R. 134. [Affirmed, 52 D.L.R. 691, 59 Can. S.C.R. 640.]

NONDELIVERY—MEASURE OF DAMAGES.

The rule for measuring damages for nondelivery of goods laid down in the Sales of Goods Act (R.S.S. 1909, c. 147, s. 49 (3)), namely, that where there is an available market the measure of damages is prima facie to be ascertained by the difference be-

tween the contract price and the market or current price at the time or times when the goods ought to have been delivered, is inapplicable where the price has been prepaid, and in such case, if the market price is higher at the time of trial than at the time specified for delivery, the damages are to be measured by the latter price.

Peebles v. Pfeifer, 11 S.L.R. 249, [1918] 2 W.W.R. 877.

DISPUTE AS TO VALUE—MISTAKE OF VENDOR IN "APPROVAL BILL"—KNOWLEDGE OF VENDEE—PRICE AGREED UPON.

Michaelson v. Babb, 15 O.W.N. 86.

CONTRACT—SALE OF COPPER—QUANTITY—EVIDENCE.

Eckert v. London Elec. R. Co., 57 Can. S.C.R. 610.

CONTRACT—SALE TO RETAILER BY TRAVELER FROM WHOLESALE HOUSE — TERM OF SALE—LIBERTY TO RETURN GOODS UNSOLD — ORAL EVIDENCE TO ESTABLISH TERM — CONTRADICTION BY DOCUMENT AND CONDUCT OF PARTIES — EXTENSION OF TIME FOR PAYMENT—NEW BARGAIN FREE FROM TERM.

Continental Costume Co. v. Appleton, 17 O.W.N. 258.

ACTION TO SET ASIDE A SALE.—SALE OF HAY—DELAY—C.C. QUE. ART. 1530.

One who buys hay and receives delivery the following day, and immediately reports alleged defects in the hay cannot, when he is sued, 15 days later, refuse payment for the reason that the hay was not of the quality agreed on. He ought to take the initiative himself, and sue his seller to annul the contract of sale, within 9 days after the discovery of the alleged defects, the grounds set up in the defence being of the nature of an action to set aside the sale.

Duclos v. Dubrofsky, 25 Rev. Leg. 47.

ACTION IN DIVISION COURT UPON PROMISSORY NOTE GIVEN FOR PART OF PRICE—WARRANTY — BREACH — DISPUTE-NOTE NOT SETTING UP COUNTERCLAIM ON WARRANTY—VERDICT OF JURY IN EFFECT AWARDING DAMAGES BY DEDUCTION OF SUM FROM AMOUNT OF NOTE—JUDGMENT—APPEAL—COSTS.

Fanning v. Wales, 15 O.W.N. 259.

DEFECTS—ACTION—REASONABLE TIME.

When a purchaser accepts and keeps goods which he has bought, and later commences an action in damages against the vendor, on the ground of defects which he discovered in the goods after their delivery, he must bring his action within a reasonable time.

De Felice v. O'Brien, 27 Que. K.B. 192. [Affirmed, 45 D.L.R. 295, 59 Can. S.C.R. 684.]

ANIMAL—REDHIBITORY ACTION—DELAY.

A redhibitory action, commenced 30 days after the sale of a horse, is not brought within a reasonable delay, when the purchaser might have ascertained the animal's defects the day after the contract, and when the parties live in the same place.

Suthergill v. Portelance, 24 Rev. Leg. 473.

ASSUMPSIT—ATTACHMENT.

If goods are delivered to a person who asserts that he never bought them, but who refuses to return them, the plaintiff's action should be in revendication or payment of their value, in default of their being returned, and not by an action of account for sale and delivery of goods.

Léger v. Viau, 53 Que. S.C. 501.

AUCTION SALE—LIABILITY OF PURCHASER—DELAY—DAMAGES.

As a general rule the purchaser of goods sold at public auction, who does not immediately pay the price at which the article was knocked down to him, must pay damages for his failure to do so. But, if such person had been in the habit, for many years, of buying at the same auction rooms, and that according to the custom of the vendor he was always granted a delay of three, five or even eight days, he should not be held responsible for his default in payment unless the vendor at the opening of the bidding had given notice that no delay would be allowed for payment for goods sold.

Montreal Fruit Auction Co. v. Payne, 53 Que. S.C. 503.

SALE OF SUBSTITUTED GOODS—INVESTMENT OF PROCEEDS IN GOVERNMENT SECURITIES—CONDITIONS—C.C. (QUE.) ARTS. 953a, 951 (a) — R.S.Q. ARTS. 5899, 5893.

Re Smith, 54 Que. S.C. 512.

BOTTLED BEER SOLD IN CASES—CONTRACT—INVOICES — RETURN OF EMPTY CASES AND BOTTLES — CREDIT FOR PART RETURNED—EVIDENCE IN REPLY—CUSTOM OF TRADE—ADMISSIBILITY.

Hamilton Brewing Co. v. Thompson, 12 O.W.N. 351.

SALE OF FLOUR—FAILURE TO DELIVER FULL QUANTITY—MONTHLY DELIVERIES — DELIVERY "AS REQUIRED"—POSTPONEMENT OF TIME FOR DELIVERY—ACQUIESCENCE — ENTIRE CONTRACT—BREACH—DAMAGES—RISE IN PRICE OF FLOUR.

Gerow v. Hughes, 13 O.W.N. 8; Sierichs v. Hughes, 13 O.W.N. 10.

SALE OF GOODS TO BE MANUFACTURED—ACTION FOR PRICE — DEFECTS—COUNTERCLAIM—DAMAGES—COSTS.

McGill Chairs v. Jones, 13 O.W.N. 15.

SALE—ACTION FOR PRICE—MACHINERY NOT FIT FOR WORK FOR WHICH INTENDED—FINDING OF FACT OF TRIAL JUDGE—DISMISSAL OF ACTION.

Toronto Type Foundry v. Ormsby, 13 O.W.N., 145.

WRITTEN MEMORANDUM—NO EXPRESS CONDITION OF PREPAYMENT—STATEMENT OF TERMS OF PAYMENT — "HALF-CASH" — CHEQUE GIVEN FOR HALF OF PRICE OF GOODS—DISHONOUR OF CHEQUE—SUBSEQUENT ACCEPTANCE OF SECURITY — PROPERTY PASSING—GOODS RETAKEN BY VENDORS—WRONGFUL TAKING—ASSIGNMENT BY PURCHASER FOR BENEFIT OF CREDITORS—ACTION BY ASSIGNEE FOR VALUE OF GOODS.

Lawson v. Martin, 13 O.W.N. 306.

SALE — CREDIT SALE — CONTRACT — CONSTRUCTION — NON-DELIVERY — ACTION FOR DAMAGES FOR — MONTHLY DELIVERIES—FAILURE TO TAKE STIPULATED QUANTITIES — DEFAULT — PAYMENT "DUE" WHEN DEMANDED — WAIVER — JUSTIFIABLE REFUSAL TO SHIP—RIGHT OF ACTION—DEATH OF PARTNER—DAMAGES.

Doner v. Western Canada Flour Mills Co., 41 D.L.R. 476, 41 O.L.R. 503, reversing 12 O.W.N. 301.

VENTE A REMERE—REDEMPTION—ACTION TO COMPEL.

A purchaser with a right of redemption, having become irrevocable owner by failure of the vendor to redeem within the stipulated delay, has no right of action to compel him to redeem. He cannot claim the price of merchandise delivered in consideration of the sale on the ground that the contract is one of security and only intended to guarantee payment of the price of the merchandise.

Landry v. Nicole, 51 Que. S.C. 253.

PRICE PER POUND—WARRANTY OF QUANTITY —WORDS WRITTEN OF CHEQUES GIVEN IN PAYMENT — ESTOPPEL — CLAIM FOR SHORTAGE.

The plaintiffs had in their yard a quantity of "scrapped" copper-wire, which they estimated at about 70 tons. The defendant negotiated with the plaintiffs' manager for the purchase of the wire, and was told that it had not been weighed, but was estimated at 70 tons. A bargain of sale and purchase was made at 15 cents per lb. There was no written memorandum of the bargain. The weight turned out to be only 100,700 lbs. The defendant paid the plaintiffs a sum based upon that weight at 15 cents per lb., less a sum representing his loss of profit upon 39,300 lbs., the shortage; and the question in this action was, whether the sale was of 70 tons or of such quantity as the plaintiffs actually had in their yard. On the defendant's cheque for the first payment made on account of the price were written the words "on a/c purchase 70 tons copper." Another cheque contained the words "payment on purchase copper-wire." The defendants had the opportunity of examining the wire before purchase. The defendant was not buying for any purpose which required 70 tons or about 70 tons. The defendant took from the plaintiffs a written warranty of title to the wire, but did not ask for or receive a warranty as to quantity. Held, that the sale and purchase were not of 70 tons, neither more nor less, but were of all the scrapped copper-wire the plaintiffs had and were offering for sale. The words written on the cheques simply ear-marked the transaction in which they were given, and the cashing of them did not estop the plaintiffs from shewing the truth of the matter.

London Electric Co. v. Eckert, 40 O.L.R. 208.

CASH ON DELIVERY—DEDUCTION.

Where a thing purchased is to be paid for in cash on delivery and the vendor receives from the purchaser a letter to the effect that he will not deduct from the price the amount of a claim which the vendor denies, the vendor is not bound to deliver.

Winearls v. Hoey, [1917] 2 W.W.R. 287.

GAS-TANKS — OUT-AND-OUT PURCHASE — FILLING WITH GAS OTHER THAN THAT MANUFACTURED BY VENDORS — UNFAIR COMPETITION—PASSING OFF — ACTION FOR INJUNCTION — EVIDENCE — FINDINGS OF FACT OF TRIAL JUDGE—APPEAL.

Prestolite Co. v. London Engine Supplies Co., 11 O.W.N. 225, affirming 10 O.W.N. 454.

ACTION FOR PRICE — DEFENCE THAT GOODS NOT SUPPLIED IN ACCORDANCE WITH CONTRACT—ACCEPTANCE—DELAY IN DELIVERY—INTEREST—COUNTERCLAIM.

Hoe v. Wilson Publishing Co., 11 O.W.N. 339.

NONDELIVERY — BREACH OF CONTRACT — COUNTERCLAIM—FINDINGS OF FACT OF TRIAL JUDGE.

Canadian Hood-Haggie Co. v. Samwell, 11 O.W.N. 366.

ACTION FOR BALANCE OF PRICE OF DROVE OF CATTLE — ENTIRE CONTRACT — ACCEPTANCE AND RECEIPT OF PART—PROPERTY PASSING—STATUTE OF FRAUDS—PART PERFORMANCE — EVIDENCE — FINDING OF JURY—FINDING OF TRIAL JUDGE—APPEAL.

Clark v. Howlett, 12 O.W.N. 179.

SALE OF MACHINE MANUFACTURED BY PLAINTIFFS—ACTION FOR BALANCE OF PRICE — PERFORMANCE OF CONTRACT—JUDGMENT ORDERING DELIVERY OF MACHINE.

Jones & Moore Electric Co. v. Bateman, 10 O.W.N. 253.

GAS TANKS — FILLING WITH GAS OTHER THAN THAT MANUFACTURED BY VENDORS — UNFAIR COMPETITION — PASSING-OFF —INJUNCTION.

Prestolite Co. v. London Engine Supplies Co., 10 O.W.N. 454, 11 O.W.N. 225.

BREACH OF CONTRACT—SUBSTITUTED CONTRACT—EVIDENCE—DAMAGES.

Mazzareno v. Pastino, 9 O.W.N. 414.

FRAUD AND MISREPRESENTATION—SALE OF PLANT AND BUSINESS—ACTION FOR BALANCE OF PRICE—EVIDENCE—FAILURE OF DEFENDANTS TO PROVE MISREPRESENTATIONS.

Barker v. Nesbitt, 7 O.W.N. 17.

PROCURING GOODS UPON ORDER OF THIRD PARTY—LIABILITY FOR PRICE.

A person who buys goods from a merchant in good faith on an order signed by him scarcely legible in the name of a third party, and who receives the goods at his place of business, promises to pay for them and pays something on account, cannot afterwards refuse to pay the balance due on the ground that he has not contracted for himself.

Gauthier v. Werner, 47 Que. S.C. 400.

SALE OF PLANT AND BUSINESS—ACTION FOR BALANCE OF PURCHASE-PRICE—EVIDENCE — FAILURE OF DEFENDANTS TO PROVE MISREPRESENTATION.

Barker v. Nesbitt, 7 O.W.N. 679.

SALE OF BUSINESS — MISREPRESENTATIONS AS TO WHAT WAS INCLUDED—EVIDENCE —COSTS.

Persofsky v. Finkelstein, 9 O.W.N. 106.

FAILURE TO DELIVER—EVIDENCE—FINDING OF TRIAL JUDGE—APPEAL.

Canada Sand Lime Co. v. Orr, 9 O.W.N. 25.

Plaintiff and defendant entered into a contract for the supply by the former to the latter of a quantity of sewer pipe of specified dimensions at an agreed price. Subsequently to the making of the contract plaintiff was requested to supply a quantity of pipe of a size not included in the contract, but for which a price had been quoted in correspondence leading up to the making of the contract. It was held, affirming the judgment of the Trial Judge that plaintiff was not bound to accept the price quoted for pipe not included in the contract, but was entitled to recover the fair market price of the pipe supplied at the time the order was given.

Richey (Toronto Sewer Pipe Co.) v. Sydney, 45 N.S.R. 202, 9 E.L.R. 313.

ACTION FOR PRICE — CONTRACT BY CORRESPONDENCE—SPECIFICATIONS.

Richey v. Sydney, 9 E.L.R. 313.

(§ III A—51)—RIGHT OF ACTION.

The seller of a dredge, who had knowledge of, or from the circumstances could infer the use of the purchaser was to make of it, must compensate the latter for not delivering it within the stipulated time, so that he may be placed in the position he would have occupied had there been a prompt delivery.

Brown v. Hope, 2 D.L.R. 615, 20 W.L.R. 907, 17 B.C.R. 220.

GOODS SHIPPED WITH DRAFT ATTACHED—REFUSAL TO ACCEPT FOR SHORTAGE.

Where goods are purchased for shipment f.o.b., and are billed in the seller's name, and the bill of lading, with a draft for the purchase money attached, sent a bank for delivery to the purchaser only on payment of the draft, the seller's right of action on the buyer wrongfully declining to accept the draft and take delivery, would not be an action for the price, but for damages for refusal to accept.

Vipond v. Sisco, 14 D.L.R. 129, 29 O.L.R. 200.

RIGHT OF ACTION—DELIVERY F.O.B. CARS—REFUSAL BEFORE DELIVERY TO ACCEPT—RESULT AS TO FORM OF ACTION.

In an action for goods sold and delivered the plaintiff must establish appropriation of goods in pursuance of the contract so as to vest the property in the goods in the buyer; if the latter repudiates the contract before delivery has been made to the carrier at the place where the contract provides for delivery f.o.b., and refuses to accept the goods from the carrier, the action should be a claim in damages for nonacceptance and not for goods sold and delivered.

Butterick Publishing Co. v. White, 18 D.L.R. 636, 28 W.L.R. 941, 6 W.W.R. 1394, 8 A.L.R. 55.

RIGHTS AND REMEDIES OF PARTIES—IN GENERAL—RIGHT OF ACTION—DAMAGES.

A vendor can recover damages under a written contract for the sale of cattle on a breach thereof, notwithstanding a subsidiary agreement having been arrived at as to delivery, the subsidiary agreement not being deemed an essential part of the contract, but merely collateral thereto.

Lewis v. Bragg, 17 D.L.R. 776.

TO MEMBERS OF A CLUB—ASSIGNMENT OF VENDOR FOR BENEFIT OF CREDITORS — NOTES OF TRIAL UNSATISFACTORY—EVIDENCE.

Krienke v. Schafter, 45 D.L.R. 758, 12 S.L.R. 148, [1919] 1 W.W.R. 990.

CONDITIONAL SALE—RIGHT TO RETURN—ACTION ON LIEN NOTES.

Where there has been no breach of warranty by the conditional vendors and there is no right to return the goods, the conditional vendee who has returned them to the premises of the conditional vendor is not thereby entitled to defend an action brought by the latter on the lien notes where the conditional vendor has not exercised its right to repossession and has done nothing inconsistent with the right of the conditional vendee to the possession of the chattels in question.

International Harvester Co. v. Leeson, 23 D.L.R. 674, 31 W.L.R. 219.

EFFECT OF INCORPORATION ON LIABILITY FOR PRICE.

When a person does business under a firm name and gives orders to a manufacturing company, and afterwards turns his business into a stock company under the same name, of which he becomes the manager, and continues to give orders to the same company in his own name, the latter has no personal recourse against him if it was aware of the constitution of the company

and if the goods were delivered and charged in its books to and partly paid for by the company.

Rolph v. Villeneuve, 47 Que. S.C. 29.

LATENT DEFECTS—REMEDY OF PURCHASER—REDHIBITORY ACTION.

The principle of art. 1530 C.C. (Que.) respecting the delay within which the purchaser may bring a redhibitory action equally applies to the action quanti minoris and the action for damages in compensation for the prejudice caused by latent defects. A purchaser cannot, then, bring any one of these actions if he has been in charge of the goods purchased for several months and has finally disposed of them at a reduction. Letters or telegrams of protest or of refusal, declaring that the goods refused are defective, are insufficient; it is the action itself which should be brought with reasonable diligence.

Girard v. Dessert, 48 Que. S.C. 508.

(§ III A—52)—INSPECTOR'S CERTIFICATE—DELIVERY—WARRANTY AS TO QUALITY—BURDEN OF PROOF.

Montreal Abattoirs v. Davies, 41 D.L.R. 747, 24 Rev. Leg. 180.

CHEQUE—SICKNESS—FAILURE OF CONSIDERATION—BREACH OF WARRANTY.

Myklebust v. Galey, 46 D.L.R. 699.

QUALITY.

To an action for the price of goods sold and delivered there may be set up by way of total or partial defence, damages for breach of contract resulting in a diminution of the value of the article sold. The defendant had this right before the Judicature Act and it exists independently of the rules relating to set-off and counterclaim. Only damages so diminishing the value of the goods, however, can be so set up and not any other damages arising from the breach of contract, the latter being recoverable only by way of cross-action or counterclaim, and delay in delivery does not so touch the value of the goods as to permit for damages arising therefrom being set up as a defence by way of diminution of the price.

Edmonton Iron Works v. Cristall, 3 A.L.R. 338.

SALE OF CEDAR TIES—PARTIAL ACCEPTANCE—INFERIOR QUALITY — LIABILITY OF PURCHASER FOR UNACCEPTED PORTION.

Lemay v. O'Brien, 20 Rev. de Jur. 557.

DEFECTIVE QUALITY — ACCEPTANCE — C.C. QUE. ARTS. 1493, 1506, 1522—RECOUPMENT OF PRICE.

When a purchaser of a car of lumber, although complaining of the quality of part of the goods received, accepted the quantity complained of together with the rest of it, and, moreover, sold the whole of it to a third party, he thereby, gives effect to the contract, and cannot claim a diminution of the price on the ground that said part of said lumber was not of quality or grade agreed upon.

Cameron v. Faust, 46 Que. S.C. 491.

(§ III A—53) — QUANTITY — ALL LOGS WHICH VENDOR "SHALL CUT" — CONSTRUCTION.

A sale of logs to be cut by a jobber in these words "all white pine logs which N. shall cut, etc.," must be construed as meaning as many as the jobber will cut, and not the specific number which he may have contracted to cut, notwithstanding a mention made in the sale, and the annexing thereto of a copy of the jobber's contract, by which he undertook to cut 50,000.

Bank of Ottawa v. East Templeton Lumbering Co., 44 Que. S.C. 295.

ACTION FOR DIMINUTION OF PRICE AND FOR REPAYMENT—SALE OF GOODS—GUARANTEE OF QUALITY—DELIVERY—DEFICIENCY—DELAY IN COMMENCING ACTION—C. C. QUE. ARTS. 1504, 1507, 1530.

In a sale of goods carried in the cars of a railway company, the agreement "quality and quantity guaranteed at out turn" constitutes a conventional guarantee of quality and of quantity at the moment of unloading and covers the delivery up to unloading. If, at the time of the delivery, there is found to be a deficiency in the quantity sold and paid for, the purchaser has an action for diminution of the price and for recovery of the money which he has so paid. This action is not subject to the short period of limitation of an action for setting aside a sale; it is only prescribed by 3 years.

Porter v. Bouchard, 55 Que. S.C. 412.

QUANTITY—RESCISSION.

A purchaser of a quantity of cord-wood of a stated measurement, among which the vendor delivered wood of a shorter length than that stipulated, may keep the wood by paying the contract price for the quantity delivered. He is not bound to ask for an annulment of the sale or refuse the wood on such ground.

La Pierre v. Pelchat, 20 Que. P.R. 212.

WEIGHING.

A sale of an undetermined quantity of tobacco, which is drying on the ground at the rate of so much a pound, is not a sale in lump or by weight. In a sale by weight, if the purchaser refuses to accept and weigh the goods sold, the vendor may, after offering to determine the weight and to deliver it, weigh it himself and claim the price from the purchaser.

Jubinville v. Lafond, 54 Que. S.C. 377.

SALE OF GOODS—FAILURE OF VENDOR TO SUPPLY — DAMAGES — MEASURE OF — INCREASED COST OF PROCURING MATERIAL—FAILURE OF CAUSING DELAY AND EXPENSE TO PURCHASER—REMOTENESS OF DAMAGE.

Plaintiff was given damages for defendants' failure to supply sand and gravel pursuant to contract, the damages allowed being for increased amounts paid by plaintiff to procure the material; but he was not allowed for additional loss through having to continue the employment of a large number

of skilled workmen for many days while he was waiting for material or for delays through bad weather in the fall after the time when he could have completed his work but for the defendants' default, such damages being too remote.

Stewart v. Stonewall Gravel, [1919] 1 W. W.R. 344.

MANUFACTURE OF SPECIFIC ARTICLE—UNDERTAKING TO DELIVER BY NAMED DAY—DELAY—PENALTY OR LIQUIDATED DAMAGES.

Pelee Island Navigation Co. v. Doty Engine Works Co., 23 O.L.R. 402, 18 O.W.R. 599.

(§ III A—54)—DEDUCTION FROM PRICE—FREIGHT CHARGES.

On settlement for building materials bought under a contract requiring payment of the freight charges by the seller to the place of delivery, the buyer is entitled to a deduction for such charges and for customs duty paid by him at the point of destination.

Western Planing Mills Co. v. Eaton, 11 D.L.R. 325, 24 W.L.R. 411.

RIGHT TO REJECT—INCOMPLETE SHIPMENT—F.O.B. SALES BY WHOLESALER.

A buyer of goods to be shipped f.o.b. at the dispatching point, with settlement by sight draft, with bill of lading attached, is justified in rejecting the goods if, on inspection of same with the carrier on their arrival, it is found that a part of the goods contracted for have not been included; the buyer in such a case is justified in declining to accept the goods or pay the draft until the shipment is complete.

Vipond v. Sisco, 14 D.L.R. 129, 29 O.L.R. 200.

SHARES — PROMISSORY NOTE — DELIVERY — NOVATION.

Where a promissory note is given for company shares, and made payable in another jurisdiction concurrently with the delivery of the shares, the seller is not entitled to maintain an action upon the original contract in the Court of Quebec, if he is unable, as a result of an attachment by his creditors in the other jurisdiction, to produce the note and tender delivery of the shares. The note does not operate as a novation of the debt.

Saunders v. Deavitt, 28 D.L.R. 546, 49 Que. S.C. 445.

DELIVERY F.O.B.

When goods are bought f.o.b. at New York, the freight from New York to Montreal to be paid by the purchaser, the delivery of the goods to a railway company designated by the latter entirely frees the vendor from all responsibility, which from that time falls on the purchaser.

Spiegelberg v. Helleur, 24 Rev. Leg. 147.

DAMAGE IN TRANSIT.

In shipping goods the shipper acts as the agent of the person to whom the goods have been consigned, and the latter is responsible for the cost of carriage and obliged to bear the losses and damages which may happen during transportation.

National Breweries v. Guillemette, 50 Que. S.C. 329.

REPUDIATION OF CONTRACT BY BUYER—FAILURE OF SELLER TO PREPAY FREIGHT AS AGREED.

Greer v. Dennison, 21 Man. L.R. 46, 18 W.L.R. 225.

(§ III A—55)—WHERE VENDEE IS LIABLE ON "QUANTUM VALEBANT."

Notwithstanding a special contract for the sale of a quantity of goods at a specified price, where the vendee accepts a certain number of the goods, he is liable for their value on quantum valebant, though the goods accepted were not up to the contract. [Cutter v. Powell, 6 Term R. 320, 2 Smith's L.C., 9th ed., 1912 (and similarly 11th ed., 1903, Vol. 2, p. 24), followed.] Where a vendee becomes liable on quantum valebant for goods sold and delivered, the liability accrues as soon as the goods are retained by him, notwithstanding that the period of credit under the original agreement had not expired.

Harquail Co. v. Roy, 7 D.L.R. 282, 41 N.B.R. 255, 11 E.L.R. 190.

(§ III A—56)—CHATTELS — CONDITIONAL SALE—COLLATERAL LAND MORTGAGE.

The fact that an agreement for the purchase of chattels provides that the buyer shall give the seller a mortgage on certain designated land to secure the payment of the purchase money does not render a mortgage, given in compliance with such stipulation but contained in an instrument separate and apart from the agreement of purchase, although executed simultaneously therewith, void under Alta. Stat. C. 5 of 1910 (2nd sess.) as a "charge or encumbrance" on land contained in or annexed to an agreement for the purchase of chattels. [Smith v. American-Abell, 17 Man. L.R. 5, followed.]

Nichols and Shepard Co. v. Skedanuk, 13 D.L.R. 892, 25 W.L.R. 453, 6 A.L.R. 368, 25 W.L.R. 453, 5 W.W.R. 118, reversing 11 D. L.R. 199, 6 A.L.R. 368, 24 W.L.R. 184, 4 W.W.R. 587.

(§ III A—57)—ON BREACH OF WARRANTY—ACTION FOR BALANCE OF PRICE—EVIDENCE — SET-OFF — DAMAGES — FINDINGS OF TRIAL JUDGE—APPEAL.

Morgan v. Gordon, 2 D.L.R. 889, 3 O.W. N. 971.

Upon the failure of an engine to conform to a written warranty, the neglect of the purchaser to give notice thereof to the vendor by registered mail at his place of business, as the contract required, precludes the setting up the breach of warranty in an action to recover the purchase money.

Robert Bell Engine Co. v. Burke, 4 D.L.R. 342, 5 S.L.R. 75, 19 W.L.R. 934, 1 W.W.R. 707.

Where a contract for the sale of several articles of machinery is expressed to be di-

visible, and the warranty given thereon is expressly made applicable to each article, separately, though the articles are intended to be used together and to form one outfit, a defect in one article will not entitle the purchaser to rescind the whole contract or to refuse payment for the articles which are not defective, but relief will be confined to the defective article.

Bell Engine & Threshing Co. v. Wesenberg, 3 D.L.R. 550, 3 O.W.N. 1169, 21 O.W.R. 969.

The fact that a subwarrantor had received pay for an article furnished a warrantor, does not absolve the former from liability to the plaintiff in warranty for damages caused by defects in the thing warranted.

Wilson v. Vogel; Vogel v. Gardiner; Gardiner v. Locomotive & Machine Co., 4 D.L.R. 196.

ALLEGED BREACH—REMEDY—CONDITIONS OF SALE AND WARRANTY UNFULFILLED—NO REMEDY BEFORE FULFILLMENT.

When a sale of goods has taken place and warranty given to the purchaser, he must claim under breach of warranty either setting up a reduction in the price or an action for damages; and cannot, in action, in an action against him for the purchase price, rely on the alleged breach to justify a defence of failure of consideration.

Edwards v. Pearson, 50 D.L.R. 600, [1919] 3 W.W.R. 505.

In an action by the buyer for breach of warranty on the sale of a motor car, where the evidence as to the efficiency of the car is conflicting, the court will not sua sponte, appoint an expert to determine and report upon the efficiency of the car, even where the seller will not assist in proving the actual condition of the car; the onus being upon the buyer to establish the breach complained of.

Middleton v. Black, 2 D.L.R. 209, 21 W.L.R. 249.

RIGHTS OF PARTIES ON BREACH OF WARRANTY — NOTICE OF DEFECTS — IMPUTED KNOWLEDGE OF CONTENTS OF WRITTEN AGREEMENTS.

White v. Hobbs, 16 D.L.R. 880, 6 O.W.N. 314.

DELIVERY—TIME—BREACH OF WARRANTY.

Where a valid sale is made of goods in existence and ready for delivery when the sale is made, the contract of sale not being severable, and the property in the goods passing to the purchaser at the time of the sale; the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty and not as a ground for rejecting the goods and treating the contract as repudiated, unless there is a term in the contract express or implied to that effect. Where no time is mentioned a contract must be executed within a reasonable time.

Armand v. Noonan, 41 D.L.R. 433, 41 O.L.R. 551.

OF GOODS—CONTRACT—BREACH OF WARRANTY—PROMISE OF ADJUSTMENT—ACCEPTANCE OF GOODS—EVIDENCE FOR JURY—NEW TRIAL.

Smallman v. Bates, 47 D.L.R. 709, [1919] 2 W.W.R. 238.

REPRESENTATION AS TO QUALITY AND SIZE—BREACH — DAMAGES — ALLOWANCE TO VENDEES AND TO SUBVENDEES ON RESALE —PAYMENT INTO COURT—RULE 308—COSTS.

Where there has been a representation and warranty the vendees are entitled to a reduction in the contract price for a breach of that warranty, the amount being the actual reduction in the value of the goods by reason of the breach. Allowances must also be made to subvendees who bought the goods on the same warranty. The vendees are not prejudiced by payment into court and must have their costs in the action from the date of payment in. [Mondel v. Steel, 8 M. & W. 858, 151 E.R. 1288; Dingle v. Hare, 7 C.B. (N.S.) 145, 141 E.R. 770, followed.]

Catalano v. Cuneo Fruit & Importing Co., 49 D.L.R. 610, 46 O.L.R. 160.

BREACH—SECTION 5 FARM MACHINERY ACT, 4 GEO. V., 1913, ALTA., C. 15—DAMAGES.

Section 5 of the Farm Machinery Act (Alta.) 4 Geo. V., 1913 (Alta.), c. 15, amply covers warranties and breaches in respect to the sales of farm implements, and it is unnecessary to have recourse to the general conditions referred to in s. 16—Sales of Goods Ordinance. Relief for breach of warranties referred to in the said s. 5 of the Farm Machinery Act is found in damages, not in rescission of the contract.

Nolan v. Emerson Brantingham Implement Co., 49 D.L.R. 378.

BREACH OF WARRANTY—DEFECTIVE TRACTION ENGINE—LIMITATION OF LIABILITY.

In an action by the seller for the price of a traction engine the buyer is entitled to counterclaim for all damages resulting from a failure of the engine to fulfil the purpose for which it is to be used, and such right is not affected by a condition in the contract against liability for secret defects.

Chapin v. Matthews, 24 D.L.R. 457, 9 A.L.R. 209, 9 W.W.R. 391, 32 W.L.R. 663, reversing 22 D.L.R. 95.

MISREPRESENTATION AND WARRANTY — ACTION FOR BREACH.

Where the contract of sale of an interest in a business is silent as to warranty, evidence is nevertheless admissible to prove representations made at the time of entering into the contract and intended as a warranty to have been untrue; an action in damages as for breach of warranty upon such misrepresentations will lie whether the representations were fraudulently made or not. [Bentsen v. Taylor, [1893] 2 Q.B. 274, 280, applied.]

DeWynter v. Fulton, 23 D.L.R. 447, 8 A.L.R. 221, 7 W.W.R. 1361, 30 W.L.R. 696.

WARRANTY OF TITLE—OUTSTANDING MORTGAGE.

A purchaser is entitled to be indemnified by the immediate seller where the title to the article sold fails by reason of an outstanding chattel mortgage.

Sharp v. Ingles, 23 D.L.R. 636, 21 B.C.R. 584, 8 W.W.R. 1325, 32 W.L.R. 150.

INSTALLATION OF MACHINERY—BREACH OF WARRANTY—MEASURE OF DAMAGES.

Where, after the installation of a new burning plant, it fails to operate as economically as warranted at the time of the sale, and the work performed proves of no value and less economical than the old equipment, which necessitates the removal of the new plant and the reinstalling of the old system, the buyer may rightfully recover all expenses incurred and damages suffered in connection with the construction of the new plant and the reinstatement of the old one, against which no counterclaim for the price is maintainable. [Basten v. Butter, 7 East 479, applied.]

British American Paint Co. v. Fogh, 24 D.L.R. 61, 22 B.C.R. 97, 8 W.W.R. 1331, 32 W.L.R. 142.

SALE OF BOAT—MISREPRESENTATION OF AGE.

Representing a boat to be only 8 years old, where it, in fact, appears to be 14 years old, does not establish fraud or misrepresentation in defence of an action on a promissory note given as part of the purchase price thereof.

Losier v. Mallay, 24 D.L.R. 315, 43 N.B. R. 364.

BREACH OF WARRANTY—REDUCTION OF PRICE—SET-OFF—INSCRIPTION EN DROIT.

An inscription en droit cannot be taken against a defence setting up in compensation a debt which can only be claimed by a reconventional demand. One who has sued for the price of an automobile sold with warranty, and who sets up in compensation a sum of money resulting from damages suffered to the automobile through no fault of his, does not exercise a recourse for damages but a demand for reduction of the price under arts. 1511, 1518, C.C. (Que.).

Lacroix v. Giguère, 48 Que. S.C. 81.

WARRANTY AGAINST LATENT DEFECTS—SALE OF COW.

The purchaser of a cow who, on the day of the sale, finds, on milking her, that she has inflammation of the udder, should immediately notify the seller. An action to cancel the sale brought after 13 days, is too late, and disregards the rule as to diligence, in such cases, of art. 1530, C.C. (Que.).

Roy v. Dundon, 44 Que. S.C. 309.

WARRANTY — CONTRACT — FAILURE TO GIVE NOTICE REQUIRED.

Allcock v. Manitoba Windmill & Pump Co., 4 S.L.R. 135, 18 W.L.R. 77.

SALE OF MACHINE—AGREEMENT FOR NOTICE OF DEFECT—ACT OF VENDOR'S AGENT.

Chalifoux v. Forest, 20 Que. K.B. 93, affirming 34 Que. S.C. 226.

SPECIFIC ARTICLE—NEW ENGINE.

Bauman v. Dafoe, 19 W.L.R. 757.

ACTION FOR PRICE — COUNTERCLAIM FOR BREACH OF WARRANTY—PROPERTY NOT PASSING UNTIL PAYMENT IN FULL—RIGHT OF PURCHASER TO DAMAGES—"REBUILT" ENGINE.

New Hamburg Mfg. Co. v. Webb, 23 O.L. R. 44, 18 O.W.R. 216.

RIGHT TO RETURN FOR BREACH OF WARRANTY.

May v. Conn, 23 O.L.R. 102, 18 O.W.R. 141.

(§ III A—58)—TENDER OF SECOND SAMPLE—REFUSAL TO INSPECT.

The buyer is not entitled to withdraw from his contract on the ground that one box of merchandise (e.g., evaporated apples), forwarded as a sample, was not satisfactory, where the contract of sale contained a stipulation that it was "subject to the approval of five boxes, when ready for shipment;" the buyer must still inspect and pass upon a shipment of five boxes forwarded for the approval of the buyer in accordance with the terms of the contract and if the buyer refuses even to inspect these shipments, on the ground that the rejection of the one box operated as a termination of the contract, the seller may resell the goods and recover damages. [Borrowman v. Free, 4 Q.B.D. 500, applied.]

Graham Co. v. Canada Brokerage Co., 10 D.L.R. 107, 24 O.W.R. 277.

PURCHASE OF STOCK OF GOODS—FAILURE OF PURCHASER TO PAY — DAMAGES — LOSS ON RESALE.

Hutchinson Co. v. McGowan, 5 O.W.N. 27, 24 O.W.R. 969.

RESALE.

When the seller of goods calls on the buyer to take delivery at the appointed time, and informs him that if he is not prepared to do so, he, the seller, knows parties willing to buy, to whom he can sell the goods, and the buyer acquiesces in that course, the sale is not thereby cancelled, and the seller has a right to recover from the buyer the difference between the price agreed on between them, and that for which he sells to third parties.

Daigle v. Brochu, 44 Que. S.C. 397.

(§ III A—59)—POWER OF RESALE—HOW EXERCISED—NOTICE OR DEMAND.

M. bought cattle from T., leaving them in possession of T. for future delivery, and paying a deposit upon their purchase price. M. failed to take delivery on the date fixed, and upon subsequently asking for them, T. refused to give them up, and thereafter sold them to another purchaser:—Held, that as T. had not demanded from M. or notified him to take delivery of the cattle, he could not exercise a right of resale, and that his repudiation of the contract gave M. an immediate right of action.

Molyneux v. Traill, 9 W.W.R. 137, 32 W.L.R. 292.

B. Lien for price.

See Ante, I C.

(§ III B—60)—Lien for price—Stoppage in transitu.

The unpaid vendor of goods has the right to resume possession of them while in transit, so long as delivery within the meaning of art. 1492 C.C. (Que.), has not been made to the vendee, notwithstanding any sale or transfer by the latter to a third party, and without the necessity of revendication or other judicial proceeding.

Abinovitch v. Ehrenbach, 41 Que. S.C. 55.

Lien note—Default in payment—Retaking possession of goods—Compliance with ss. 7, 8 of Sale of Goods Act—Onus of proof.

The onus of proving compliance with ss. 7, 8 of the Sale of Goods Act rests upon the plaintiff. [Sawyer-Massey v. Bouchard, 13 W.L.R. 394, followed; Massey-Harris v. Elliot, 11 D.L.R. 632, inapplicable.]

Armstrong v. Larson, 30 W.L.R. 545.

Terms of payment—Time.

In the absence of any mention of a time limit within which the payment of goods sold and delivered was to be made it will be held that the vendor is entitled to claim payment immediately on the delivery of the goods. A sale of effects made under the following conditions: "Terms, September, October, November and December, net 25 per cent" means that the goods were sold for their face value and were to be paid, without any discount deducted or interest added, by four equal payments during the months respectively.

Horton v. Deeb, 54 Que. S.C. 35.

(§ III B—61)—Vendor's lien.

The failure to insert the name of the vendor in the space intended therefor in a lien note given for property purchased at an auction, which provided that "the titie, ownership and right of possession of the goods for which [the] note [was] given shall be and remain at my risk in . . . until this note . . . is paid in full," does not affect the vendor's title to and ownership of the personalty sold, where the terms of sale, which were known to the vendee, required such a note to be given. [Kirk v. Unwin, 20 L.J. Ex. 345, applied.]

Bell v. Schultz, 4 D.L.R. 400, 5 S.L.R. 273, 2 W.W.R. 491, 21 W.L.R. 408.

Vendor's lien — Loss of — Parting with possession.

A vendor's lien for the price of chattels sold is lost when he parts with possession by a wrongful sale of the chattels to another.

McGregor v. Whalen, 20 D.L.R. 489, 31 O.L.R. 543.

Conditional sales—Reserving property in goods until paid for—Partial payments as liquidated damages—Vendor's lien.

Under a conditional sale contract which contains in addition to the reservation of property in the goods until paid for, a stipulation that in case of default the sellers may retain all partial payments as liquidated damages, and may also retake possession, the sellers may avail themselves of their common law right of suing for the instalments as they become due or prove against the purchasing company in liquidation proceedings, and still retain the property in the goods. [Utterson Lumber Co. v. Petrie, 17 O.L.R. 570, followed.]

Canadian Westinghouse v. Murray Shoe Co., 20 D.L.R. 672, 31 O.L.R. 119.

Vendor's lien — Postponement of—Non-interference with findings of trial court.

Wade v. Johnston, 31 D.L.R. 555.

Lien agreement—Agent to receive payment at a certain time — General agency to receive payment.

A lien agreement in which a bank is named to receive the money due under the agreement on or before a certain date does not constitute the bank the agent to receive the money generally or at any other time than on the date on which the payment becomes due.

Thomson v. Denton, 47 D.L.R 63, 12 S.L.R. 306, [1919] 2 W.W.R. 798.

Will—Direction for sale of property to person named—Security for payment of price—Executors—Vendor's lien.

A testator by his will directed that his business should be sold and that his brother should "have the privilege of first purchasing the same;" in the event of his purchasing, the stock was to be sold to him at invoice prices, he was to receive the fittings and fixtures free of charge, was to have a year to pay the price, and was to pay a fixed monthly rental for the business premises for one year; after the expiration of the year, the rental was to be fixed by the executors. By a codicil, the testator directed that the purchase-price should be paid in monthly or quarterly instalments, and the whole should be paid within one year from the date of the purchase. The brother elected to purchase upon the terms stated in the will:—

Held, that the executors were entitled to the security of a vendor's lien, and that the purchaser was entitled to take only subject to that lien.

Re Harris, 43 O.L.R. 476.

Vendor's lien—Notice.

When the proprietor receives personally from the supplier the building materials accompanied by invoices indicating their nature and the cost thereof, and signs said invoices as having received the same, this is sufficient to comply with the notice required to secure the supplier's privilege.

Desnoyers v. Therrien, 15 Que. P.R. 238.

Vendor's lien.

Laidlaw v. Vaughan-Rhys, 44 Can. S.C.R. 458.

(§ III B—62)—Reclaiming property.

When pulp wood from his principal's land was sold by an agent without authority, the principal is entitled to follow the pulp wood into the buyer's hands. [Greer v. Faulkner, 40 Can. S.C.R. 399, affirming Faulkner v. Greer, 16 Ont. L.R. 123 followed.]

B.N.A. Mining Co. v. Pigeon River Lumber Co., 2 D.L.R. 609, 3 O.W.N. 701, 21 O. W.R. 291.

Unsatisfied judgment against vendor—Breach of warranty — Nonpayment of purchase-price—Set-off—Seizure.

An unsatisfied judgment against the vendor of a motor car for breach of warranty in connection with the sale of the car cannot be set off against the purchase-price of the car, and does not prevent such vendor from seizing the car under a lien agreement for nonpayment of the purchase-price.

Thomson v. Denton, 47 D.L.R. 63, 12 S.L. R. 306, [1919] 2 W.W.R. 798.

Cancellation—Mutual consent—Ratification—Settlement of accounts—C. C. arts. 1539, 1540.

After the sale on instalments of an automobile, the vendor, in default of payment on the part of the purchaser, went to the domicile of the latter where his wife was found alone, and with her consent took back his car; the purchaser instead of reclaiming it, sued for damages, alleging that the vendor had acted illegally. Held that the vendor, not having committed any wrong in fact, or any violence, was justified in taking back his car, and moreover, that the purchaser had not disavowed the consent given by his wife by commencing an action for recovery of the car, but had sued for the return of the money he had paid and for damages. In these circumstances, the purchaser has no other right than those under arts. 1539,1540, C.C. (Que.) i.e., the right to a settlement of their respective claims with regard to the car.

Laplante v. Dubois, 55 Que. S.C. 355.

Sale of goods—Conditional sale—Lien-notes — Repossession — "Seizure" —Vendor deeming himself insecure.

Peterson v. Johnston, 17 W.L.R 596.

(§ III B—64)—Stoppage in transitu—Insolvency of vendee—Goods in customs.

Under art. 1543 C.C. (Que.) as amended, an unpaid vendor has the right of stoppage in transitu where goods have been sold and shipped to a vendee within 30 days of the insolvency of the latter, even where delivery has been made but not where goods have been sold and shipped to a limited liability company more than 30 days before the date of the winding-up order if the company had taken delivery of the goods. Goods deposited in a customs warehouse or held by a carrier pending the passing of an entry through the customs may be stopped in transitu by an unpaid vendor, where the vendee has become insolvent. An unpaid vendor of goods has the right of stoppage in transitu in the event of the vendees' insolvency while the goods are still in the course of transit; their retention by the carrier entrusted with the delivery of the goods, or the handing of them over to a wharfinger, or to the selling agent of the vendor, will not defeat this right.

Florsheim Shoe Co. v. Boston Shoe Co., 9 D.L.R. 602.

Sale of goods—Vendor's lien — Insolvency of purchaser.

The vendor of moveable goods payable on the instalment plan and delivered to the purchaser, may, later, validly agree with the latter, that until the price is paid, the goods sold will remain his property although in the purchaser's possession. Therefore, in case of the latter's bankruptcy before the happening of the condition, the vendor may exercise with respect to the goods sold, all the remedies of an owner.

William Lloyd Machinery Co. v. Publishers Press, 23 Que. K.B. 184.

(§ III B—66)—Acceptance of notes—Liability of joint maker.

Promissory notes jointly signed by father and son, which are given in payment of a threshing outfit sold to the son under an agreement signed by the father as co-purchaser, will render the latter primarily liable as a joint purchaser and not as surety.

Sawyer-Massey v. Tohms, 24 D.L.R. 724, 9 W.W.R. 210, 32 W.L.R. 472.

Acceptance of notes.

If the purchaser of a stallion did not, before the agreement for sale was made, have notice of an attack it had made on the vendor, and that was sufficient to amount to misrepresentation sufficient to avoid the sale, it was waived by the giving of a note for a part of the purchase money after learning such fact.

McPherson v. Faris, 5 D.L.R. 385, 4 A. L.R. 373, 21 W.L.R. 654, 2 W.W.R. 643.

(§ III B—66a)—Lien for price — Lien notes—Taking after sale—Right of subsequent purchaser.

A lien note to the seller given for unpaid purchase money by the buyer of chattels long after the transaction of sale and after title had passed to the buyer, will not be effective to confer a title or right of seizure as against a subsequent purchaser from the original buyer taking without notice of the original seller's pretended lien.

Chechik v. Finn, 14 D.L.R. 705, 25 W.L.R. 897.

Lien notes—Absence of proviso for seizure—Retaking of possession — Rescission.

The note which defendant gave plaintiffs for the price of an automobile purchased from the plaintiffs contained a provision that, until the note should be paid, the automobile should remain the property of the plaintiffs. After default in payment, the plaintiffs retook possession of the car apparently intending to keep it as their

own. Held, following Sawyer v. Pringle (1891) 18 A.R. (Ont.) 218, that the plaintiffs had, by such action, rescinded the contract of purchase and could not recover in an action upon the note.

Boyce Carriage Co., Ltd. v. Squires, 25 Man. L.R. 47, 7 W.W.R. 555.

ACTION FOR PRICE—LIEN NOTES—PROOF OF DELIVERY OF GOODS.

Actual delivery of goods need not be proved in an action on a lien note given as security for the purchase price of such goods.

International Harvester Co. v. Leeson, 7 W.W.R. 590, 30 W.L.R. 293.

LIEN NOTE — REPOSSESSION — MORTGAGE —CONVERSION.

A lien note which entitles the holder, in case of default in payment of the debt, to take and hold possession of the chattel until the note is paid, or to sell it by private or public sale and apply the proceeds in payment of the note, does not give the holder a right to convert the chattel to his own use, or to mortgage it to another, without being answerable for the conversion.

Mellis v. Blair, 27 D.L.R. 165, 22 B.C.R. 450, 10 W.W.R. 241.

LIEN NOTES.

In order to justify the retention by the holder of a lien note upon a resale of the chattels for which it was given, of the expenses of retaking them, he must shew that the charges were fair and reasonable, and they were actually paid or incurred by him. The fact that a lien note was assigned by the payee will not prevent him maintaining an action thereon, notwithstanding it was not reassigned to him in writing before suit was begun, where the assignment was to a bank as security only. [Covert v. Janzen, 1 S. L.R. 429, followed.]

Braithwaite v. Bayham, 4 D.L.R. 498, 21 W.L.R. 839, 2 W.W.R. 778.

(§ III B—69)—LIEN ON LANDS.

Where an implement company sells certain machinery and its attachments, taking for the purchase price the buyer's so-called promissory notes, appending to the notes a specific lien agreement as well as an agreement to execute a mortgage against his lands, for the price of the goods, the delivery of all the goods is, by necessary implication, a condition precedent to the operation of the lien and execution of the mortgage against the lands; yet if some of the attachments are missing and their non-delivery is subsequently compromised orally between the seller and the buyer by a stipulated allowance satisfactory to the buyer, the seller is not thereby disentitled to the collateral security by way of lien on the lands, for the price as so reduced. [Rustin v. Fairchild, 39 Can. S.C.R. 274, discussed and distinguished.]

Gaar-Scott v. Mitchell 8 D.L.R. 129, 22 Man. L.R. 474, 3 W.W.R. 19, affirming 1 D. L.R. 283, 1 W.W.R. 762, 20 W.L.R. 6.

C. RESCISSION.

(§ III C—70)—RESCISSION BY BUYER FOR DELAY—ACQUIESCENCE BY SELLER.

On notice by a buyer of building materials of rescission of his contract as to undelivered materials, for the seller's failure to deliver within a reasonable time, the seller's conduct in asking withdrawal of the cancellation, in stopping further preparation of the materials, and in afterwards negotiating for a new contract, constituted acceptance of the cancellation and acknowledgment of the right to cancel.

Western Planing Mills Co. v. Eaton, 11 D.L.R 325, 24 W.L.R. 411.

INNOCENT MISREPRESENTATIONS — LACHES —EFFECT.

Where the buyer by his own acts so deals with the property purchased as to put it out of his power to return it to the seller in like condition as when it was bought, and this after ascertaining that the seller had made material misstatements as to the subject-matter in the negotiations, damages will not be awarded in the absence of any warranty if there was no fraud and the statements were made in a belief of their truth, but semble, the buyer might have rescinded had he acted promptly on learning of the misrepresentation.

Humber v. McConnell, 19 D.L.R. 766.

OBLIGATION TO RETURN SUBJECT-MATTER, HOW LIMITED.

While ordinarily a purchaser of personalty who elects to treat the contract as repudiated is bound to restore the article which has been furnished to him in the condition in which it was, yet, where his inability to do this is not the result of anything he has done, but is due to the thing sold breaking down, owing to defects for which the other party is responsible, it is sufficient if the purchaser offers and is ready to return it in the condition in which it thus was after the breakdown.

Alabastine Co. v. Canada Producer & Gas Engine Co., 17 D.L.R. 813, 30 O.L.R. 394, affirming 8 D.L.R. 405, 23 O.W.R. 841.

DEFICIENCY IN QUANTITY.

An action for rescission as distinct from an action for damages may be supported by proof of innocent representations as to quantity, where the deficiency between the actual quantity represented and that existing is so great that the buyer cannot be said to have received what he bargained for.

O'Connor v. Sturgeon Lake Lumber Co., 17 D.L.R. 316, 7 S.L.R. 60, 27 W.L.R. 813, 6 W.W.R. 701.

SALE IN VIOLATION OF STATUTE.

It is ordinarily the duty of the seller to know of the defects in the engine he sells, and where the legislature has imposed a duty on him and prohibits any sale not in accordance with the statute, making the seller liable to a penalty, but does not in express terms prohibit the purchase nor

make the purchaser liable to any penalty even though he buy with knowledge that the specifications have not been statutorily complied with, the legislation must be deemed to have been passed primarily for the protection of the purchaser, who is entitled to have the purchase price returned; the seller being entitled to possession of the engine. [Kearley v. Thomson (1890), 24 Q.B.D. 742; Moses v. Macferlan, 2 Burr. 1005; Lodge v. Nat. Union Inv. Co., [1907] 1 Ch. 300, applied.]

Haug v. Murdock, 26 D.L.R. 200, 9 S.L.R. 56, 33 W.L.R. 442, reversing 25 D.L.R. 666, 32 W.L.R. 572, 9 W.W.R. 474.

CONTRACT—"IN GOOD RUNNING ORDER"—CONDITION NOT CARRIED OUT—RETURN OF DEPOSIT.

A contract for the sale of a separator contained a stipulation that the separator was to be put in running order. The machine was never put in running order although the plaintiff had the necessary parts needed in stock. The court held that the defendant had not agreed to buy the various parts of a separator but a separator in good running order, and as he had not been able to get that article he was entitled to have the contract rescinded and his deposit money returned.

Fleming v. Wilkie, 49 D.L.R. 27, 12 S.L.R. 393, [1919] 3 W.W.R. 569.

MUSICAL INSTRUMENT—AGENCY OF VENDOR FOR PURPOSE OF SELECTION OF PARTICULAR INSTRUMENT—REVOCATION BY PURCHASER BEFORE APPROPRIATION TO CONTRACT OF PARTICULAR INSTRUMENT—SUBSEQUENT APPROPRIATION—REFUSAL OF PURCHASER TO ACCEPT—LEGALLY APPROPRIATED ARTICLE NOT TENDERED.

Mason & Risch v. Christner, 46 D.L.R. 710, 44 O.L.R. 146.

MINERAL CLAIM—THIRD PARTY.

A sale of mineral claim, by a person having the right to convey title, will not be set aside at the instance of one claiming an interest under an unwritten agreement where there has been no fraud on the part of the purchaser, especially if there has been delay in bringing the action.

Reynolds v. Jackson, 41 D.L.R. 168.

DELIVERY IN INSTALMENTS—DEFAULT.

The failure of a seller of lumber who had contracted to ship the lumber at regular intervals to ship the anticipated quantity, held not to entitle the purchaser to repudiate the contract.

Meadowcreek Lumber Co. v. Adolph Lumber Co., 25 B.C.R. 298, [1918] 2 W.W.R. 466. [Reversed 45 D.L.R. 579, 58 Can. S.C.R. 306, [1919] 1 W.W.R. 823.]

ACCELERATION CLAUSE—DEFAULT—WAIVER.

Although a contract for the sale of goods on the instalment plan contains an acceleration clause making the full amount of the unpaid purchase-price due and payable on default in payment of any instalment, yet if the seller accepts an overdue payment, without objection, he cannot take advantage of such clause in respect to the delay in the payment of such instalment.

Advance Rumely Thresher Co. v. Grenier [1918] 3 W.W.R. 497.

RESILIATION CLAUSE.

An "ipso facto" resiliation clause is not a power given the vendor to cancel the contract, but the contract continues to exist so long as the vendor has not shewn his intention of cancelling it. The vendor, therefore, may always, if he sees fit, ask the fulfilment of the contract. If the vendor seeks the enforcement of the resiliation clause, he must return the money and things he has received.

Lesage Packing Co. v. Lesage, 53 Que. S. C. 491.

WHAT CONSTITUTES — REMEDIES—BREACH OF WARRANTY.

A breach of warranty as to the quality of goods sold entitles the buyer to damages for the difference in value but not to the right of rescission; nor will the seller's dealings with the returned article in an attempt to remedy its defects amount to acts of ownership so as to operate as a rescission.

Laleune v. Fairweather, 25 D.L.R. 23, 25 Man. L.R. 783, 9 W.W.R. 567, 32 W.L.R. 917.

REPOSSESSION AND RESALE—ASSERTION OF OWNERSHIP.

Where a vendor repossesses an article sold under an agreement which provides for repossession and resale, and acts in reference to the article in a manner not provided for in the agreement, the purchaser may treat the contract as rescinded, if the acts of the vendor amount to an assertion of unqualified ownership of the article, or if, as a result of such acts, the value of the article is depreciated.

Gartside v. Leland, 24 D.L.R. 732, 8 S.L.R. 213, 31 W.L.R. 827.

REPOSSESSION AND RESALE—RETURN OF PAYMENTS.

The repossession of animals by a vendor in the exercise of his lien under a conditional sale and their subsequent resale subject to the ratification of the defaulting vendee, without exercising any rights of ownership over them by the vendor, does not operate as a rescission of the contract as to entitle to a return of the payments in restitution of statu quo.

Gartside v. Leland, 24 D.L.R. 732, 8 S. L.R. 213, 31 W.L.R. 827.

WRONGFUL CANCELLATION OF ORDER — RECOVERY BACK OF DEPOSIT.

The person who contracts to purchase a chattel, in this case an automoblie, and makes a deposit along with his contract, cannot recover the deposit upon his wrongfully assuming to cancel the order and refusing to take delivery; the money paid is no less a deposit because it is a part payment. [Howe v. Smith, 27 Ch.D. 89, applied; Snell v. Brickles, 20 D.L.R. 209, 49

Can. S.C.R. 360; Kilmer v. B. C. Orchard Lands Co., 10 D.L.R. 172, [1913] A.C. 319, distinguished.]

Small v. Dominion Automobile Co., 23 D.L.R. 304, 7 O.W.N. 700.

WHEN REFUSED—IMPOSSIBILITY OF RESTITUTION.

Where as part of the transaction in the sale of an automobile the seller is also required to procure a loan for the buyer to meet the purchase price, the buyer, after receiving the benefit of the loan cannot claim a rescission of the sale for misrepresentations as to concealed defects, where from the nature of the contract the parties cannot be completely restored to their original position.

Lee v. Chapin, 25 D.L.R. 299, 9 A.L.R. 74, 9 W.W.R. 228, 32 W.L.R. 509, affirming 23 O.L.R. 697, 8 W.W.R. 436, 31 W.L.R. 113.

BREACH OF WARRANTY—RECOVERY OF PAYMENTS.

R. agreed to buy from M. well-smoked haddies. At the request of H., who purported to act for M., R. paid M.'s draft for the price of the fish and the C.P.R. charges for freight, in order to facilitate H. in getting the fish as speedily as possible into cold storage:—Held, that upon the haddies turning out not to be well smoked, R. was entitled to a return of the moneys paid.

Royal Fish v. Maritime Fish, 9 W.W.R 169.

AGREEMENT FOR PURCHASE OF VEHICLE—CANCELLATION—ACTION FOR RETURN OF DEPOSIT—COLLATERAL AGREEMENT—EVIDENCE — FINDINGS OF FACT OF TRIAL JUDGE—APPEAL.

Small v. Dominion Automobile Co., 8 O.W.N. 256.

SALE ON APPROVAL—REVENDICATION.

A person who delivers goods for trial, or with a promise of sale under a suspensive condition reserving to himself the right of ownership in the goods, is not such a seller as may exercise the action in rescission of sale or of revendication under art. 1543, 1998 C.C. (Que.)

Hyatt v. Herlihy, 50 Que. S.C. 163.

(§ III C—72)—RESCISSION—FRAUD AND MISREPRESENTATION—TRADE CUSTOM.

A representation made on the sale of an automobile that it was a "perfectly new car" will be a ground for rescission of the contract by the party deceived who had accepted delivery of the car on the faith of the representation, where the car was in fact a car which had been sold and used during the previous season and had since been "rebuilt," and where the vendor knew that the purchaser in requiring the assurance that it was a "perfectly new car" meant that it had not been previously sold and used and was ignorant of the trade custom set up by the defense of treating "rebuilt" cars as new. [Erlanger v. New Sombrero Co., 3 A.C. 1218, applied.]

Addison v. Ottawa Auto & Taxi Co., 16 D.L.R. 318, 30 O.L.R. 51.

FRAUD—PUFFING.

Mere puffing and favourable comment on the part of an agent or promoter to present his company shares to an intending investor so as to induce the investor to purchase, do not constitute misrepresentation or fraud.

North West Battery v. Hargrave, 15 D.L.R. 193, 23 Man. L.R. 923, 26 W.W.R 331, 5 W.W.R. 821, 1002.

OF ENGINE—CONDITION—ENGINE ORDERED NOT DELIVERED—ACTION FOR PURCHASE PRICE—RESCISSION OF CONTRACT.

It being a condition of the sale that a threshing engine shall be a 25 h.p. engine, the purchaser is entitled to have the contract rescinded and the deposit returned to him upon the admission of the vendor in an action brought by him to recover the balance of the purchase price, that the machine was in fact a 22 h.p. standard machine, although the purchaser has retained and used the machine through two seasons upon the vendor's continued assurances that he would put it in good working order, if the purchaser did not know until the trial that the machine was not in fact a 25 horse power machine such as he had contracted to purchase.

Cushman Motor Works v. Laing, 49 D.L.R., [1919] 3 W.W.R. 494, affirming [1919] 2 W.W.R. 311.

MISREPRESENTATION—REMEDY—ACTION FOR BREACH OF WARRANTY.

The provisions of the Sales of Goods Ordinance (Alta.) are not inconsistent with the right of a purchaser to be relieved from a sale induced by a fraudulent misrepresentation as to a material fact; his remedy in such case is by rescission and restitution, and not for an action for breach of warranty.

Lynch v. Jackson, 38 D.L.R. 61, 13 A.L.R. 344, [1917] 3 W.W.R. 939.

FRAUD AND MISREPRESENTATIONS—SALE OF COMPANY SHARES—RETURN OF MONEY PAID WITH INTEREST—PRINCIPLE AND AGENT—EVIDENCE.

Seagram v. Kemish, 14 O.W.N. 187, affirming 13 O.W.N. 321.

ASSIGNMENT—FRAUD—JOINDER OF PLAINTIFFS.

A vendor to whom a purchaser has transferred a pretended debt in partial payment of the price of a sale, may demand that the transfer be annulled on the ground of fraud and claim the price of sale from the purchaser. Such a demand does not annul the sale itself.

Comtois v. Pesant, 24 Rev. de Jur. 566.

MISREPRESENTATION—AGENT.

A material false representation, inducing

a sale, entitles the purchaser to rescission, even if made innocently by an agent.

Gibson v. Cottingham, 32 D.L.R. 213, 23 B.C.R. 393, [1917] 1 W.W.R. 496.

FRAUD—REMEDY.

The rules of law relating to the effect of fraud and misrepresentation upon a contract for the sale of goods are expressly preserved by s. 58 of the Sale of Goods Ordinance save in so far as they are inconsistent with the express provisions of the ordinance. There is nothing in the ordinance which is inconsistent with the right which the law gives a man to be relieved from a contract into which he has been induced by the fraudulent misrepresentation in a material respect of the other party to it.

Lynch v. Jackson, 38 D.L.R. 61, 13 A.L.R. 344, [1917] 3 W.W.R. 939.

FRAUD AND MISREPRESENTATION—SALE OF COMPANY SHARES—RETURN OF MONEY PAID WITH INTEREST—PRINCIPAL AND AGENT—EVIDENCE.

Seagram v. Kemish, 13 O.W.N. 321.

RIGHT TO PURCHASE-MONEY.

The general rule of law laid down in art. 1538, C.C (Que.) to the effect that in an action for the rescission of a sale for non-payment of the price, the buyer may pay the price with interest and costs of suit at any time before the rendering of the judgment, does not apply when the parties, in a deed of sale, have defined their legal rights by stipulating that if the purchaser should fail to make any payment within a certain delay, the sale shall be considered null and void, without any notice or legal proceedings.

Roberts v. Solomon, 51 Que. S. C. 372.

FRAUD AND MISREPRESENTATION—SALE OF SHARE IN BUSINESS—PARTNERSHIP—LIABILITIES AND ASSETS—AGREEMENTS.

Doerr v. Miller, 10 O.W.N. 58.

SALE OF BUSINESS — UNDERTAKING TO RETURN PURCHASE-MONEY IF PURCHASER DISSATISFIED AND FINDS BUSINESS NOT AS REPRESENTED—FRAUD — PREMATURE ACTION.

Watson v. Morgan, 11 O.W.N. 125.

FRAUDULENT REPRESENTATIONS—DELAY.

A stipulation in a contract of sale that the purchaser may annul the sale within a month from the date, if the thing sold is not such as it has been represented, the sale will nevertheless be annulled by the court, after such delay, if the purchaser has been the victim of false representations amounting to fraud.

De Sable Union v. Warren, 24 Que. K.B. 111.

LATENT VICE OF ANIMAL AS GROUND FOR RESILIATION.

The vice of kicking in a horse, when latent, gives right to a rescission of the contract of exchange or sale between the parties.

Bibeau v. Leclerc, 47 Que. S.C. 272.

FRAUD AND MISREPRESENTATION—SALE OF ANIMAL—EVIDENCE—FAILURE TO PROVE FRAUD.

Rogers v. Wylie, 7 O.W.N. 790.

FRAUD AND MISREPRESENTATION—SALE OF THEATRE—FINDINGS OF FACT OF TRIAL JUDGE—RESCISSION OF CONTRACT OF SALE AND RETURN OF MONEY PAID—DEDUCTION OF RENT—ACCOUNT—REFERENCE.

Peppiat v. Reeder, 8 O.W.N. 84, 332, 526.

FRAUD.

The purchaser of the stock in trade en bloc of a merchant who fails to obtain the names of the unpaid creditors who furnished the goods in order to pay them out of the purchase money cannot invoke his good faith; when for fear of fraud the law declares certain acts to be void its provisions cannot be evaded on the ground that proof could be made that the acts were not fraudulent. Such purchaser cannot put aside the claim of a creditor because some of the goods which he furnished were not contained in the stock sold, having been previously disposed of.

Ramsay v. Turcotte, 13 Que. P.R. 213.

FRAUD — SALE OF SHARES — RETURN OF MONEYS PAID.

Farah v. Capital Mfg. Co., 4 O.W.N. 680, 23 O.W.R. 918.

WRITTEN AGREEMENT—ORAL EVIDENCE OF CONDITION UPON WHICH CONTRACT ENTERED INTO — ADMISSIBILITY—ACKNOWLEDGMENT THAT WRITING CONTAINED WHOLE AGREEMENT—PRINTED FORM—DECEITFUL REPRESENTATIONS AS TO FAIR VALUE OF GOODS—ORAL PROMISE TO ACCEPT RETURN.

Long v. Smith 23 O.L.R. 121, 18 O.W.R. 88.

CONTRACT FOR SALE OF PATTERNS—MISREPRESENTATION OF AGENT — ACTION FOR BREACH.

McCall v. Hickson, 2 O.W.N. 867, 18 O. W.R. 825.

SALE OF FARM, CHATTELS AND CANNING FACTORY—ADVERTISEMENT IN NEWSPAPER—PURCHASER DID NOT GET WHAT ADVERTISEMENT CALLED FOR.

Stocks v. Boulter, 3 O.W.N. 277, 20 O W.R. 421.

(§ III C—73) — REPUDIATION BY BUYER — GOODS NOT APPROPRIATED TO CONTRACT —DAMAGES.

Where goods for future delivery are sold under an implied term that the seller may appropriate the goods to the contract, the authority so to appropriate is withdrawn by the buyer's notice of repudiation of the contract; it is not open to the seller thereafter to select and ship the goods and to sue for the price as upon an executed contract, but his remedy is only for damages for the buyer's failure to carry out the agreement. [Hochester v. De la Tour, 2 El. & Bl. 678, 118 Eng. R. 922; Tredegar

Coal Co. v. Hawthorn, 18 Times L.R. 716, distinguished.]

Sells v. Thomson, 17 D.L.R. 737, 19 B.C. R. 460, 27 W.L.R. 901, 6 W.W.R. 731.

FAILURE TO SUPPLY ENTIRE ORDER.

Rescission of an entire contract of sale for the seller's omission to supply all of the several articles included in the order is a right which must be exercised as to all or none, and retention of part of the goods is a waiver of the right as it disaffirms that the contract was an entire one.

Victor Mfg. Co. v. Regina Trading Co., 14 D.L.R. 801, 6 S.L.R. 302, 26 W.L.R. 157, 5 W.W.R. 624.

ORDER FOR CHATTELS GIVEN UNDER SEAL—RIGHT OF OFFERER TO WITHDRAW FROM PURCHASE BEFORE ACCEPTANCE.

Gaar Scott Co. v. Ottoson, 21 Man. L.R. 462, 16 W.L.R. 663.

(§ III C—74) — REJECTION — RETURN IN "REASONABLE TIME"—QUESTION OF FACT.

Whether a purchaser at an auction sale, which was fraudulently conducted in that the seller employed a "puffer" to bid up the price far beyond the actual value of the chattel, has repudiated the purchase and returned the chattel within a reasonable time, is a question of fact in each case.

Wright v. Bentley, 11 D.L.R. 515, 49 C. L.J. 269, 46 N.S.R. 534, 12 E.L.R. 270.

BY DESCRIPTION—FAILURE TO COMPLY WITH —REJECTION OF GOODS.

Under a contract for the sale of a portable engine it may be returned to the dealer where, upon a fair test, on account of its construction, it does not prove to be portable nor to work satisfactorily as such.

Massey-Harris Co. v. Elliott, 11 D.L.R. 632, 4 W.W.R. 134.

ACCEPTANCE WITHOUT INSPECTION—GOODS UNMERCHANTABLE.

A purchaser who accepts delivery and resells the material purchased, shipping it a long distance without making any examination as to its quality or condition, is guilty of imprudence; on the goods proving unmerchantable he is entitled to have the contract rescinded and the purchase money returned but not to damages for freight demurrage or loss of profits.

Diamonde Metal v. Standard Paint Co., 41 D.L.R. 129, 24 Rev. de Jur. 193.

REJECTION OF GOODS — DELAY—TENDER—PAYMENT.

When a vendor, upon the complaint of the purchaser that the thing sold is defective, undertakes to take it back, asking delay for doing so, the purchaser is no longer bound to bring his action for cancellation of the sale within a reasonable time after the sale. He can make use of his recourse any time before prescription is acquired. A purchaser who sues his vendor for cancellation of a sale is only bound, in making a legal tender, to request the vendor to come and take the thing sold, wherever it is. A defendant cannot allege default or insufficiency of tender when he refuses to pay in any case.

Boivin v. Les Allumettes de Drummondville, 54 Que. S.C. 337.

REJECTION OF GOODS.

The obligation of the purchaser of goods to use diligence in demanding cancellation of the contract of sale only exists in the case of warranty against latent defects in the goods sold. The right to demand cancellation for breach of warranty against eviction or warranty by contract is only subject to the prescription of thirty years. An action brought against a foreigner within a reasonable delay is evidence of diligence and the judgment given therein interrupts the prescription.

Lapierre v. Drouin, 41 Que. S.C. 133.

Where a purchaser of an unexpired lease of a hotel and the chattels contained therein pays part of the purchase price for which a receipt is issued by the seller setting forth the terms of the contract and the seller told the buyer that the lessor of the premises would have to be satisfied with the new tenant, but did not disclose to him or to the agent that there was an arrangement between him and his lessor by which the lessor was to get a certain percentage of the purchase price in the event of the sale of the unexpired term and it subsequently developed that the lessee refused to carry out this arrangement but tried to get the purchaser to pay all or part of this sum to the lessor, the purchaser is justified in rescinding the contract.

Herbert v. Vivian, 8 D.L.R. 340, 23 Man. L.R. 525, 22 W.L.R. 676, 3 W.W.R. 473. [Affirmed in 11 D.L.R. 839, 23 Man. L.R. 525, 4 W.W.R. 891, 24 W.L.R. 803.]

A vendee of chattels, upon rescission of a contract of sale for the default of the vendor, has a lien thereon for the purchase money he has paid on the contract, which lien is not displaced by the recovery of a judgment against the vendor for the amount so paid.

Canadian Gas Power & Launches v. Orr, 4 D.L.R. 641, 3 O.W.N. 1362, 22 O.W.R. 351.

(§ III C—74a)—DEFAULT OF VENDOR—LIEN OF VENDEE.

Upon breach of warranty by a seller of goods the court, on giving a judgment for the return of the purchase payment to the buyer, will direct that upon such refund being made the goods be returned to the seller. [Canadian Gas Power v. Orr, 4 D.L. R. 641, applied.]

Alabastine Co. v. Canada Producer & Gas Engine Co., 8 D.L.R. 405, 30 O.L.R. 394, 23 O.W.R. 841.

D. RIGHTS OF BONA FIDE PURCHASERS.

(§ III D—75)—TITLE TO ANIMAL SOLD BY POUND-KEEPER.

Where a plaintiff claims title to a horse under a bill of sale from a pound-keeper, sold under the provisions of the Rural

Municipality Act (Alta. 1911-1912, c. 3, ss. 206 et seq.), the onus is upon him to shew that there were no irregularities in the sale proceedings.

Clark v. England, 29 D.L.R. 374, 10 A.L.R. 94, 34 W.L.R. 1012, 10 W.L.R. 1056.

INVALID REGISTRATION OF LIEN NOTE.

A purchaser in good faith for valuable consideration obtains title to the chattel which was the subject of the sale although he had notice that the seller had given a lien note at the time that such seller bought the chattel, if such lien note was not registered as required by the Conditional Sales Act, (Sask.) which provides that the seller shall not be permitted to set up a right of property or right of possession under the unregistered lien note as against the subpurchaser from the party to whom he gave possession under a conditional sale. [Moffatt v. Coulson, 19 U.C.Q.B. 341; Roff v. Krecker, 8 Man. L.R. 230, applied.]

Ferrie v. Meikle, 23 D.L.R. 269, 8 S.L.R. 161, 8 W.W.R. 336, 30 W.L.R. 913.

PURCHASE FROM WIFE OF CONDITIONAL OWNER—FAILURE TO REGISTER LIEN NOTES—RIGHTS OF PARTIES.

The buyer of a horse from the wife of a previous purchaser who had obtained it upon a conditional sale contract will, if he buys with the acquiescence of the conditional purchaser, be entitled to the like protection because of the failure of the conditional vendor to register his lien notes under the Lien Notes Act (Sask.) as a purchaser from the husband who gave the lien notes would have been entitled to, where the purchase from the wife was carried out in good faith and for valuable consideration.

Willie v. DeLisle, 21 D.L.R. 407, 8 S.L.R. 12, 30 W.L.R. 918.

Where "The L. M. Ericsson Telephone Manufacturing Company," the vendor of a telephone switchboard, affixed its name thereto as the "L. M. Ericsson Tel. Mfg. Co.," it is not entitled to a lien thereon, under c. 145, s. 1 of the Conditional Sales Act, R.S.O. 1897, for unpaid purchase money as against a purchaser who, in good faith, for a valuable consideration and without notice, acquired title through the vendee, as there was not a sufficient compliance with the provisions of such Act.

Ericsson Telephone Mfg. Co. v. Elk Lake Telephone & Telegraph Co., 4 D.L.R. 576, 3 O.W.N. 1309, 22 O.W.R. 161.

RIGHTS OF BONA FIDE PURCHASERS.

A good title to a horse is acquired by one who, for a valuable consideration, purchased it from a dealer in such animals in the usual course of business, without notice that the person from whom the dealer obtained it had reserved the title thereto by an agreement that the law did not require to be registered, in which he was described as a dealer in horses. [Dedrick v. Ashdown (1887), 15 Can. S.C.R. 227, followed.]

Delaney v. Downey, 4 D.L.R. 474, 21 W.L.R. 577, 2 W.W.R. 599.

REVENDICATION—NONDELIVERY.

A purchaser who has not had delivery of the thing purchased cannot revendicate it from a third person who, in good faith, has subsequently acquired it from the same vendor and has been put in possession of it.

Carrière v. Déziel, 50 Que. S.C. 28.

GOODS UNDER EXECUTION—PURCHASER IN GOOD FAITH — "TRADING IN SIMILAR MATTERS" — REIMBURSEMENT — THINGS OF MINIMUM VALUE — C.C. QUE. ARTS. 1487, 1989.

The sale of goods which are under execution, by the judgment debtor to a third party in good faith, is like a sale of a thing stolen. The judicial guardian of these goods has the right to recover them from the hands of the purchaser, reimbursing him for the price he has paid in accordance with art. 1489, C.C. (Que.).

But, the purchaser cannot, in order to justify the retention of part of the goods seized and sold, plead that they have no value. He must return them in their entirety in the condition in which they were received.

Bourdeau v. Capuano, 55 Que. S.C. 135.

PAROL CONTRACT—PASSING OF PROPERTY—PURCHASER WITHOUT NOTICE — BILLS OF SALE ACT.

In an action of trover for the conversion of pulpwood, the evidence was that under a verbal contract, one P., in consideration advances made and to be made, agreed to get out and deliver to the plaintiff 5,000 cords of pulpwood: the wood to be marked in the woods with the plaintiff's mark, the letter "Q.," and to be the plaintiff's property immediately it was cut, and to be delivered to the plaintiff along the railway track at Peters Siding.

Held, affirming the Trial Judge, that if the jury found the pulpwood in question was cut and marked with the plaintiff's mark, or, if not so marked, if it could be identified as pulpwood cut under the contract, it was the plaintiff's property as against the defendant, a purchaser for value, without notice, and the contract was not in contravention of the provision of the Bills of Sale Act, C.S.N.B. 1903, c. 142.

Quebec Forest Products Co. v. Shannon, 46 N.B.R. 294.

IV. Bulk sales.

(§ IV—90)—BULK SALES—"ENTIRE CROP" OF POTATOES—ESTIMATED QUANTITY—EFFECT OF.

A contract for the sale of "the entire crop of merchantable potatoes" to be raised on a specified ranch in a season at market price for September, is not restricted as to the quantity affected by a statement in the contract that the vendor "estimates" the yield at "600 tons more or less;" the purchaser is bound to take the entire crop,

although it amounted to double the estimate.

Hammond v. Daykin, 18 D.L.R. 525, 19 B.C.R. 550, 6 W.W.R. 1205, 28 W.L.R. 763.

SETTING ASIDE—STATUTORY PERIOD.

A sale declared void as not having complied with the provisions of the Bulk Sales Act is void only as against the claimant who has brought action within the 60 days prescribed by the Act, and is binding as against those who have not attacked it within that time, and they will not be allowed to come in subsequently and share ratably with the one who, by his diligence, has succeeded in having the sale set aside.

Draper v. Jackson, 26 D.L.R. 319, 28 Man. L.R. 165, 33 W.L.R. 796, 10 W.W.R. 78.

BULK SALES ACT.

A sale of a stock of goods in bulk, unaccompanied by any payment in cash or by promissory note, or other document for the purchase price, is not within the Bulk Sales Act (Sask.), 1910-11, c. 38, s. 3, and is not fraudulent and void thereunder.

Peart v. MacDonald, 33 D.L.R. 19, 10 S. L.R. 6, [1917] 1 W.W.R. 1118.

STOCK IN TRADE—GOOD-WILL.

The sale of a stock-in-trade includes essentially the good-will, which embraces the name, the title, the sign and everything which may help the buyer to retain the customers and notify them of his acquisition of the business.

Barlow v. Turner, 51 Que. S.C. 52.

AFFIDAVIT—SCHEDULE OF CREDITORS.

In a sale en bloc under arts. 1569a et seq., C.C. (Que.), the purchaser is not personally liable on account of a false statements in the affidavit of the vendor. The vendor in the sworn declaration must mention all the creditors and not only those to whom he is indebted in respect of the goods sold en bloc; a default in doing voids the sale. It is incumbent upon the purchaser to demand and see that this affidavit is made in conformity with the law and he should bear the consequences of defects in form which are in it. A creditor of the vendor not so mentioned can take advantage of a defect in form, even when the goods that he sold to the vendor were not included in the stock sold en bloc, provided that his claim was prior to such sale.

Montreal Abattoir v. Picotte, 52 Que. S.C. 373.

RECOURSE OF CREDITORS—NOVATION.

The object of the arts. 1569a to 1569e, C.C. (Que.), is to permit a merchant debtor to dispose en bloc of his business property and stock, or the greater part of it, so as not to make himself liable to a capias or a seizure before judgment, but the other property of the merchant is not affected. Thus, a creditor can take advantage of these provisions by presenting to the purchaser his total claim against the vendor, without losing his remedy against the other property of the debtor, the presentation of the claim not effecting a novation.

Patenaude v. Beaudin, 51 Que. S.C. 509.

SALE EN BLOC—CREDITORS—PAYMENT.

The transferees of the sale price of a business sold en bloc for a price payable by monthly instalments, when the vendor undertook that he would himself pay all his creditors, have no right to claim from the purchaser the payment of one of the instalments so long as those creditors have not been paid, inasmuch as up to that time, under art. 1569a C.C. (Que.), the sale is null as far as the creditors are concerned.

Duhamel v. Graves, 24 Rev. Leg. 388.

The nullity declared in arts. 1569a et seq. C.C. (Que.) as a penalty for noncompliance with the formalities requisite to the validity of a sale en bloc, is not absolute but relative. It can be invoked only by creditors whose claims are prior to the sale and not by the curator in insolvency of the estate of the vendor, for the benefit of all the creditors, whose claims are subsequent to the deed attacked.

Gagnon v. La Banque Nationale, 54 Que. S.C. 259.

SALE OF GOING CONCERN—LIST OF CREDITORS—OMISSION.

There is no legal relation between the creditor of a trader and the purchaser of the latter's business, if his name does not appear on the sworn list of creditors furnished by the vendor; and the creditor cannot sue the purchaser to recover what the vendor owes him.

St. Amour v. Pusie, 54 Que. S.C. 386.

MEANING OF "GOODS, WARES OR MERCHANDISE"—LIVERY BUSINESS.

A transfer of a livery stable, including the horses, fixtures, harness, wagons, good will of the business, etc., is not such a "sale or transfer of a stock of goods, wares or merchandise" as to come within the provisions of the Bulk Sales Act, B.C. 1913, c. 101.

Brown v. McLeod, 8 W.W.R. 110.

SALE EN BLOC—STATUTORY FORMALITIES—AFFIDAVIT OF NAMES OF CREDITORS—NONCOMPLIANCE—PRESUMPTION AS TO FRAUD — ARTS. 1569c, 1569b, 1569a, C.C. (QUE.)—ART. 646, C.C.P.

Rousseau v. Heirs of A.J. Dubuc, 25 D.L.R. 854, 47 Que. S.C. 127.

BULK SALES—SALE BY CHATTEL MORTGAGE—STATUTORY REQUIREMENTS.

A sale of stock-in-trade by a chattel mortgagee is not within the Bulk Sales Act (B.C.) which is not intended to destroy a security of that nature and enable the general creditors of a mortgagor to share equally with a secured creditor.

Drinkle v. Regal Shoe Co., 20 B.C.R. 314, 7 W.W.R. 194.

BLACKSMITH'S SHOP.

The provisions of arts. 1560, etc., C.C. (Que.) as contained in c. 39 of 1 Geo. V. (1910), which impose certain formalities

for the protection of creditors in the case of sales en bloc of stocks in trade or of merchandise, do not apply to the sale by a master-blacksmith of his shop with tools and working material, such a seller not being a merchant or manufacturer, but an artisan. The fact that a person has admitted that he is a merchant or manufacturer, or that he assumes that character without having it, does not suffice for considering him as if he actually were a merchant or manufacturer.

Wilson v. Chaput, 50 Que. S.C. 321.

(§ IV—91)—BULK SALES—STATUTORY REQUIREMENTS—SALE OF HOTELKEEPER'S BUSINESS NOT INCLUDED.

An hotelkeeper operating under a license granted him under the Liquor License Act, R.S.M. 1913, c. 117, restricting the conduct of his business and the place of sale of liquors by him is not a "trader" or "merchant" within the meaning of the Bulk Sales Act, R.S.M. 1913, c. 23, so as to bring a bulk sale of the hotel equipment and stock within the requirements of that statute.

Barthels v. Peterson, 16 D.L.R. 465, 24 Man. L.R. 794, 6 W.W.R. 396, 27 W.L.R. 734.

BULK SALES OF GOODS BY TRADER — STATUTORY REQUIREMENTS.

Thomson v. Nelson, 11 D.L.R. 851, 4 W. W.R. 712.

STATUTORY REQUIREMENTS—WAIVER.

When a trader is endeavouring to uphold a transaction which without the waiver of his creditors would be in plain disregard of the Bulk Sales Act, it is his duty to shew that the statute does not apply to the transaction by the clearest proof of such waiver as the statute calls for. (Semble): A waiver under the Bulk Sales Act, to be effective, must be given before the sale is completed.

Walter v. Leduc, 8 W.W.R. 360.

BULK SALES—DEBTOR AND CREDITOR.

Articles 1569a, 1569b, 1569c, 1569d, 1569e added to C.C. (Que.) by 1 Geo. V., c. 39 (Que.) are only intended to protect unpaid creditors whose goods formed part of the stock which their debtor sold en bloc. Hence, those persons whose goods were disposed of before the "bulk sale" cannot benefit by the provisions of said articles.

Ramsay v. Turcotte, 42 Que. S.C. 459.

SALVAGE.

See Towage; Seamen; Admiralty; Shipping.

(§ I—1)—MOTION TO STRIKE OUT PARTY—RIGHT OF ACTION BY PURCHASER — PRACTICE IN SALVAGE ACTION.

A plaintiff who complains that his name is being used without authority may be retained as plaintiff if he has acquiesced in the action being prosecuted, although he may not have originally instructed the solicitor. The purchase of an interest in a ship after the performance by it of salvage services does not necessarily disable the purchaser from prosecuting an action to recover same, when defended by underwriters. It is proper to have the master and crew before the court in an action for salvage. The maritime lien for salvage arises when the service is performed. It is not necessary in a salvage case to add cargo or freight unless a claim is made against them. When actions are brought by the same plaintiff in courts of different local jurisdictions, but by the same procedure, and the judgments in which are followed by the same remedies, such action will be treated as prima facie vexatious.

Johnson v. S.S. "Charles S. Neff," 18 Can. Ex. 159.

(§ I—2)—DEFINITION OF — PROOF—"OFFICIAL LOG" — AMENDMENT TO LOG — MERCHANT SHIPPING ACT, ART. 239 AND FOLLOWING.

During a heavy easterly gale, the "Commodore," towing the barge "St. David," and bound from Valdez to Anyox, B.C., had her rudder carried away and 2 of her 4 propeller blades broken, and was rendered practically helpless. She was drifting and leaking fast and was flying distress signals. The plaintiff managed to make fast a line to the "Commodore" and after twice breaking away succeeded in towing defendant into safety. Held, that the services rendered were skilful, considerable and meritorious, and, while not in a strict sense unusually hazardous, were in the nature of salvage services and not merely of the nature of towage. That the "log" kept in this case was an "ordinary ship's log" and not "official" within the meaning of s. 239, Merchants Shipping Act, 57 & 58 Vict., 1894, c. 60, and statements therein should not be accepted in evidence for the ship, but might be used against it to correct a statement made at a subsequent time. One year and 4 months after the accident, it is asked to add sheets of manuscript notes to the log, alleged to have been made by the master, but not proved to have been made at the time nor for the purposes of incorporation in the "log." Held, that permission to so amend the "log" will be refused.

The "Andrew Kelly" v. the "Commodore," 48 D.L.R. 213, 19 Can. Ex. 70, [1919] 1 W.W.R. 1059.

RIGHT TO — TOWAGE WITH APPRECIABLE RISK.

Where a large boat picks up and tows into harbour a gasoline passenger launch which had become disabled through depletion of the gasoline supplies and was drifting in the track of large vessels in an inlet, an allowance should be awarded on a salvage rather than a towage basis, although the gasoline launch was not in immediate danger, if there was an appreciable risk to the larger boat in her manoeuvres by being carried by the tide to a position close to the land.

Grand Trunk Pacific Coast S.S. Co. v. The Launch "B.B.," 17 D.L.R. 757, 15 Can. Ex. 389, 6 W.W.R. 711.

TOWAGE—COSTS.

When about twenty miles out from Kingston the sole engineer on the tug "Dixon," towing 2 barges, fell overboard and was lost. He was the only one on board who knew anything about engines and the tug was, in consequence, without means of keeping up motive power. She was drifting and was in a position of actual or apprehended danger, and was signalling for help, when the "Keyvive," with some risks to herself, took them in tow and brought them to safety. Held (1), that the claim arising thereunder was one of salvage and not merely of towage. (2) That the act of plaintiff in claiming an excessive amount and having the ship arrested therefor was oppressive, and costs relative to the arrest and release on bail, and applications relative thereto will not be allowed him.

The "Keyvive" v. The "S. O. Dixon," 48 D.L.R. 114, 19 Can. Ex. 87.

MORTGAGEE AS SALVOR—VOLUNTEERS.

The recovery of a sunken dredge, with its contents, constitutes a salvage service creating a maritime lien. Where the mortgagee of the dredge employed others to perform the work of salving and is neither the owner nor charterer of the salving vessels, he cannot claim exemption from the rule that a salvor must be one personally engaged in the work done.

Simpson v. The "Kruger," 19 Can. Ex. 64.

RIGHT TO.

The S.S. "Berwindmoor" was picked up some seventy miles S.S.E. of Sable Island in a disabled condition (in consequence of having lost her rudder) by the S.S. "Energie" on the morning of Nov. 27 and brought into the port of Halifax. The position in which the ship was found was a dangerous one at that time of year. During the operations heavy weather prevailed for the greater part of the time, in consequence of which the salving ship lost a number of lines, one of her anchor chains and anchor, had her windlass broken, and sustained other damage which necessitated detention and repairs at Halifax. The time consumed in the salving work and in the consequent repairs amounted to 11½ days. It was held that the services rendered by the "Energie" were of a meritorious character and that the sum of $12,500 would be a reasonable allowance therefor, to be apportioned $10,000 to the owners of the ship and $2,000 to the officers and crew. When the "Energie" with the "Berwindmoor" was within 13 miles of the mouth of Halifax harbour, the weather at the time being fine and there being nothing to prevent the "Energie" completing her work without assistance, the S.S. "Mackay-Bennett" was taken down by the agent of the owners of the "Berwindmoor," and, by the directions of the agent, a line was put on board the disabled ship from the "Mackay-Bennett" and that ship assisted in the further work of getting the "Berwindmoor" into port, and held, that, under the circumstances, the services rendered by the "Mackay-Bennett" could only be regarded as in the nature of towage-salvage, but that, having regard to the size, power and equipment of the ship, the ordinary rule in relation to remuneration for towage services should not apply.

S.S. "Energie" v. S.S. "Berwindmoor;" Commercial Cable Co. v. S.S. "Berwindmoor," 14 Can. Ex. 23.

ACTION OF IN REM VERSO — STRAY LOGS — COSTS OF SALVAGE — SURRENDER C.C. ART. 1046.

One who of his own initiative undertakes to salvage stray logs drifting in a stream or a river, has no recourse against the owner for the cost of salvage, if the latter prefers to give up the property.

Rousseau v. Breakey, 56 Que. S.C. 255.

(§ I—3) — DERELICT — ABANDONMENT OF VESSEL.

A vessel cannot be derelict before abandonment; derelict is a term applied to a thing abandoned and deserted at sea by those in charge of it without hope on their part of recovering it and without any intention of returning to it.

Humboldt v. The Escort, 8 W.W.R. 194, 30 W.L.R. 911.

(§ I—4)—APPREHENDED RISK OF DANGER—NATURE OF SERVICES—COMPENSATION.

Where there is apprehension of risk, or danger, to a ship, though no immediate risk or danger, the services voluntarily rendered such ship are in the nature of salvage services and though danger to the salving vessel is an ingredient of such services, it is not always necessarily present, and is not essential, but the degree of danger to life and property of the salvors is an element to be considered in arriving at the measure of compensation.

Clayoquot Sound Canning Co. v. S.S. "Princess Adelaide," 48 D.L.R. 478, 19 Can. Ex. 128, [1919] 3 W.W.R. 241.

CLAIM—BASIS OF ASSESSMENT—DERELICT—ACTUAL ABANDONMENT.

A salvage claim is not to be assessed on the basis of the salved boat being a derelict merely because she was on the point of being abandoned by her master and crew; there must be an actual abandonment to constitute a derelict and it must be without hope of recovering it or of returning to it.

The "Humboldt" v. The "Escort No. 2," 20 D.L.R. 899, 20 B.C.R. 595.

WAGES—LOSS OF EARNINGS.

Where the wages of the crew of a ship which has been salved are paid by the salvors, a lien therefor attaches, and can be enforced against the salved ship. No lien attaches in a case of attempted salvage

where the services rendered produced no result, and contributed in no way to the subsequent saving of the boat. [Note.—On the first question decided above reference should now be made to a decision of Hill, J., in "The Petone," [1917] P. 198, reported since judgment was given in this case.]

Canadian Dredging Co. v. The "Mike Corry," 47 D.L.R. 495, 19 Can. Ex. 61.

MODE OF ESTIMATING AMOUNT — COSTS — DISTRIBUTION.

In finding the value of salvage services, amongst other circumstances the court must consider the degree of danger to which the salved vessel was exposed, and from which she was rescued by the salvors, and the risk incurred by the salvors in rendering their services and the mode in which the services were rendered. The value of the vessel salved, while important, is not decisive. There is a difference owing to conditions rendering disaster less probable in the amount to be allowed for salvage services on the Great Lakes and on the high seas.

Johnson v. S.S. "Charles S. Neff," 44 D. L.R. 148, 18 Can. Ex. 168.

EXTRAVAGANT CLAIM — TENDER—PAYMENT INTO COURT—COSTS.

Where plaintiff named an extravagant sum for salvage services in his statement of claim, but the services were meritoriously rendered and the defendant did not tender or pay into court any moneys to cover the demand, the court declined to deprive plaintiff of costs although awarding a sum quite disproportionate to the amount claimed.

Brister v. S.S. Uranium, 15 Can. Ex. 102.

SHIPPING — EFFICIENT SERVICE — REASONABLE AWARD—AMOUNT.

A steamship of the approximate value of $45,000, carrying a cargo of deals of the value of $25,000 in respect of which the freight when earned would have amounted to $13,375, went aground on a shoal on the coast of Prince Edward Island, and lay in an exposed and dangerous position. The plaintiff sent his salvage steamers to the grounded ship, pumped water from her hold, and set a gang of men to jettison part of the cargo, which was boomed and towed ashore where it was afterwards sold. It was agreed between the agent of the underwriters and the plaintiff that if the plaintiff failed to get the defendant steamship off the shoal, the plaintiff would get $1,500 for loss of gear, but no arrangement was made in the event of success. The plaintiff succeeded in getting the steamship afloat some 3 days after she grounded. The steamship then proceeded under her own steam to Halifax, but one of the plaintiff's steamers stood by her until she was docked:—Held, that under all the circumstances and considering the respective values of the ship and cargo, the plaintiff was entitled to a salvage award of $8,000.

Brister v. S.S. Bjorgviu, 15 Can. Ex. 105.

AWARD—AMOUNT—VALUE BASED ON DEPRECIATION OF SHIP.

The O., a freight steamer, fully laden with coal, had gone ashore on Danger reefs, at the northerly end of Thetis Island, and about seven and a half miles, by ship's course, from Ladysmith, B.C. She had sprung a leak and the water had put out her fires. About ten feet of her forefront was on the rock, while her stern was in deep water. The P. sighted the stranded vessel in the night-time and went to her relief, taking in a hawser passed to her by the O., and waiting for the tide and daylight. Just before 6 o'clock in the morning, the P. started to pull straight ahead at full speed, and shortly succeeded in getting the O. off the reef. The P. then cut the O.'s hawser, so as to lose no time, backed up to the O. and made fast to her with the P.'s hawser, and succeeded in towing her under forced draft into Ladysmith, where the O. was tied up to a wharf in a position of acknowledged safety:—Held, that the services performed by the P., while without the specially meritorious features of saving human life or danger to herself and crew, were as skilfully conducted as the nature of the case permitted, and valuable, and as such were entitled to corresponding recognition, even though they were of short duration. Salvage awarded in an amount of $2,200. In finding the value of the ship and cargo, the district registrar allowed a yearly depreciation in the value of the ship of 7 per cent, following a practice with reference to wooden vessels said to prevail in British Columbia. Held, that whatever may be said of the allowance of such a depreciation in the case of wooden vessels as a rule, it must always very largely depend upon the manner in which the vessel was originally constructed and the care she had subsequently received, but, in any event, it could not be applied to the ship in respect of which salvage services were rendered in this case, as she is a better built ship than the average, and has been well cared for and maintained.

Dunsmuir v. The Otter, 18 B.C.R. 435.

RELATIVE LIABILITY OF SHIP AND CARGO.

Where no specific agreement is made for a sum certain, the rule in a salvage action is that the interests in the ship and cargo are only severally liable, each for its proportionate share of the salvage remuneration.

Peninsular Tug & Towing Co. v. Stephie, 22 D.L.R. 600, 15 Can. Ex. 124.

MOTOR-BOAT—CONVERSION — COUNTERCLAIM FOR SALVAGE—JURISDICTION.

Heisler v. Conors, 10 E.L.R. 61.

SALVAGE—INJURY TO SALVING SHIP—NECESSITIES OF SERVICE.

The "Mystic" v. The "Nanna;" English

& American Shipping Co. v. The "Nanna," 8 E.L.R. 381.

REPAIRS AND NECESSARIES—LIEN—DOCKAGE.

Reid Wrecking Co. v. The "John B. Ketcham 2nd," 13 Can. Ex. 413.

(§ I—5)—SUDDEN FREEZING OF WATER—TIMBER TAKEN OUT OF THE STOCKADES AND ADRIFT.

When in an action by way of seizure and sale the plaintiff claims logs carried from the stockades by a sudden freezing the waters, and which the defendant has seized. The defendant has no serious right to contest the ownership of the property, or to allege that the wood in question is on the contrary the property of other companies not parties in cause. The defendant right is take possession to insure payment of his rights of salvage and not to claim the property. He pleads the right of others in pleading the right of property of other companies. Furthermore if the defendant had the right of retention until payment of salvage, be it by action or by exception, he ought to ask, not to be dispossessed of the wood in question before being reimbursed for the sum to which he would have a right. He should take steps to this end and in this case, not having done so, having sought only to renew the action, the court cannot do it for him.

Turgeon & Co. v. Mercier, 25 Rev. de Jur. 21.

SATISFACTION.

Of mortgage, see Mortgage; Land Titles. Of judgment, see Judgment V; Execution.

SCHEDULE.

In assignment for creditors, see Assignment for Creditors.

SCHOOLS.

I. IN GENERAL.
A. Legislative power; constitutionality of statutes.
B. Admission; attendance; tuition.
C. Health regulations.
D. Suspension; control over pupil.
II. TEACHERS.
A. Employment; qualification.
B. Compensation; salary.
C. Removal; dismissal.
D. Liability of teacher.
III. OFFICERS AND ELECTIONS.
A. Officers.
B. Elections.
IV. DISTRICTS AND PROPERTY; SCHOOL TAXES.
V. BOOKS; INSTRUCTIONS.

Annotation.

Denominational privileges; constitutional guarantees: 24 D.L.R. 492.

I. In general.

A. LEGISLATIVE POWER—CONSTITUTIONALITY OF STATUTES.

See Constitutional Law, II A—154.

(§ I A—1)—SEPARATE SCHOOLS—SECTION 17 OF SASKATCHEWAN ACT — WHOSE "RIGHTS AND PRIVILEGES" ARE PRESERVED THEREBY.

Section 17 of the Saskatchewan Act which preserved any right or privilege with respect to separate schools which any class of persons had at the date of passing the Act operates only in favour of the minority in any school district; the majority in a district had no "rights or privileges" with respect to separate schools because the school of the majority whether Protestant or Roman Catholic is in Saskatchewan always the "public school."

Regina Public School v. Gratton Separate School, 18 D.L.R. 571, 29 W.L.R. 221, 399, 6 W.W.R. 1088, 7 W.W.R. 7. [Reversed, 21 D.L.R. 162, 50 Can. S.C.R. 589, 7 W.W.R. 1248, 8 W.W.R. 156, 31 W.L.R. 82.]

THE WORD "SCHOOL" DEFINED — ONTARIO PUBLIC SCHOOL ACTS.

The word "school" as used in the Ontario Public School Acts prior to that of 1896 is not prima facie to be interpreted as meaning "department" for which there is a teacher occupying a separate room with a separate register, but is to be given its ordinary and popular meaning—a place or establishment for instruction.

Carlyle v. Oxford, 18 D.L.R. 759, 30 O.L.R. 413.

(§ I A—5)—LEGISLATIVE POWER.

The court will prevent the invasion by a municipal council of the legislative territory assigned to a school board, and will compel by mandamus the discharge of a council's statutory duties which are merely ministerial and ancillary in their nature; and necessary for properly carrying out the lawful action of a school board. The fact that the ratepayers disapprove of the action of a school board is no excuse for interference by a municipal council. A school board is supreme within the limits of its own jurisdiction, and a municipal council has no right to review or render nugatory the action of a school board in the exercise of a power given by statute to the board.

Re West Nissouri Continuation School, 1 D.L.R. 252, 25 O.L.R. 559, 21 O.W.R. 533.

LEGISLATIVE POWER — MENNONITE SETTLEMENT — SPECIAL PRIVILEGES — COMPULSORY SCHOOL ATTENDANCE.

The compulsory provisions of the School Attendance Act, 1916 (Man.), c. 97, are binding upon Mennonites who settled in Manitoba under an arrangement with the Canadian Government made in 1873, and a Mennonite who neglects to send his child aged between 7 and 14 to a public school is liable to summary conviction and fine under that Act. The special provisions as to education in the settlement arrangement do not

in fact interfere with the compulsory provisions of the provincial law and furthermore could not bind the Province of Manitoba as to its jurisdiction in educational matters conferred by s. 22 of the Manitoba Act, 33 Vict., (Can.), c. 3, confirmed by 34-35 Vict., (Imp.), c. 28.

R. v. Hildebrand; R. v. Doerksen, 31 Can. Cr. Cas. 419, [1919] 3 W.W.R. 286.

B. Admission; attendance; tuition.

(§ I B—12)—Attendance.

Where both parent and child have their permanent and principal place of residence within the limits of a school district, the child is not to be deemed a "nonresident pupil" and the trustees of the school district have no right to claim the payment of nonresident pupil's fees as a condition of such child being allowed to attend school.

Inkster v. Minitonka School District, 6 D.L.R. 57, 22 Man. L.R. 487, 22 W.L.R. 57, 2 W.W.R. 1105.

Residence—Rates.

There is no duty cast upon a school board to receive within its schools children who are not resident within its own municipal district.

Patterson v. Victoria School Trustees, 24 B.C.R. 365.

Transport of pupils — Mandamus — Discretionary matter.

The powers of the Superior Court, by virtue of art. 50 of C.C.P., do not extend to matters which are discretionary. So, the court cannot order school commissioners to transport children free of charge to schools of a school municipality, seeing that the Act states that they "may" do it "if necessary," and that, consequently, it is not imperative but only optional.

Lacroix v. La Commission d'Ecoles de la Pointe Claire, 53 Que. S.C. 88.

Rates—Residence.

Apart from s. 110 of the Public Schools Act, which refers only to rural school districts, the right to attend British Columbia Public Schools is in no way connected with the payment of rates, and depends on residence.

Patterson v. Victoria School Trustees, 35 W.L.R. 526.

C. Health regulations.

(§ I C—16)—Vaccination — Powers of Health Board.

A regulation by a Provincial Board of Health prohibiting, under the Public Health Act (Alta.), admittance of a pupil to any school unless he produces evidence of successful vaccination, is, as respecting the mode of enforcement, in conflict with the Truancy Act providing for compulsory attendance, nor within the excusable exceptions enumerated therein, and, therefore, ultra vires.

Clowes v. Edmonton School Board, 25 D.L.R. 449, 9 A.L.R. 106, 32 W.L.R. 733, 9 W.W.R. 372.

II. Teachers.

A. Employment; qualification.

(§ II A—30)—Qualification — Employment—Formalities of contract.

A contract of a teacher with school trustees in New Brunswick is not invalid because not under the corporate seal of the trustees. [Alexander v. School Trustees, 39 N.B.R. 597, applied.]

Quinlan v. School Trustees, 14 D.L.R. 376.

Terms of employment—School Act.

Neither teachers nor trustees may contract themselves out of the School Act (Sask.), and any term in such a contract which is inconsistent with any provision of the Act will be void.

Hayes v. Loyola School District, 34 W.L.R. 799.

Engagement of unqualified teacher — Unauthorized teaching of French—Separate Schools Act, s. 80—Regulations of Department of Education —Misconduct of trustees—Parties.

In an action by a ratepayer of a Roman Catholic separate school section against the trustees of the section and a teacher engaged by them, to restrain the trustees from continuing to employ the teacher:—Held, (1) that the engagement of the teacher was illegal, because she had not the necessary qualification, and such qualification as she had, had not been validated by the Minister or Department of Education. (2) That the use and teaching of the French language in the school section as carried on by the defendants were unauthorized. (3) That s. 80 of the Separate Schools Act, 3 & 4 Geo. V. c. 71, was not applicable to this case, and did not create a domestic forum for the disposal of it. (4) Semble, that the word "prevail" in the regulation of the Education Department prescribing the course of study in a school section "where the French or the German language prevails," means "gain the mastery" or "predominate." (5) Held, that the conduct of the defendants, in disregarding and defying the rulings and remonstrances of the Department and its officers, was recalcitrant and recusant. (6) That the teacher was a necessary or proper party to the action. (7) That there should be a judgment for the plaintiff enjoining all the defendants as prayed, and for the recovery of nominal damages and full costs against the defendants the trustees personally.

McDonald v. Lancaster Separate School Trustees, 31 O.L.R. 360, 6 O.W.N. 328.

Bilingual — Teacher — Qualification — Duty of school commissioner — Mandamus — Public instruction — Section ref., [1909] arts. 2586, 2709, 2717.

School commissioners are obliged to employ, for teaching in the model school of their municipalities, teachers having a model French and English diploma. If they neglect to do this, a mandamus may

be applied for. However, if it is impossible to procure the services of a teacher having the certificate required by the Act, the commissioners can, with the permission of the superintendent of public instruction, engage a competent teacher although not provided with a bilingual diploma corresponding to a teacher's certificate.

Doherty v. School Commissioners of St. Gilles, 56 Que. S.C. 532.

B. COMPENSATION; SALARY.

(§ II B—35)—ADVANCE BY OFFICER BEFORE SCHOOL TAX AVAILABLE—RIGHT OF REIMBURSEMENT.

A school trustee who is also secretary to the board has a right of action against the board to recover the amount of a teacher's salary advanced by him where the necessary money had been voted and the advance was made with the concurrence of his cotrustees in reliance upon his being reimbursed when the school tax should be collected, the assessment of which had been duly authorized.

Quinlan v. School Trustees, 14 D.L.R. 376.

The plaintiff, an unlicensed teacher, was employed to teach in a school district for one term, under a written contract purporting to be made by the defendants, who are school trustees, incorporated under the Schools' Act, C.S.N.B. 1903, c. 50. The contract was signed by two out of the three trustees but the corporate seal was not affixed to it and no meeting of the trustees was held to authorize the contract. Under this contract the plaintiff taught for one full term. In an action to recover the amount agreed to be paid to her, it was held (1), that the contract was made by the school trustees as a corporation and not as individuals. (2) The contract is unenforceable because under c. 50, it is ultra vires of the school trustees to employ an unlicensed teacher. (3) The defendants are not liable on a quantum meruit for the services of the plaintiff because (a) the employment of the plaintiff was ultra vires, and (b) there was no completed work which the trustees could accept or reject.

Trustees of School District of Bright v. Yerxa, 40 N.B.R. 351, 10 E.L.R. 1.

C. REMOVAL; DISMISSAL.

(§ II C—40)—NOTICE — SUFFICIENCY — RESOLUTION—SEAL.

The engagement of the principal of a high school, terminable upon a month's notice, is sufficiently terminated by communicating to him the resolution of the board that he "be given a month's notice to resign"—the exactness of the language being unimportant; the notice need not be under the corporate seal of the board.

Smith v. Campbellford Board of Education, 37 D.L.R. 506, 39 O.L.R. 323.

NOTICE OF DISMISSAL.

A motion adopted by school commissioners ordering the secretary-treasurer to notify "two teachers that the commission does not any longer require their services for the year 1913–1914," although passed in regard to both of them together, is of legal effect, provided each of such teachers receives individual and separate notice of dismissal.

Leroux v. Commissioners of Schools of St. Emile, 50 Que. S.C. 316.

III. Officers and elections.

A. OFFICERS.

(§ III A—55)—At a meeting of school commissioners (Que.) regularly opened with only three members present, a motion by one to appoint another of them chairman of the meeting is carried by the concurrence of the person so nominated, and is not subject to reconsideration or repeal by the whole meeting on the late arrival of two other members opposed thereto.

Demers v. Moffet, 8 D.L.R. 234, 21 Que. K.B. 394.

SCHOOL COMMISSIONER — DISQUALIFICATION —CONTRACT WITH COMMISSION.

Martineau v. Dansereau, 12 Que. P.R. 199.

POWERS OF SCHOOL BOARD—SELECTION OF TEACHERS.

Resolutions of a "separate school" board purporting to delegate to the chairman of the board power to discharge, select and engage teachers, are ultra vires.

Mackell v. Ottawa Separate School Trustees, 24 D.L.R. 475, 34 O.L.R. 335.

DELEGATION OF AUTHORITY BY SUPERINTENDENT AS TO HEARING CHARGES—POWER AS TO.

The superintendent of public instruction has the right to delegate to a Judge of the Superior Court the power conferred on him by art. 2536, R.S.Q. 1909, to have a hearing upon certain accusations made against one of the members of the Catholic School Commissioners of Montreal.

Therrien v. Mercier, 24 Que. K.B. 352.

SCHOOL COMMISSIONERS—CHOICE OF SCHOOL SITE—MODE OF REVIEW—CHOSE JUGEE.

There is no other remedy in law to have quashed for illegality a resolution of the school commissioners deciding to acquire a certain land for a schoolhouse than the appeal given to the Circuit Court by R.S.Q. 1909, art. 2981. The judgment of the Circuit Court upon such appeal is final, and is chose jugee between the parties. Any subsequent action in the Superior Court to have such resolution quashed, and an application for an injunction to prevent the commissioners from carrying out these resolutions, cannot be maintained because it would constitute an appeal from a judgment of the Circuit Court when the law refuses it, and because the Superior Court has no jurisdiction to decide such application.

Paquin v. School Com'rs of Ste. Genevieve, 47 Que. S.C. 218.

CONTINUATION SCHOOL ACT—BOARD VACANCIES—MANDAMUS.

Members of a township council who refuse to discharge their duties under the Continuation Schools Act, R.S.O. 1914, c. 267, in filling vacancies in the board of trustees of a township continuation school, may be compelled to do so by mandamus; a formal demand and refusal need not be shewn, but refusal may be inferred from their conduct.

Re West Nissouri Continuation School, 33 D.L.R. 209, 38 O.L.R. 207, varying, as to costs, 11 O.W.N. 197.

REGULATIONS AS TO TEACHERS AND LANGUAGE—B.N.A. ACT.

The Ontario Legislature has power under s. 93 of the B.N.A. Act (inter alia) to regulate the manner of conducting schools in the province, to determine the qualifications required by the teachers, and to regulate the use of the French language in the schools; and a regulation of the Department of Education dealing with these matters does not conflict with those rights and privileges with respect to denominational schools which any class of persons had at the passing of the Act.

Ottawa Separate School Trustees v. Mackell, 32 D.L.R. 1, [1917] A.C. 62, 115 L.T. 793, affirming 24 D.L.R. 475, 34 O.L.R. 335. [See 12 O.W.N. 401.]

LIABILITY OF SCHOOL TRUSTEES—WRONGFUL DISBURSEMENTS—COURT COSTS — RESOLUTION — ALTERATION OF MINUTES — PARTICIPANTS.

Neal v. Kellington, 35 D.L.R. 142, 10 S.L.R. 87, [1917] 2 W.W.R. 101.

VACANCIES — RESIGNATION — INABILITY TO ACT.

A school commissioner who hands in his resignation can no longer exercise his functions even if the resignation is not accepted. If he resigns and at the same time sends to the secretary-treasurer a certificate attested under oath stating his inability to act on account of illness, the production of the certificate vacates his position independently of the resignation.

Carrière v. Perrault, 51 Que. S.C. 237.

Where the election of a chairman at a meeting of a board of commissioners has taken place in obedience to statutory requirements at the hour fixed for the session and while a quorum was present it cannot be considered to have been acomplished by trickery or stratagem, and cannot be reconsidered or disregarded at an adjourned sitting.

Demers v. Moffet, 18 Rev. de Jur. 419.

BORROWING—VAGUE RESOLUTION — AUTHORIZATION—RATIFICATION.

A resolution adopted by school commissioners authorizing their secretary-treasurer "to borrow in the name of the school commission a few hundred dollars to meet expenses of betterments and repairs, and for the reduction of debts," does not give the right to this officer to contract a debt upon a note of $1,100 with interest at 6 per cent per annum. A resolution authorizing an indeterminate and indefinite borrowing, leaving to the secretary-treasurer the discretion of determining the amount to borrow, is illegal and ultra vires. It follows that the note given by the secretary-treasurer in the name of the school commission for such loan is void. In order that there may be ratification by the principal he must have knowledge of the agents excess of his powers and have the wilingness to ratify it. So the negligence of the school commissioners to check over the accounts of that secretary-treasurer, who had illegally contracted a loan, is not a ratification of his conduct if they were ignorant of what he had done. Articles 232, 234, et seq., of the School Code, which requires the authorization of the superintendent of public instruction and of the Lieut.-Governor-in-council, and which impose certain formalities in order to contract a loan, apply only to loans of a permanent character which requires the issue of debentures or bonds, but does not affect temporary loans for costs of administration.

School Commissioners of Ste. Elisabeth v. Lafrenière, 27 Que. K.B. 73.

OFFICERS.

If all the qualified members of the board are present at a meeting, the absence of a notice convening it cannot afterwards be invoked.

Giasson v. Les Commissaires d'Ecoles de Farnham, 14 Que. P.R. 137.

COMMISSIONER OF—REGULARITY OF APPOINTMENT—ABILITY TO READ AND WRITE.

In order to exercise the office of school commissioner two conditions are required; regular appointment to office and proper qualifications. Failure to know how to read and write constitutes an incapacity rendering his exercise of office unlawful and is not a mere defect of eligibility covered by the failure of the voters to contest his election within 15 days before the Circuit Court. [Bonin v. Page, 9 Que. P.R. 177, overruled.]

Desaulniers v. Desaulniers, 9 D.L.R. 201, 22 Que. K.B. 71, 19 Rev. de Jur. 352.

QUO WARRANTO — SCHOOL COMMISSIONER OUGHT TO KNOW HOW TO READ AND WRITE BUT NOT NECESSARILY FLUENTLY —S.R.P.Q. 2639—C.M. 227.

It is not necessary, according to the law of public instruction, that a school commissioner know how to read and write fluently, in order to be deemed to know how to read and write.

Carriere v. Richer, 25 Rev. de Jur. 443.

(§ III A—56)—BOARD DELEGATING ITS POWER—IMPAIRING EFFICIENCY OF SCHOOLS —REMEDY.

Where a School Board has delegated its discretionary and quasi-judicial duties and functions to another and thereby impaired the efficiency of its schools, the court will remedy the wrong.

Mackell v. Ottawa Separate School Trustees, 18 D.L.R. 456, 7 O.W.N. 35.

RIGHTS AND LIABILITIES OF MEMBERS OF SCHOOL BOARD — DISCRETIONARY AND QUASI-JUDICIAL POWERS — DELEGATION OF POWERS.

The discretionary and quasi-judicial powers vested in a School Board in matters relating to the schools under its control are so limited that the business of the Board must be regularly conducted within its jurisdiction in the bona fide discharge of its duties and in harmony with the laws of the province and the regulations of the Department. A School Board in matters relating to the schools under its control and involving discretion or judgment is bound to exercise such functions so that the whole question must be presented to the Board, should be weighed and considered by the Board and must be determined upon by the Board, nor has the Board the power to delegate duties or functions of this character to another instead of exercising its own judgment and discretion throughout.

Mackell v. Ottawa Separate School Trustees, 18 D.L.R. 456, 7 O.W.N. 35.

OBLIGATION TO CONVEY PUPILS TO SCHOOL—DISTANCE OF "FURTHER THAN ONE MILE."

Under a by-law passed pursuant to sec. 91 (a) of the Public Schools Act, R.S.M. 1902, c. 143, to the effect that trustees shall provide suitable arrangements for conveying to and from school "all pupils who would have further than one mile to walk in order to reach the school," the distance between the house where the school children live and the road over which the van provided by the trustees passed should be taken into account, and also the distance from the school gate into the school building.

R. ex rel. Wells v. Green, 10 D.L.R. 111, 23 W.L.R. 264.

PUBLIC SCHOOLS — ERECTION OF SECOND SCHOOL-HOUSE IN RURAL SCHOOL SECTION — FIRST SCHOOL-HOUSE BUILT BY GOVERNMENT—AGREEMENT OF TRUSTEES WITH GOVERNMENT — ACTION TO RESTRAIN TRUSTEES FROM PROCEEDING WITH WORK—MONEY IN HANDS OF TRUSTEES FROM SALE OF TOWNSHIP DEBENTURES UNDER VALID AND SUBSISTING BY-LAW — REMEDY OF RATEPAYER — OBJECTIONS RAISED—REGULARITY OF PROCEEDINGS OF TRUSTEES — PUBLIC SCHOOLS ACT, R.S.O. 1914, c. 266, ss. 11, 31, 44.

Carr v. Public School Board of School Section 2, of Casey, 17 O.W.N. 27.

SCHOOL DISTRICT—PLEADING — RATEPAYERS SUING TRUSTEES—FORM OF ACTION.

In an action by ratepayers of a school district complaining of the act of the trustees in moving the school, if they do not constitute a majority of the ratepayers they shall plead as individuals and as suing on behalf of themselves and of the class to which they belong. In an action claiming an injunction against moving a school and damages, the trustees should not be sued, nor be held responsible, as individuals, but as a board, unless they are shown to have acted in bad faith, or at least wilfully.

Bowman v. Faber, [1919] 3 W.W.R. 755.

SCHOOL TRUSTEES—CONTRACT WITH SOCIETY TO WHICH TRUSTEES BELONGED—VALIDITY—SCHOOL ORDINANCE, S. 102.

When a contract is made between trustees of a school district and a society of which some of the trustees are members, and there is no pecuniary interest, profit, promise or expected benefit of such members, the transaction is not prohibited by s. 102 of the School Ordinance.

Re School Ordinance, 5 W.W.R. 1268.

RIGHTS AND LIABILITIES OF MEMBERS OF SCHOOL BOARD.

School commissioners are subject to the right of supervision by the Superior Court; and a suitor who demands the annulment of a resolution of the school commissioners "because it is illegal and constitutes a flagrant injustice to his rights," thereby sets up facts sufficient to give jurisdiction to the Superior Court.

Chaine v. School Commissioners of St. Severe, 18 Rev. de Jur. 508.

CHANGE OF SCHOOL SITES IN A DISTRICT—INTERPRETATION OF SCHOOL-LAW.

In this case the respondents were obliged to change the present location of the school because it did not fulfill the conditions the rules required. It was not easily reached by the teachers nor was water of good quality provided. It was not required by law that the new site chosen by the respondents ought to be in the same centre of the district, which was moreover impossible. Taking into consideration all the circumstances of this case the respondents exercised wisely their discretionary powers in passing the resolution of July 23, 1918, which decreed the change of the school site, and consequently the appeal should be dismissed with costs.

Dufault v. Les Commissaires d'Ecoles pour La Riviere Richelieu, 25 Rev. de Jur. 80.

RIGHTS AND LIABILITIES OF MEMBER OF SCHOOL BOARD.

The secretary-treasurer of a board of school commissioners is justified in not notifying of a meeting a school commissioner who cannot read and write and who has previously declared that he would not act as such.

Giasson v. Les Commissaires d'Ecoles de Farnham, 14 Que. P.R. 137.

(§ III A—58)—REQUEST FOR THE RECONSTRUCTION OF A SCHOOL IN THE CENTRE OF THE DISTRICT WHICH CONSTITUTED AN ANNEXATION—RIGHT OF APPEAL TO THE CIRCUIT COURT—ART. 2981 R.S.Q. 1909.

There is no appeal from a resolution of a school board, refusing a request that they rebuild the school in the centre of the district which has been annexed, art. 2981, R.S. Q. 1909. It would be unjust to change the

site of the school at the request of the annexed portion which for 20 years never complained of the existing state of affairs.

Hamel v. School Board of St. Damase, 25 Rev. de Jur. 393.

SCHOOL LAW — RESOLUTION OF SCHOOL BOARD—CHANGE OF A SITE OF SCHOOL HOUSE—APPEAL—JURISDICTION OF THE CIRCUIT COURT—R.S.Q. 1909, ART. 2988.

It is a principle that a law is not repealed unless it be so in formal terms, or that it be incompatible with the new law dealing with the same subjects. Article 2988 R.S.Q. 1909, allowing an appeal to the Circuit Court from a resolution of school trustees concerning the district schools or the construction of school houses, has replaced art. 2055 R.S.Q. 1888. Article 2988 does not give the Circuit Court such extensive powers as the superintendent of public instruction had by reason of art. 2055. The Circuit Court in this case has only the usual jurisdiction of the Court of Appeal. It is a recognized rule that where a question of fact arises, a court of appeal does not lessen or modify the judgment of the first instance, unless it contains serious mistakes, or applies erroneous principles, or omits to take into consideration the evidence or part of the evidence, or unless it has acted in bad faith.

Lamarche v. St. Michel de Napierreville, 25 Rev. Leg. 342.

B. ELECTION.

(§ III B—60)—NOMINATION OF CANDIDATES —PARTICULARS.

Under art. 5422 R.S.Q. 1909, the nomination paper of each candidate in an election, held under the provisions of the School Law Act, should designate his domicile and his profession and occupation, in a manner sufficient to identify him and under art. 5429; the nomination which does not conform to these requirements is invalid and should not be given any effect.

Gauthier v. Poitras, 49 Que. S.C. 232.

SCHOOL COMMISSIONERS—ILLEGAL ELECTION —CONTESTATION—QUO WARRANTO.

When, at an election of school commissioners where four candidates are nominated, the presiding officer assumes the power to declare that two of them are not qualified to exercise the functions and are ineligible, and proclaims the other two elected, without voting, there is, on his part, "non-observance of the formalities required," within the meaning of art. 2672, R.S.Q., 1909, which gives the right to contest the election, and which contestation, under art. 2673 shall be tried and decided by the Circuit Court or the Magistrate's Court to the exclusion of every other court. Consequently, remedy by quo warranto before the Superior Court cannot be had for the purpose of declaring that the trustees who were proclaimed elected have forfeited their office.

Lorrain v. Trudeau, 45 Que. S.C. 235.

(§ III B—61)——SCHOOL COMMISSIONER— NOMINATION BY BOARD — PETITION IN CONTESTATION—QUO WARRANTO—R.S.Q. 2692—QUE. M.C. 120.

The nomination of a school commissioner by the Board of School commissioners cannot be contested by a petition in contestation of election, but by the remedy of quo warranto. A school trustee, who has left his domicile in the municipality for which he was nominated, can no longer sit as such trustee, and resolutions adopted at meetings where he took his seat at which there would not have been a quorum without him, are null. As such a trustee is not acting in good faith, he cannot be considered as an officer de facto.

Dechamps v. Christin, 46 Que. S.C. 367.

IV. Districts and property; school taxes.

Regularity of assessment under School Act, see Taxes, III—100.

(§ IV—70)—RIGHT TO TAX EXEMPTED COMPANIES — MUNICIPAL BY-LAWS FIXING ASSESSMENT OF COMPANIES — PUBLIC SCHOOLS ACT—MUNICIPAL ACT—VALIDATING LEGISLATION, HOW LIMITED.

That municipal by-laws fixing the assessment of certain power companies had been confirmed by the Ontario Legislature will not prevent the operation of the restriction imposed by the Public School Act and the Municipal Act, [R.S.O. 1914, c. 266, s. 39, and R.S.O. 1914, c. 192, s. 396 (e)] by which no municipal exemption by-law in whole or in part shall be held or construed to exempt from school rates; this restriction applies not only to by-laws passed under the general powers of a municipality but also to special by-laws exempting from municipal assessment of any nature or kind beyond the rates of an agreed annual assessment and the assessment for school rates is not limited by the by-law. [Leave to appeal to Privy Council refused Aug. 4, 1914. C.P.R. v. Winnipeg, 30 Can. S.C.R. 558, distinguished.]

Canadian Niagara Power Co. v. Stamford; Electrical Development Co. v. Stamford; Ontario Power Co. v. Stamford, 20 D.L.R. 261, 50 Can. S.C.R. 168, 50 C.L.J. 586, affirming 18 D.L.R. 64, 70; 30 O.L.R. 378.

PURCHASE OF SITE—DEBENTURES—NULLITY.

An attempted purchase of a school site by a rural school board, to be paid for by debentures, before the proposal for the loan has been submitted to and sanctioned at a special meeting called for that purpose, and the debentures duly issued in pursuance thereof, does not comply with s. 44 of the Public School Act, R.S.O. 1914, c. 266, and is therefore invalid and nugatory. [Smith v. Fort William School Board, 24 O.R. 366; Forbes v. Grimsby Public School Board, 6 O.L.R. 539, approved.]

Birch v. Public School Board of Sec. 15, Tp. of York, 31 D.L.R. 705, 37 O.L.R. 392.

CONSOLIDATION OF SCHOOL DISTRICTS—ASSUMPTION OF LIABILITIES.

The purpose of s. 40 (d) of the School Ordinance (Alta.) is to preserve upon a consolidation of school districts, the separate entity—not the corporate existence—of the original districts, for the purpose of discharging their distinct debts and liabilities, and the section only permits the board of the consolidated district to enter into an agreement for the taking over and assumption of the assets and liabilities of all the districts, and not of any single district.

Arnegard v. Board of Trustees of Barons Consol. School District, 33 D.L.R. 735, 11 A.L.R. 460, [1917] 2 W.W.R. 302.

DEBENTURES — APPROVAL OF MINISTER — STATUTORY REQUIREMENTS.

The Minister of Education may refuse to countersign debentures for school building purposes, where the site and the building contract have not received his statutory approval, in virtue of the School Ordinance (Alta.), s. 130, which empowers him to countersign the debentures if satisfied that the requirements of the Ordinance have been substantially complied with.

Oyen School District v. Minister of Education, 34 D.L.R. 78, 11 A.L.R. 280, [1917] 2 W.W.R. 313, affirming [1917] 1 W.W.R. 1258.

PUBLIC SCHOOLS—HIGH SCHOOL.

The true construction of s. 15 of the Public Schools Act (R.S.B.C. 1911, c. 206) is that public school includes high school, and a city municipality school district has a right to collect fees from a district municipality school district whose pupils attend its high schools.

Victoria v. District of Oak Bay, 38 D.L.R. 238, 24 B.C.R. 516, [1918] 1 W.W.R. 158, affirming 34 D.L.R. 734.

SCHOOL TAXES—NOTICE.

An assessment for school taxes in the name of one who has no interest in the land and is not the occupant thereof, and failure to send any notice of assessment whatever to the owner of the property renders the assessment void. [The King v. Grand Falls, 13 D.L.R. 266; Riesbach v. Creighton, 12 D.L.R. 363, followed.]

Wallbridge v. Steenson, 41 D.L.R. 330, 11 S.L.R. 224, [1918] 2 W.W.R. 861.

NEW SCHOOL SITE—CONSENT OF RATEPAYERS — ARBITRATION—CONSTRUCTION OF PUBLIC SCHOOL ACT.

McDonald v. School Dist. of Earl Grey, 38 D.L.R. 747, [1918] 1 W.W.R. 112.

ERECTION OF NEW SCHOOL—DEBENTURES—VALIDITY OF PROCEEDINGS—INJUNCTION —RATEPAYER.

Robertson v. Springbrook School District, 36 D.L.R. 777, 10 S.L.R. 267. [See also [1917] 3 W.W.R. 970.]

PUBLIC SCHOOLS—UNION SCHOOL SECTION—REQUISITION OF BOARD FOR SUM OF MONEY FOR SCHOOL PURPOSES—APPORTIONMENT BETWEEN TWO MUNICIPALITIES OUT OF WHICH SECTION FORMED—PROPORTIONS FIXED BY ASSESSORS—POWERS OF ASSESSORS—PUBLIC SCHOOLS ACT, R.S.O. 1914, c. 266, s. 29 (1), (8), (9)—ASSESSMENT ACT, R.S.O. 1914, c. 195, s. 50.

Eastview Public School Board v. Gloucester, 40 D.L.R. 707, 41 O.L.R. 327, reversing 12 O.W.N. 372.

CONSOLIDATION OF DISTRICTS—FRANCHISE—CHARGE OF MAKING FALSE DECLARATION.

The franchise provided for districts already established is to prevail upon the vote taken for consolidation of school districts under the School Ordinance (Alta.)

R. v. Gainor, 30 Can. Cr. Cas. 357, [1919] 1 W.W.R. 801.

FORMATION OF UNION SCHOOL SECTION — AWARD OF ARBITRATORS — CONFIRMATION BY COUNTY BY-LAW — COUNTY COURT JUDGE REFERRING ADJUSTMENTS BACK TO ARBITRATORS — JURISDICTION —LEAVE TO APPEAL—PUBLIC SCHOOLS ACT, R.S.O. 1914, c. 266.

Re Flamborough West Union School Section, 10 O.W.N. 228, 11 O.W.N. 5.

A resolution of school commissioners deciding upon the purchase of a school-house is valid notwithstanding that the commissioners have not provided beforehand for the accomplishment requisite for providing the amount of the price.

Blais v. School Commissioners of St. Francis, 25 Que. K.B. 566.

SCHOOL SITE.

The site of a school house is to a certain extent in the discretion of the school commissioners and the court will not interfere with the exercise of this discretion.

Gaisson v. Commissaires d'Ecoles de Farnham, 14 Que. P.R. 137.

TRANSFER TO ANOTHER DISTRICT.

A board of school commissioners has no right to transfer certain ratepayers from one district to another if there is no reason for the detachment, especially if it is proved that said ratepayers formerly belonged to the latter district and were at their own request added to the former.

Gaisson v. Commissaires d'Ecoles de Farnham, 14 Que. P.R. 137.

ERECTION OF SCHOOL BUILDING—MONEYS EXPENDED BY TRUSTEE WITHOUT AUTHORITY.

Vassar School District Corp. v. Spicer, 21 Man. L.R. 777, 18 W.L.R. 147.

SCHOOL LANDS HELD IN TRUST FOR SCHOOL PURPOSES — UNINCORPORATED RELIGIOUS ORDER.

Attorney-General v. Landry, 9 E.L.R. 472, affirming 9 E.L.R. 270.

(§ IV—71)—DISTRICTS.

A by-law passed by a county council establishing a continuation school in a high school district which never existed in fact

is valid, and does not contravene the High School Act, 9 Edw. VII., c. 91, s. 4 (Ont.).

Re Henderson and West Nissouri, 46 Can. S.C.R. 627, affirming 24 O.L.R. 517, and 23 O.L.R. 21.

APPEAL FROM A RESOLUTION PASSED BY THE SCHOOL COMMISSIONERS REVOKING A FORMER RESOLUTION RELATIVE TO THE DISTRICT SCHOOLS OF THE MUNICIPALITY —QUESTION AS TO THE RIGHT OF APPEAL —IS THE APPEAL IN FACT AND IN LAW WELL FOUNDED IN THIS CASE—C.C. QUE. 496.

On May 20, 1917 the school commissioners of St. S. passed a resolution subdividing the town into six districts, and set out the limits of these districts according to law. Public notice of the resolution and of the division was given by the secretary-treasurer. The six districts were then created and existed in law and all proceedings taken at the said sitting where only certain proceedings intended to put into execution the said resolution forming these districts. The court is not now concerned with ascertaining whether these proceedings were regularly taken. The resolution of May 20, was repealed by another resolution of respondents; it is this resolution that is appealed. There cannot be any doubt that the appeal is in conformity with art. 489 of the School Law. There is here no question of a case under art. 490. The respondents have used one of the powers given them by law in changing the boundary of the districts created May 20, and as a result there is an appeal from their decision and this court has jurisdiction under art. 496. On the merits the evidence shows that both in law and in fact, the said petition in appeal is well founded and should be maintained, with costs.

Martin v. The School Commissioners of St. Samuel, 25 Rev. de Jur. 167.

SCHOOL LAW — DIVISION OF DISTRICT — SCHOOL HOUSE—MANNER OF APPORTIONING THE VALUE—S. REF. [1909], ARTS. 2596, 2758.

When a school district is divided, the part where the school house is situated retains the ownership of it, but it should make the other a remittance the amount of which is established pro rata, according to a landed valuation of the properties which were taxed for its construction. This apportionment should be based upon the valuation roll in force when the school house was constructed, and not on that in force at the time of the division of the district.

Marcotte v. School Commissioners of Notre-Dame-de-Portneuf, 55 Que. S.C. 15.

DIVISION OF DISTRICT—COMPULSION TO ATTEND PARTICULAR SCHOOL.

Prima facie, every resident of a school district has the right to send his children to the school of that district so long as the children conduct themselves in conformity with the rules of that school, and the rates, if any, required to be paid on their behalf have been fully paid. This, however, does not give him the right, where there is more than one school in the district, of determining to which particular school they shall go.

Patrick v. Board of Trustees of Yorkton School District No. 59, 6 W.W.R. 1107.

CONTINUATION SCHOOL—COUNTY BY-LAW—HIGH SCHOOL DISTRICT—"EXISTED IN FACT."

Re Henderson and West Nissouri, 23 O.L.R. 21, 24 O.L.R. 517, 3 O.W.N. 65, 20 O.W.R. 50.

(§ IV—72)—LIABILITIES — SCHOOL BOARD AND OFFICERS.

Apart from the express provisions contained in c. 59 of C.S.N.B. 1904, whereby school trustees may borrow money for certain purposes, the trustees would have no power to bind the school board by a promissory note signed by them as trustees and discounted with a bank, although this were done for the purpose of raising money to pay current liabilities in connection with running the school.

Quinlan v. School Trustees, 14 D.L.R. 376.

CONSOLIDATION OF SCHOOL DISTRICTS—VALIDITY OF DEBENTURES.

Section 219 (g) of the Public School Act providing that the signature of the Provincial Secretary and the Seal of the Province affixed to school debentures shall be "conclusive evidence that such corporation has been legally formed," precludes an attack as to the validity of the various proceedings leading up to the consolidation of a school district, and constitutes the debentures thereof indefeasible securities in the hands of their holders.

Molison v. Woodlands, 25 D.L.R. 30, 25 Man. L.R. 634, 9 W.W.R. 183, 32 W.L.R. 452, affirming 21 D.L.R. 19, 7 W.W.R. 1315.

SCHOOL DISTRICT—LIABILITY FOR TORT—ACTS COMPLAINED OF NOT AUTHORIZED AT MEETING—MALICIOUS ABUSE OF LEGAL PROCESS—ABSENCE OF REASONABLE AND PROBABLE CAUSE.

Action against a school district for damages for malicious abuse of legal process was dismissed because the acts complained of were not authorized at a meeting of the board according to s. 105 of the School Act, and because there was no evidence of malice or absence of reasonable and probable cause, which are necessary ingredients in such an action.

Pollon v. Kobzar School District, [1919] 3 W.W.R. 771.

(§ IV—74)—SCHOOL TAXES—WHAT MAY BE INCLUDED — DEFICIT FROM PRECEDING YEAR.

A high school board may, in the absence of mala fides or any deliberate intention to postpone the debts incurred in one year to the next, include in the amount to be levied by a township corporation for school purposes for the ensuing year, the amount of a deficit arising from unforeseen contingen-

cies during the preceding year, which was met with money borrowed by the board. [Atty.-Gen. v. Lichfield, 17 L.J.Ch. 472; Jones v. Johnson, 5 Ex. 862; and Haynes v. Copeland, 18 U.C.C.P. 150, followed.]

Re Athens High School Board, 14 D.L.R. 543, 29 O.L.R. 360.

SCHOOL TAXES—REQUISITION BY TRUSTEES—LEVY BY MUNICIPALITY—LEVY ILLEGAL IF SUFFICIENT FUNDS IN HAND TO MEET REQUISITION.

Under s. 24 (a) of the School Assessment Ordinance (Alta.) and s. 295 of the Municipal District Act (formerly the Rural Municipality Act) it is the duty of the municipality to levy and collect the taxes requisitioned by the school trustees and pay the proceeds thereof to the treasurer of the school district. Under s. 308 of the Act the amount so requisitioned becomes a debt due and owing by the municipality to the district. If at any time after paying the amount requisitioned there is a balance to the credit of the municipality it should be utilized in meeting the next requisition, but if the municipality has funds on hand sufficient to meet the requisition it is illegal for it to make a new levy and retain such funds. The school rate struck in a district should not be more than reasonably required to meet the amount of the requisition.

Re Spruce Grove, 44 D.L.R. 153, [1919] 1 W.W.R. 4.

SEPARATE SCHOOLS—TAXES.

The scheme of the Separate Schools Act (Ont.) c. 71, 1913, R.S.O. 1914, c. 271, is that the school board and not the municipal council is empowered to impose the school rates, but the board may cause the rates to be levied either by its own collector or by the municipal council.

Re Therriault and Cochrane, 15 D.L.R. 675, 30 O.L.R. 367.

COMPANY TAX—APPORTIONMENT—SEPARATE SCHOOLS.

A separate school board cannot obtain a share of the school taxes of a company by notice under s. 93a of the School Assessment Act (Sask.), as amended 1912-13, c. 36, s. 3, requiring the company to apportion school taxes between public and separate schools according to the religious belief of the shareholders, and the failure of the company to make any apportionment, if the company is not shewn to have any shareholders of the religious belief to which the separate school pertains, for s. 93a, if constitutional, applies only to companies who could apportion under s. 93, and s. 93a is unconstitutional and ultra vires of the Saskatchewan Legislature.

Regina Public School v. Gratton Separate School, 21 D.L.R. 162, 50 Can. S.C.R. 589, 7 W.W.R. 1248, 8 W.W.R. 156, 31 W. L.R. 82, reversing 18 D.L.R. 571, 7 S.L.R. 451, 29 W.L.R. 221, 399, 6 W.W.R. 1088, 7 W.W.R. 7.

ASSESSMENT AND TAXES—LIABILITY FOR SCHOOL TAXES.

Stamford v. Ontario Power Co., 7 O.W.N. 646, 8 O.W.N. 241.

SCHOOL TAXES—FUNCTIONS OF BOARD.

The school board of a township school district in Ontario has the legal right itself to receive whatever money it regularly calls for and to arrange and liquidate its own debts unhampered by the township council. [For various prior decisions relating to the same matter, see Re West Nissouri Continuation School, 1 D.L.R. 252, 3 D.L.R. 195, 4 D.L.R. 847.]

McFarlane v. Fitzgerald, 9 D.L.R. 629, 4 O.W.N. 869, 24 O.W.R. 230.

NOTICE OF ASSESSMENT.

To be effective in any one year, notice required to be given under s. 43 of the School Assessment Act (Sask. 1915, c. 25) must be given before the completion of the assessment roll.

Grattan Separate School v. Regina Public School, 38 D.L.R. 217, 10 S.L.R. 455, [1918] 1 W.W.R. 16, affirming 35 D.L.R. 158, [1917] 2 W.W.R. 565.

UNION SCHOOL SECTIONS—APPORTIONMENT OF TAXES.

The assessors of municipalities comprising a union school section under the Public Schools Act (R.S.O. 1914, c. 266) have power under s. 29 (1) of the Act to apportion the amount to be paid respectively for school purposes, and in so doing should equalize the assessments in the municipalities, having regard to the actual values of the properties assessed. They are not bound by the values appearing on the assessment rolls and any irregularity in the manner of determining the amounts, does not afford an excuse for failure to levy and collect the sums required.

Eastview Public School Board v. Gloucester, 40 D.L.R. 707, 41 O.L.R. 327, reversing 12 O.W.N. 372.

SEPARATE SCHOOLS—ASSESSMENT.

Where the minority ratepayers in a district have established a separate school under the School Act (Sask. 1915, c. 23, s. 39) all the ratepayers of the same religious denomination in the district are bound to contribute to the support of such school; a ratepayer of the same religion cannot elect to be a supporter of another school.

Regina v. McCarthy, 43 D.L.R. 112, [1918] A.C. 911, 119 L.T. 661, [1918] 3 W. W.R. 302, affirming 32 D.L.R. 741, 10 S. L.R. 14, [1917] 1 W.W.R. 1105. [See 46 D.L.R. 74, [1919] 1 W.W.R. 814.]

DIVISION OF DISTRICT—VALUATION OF TAXABLE REAL ESTATE.

When a school district is divided by the formation of a new district, the part in which the school-house is situated retains the property thereof, making a refund to the other part. The amount of such refund is established proportionately to the value of the real estate of the two sections of the divided district at the time of its division,

and not to their respective value at the time of the construction of the school house.

Marcotte v. Commissaires d'Ecoles de Portneuf, 54 Que. S.C. 12.

TAXABLE PROPERTY—TELEPHONE LINE.

The poles and wires of a telephone line do not constitute a taxable property under the terms of art. 2521, para. 15, of R.S.Q. (Public Instruction Act), and are not subject to the imposition of school taxes.

Commissaires d' Ecoles de St. Alphonse v. Continental Heat & Light Co., 53 Que. S.C. 385.

A ratepayer not of the same religious denomination as the minority of the ratepayers who have established a separate district school is to be assessed as a public and not a separate school supporter.

McCarthy v. Regina (Neida case), 32 D.L.R. 755, 10 S.L.R. 29, [1917] 1 W.W.R. 1088.

ACTIONS FOR SCHOOL ASSESSMENTS—JURISDICTION.

Under art. 2971, R.S.Q. 1909, school commissioners may bring action for the recovery of school rates notwithstanding the provisions of art 2872, and the Circuit Court and District Magistrate's Court alone have jurisdiction in such actions whatever may be the amount claimed.

School Commissioners of St. Paul v. Compagnie de Placements de la cité, 51 Que. S.C. 185, 18 Que. P.R. 208.

The jurisdiction of the Circuit Court over actions to collect school taxes is exclusive of that of the Superior Court and governs the case of hypothecary action, as well as others for the collection of school taxes. In the law relating to public instruction in the Province of Quebec, provision is made for the manner of collecting the school tax (a) by a warrant of seizure signed by the chairman of the School Board, and addressed to a bailiff for the seizure of the debtor's moveable property; (b) through the secretary-treasurer of the county council for the sale of immoveable property of the debtor. The above remedy is exclusive of the action at law.

School Commissioners of St. Joseph-de-Bordeaux v. Gagnon, 18 Que. P.R. 149, 51 Que. S.C. 175.

TAXATION.

The law relating to public instruction (arts. 2521 et seq. R.S.Q. 1909), in declaring that the valuation of property made by the municipal authorities shall serve as the basis of the assessments to be imposed by school corporations (art. 2836) does not thereby authorize school corporations to tax all property valued in the municipal roll. School corporations cannot tax all property valued in the municipal roll but only so much of such property as they may tax under the law of public instruction, i.e., that which constitutes "real estate" under that law (art. 2521, pars. 15, 16).

School Municipality v. Montreal Water & Power Co., 4 D.L.R. 776, 41 Que. S.C. 500.

Where the application of a school board for funds under s. 38 of the Ontario High Schools Act, has been once approved by the municipal council to whom it is made, it is the duty of the council to pass a by-law and do all that is necessary for the raising of the money, and this duty cannot be evaded by a subsequent disapproval or by repealing the by-law that had been passed in compliance with that duty. [Re West Nissouri Continuation School, 1 D.L.R. 252, 25 O.L.R. 550, 3 O.W.N. 478, affirmed on this point.]

Re West Nissouri Continuation School, 3 D.L.R. 195, 21 O.W.R. 533, 25 O.L.R. 550.

TAXES—ASSESSMENT—SCHOOL PURPOSES—SPECIAL EXEMPTION BY STATUTE—APPLICABILITY — SCHOOLS ACT — CON. STATS. N.B. 1903, c. 50, ss. 105-108.

Exemptions, as to assessment within a city or town granted by statute to a corporation are not applicable to the assessment fixed by the School District, in which the corporation in question owns the assessable property unless the schools in the school district have been taken over by the city or town under the provisions of ss. 105, 108 of the Schools Act. (C.S.N.B. 1903, c. 50.)

The King v. School District of Madawaska; Ex parte Fraser Co., 49 D.L.R. 371.

HIGH SCHOOL DISTRICT COMPOSED OF TWO MUNICIPALITIES—COST OF ERECTION OF SCHOOL BUILDING—PAYMENT IN PROPORTION TO EQUALIZED ASSESSMENT —MUNICIPAL BY-LAW PROVIDING FOR RAISING EXCESSIVE AMOUNT—ORDER QUASHING —HIGH SCHOOLS ACT, R.S.O. 1914, c. 268, s. 6, 38 (4), (8).

Re Fowler and Waterdown, 7 O.W.N. 309.

SCHOOL TAXES—CATHOLIC OR PROTESTANT—EVIDENCE.

The fact, whether or not a ratepayer is a Roman Catholic for the purpose of being assessed for school taxes, can be proved by the one who is taxed, notwithstanding that the certified copy of the municipal valuation roll describes him as Catholic. The document, although authentic binds only the ratepayers who are subject to it.

Montreal St. Michel Archange Separate Schools v. Wall, 49 Que. S.C. 536.

SCHOOL TAXES—WHEN PAYABLE.

School taxes are due to the school commissioners only by those ratepayers whose names have been entered in the collection roll.

Gamache v. Blais, 50 Que. S.C. 200.

TAX RATE—SEPARATE SCHOOLS.

Re Therriault and Cochrane, 5 O.W.N. 26, 24 O.W.R. 964.

SCHOOL TAX.

A school rate is illegally imposed and invalid where it is struck before the time has expired in which the assessment roll may be appealed; and where it includes the estimated probable expenditure not only for

the then current year, but for a greater part of the succeeding year. [Braatz v. White Whale School District, 1 A.L.R. 14, followed.]

Muirhead v. Bullhead Butte, 4 A.L.R. 12.

(§ IV—75)—TWO SCHOOLHOUSES IN ONE SECTION—TOWNSHIP CORPORATION—BY-LAW.

Re Medora School Section, 23 O.L.R. 523, 18 O.W.R. 992, affirming 2 O.W.N. 594, 18 O.W.R. 279.

(§ IV—76)—BUILDING SCHOOL—STATUTORY REQUIREMENTS.

A ratepayer, a municipal elector, who is called upon to pay a special school tax for a loan intended to be applied to the building of a school house, has a special interest sufficient to entitle him to contest by direct action the legality of the resolutions of the school commissioners authorizing the loan and the construction. The text of art. 2746, R.S.Q. 1909, which declares that "school houses should be built conformably to plans and specifications approved or furnished by the superintendent" is imperative and should be rigourously observed by the school commissioners. They are equally bound to submit to him all the essential changes made in their original plans and specifications.

Desjardins v. School Commissioners of Maisonneuve, 51 Que. S.C. 450.

(§ IV—77)—SCHOOL LANDS.

Waste Crown lands that were, by an order of the Lieut.-Governor in Council set apart for school purposes pursuant to the Public School Act, 35 Vict., No. 16 (1872), were thereby absolutely and unqualifiedly dedicated for school purposes, and such order constituted an alienation by the Crown within the meaning of s. 6 of c. 14 of 47 Vict. (1884), so that such lands could not be subsequently granted by the Crown to another without the consent of the trustees of the school district under the 1882 amendment to the school Act, notwithstanding a school house was not erected thereon until twelve years later, although s. 30 of the Public School Act of 1872 required that the trustees should take possession of land acquired or given for school purposes.

Attorney-General v. Esquimault & Nanaimo R. Co., 4 D.L.R. 337, 17 B.C.R. 427, 21 W.L.R. 549, 2 W.W.R. 568.

THE SCHOOL ASSESSMENT ACT, S. 43—NOTICE BY SEPARATE SCHOOL BOARD TO COMPANY AS TO DIVISION OF TAXES.

Section 43 of the School Assessment Act (c. 25 of 1915, Sask.) is intra vires. It was held to affect the companies and taxes in question. Notices under it were held to be continuing notices so that a notice given in 1916 was effective as to the taxes for 1917.

Board of Trustees of Grattan Separate School v. Board of Trustees of the Regina Public School, [1919] 3 W.W.R. 769.

V. BOOKS; INSTRUCTIONS.

(§ V—84)—SEPARATE DENOMINATIONAL SCHOOLS—USE OF FRENCH LANGUAGE—RELIGIOUS TEACHINGS—BREACH OF DEPARTMENTAL REGULATIONS — INJUNCTION.

McDonald v. Lancaster Separate School Trustees, 24 D.L.R. 868, 34 O.L.R. 346, affirming 31 O.L.R. 360.

PUBLIC SCHOOL — RELIGIOUS INSTRUCTION GIVEN BY TEACHER AFTER SCHOOL HOURS.

Shaver v. Cambridge and Russell Union School Section, 2 O.W.N. 686.

SCIRE FACIAS.

See Judgment, VI; Execution.

As to forfeiture of charter, see Companies.

SEAL.

See Contracts.

As to company contracts, see Companies; Municipal Corporations.

SEAMEN.

See Admiralty; Shipping; Towage; Master and Servant, II A—35.

Pilotage license, want of authority to grant, recovery of payments, see Mistake, III—20.

Pilots' fund, breach of trust, see Limitation of Actions, I E—30.

Seamen's or fishermen's wages, desertion, see Master and Servant, I C—13.

(§ I—2)—CONTRACT OF HIRE—LAW OF THE FLAG — IMPROPER DISCHARGE — NORWEGIAN MARITIME CODE — ADMIRALTY ACT, 1861, S. 10 AND SS. 9, 12.

Section 10 of the Admiralty Court Act, 24 Vict. (Imp.) 1861, which extends the jurisdiction to "any claim by a seamen of any ship" permits the application by the court of the law of the country of the litigants. A contract or engagement between a Norwegian owner and a Norwegian master for services to be rendered on a Norwegian ship, registered in Norway, although verbally made in New York, U.S.A., is governed by the law of Norway. Where a change in destination of a ship is made, the crew can legally refuse to continue on terms of existing contract. In such event, where the new terms asked are not accepted by the owner, members of the crew are entitled to legal notice before being discharged.

Jacobsen v. The "Fort Morgan," 49 D.L.R. 123, 19 Can. Ex. 165. [Affirmed, 51 D.L.R. 149, 59 Can. S.C.R. 404.]

(§ I—4)—FISHERMEN—SLEEPING QUARTERS—LIEN FOR "LAY" WAGES.

Persons employed on a small launch on a salmon fishing "lay," and performing work thereon in the double capacity of sailors and fishermen, though most of their time is occupied in fishing and though not having any sleeping quarters on board the vessel, are nevertheless "seamen" and en-

titled to their maritime lien for seamen's wages; but the lien will not attach if the use of the vessel is no part of the agreement on which the "lay" is based and merely allowed by the owner as a matter of convenience.

Morrisette v. The "Maggie," 27 D.L.R. 464, 466, 22 B.C.R. 424, 476, 16 Can. Ex. 494, 498, 34 W.L.R. 39, 120, 10 W.W.R. 228.

WAGES—MASTER OF SHIP—JURISDICTIONAL AMOUNT.

Under the Canada Shipping Act (R.S.C. 1906, c. 113, s. 194) the master of a ship is put upon the same basis as a seaman as regards the jurisdictional amount for the enforcement of claims for wages.

Beck v. The "Kobe," 24 D.L.R. 573, 17 Can. Ex. 215, 22 B.C.R. 169, 9 W.W.R. 89, 32 W.L.R. 351.

LIEN FOR NECESSARIES—FISHING SCHOONER —"FISHING-STORES."

"Fishing-stores" or tackle, such as hooks, gaffs, nippers and knives, used by a schooner employed in the business of halibut fishing are necessaries.

Pichon v. The "Alliance No. 2," 17 Can. Ex. 201, 20 D.L.R. 70, 20 B.C.R. 560.

LIENS FOR EQUIPMENT—NECESSARIES—SEAMAN'S WAGES—PRIORITY.

A lien for "building, equipping or repairing" a ship under s. 4 of the Admiralty Court Act, 1861, or one for necessaries, cannot take priority over a lien for seaman's wages.

Re The "Aurora," 17 Can. Ex. 203, 20 B.C.R. 92.

PILOTAGE RIGHTS—QUEBEC HARBOUR.

The Act 4-5 Geo. V., c. 48, has not abrogated all the powers of the corporation of the pilots for the harbour of Quebec. The Act has only taken away from it the powers concerning the relations between ship owners and the public in general with the pilots, and has left the rights affecting only the pilots themselves and their relations, privileges and obligations as members of the corporation of pilots. The order-in-council of May 8, 1915, adopted in virtue of that Act, and which orders that the account of pilotage of a ship shall be paid to the pilot himself, only intends to indicate the person to whom the ship agent must pay the pilotage dues. It does not declare the pilot the owner of those dues; the latter must immediately turn them over to the pilots corporation so that they may be divided between all its members according to the law of 1860.

Pilots Corp. of Quebec Harbour v. Paquet, 27 Que. K.B. 409, 53 Que. S.C. 220.

(§ I—4)—WAGES—CONTRACT—"LAY" AND "BONUS."

A sailor who engages on a whaling voyage and is to receive a certain sum per month "and lay" (the term "lay" being set out in the ship's articles as an apportionment to the officers and crew of various amounts for various kinds of whales that are taken by the ship), may include the sum due him under "the lay" in an action for wages against the ship; the sum so due is not subject to forfeiture under a clause in the articles providing for the forfeiture of a "bonus" in case the seaman leaves his employment before the final termination of the whaling season.

Farrell v. The "White," 20 B.C.R. 576, 17 Can. Ex. 219, 7 W.W.R. 389.

WAGES—JURISDICTION OF COURT.

The Superior Court, by admitting its want of jurisdiction over an action to recover a sailor's wages, cannot order that the action be remitted to the police court under the terms of art. 170 C.C.P.

Simard v. Canada Steamship Co., 49 Que. S.C. 9.

WAGES—DISMISSAL—JURISDICTION.

Action by a sailor, who has been dismissed without cause, claiming the equivalent of wages which he will lose during the rest of the season, is not an action for wages withdrawn from the jurisdiction of the Superior Court by the Canada Shipping Act (R.S.C. 1906, c. 113). Section 162 of the Act, which provides for an indemnity equal to one month's wages, in addition to wages earned, when a seaman has been dismissed without cause before having earned one month's wages, does not apply to the case of a sailor who has performed more than one month's service.

Simard v. Canada Steamship Co., 50 Que. S.C. 105.

WAGES — JURISDICTIONAL AMOUNT — EXCHEQUER COURT.

The effect of s. 191 of the Canada Shipping Act (R.S.C. c. 113) is to require the plaintiff to recover at least the minimum amount of wages specified, and the Exchequer Court has no jurisdiction where the amount bona fide claimed is in excess of the minimum, but the amount recovered is less. [The Harriet, Lush 285; Gagnon v. The Savoy, 9 Ex. 238, followed.] The jurisdiction of the Exchequer or Admiralty Court under the Canada Shipping Act (R.S.C. 1906, c. 113, s. 191), over claims for seamen's wages, depends upon the amount of recovery, not the amount sued on. Where the amount of recovery is less, although the amount sued on is more than $200, the court is without jurisdiction. Several such claims may be consolidated into one action in order to confer jurisdiction.

Cowan v. The "St. Alice," 17 Can. Ex. 207, 21 B.C.R. 540, 32 W.L.R. 17, 8 W.W.R. 1256.

WAGES.

In proceedings for the recovery of seamen's wages had before a stipendiary magistrate the magistrate found that the wages claimed were due and gave judgment in favor of the claimants and a warrant issued under which defendant, a constable, levied upon the vessel of which plaintiff was master. There being nothing on the

face of the warrant disclosing error on the part of the magistrate. It was held that the court had no jurisdiction to retry the matter or reverse his finding. Also, that the warrant, being good, on its face protected the constable levying under it and defeated the action brought against him. And also, that it could be clearly inferred from the face of the warrant that the magistrate had jurisdiction.

Horwood v. Nicholson, 45 N.S.R. 206, 9 E.L.R. 309.

SEARCH AND SEIZURE.

See also Levy and Seizure; Intoxicating Liquors.

(§ I—2)—Information for search warrant.

A search warrant will be quashed if the information for same, taken under Cr. Code, s. 629, fails to allege any criminal offence. A search warrant issued under the authority of s. 629, is invalid if it does not allege a criminal offence. A search warrant will be quashed if the information for same taken under s. 629, fails to allege the causes of suspicion as required by Code form No. 1. [R. v. Kehr, 11 Can. Cr. Cas. 52, 11 O.L.R. 517, applied.]

R. v. Frain, 24 Can. Cr. Cas. 389, 32 W.L.R. 387.

(§ I—3)—Malicious issue of search warrant—Board of School Trustees not specifically charged—Liability for.

The Board of Trustees for a school district may be held liable, although not specifically charged with the malicious issue, without reasonable and probable cause, of a search warrant, the search and seizure although technically the act of the police authorities being substantially the act of the Board, the police acting as its agents for the purposes of vindicating a supposed civil right.

Thomas v. Board of Trustees for W. Calgary School District, 45 D.L.R. 76, 14 A.L.R. 245, [1919] 1 W.W.R. 181.

Responsibility — Larceny — Warrant —Authority to search — Duty of constable—C.C. art. 1053.

A person is liable in damages who enters a building in which a workman was employed, and, without a search warrant, but accompanied by a detective and a constable, seizes some tools, in the presence of fellow employees, declares they had been stolen from him, and carries them away, and who, the same day, in the same manner, made a search through the said workman's residence. If an individual charges verbally a certain person, whom he points out to a constable, with having committed a larceny, such officer would be entitled to arrest such person without a warrant, but, in the absence of a charge, the constable has no authority to interfere with any person or property, or to enter anyone's house for purpose of making a search without a warrant.

Phillips v. Meany, 56 Que. S.C. 451.

(§ I—4)—Search warrant—Sufficiency.

An information to obtain a search warrant under s. 629 of the Cr. Code (Form 1) need not be signed by the complainant if he in fact takes his oath before the magistrate as to its truth; such information must state the cause of suspicion, whatever it may be, as provided for in such form. The search warrant issued by the magistrate as provided by Form 2 of s. 629 is invalid if it does not describe the things to be searched for and the offence in respect of which the search is made, and a search made under such warrant is illegal.

R. v. La Vesque, 42 D.L.R. 120, 30 Can. Cr. Cas. 190, 45 N.B.R. 522.

(§ I—5)—What constitutes.

A seizure of goods under authority of law requires that there should be a formal taking possession of the articles seized and a dispossession from the person having the custody thereof by the seizing official. A letter or notice addressed by a food inspector to a company having certain articles in storage not to dispossess itself of said articles or otherwise dispose of the same does not constitute a valid seizure of said articles.

Montreal v. Layton, 1 D.L.R. 160. [Affirmed, 10 D.L.R. 852, 47 Can. S.C.R. 514.]

(§ I—7)—Execution of warrant—Sunday.

A search warrant for liquor issued under the Canada Temperance Act, R.S.C. 1906, c. 152, cannot be executed on a Sunday.

Ex parte Willis (R. v. Lawlor), 27 Can. Cr. Cas. 383, 44 N.B.R. 347.

(§ I—10) — Force in executing search warrant on gaining house charge—Producing warrant.

An officer executing a search warrant is protected only in so far as he uses no more force than under the circumstances is reasonably necessary. In the execution of a search warrant on a gaming-house charge under Cr. Code, s. 641, where the place is not a dwelling house or part of a dwelling house, the police officer executing it must have the search warrant with him in order to exhibit it for inspection if asked for, but it is not obligatory where it is not a dwelling house that the officer should first demand an entrance or signify the cause of his coming before breaking in.

Wah Kie v. Cuddy, 20 D.L.R. 351, 23 Can. Cr. Cas. 383, 8 A.L.R. 111, 30 W.L.R. 167, 7 W.W.R. 797, affirming 19 D.L.R. 378, 23 Can. Cr. Cas. 325.

Illegality of arrest of person lured by police into suspected gaming house after the raid—Cr. Code, s. 641.

A search order issued under Cr. Code, s. 641, in respect of a suspected gaming house, may authorize the arrest of all persons who are "found therein;" but this

does not authorize the police executing such search order to arrest a person who was not there when the raid took place but whom they induced to come there by telling him that the place had been raided and that others placed under arrest wanted to see him. His arrest under such circumstances is a misuse of the search order and is illegal. [R. v. Pollard, 29 Can. Cr. Cas. 35, 13 A.L.R. 157, applied.]

R. v. Kostich, 31 Can. Cr. Cas. 407.

IRREGULARITY—TEMPERANCE ACT.

A summary conviction under the Ontario Temperance Act is not affected by any irregularity in the information for the search warrant, as a result of which the prosecution was enabled to prove the finding of liquor on the premises and drinking carried on with others than persons there resident. [R. v. Swarts, 37 O.L.R. 103, 27 Can. Cr. Cas. 90, applied.]

R. v. Lake, 28 Can. Cr. Cas. 138, 38 O.L.R. 262.

TEMPERANCE ACT — STATING GROUNDS OF SUSPICION.

Reasonable grounds of suspicion required by law to appear in an information for a search warrant for liquors under the Canada Temperance Act are disclosed where a hotelkeeper is the accused and the informant swears that he knows that intoxicating liquor is being brought to defendant's hotel and persons are resorting there, as the deponent has good reason to believe, for the purpose of drinking the same.

R. v. Bedford, 32 D.L.R. 781, 27 Can. Cr. Cas. 107, 37 O.L.R. 108.

TEMPERANCE ACT—WARRANT—EXECUTION.

A search warrant for liquors under the Canada Temperance Act will not be quashed on certiorari because of its being given to the informant to execute in his capacity as a constable.

R. v. Swartz, 27 Can. Cr. Cas. 90, 37 O.L.R. 103.

INFORMATION — SEARCH WARRANT—CAUSES OF SUSPICION—POSSESSION OF WARRANT AT TIME OF SEIZURE — PROSECUTING INSPECTOR ASSISTING CONSTABLE AT SEIZURE.

Fanning v. Gough, 18 Can. Cr. Cas. 66.

COUNTY MAGISTRATES — CANADA TEMPERANCE ACT—SEARCH WARRANT NOT AN "ORDER"—R.S.N.S. 1900, cs. 33, 40.

Johnston v. MacDougall, 17 Can. Cr. Cas. 58.

SECOND OFFENCE.

See Criminal Law; Summary Convictions; Intoxicating Liquors.

SECRET COMMISSIONS.

See Principal and Agent.

APPLICATION TO RESTRAIN MAGISTRATE — SECRET COMMISSIONS ACT—SUMMARY CONVICTION—JURISDICTION OF MAGISTRATE.

An application for a writ of prohibition will not be granted, where its effect would be to negative or nullify parts of a section of a statute, the right of a Police Magistrate to proceed under Part XV., Cr. Code (Summary Conviction Part), on a charge under the Secret Commissions Act is upheld.

R. v. McNabb, 49 D.L.R. 495, [1919] 3 W.W.R. 1031.

FALSE STATEMENT IN WRITING—COLLUSIVE FIXING OF PRICE BY EMPLOYEE.

Where by collusion between the seller and the buyer's employee whose duty it was to fix the prices at which the buyer would purchase, such prices were systematically doubled or trebled over the ordinary rates, and these prices were restated in the seller's account copied from the buyer's order form, and the employee so dishonestly crediting fictitious prices was receiving cash presents from the seller as a share or bribe for the continuance of the fraud, charges under the Secret Commissions Act (Can.) 1909, are sustainable against the seller, not only in respect of the corrupt gifts, but for issuing a statement of account false and erroneous in a material particular intended to mislead, and also in respect of the fraudulent order form as to his privity to the use of same to deceive the buyer.

R. v. Rabinovitch and Clingman, 24 Can. Cr. Cas. 350, 25 Man. L.R. 341, affirming on this point, 21 D.L.R. 600, 23 Can. Cr. Cas. 496, 25 Man. L.R. 341, 30 W.L.R. 609.

SUPPLYING EMPTY CARS — PUBLIC INTEREST —CRIMINAL OFFENCE—8 & 9 EDW. VII. c. 33, s. 3(a)—RAILWAY ACT, ss. 317, 427, 431.

The Board should not take action under s. 431, against a railway employee for taking a bribe to supply empty cars contrary to ss. 317, 427, unless where it considers there has been a failure on the part of the railway company to administer such discipline as the public safety demands. In such a case the proper remedy is for the local Crown Attorney to take criminal proceedings under 8 & 9 Edw. VII. c. 33, s. 3(a).

Re Conductor A.B., 18 Can. Ry. Cas. 54.

SECURITY.

For costs, see Costs, I—14.
On appeal, see Appeal.

SEDITION.

Annotation.

Sedition—Treason: 51 D.L.R. 35.

(§ I—1)—SEDITIOUS INTENT — OFFENSIVE EXPRESSIONS OF DISLIKE TOWARDS BRITISH "SUBJECTS."

It is always open to a judge or a jury to infer a seditious intent from words spoken and the circumstances under which they are spoken. One of the forms of seditious intent is an intention to raise discontent or disaffection among His Majesty's subjects

or to promote feelings of ill-will and hostility between different classes of His Majesty's subjects. To be a "subject" within this definition it is not necessary to be a natural born or naturalized British subject. The term will include all the persons subject to His Majesty's laws, whether included in the term British subject in its narrower acceptation or not. Very offensive expressions of dislike towards Englishmen purely by themselves cannot be considered as seditious.

R. v. Felton, 28 D.L.R. 372, 9 A.L.R. 238, 25 Can. Cr. Cas. 207, 33 W.L.R. 157, 9 W. W.R. 819.

INTENT—QUESTION FOR JURY—REPETITION —EVIDENCE—NEW TRIAL.

On a charge under Cr. Code, s. 134, of speaking seditious words, the question of seditious intent is one for the jury. A new trial will not be granted in respect of a conviction for uttering seditious words, because of the prosecution eliciting on cross-examination of defendant's witness that the persons to whom the words were uttered had repeated them to the witness on an occasion when the accused was not present.

R. v. Manshrick, 32 D.L.R. 584, 27 Can. Cr. Cas. 17, 27 Man. L.R. 94.

(§ I—5)—SEDITIOUS WORDS.

A charge of speaking seditious words with intent in contravention of Cr. Code, s. 134, may be supported by evidence of seditious words openly expressed in a public place to a mere acquaintance, although others were not in a position to overhear what was said; the jury is entitled to draw inferences both as to the probability of the conversation being repeated by the person addressed and as to the possible effect on such person's loyalty.

R. v. Cohen, 28 D.L.R. 74, 25 Can. Cr. Cas. 302, 9 A.L.R. 329, 34 W.L.R. 210, 10 W.W.R. 333.

NATIONALITY OF HEARERS.

Alien residents of Canada owe a temporary allegiance to the King while they reside under his protection and are included amongst the King's "subjects" in the sense in which that term is used in a charge for speaking seditious words with intent to raise disaffection or public disorder amongst His Majesty's subjects, and it is, therefore, unnecessary to prove on the trial that any of the hearers were natural born or naturalized British subjects. Under Cr. Code, ss. 132, 134, it is an indictable offence to speak seditious words, i.e., words expressive of a seditious intention, and a conviction will be sustained if the words were a slander on the British Government and were uttered either with the intent of raising disaffection and discontent among His Majesty's subjects, or with intent to promote public disorder by insulting and annoying the hearers so that a breach of the peace is a probable consequence.

R. v. Felton, 28 D.L.R. 372, 25 Can. Cr. Cas. 207, 9 A.L.R. 238, 33 W.L.R. 157, 9 W.W.R. 819.

SPEAKING SEDITIOUS WORDS.

To constitute the crime of uttering seditious words, more must appear than the expression of disloyal and unpatriotic sentiments in a private conversation. [R. v. Cohen, 25 Can. Cr. Cas. 302, 28 D.L.R. 74, distinguished.] A count of an indictment charging the use of seditious language with intent "to raise disaffection amongst His Majesty's subjects, or to promote feelings of ill-will and hostility between different classes of His Majesty's subjects" will not, on appeal, be held invalid for duplicity where no objection was taken to same at the trial.

R. v. Trainor, 33 D.L.R. 658, 27 Can. Cr. Cas. 232, 10 A.L.R. 164, [1917] 1 W.W.R. 415.

SEDITIOUS LIBEL—INTENT.

Defamatory words likely to stir up and excite public discontent and disaffection will constitute a seditious libel under Cr. Code, s. 132, as being "expressive of a seditious intention," if they are found to have been published with intent to have the seditious effect alleged; the question of the existence of such intention in any particular case is one for the jury, and while it may be inferred by them from the nature of the publication, the verdict against the accused must be set aside and a new trial ordered if the Trial Judge declined to charge the jury in any way as to the intention of the accused. [Reg. v. Burns, 16 Cox C.C. 355; R. v. McHugh, (1901), 2 Irish R. 569, approved; R. v. Aldred, 22 Cox C.C. 1, disapproved.]

R. v. Giesinger, 32 D.L.R. 325, 27 Can. Cr. Cas. 53, [1917] 1 W.W.R. 595, 9 S.L.R. 423.

INDICTMENT FOR SEDITIOUS LIBEL — SINGLE COUNT — AMENDMENT — PARTICULARS — JURY — CONVICTION — DUPLICITY —TWO SEPARATE PRINTED PAPERS—INTENT ESSENTIAL PART OF OFFENCE—OBJECTIONS—NO SUBSTANTIAL WRONG OR MISCARRIAGE—CRIMINAL CODE, SS. 134, 852, 853, 855, 860, 861, 1019—REFUSAL OF TRIAL JUDGE TO RESERVE CASE.

R. v. Bainbridge, 13 O.W.N. 218.

INDICTMENT FOUND BY GRAND JURY FOR SEDITIOUS LIBEL—DEMURRER—MOTION TO QUASH—AMENDMENT WITHOUT PRIVITY OF GRAND JURY — DEFECT IN PROCEEDINGS—VERDICT OF JURY—CONVICTION—REFUSAL OF TRIAL JUDGE TO RESERVE CASE — LEAVE TO APPEAL GRANTED BY APPELLATE COURT—DIRECTION TO JUDGE TO STATE CASE.

R. v. Bainbridge, 13 O.W.N. 338. [See 13 O.W.N. 218; see also 28 Can. Cr. Cas. 444.]

(§ I—20)—SEDITIOUS WORDS—EVIDENCE OF PREVIOUS STATEMENTS—INTENTION.

On a charge of uttering seditious words, evidence as to previous statements of the

accused are admissible to prove intention. The words, "Everyone who gives to the Red Cross is crazy. If no one would give to the Red Cross the war would stop. The other country would beat this country if no one would give to the Red Cross," held, under the circumstances in which they were spoken, to be seditious as being calculated and intended to stir up discontent and disaffection among His Majesty's subjects.

The King v. Barron, 44 D.L.R. 332, 30 Can. Cr. Cas. 326, 12 S.L.R. 66, [1919] 1 W.W.R. 262.

SEDUCTION.

I. CIVIL LIABILITY.

II. CRIMINAL LIABILITY.

I. Civil liability.

(§ I—1)—STATUTORY ACTION—BREACH OF PROMISE OF MARRIAGE ALSO CHARGED.

An instruction to the jury, in an action for breach of promise and for seduction alleged to have taken place in reliance upon such promise, that the plaintiff could not recover unless the breach of promise was shewn, is erroneous; but, since the instruction was more favorable to defendant than to the plaintiff, it forms no ground for an appeal by defendant from the verdict given against him.

Collard v. Armstrong, 12 D.L.R. 368, 6 A.L.R. 187, 24 W.L.R. 742, 4 W.W.R. 879.

RIGHT OF ACTION NOT AFFECTED BY MARRIAGE.

The right of action in her own name given to any female who being unmarried has been seduced, is not taken away by her subsequent marriage.

Brown v. Nolan, [1917] 1 W.W.R. 1463.

SUFFICIENCY OF PROOF AND ALLEGATIONS—PRESUMPTION.

Section 4, Ordinance No. 8, 1903 (2nd sess.), provides that an action for seduction may be maintained by an unmarried female who has been seduced, in her own name, in the same manner as an action for any other tort, and that in any such action she shall be entitled to such damage as may be awarded in an action under the section. Held, that although the statement of claim did not allege that the plaintiff was unmarried and that fact was not proven at the trial by direct evidence, the trial proceeding on the assumption that such was the case, objection to absence of proof of that fact could not be taken for the first time on appeal. [R. v. Cowburn, ex parte Frith, 19 Ch. D. 419 at p. 429, 51 L.J. Ch. 473, 45 L.T. 120.] The word "seduction" in the above section has no different meaning from that which was its ordinary and legal signification before the ordinance was passed, and that, therefore, evidence sufficient to support the conclusion that the plaintiff was enticed and persuaded by the defendant to commit the act was sufficient to entitle the plaintiff to damages and that the allegation in the statement of claim that the seduction was "under promise of marriage" could be treated as surplusage. In the absence of evidence of loose behaviour by the woman, the presumption is that there was enticement by the defendant and the burden of shewing that the plaintiff cannot succeed on the ground that she was at least equally morally guilty is on the defendant. Under the ordinance, damages is the gist of the action by the woman seduced.

Gibson v. Rabey, 9 A.L.R. 409, 34 W.L.R. 85.

ACTION BY MOTHER FOR SEDUCTION OF DAUGHTER—DEATH OF FATHER BEFORE SEDUCTION—REMARRIAGE OF MOTHER—STEPFATHER LIVING AT TIME OF SEDUCTION BUT DYING BEFORE ACTION—CAUSE OF ACTION—SEDUCTION ACT, SS. 2, 3—MARRIED WOMEN'S PROPERTY ACT, S. 4 (2)—TRUSTEE'S ACT, S. 41.

Action by a widow for the seduction of her daughter, a child of her first husband, who died before the seduction. Before the seduction, the plaintiff married again; her second husband was living at the date of the seduction, but died before the action was brought, and before the birth of the daughter's child. Held, having regard to the provisions of ss. 2, 3 of the Seduction Act, R.S.O. 1914, c. 72, of s. 4 (2) of the Married Women's Property Act, R.S.O. 1914, c. 149, and of s. 41 of the Trustee Act, R.S.O. 1914, c. 121, that the action was maintainable by the mother: the stepfather was eliminated by the words of s. 2 of the Seduction Act, "whether she remains a widow or has married again." [Entner v. Benneweis, 24 O.R. 407, distinguished.]

Stoner v. Skene, 44 O.L.R. 609.

(§ I—2)—ACTION BY INJURED WOMAN—LOSS OF SERVICES.

The question of loss of service does not arise in an action brought by an unmarried woman for seduction under the N.W.T. Ord. (Alta.) 1911, c. 117, allowing such an action, and the recovery of damages for her personal benefit.

Collard v. Armstrong, 12 D.L.R. 368, 24 W.L.R. 742, 6 A.L.R. 187, 4 W.W.R. 879.

(§ I—3)—SEDUCTION ACT, R.S. SASK. 1909, C. 139, S. 4—PREVIOUS UNCHASTITY OF PLAINTIFF—EFFECT—DAMAGES.

The question of a plaintiff's previous unchastity does not necessarily enter into consideration in an action for seduction under promise of marriage and this question does not enter into an action for seduction brought by a parent or master, where the gist of the action is loss of service.

Bestpflug v. Martin, 49 D.L.R. 390, [1919] 3 W.W.R. 893.

QUESTIONS TENDING TO IMPEACH CREDIT OF SEDUCER — EVIDENCE — CREDIBILITY —PROPER ADMISSION.

McCabe v. Curtis, 48 D.L.R. 767, [1919] 2 W.W.R. 1003, affirming [1919] 1 W.W.R. 637, [Leave to appeal refused, 50 D.L.R. 618, 12 S.L.R. 455, [1919] 3 W.W.R. 716.]

WIDOW—ACTION BY—FOR OWN—DAMAGES—CONSOLIDATED ORDINANCES (ALTA.) UNMARRIED FEMALE.

An action by a widow claiming damages for her own seduction must be dismissed, as Con. Ord., c. 117, enables only an "unmarried female" to sue in her own name and is intended to apply only where the female had never been married. [Kirk v. Long, 7 U.C.C.P. 363, followed; Ward v. Serrell, 3 A.L.R. 138, and Trimble v. Hill, 5 App. Cas. 342, applied.]

Cambridge v. Sutherland, 20 D.L.R. 832, 8 A.L.R. 25, 7 W.W.R. 1219.

II. Criminal liability.

(§ II—5)—OF STEP-CHILD—CR. CODE—S. 1140—TIME FOR COMMENCING PROSECUTION.

Section 1140 of the Cr. Code, imposes no limitation of time within which a prosecution for the seduction of a step-child or foster-child must be commenced.

The King v. Stewart, 45 D.L.R. 480, 12 S.L.R. 131.

CRIMINAL LAW—STATUTES—CODE, SS. 213, 1140—ILLICIT CONNECTION WITH STEP-DAUGHTER — NO LIMIT OF TIME FOR PROSECUTION.

There is no limit of time (under s. 1140 of the Code or otherwise) within which a prosecution for illicit connection with a step-child (under s. 213 [a] of the Code) must be commenced.

R. v. S. [1919] 1 W.W.R. 977.

SEDUCTION UNDER PROMISE OF MARRIAGE OF GIRL UNDER TWENTY-ONE.

Apart from any question of corroboration, a promise of marriage cannot be predicated upon a mere question by the accused to the complainant asking if she loved him enough to live with him as he had money enough for two and her assent by answering "yes," so as to support a charge under Cr. Code s. 212 of seduction under promise of marriage.

R. v. Spray, 24 Can. Cr. Cas. 152, 20 B.C. R. 147.

PROOF OF AGE.

Upon indictment of the prisoner, under s. 212, Cr. Code, for an offence committed upon a woman under 21, it was held, that, the woman's mother being dead, the evidence of herself and of a woman with whom she had gone to live when quite young, was admissible to prove her age. [Reg. v. Cox, 1 Q.B. 179, followed.] The omission to include s. 212 of the Code in the provision (s. 984), which makes it competent for the judge or jury to form their own conclusions as to the age of a person from his appearance, has not the effect of rendering this class of evidence inadmissible.

R. v. Spera, 28 D.L.R. 377, 34 O.L.R. 539, 25 Can. Cr. Cas. 180.

(§ II—7)—PREVIOUSLY CHASTE CHARACTER.

"Previously chaste character" of a girl, as it concerns the offence of seduction (Cr. Code, ss. 211, 212, is not limited in its meaning to the physical condition of virginity, and notwithstanding that condition at the time of the alleged offence it may be shewn in defence of the charge by her admissions or otherwise that the girl had previously committed acts of gross immorality with a man and had exhibited a disposition for lewdness.

R. v. Fiola 41 D.L.R. 73, 20 Can. Cr. Cas. 125.

EVIDENCE OF PREVIOUS CHASTITY.

On the trial of a charge under Cr. Code, s. 211 for seducing a girl between 14 and 16, of previously chaste character, testimony is admissible on behalf of the accused to prove prior specific acts of illicit intercourse between the girl and another man.

R. v. Pieco, 35 D.L.R. 124, 10 A.L.R. 403, 27 Can. Cr. Cas. 435, [1917] 1 W.W.R. 892.

PREVIOUS UNCHASTITY—BURDEN OF PROOF.

In a prosecution for having had illicit connection with a girl of previous chaste character (1) the onus of proving unchastity is on the defendants, (2) the girl's admission of carnal connection with the defendant on a previous occasion is not necessarily binding upon the trial judge, and (3) evidence of occurrences on an occasion subsequent to the offence charged is not receivable as corroboration.

R. v. Farrell, 29 D.L.R. 671, 26 Can. Cr. Cas. 273, 36 O.L.R. 372.

UNDER PROMISE OF MARRIAGE—CRIMINAL CODE (1906) S. 212.

The promise of marriage referred to in s. 212, Cr. Code, must be an absolute promise and not a conditional promise only to be performed in the event of pregnancy happening, or it will be insufficient to support a charge of seduction under promise of marriage. The words "previously chaste character" as used in s. 212, as to seduction under promise of marriage, do not necessarily imply that the female shall be "virgo intacta."

The King v. Comeau, 5 D.L.R. 250, 46 N.S.R. 450, 11 E.L.R. 37, 104.

PREVIOUS CHASTE CHARACTER.

Where the girl had been seduced by the accused in a foreign country and came to Canada with him, the resumption of illicit intercourse in Canada under promise of marriage will not support a charge under Cr. Code, s. 212, of seducing a female of "previously chaste character" unless there is evidence that between the acts of seduction there was such conduct and behaviour on her part as to imply reform and self-rehabilitation in chastity. [R. v. Lougheed, 8 Can. Cr. Cas. 184, approved.]

R. v. Hauberg, 24 Can. Cr. Cas. 297, 8 S.L.R. 239, 31 W.L.R. 779, 8 W.W.R. 1130.

(§ II—8)—GIRL UNDER SIXTEEN—PREVIOUS CHASTE CHARACTER — PREARRANGED PROSTITUTION.

Where the girl was physically chaste, a conviction for her seduction when under the age of 16 may be supported under Cr. Code,

s. 211, although the circumstances indicated a fixed intention on her part, by arrangement with an intermediary, to surrender herself to the man for a stipulated price.
R. v. Rioux, 17 D.L.R. 691, 22 Can. Cr. Cas. 323, 8 A.L.R. 47, 28 W.L.R. 69.

CARNAL KNOWLEDGE OF GIRL UNDER EIGHTEEN—PROOF OF KNOWLEDGE OF AGE.
R. v. Sam Sing, 22 O.L.R. 613, 17 O.W.R. 1043.

SEED GRAIN, LIEN FOR.

See Lien, I.

SEIZURE.

See Levy and Seizure.

SENTENCE.

See Criminal Law, IV; Summary Convictions; Certiorari.

SEPARATE ESTATE.

Of married woman, see Husband and Wife.

SEPARATE SCHOOLS.

See Schools.

SEQUESTRATION.

Annotation.

The writ of sequestration, its origin and scope; 14 D.L.R. 855.

(§ I—1)—APPOINTMENT OF SEQUESTRATOR—GOODS IN CUSTODIA LEGIS—SEVERAL CLAIMANTS.
A sequestrator may be appointed even when the goods are already in the hands of justice. So where a person claiming to be the owner of certain goods violently takes possession of them during the night and another person, for the same reason, attaches the same goods, a sequestrator may be properly appointed.
Cohen v. Edelstone, 24 Que. K.B. 145.

IMMOVEABLE IN LITIGATION—SECURITY—C. C., ART. 1823.
Sequestration may take place when an immoveable is in litigation between several parties, according to circumstances, but, pending the suit, the court may, instead of appointing a sequestrator, give the possession of the disputed thing to one of the parties by him giving good and sufficient security. In such case the judgment, which declares insufficient the security offered, should fix the amount of the security to be given.
Ogdensburg Coal & Towing Co. v. Evans, 25 Rev. Leg. 409.

PETITION TO APPOINT SEQUESTRATOR.
Article 286 C.C.P. applies in all cases where there is a contestation in an action, or on an incident in a case, e.g., on a petition to appoint a sequestrator.
Bourdon v. Payette, 20 Que. P.R. 24.

SEQUESTRATOR—POWER OF APPELLATE COURT TO APPOINT—SEPARATION ACTION—ALIMONY—WIFE'S ESTATE.
The Court of Review has power to grant the appointment of a sequestrator. Such application will be granted in favour of a wife who has obtained a separation from bed and board and an alimentary pension against her husband, if the latter continues to administer his wife's property and collects its revenues without paying anything.
Weingart v. Jacobson, 24 Rev. Leg. 369.

LAND — RIGHT TO DOCUMENTS—ACCOUNTING.
A sequestrator appointed to administer real property has the right to obtain from the parties heretofore in possession thereof all titles, contracts and documents whatsoever concerning the said property, but not an account of his administration thereof.
Evans v. Ogdensburg Coal & Towing Co., 20 Que. P.R. 261.

APPOINTMENT.
Article 1823 C.C. (Que.) is not limitative and it is sufficient to authorize the appointment of a sequestrator, when the conduct of the possessor of an immovable the sequestration of which is demanded is of a nature to raise doubts as to the revenues of the immovables.
Laurendeau v. Fortier, 18 Que. P.R. 248.

INHERITANCE OF WIDOW—ACTION TO ANNUL MARRIAGE—ART. 973 C.P.Q.
Brien v. Lapointe, 12 Que. P.R. 373.

SERVANTS.

See Master and Servant.

SERVICE.

See Writ and Process; Pleading; Motions and Orders.

SERVITUDE.

See Easements.

SET-OFF AND COUNTERCLAIM.

I. OF WHAT DEMANDS.
- A In general.
- B Recoupment.
- C Mutuality of claims.
- D As against transferee or assignee.
- E By or against decedent's estate.
- F Effect of insolvency.

II. OF AND AGAINST JUDGMENTS.

Effect on jurisdictional amount, see Courts, II A—164.
Pleading breach of warranty as set-off, to note, see Pleading, VI—355.
Against liquidation for company's debentures, see Sale, I C—19.
As affected by third party procedure, see Pleading, VI—355.
As against assignee, see Assignment, III—28.

I. Of what demands.

A. In general.

(§ I A—1)—Accrual of right after action.

A defence by way of set-off, which accrued after the writ was issued in the original action, cannot be set up as an answer to such action.

Windsor v. Young, 24 D.L.R. 652, 42 N. B.R. 313.

Relation to subject-matter—Embarrassment—Delay.

Kearns v. Kearns, 3 D.L.R. 872, 3 O.W.N. 1151.

Of what demands.

A set-off, agreed to by both parties before action brought, is equivalent in law to a payment.

Caldwell v. Hughes, 10 D.L.R. 788, 4 O.W. N. 1192, 24 O.W.R. 498.

Unliquidated debt.

A litigious debt is not liquidated and cannot be set up in compensation of a claim which is admitted to be exigible. Such a claim by the defence can only be enforced by means of a reconventional demand.

Forget v. Cauchon, 49 Que. S.C. 422.

Of what demands—Contract for sale of mining share—Failure of plaintiffs to furnish shares—Counter-claim—Leave to amend.

Neil v. Woodward, 18 O.W.R. 230.

Debtor and creditor—Set-off—Soldiers Relief Act—Mortgage action—Costs of proceedings to defendant protected by the Act—Set-off of such costs against mortgage debt.

Even if the Statute of Set-off is in force in Alberta it is not applicable so as to entitle a defendant who is protected under the Soldiers Relief Act against an application made by plaintiff in a mortgage action, to recover his costs of such application and prevent their being set off by the court against the mortgage debt. The Statute of Set-Off could only apply if the mortgage debt were unenforceable, whereas it is debt in respect of which the right of action is merely in suspense.

Metals v. Frost, [1919] 2 W.W.R. 247.

(§ I A—2)—Breach of warranty—Diminution of price.

Where there is a breach of warranty on the sale of goods the buyer may set up the breach in diminution of the price without a cross-action or plea of set-off in respect thereof.

Balmain v. Neil, 11 D.L.R. 294, 41 N.B.R. 429, 12 E.L.R. 376.

Illegal seizure—Counter-claim for debt.

A defendant may be allowed by way of counterclaim all amounts due from the plaintiff to him at the date of the counterclaim, including overdue instalments of the purchase price of goods returned to the plaintiff and accepted by him after action brought by the plaintiff for illegal seizure thereof.

Matthews v. Heintzman, 16 D.L.R. 522, 7 S.L.R. 101, 27 W.L.R. 675.

Breach of contract — Unliquidated demand—Set-off.

Tocher v. Thompson, 16 D.L.R. 872, 27 W.L.R. 140.

When refused—Want of particulars—Performance of contract.

The amount of damages assessed on a counterclaim for breach of contract will not be deducted from the amount awarded the plaintiff, where no particulars are furnished and no proof of damages offered to support the counterclaim, and where the jury has also found that the defendant had accepted what the plaintiff did as a fulfilment of the contract.

Blue v. Miller, 24 D.L.R. 852, 43 N.B.R. 307.

Action on note and cheque—Counter-claim for damage from improper performance.

To a demand based upon a note and a cheque given in payment of the price of construction and repairs damages resulting from the poor execution of the work cannot be set up in compensation.

Peloquin v. Clermont, 47 Que. S.C. 403.

Sale—Respective appeals of the parties to a contract against each other—Procedure—Cross actions—C.C. Que. 1523, 1526, 1527, 1530.

A defendant sued for the price of a threshing machine sold and delivered, did not defend the action, but set up a cross action alleging defects in the machine and claiming damages and interest. The position taken by the defendant is illogical in not having contested the action of the plaintiffs, who have established their claims, and whose action should be maintained. This action being confirmed, there cannot of necessity remain any credence of damages which the defendants by cross actions wish the court to adjudge the plaintiffs. The two judgments are incompatible. Moreover they are equally incompatible by the fact that the purchaser kept the goods as to which he now sets up a hidden defect.

Tremblay v. Damours; Damours v. Tremblay, 25 Rev. de Jur. 234.

Breach of contract.

In an action by a contractor against building owners to recover a balance alleged to be due for work done under a building contract and for extras, and upon a counter-claim by the defendants for damage done to their goods by the plaintiff and for delay. It was held, that the question of completion or non-completion, in any particular case, must depend upon the terms of the contract and the facts and circumstances of the particular case; and, where there is honesty and a bona fide intention to complete, there is completion if the contract is completed in all essential and material

respects, and there exist only slight imperfections, in the work or slight deviations from the specifications, which can be easily cured and corrected at an expense trifling as compared with the amount of the contract price; and in this case, there was completion in that sense. And held, also, that, if there was non-completion, the architect, having under the authority of a clause in the agreement, elected to give a notice to the plaintiff calling his attention to certain parts of the work remaining incomplete, requiring him to complete them within three days, and stating that, failing compliance, the contract would be cancelled and the work completed by the architect, had, by taking advantage, on behalf of the defendants, of the benefits of this clause, conferred upon the plaintiff the corresponding benefits, viz., that the work must be paid for by the defendants with a deduction of the cost of such labour and materials as was incurred in completing the contract; and, an election having once been made, neither the owners nor the architects could withdraw. Held, also that, the architect, by his absolute refusal to deal with the question of damages, which necessarily involved the question of allowances for delays, abdicated his quasi-judicial office; and, therefore, the ascertainment of the amount of the damages—involving the allowance for delays—was for the court. And held, that, once the owner has seen fit to take possession of a building, although this may have no bearing on the question of completion or non-completion, it prevents the owner from claiming so-called liquidated damages for non-completion.

Watts v. McLeay, 19 W.L.R. 916.

(§ I A—3)—Action for conversion—Trespass—Libel and slander—Counterclaim for balance under chattle mortgage.

Action for damages for goods and chattels wrongfully taken, for trespass and for libel and slander. The defendant counterclaimed for damages for non-delivery of hay according to contract, balance due under chattle mortgage and the balance of an account. The jury found a verdict for the plaintiff on the libel count; the plaintiff was non-suited in regard to his claim for slander and other claims. Judgment was given for the defendant on his counterclaim for damages in the amount of the balance due under the chattel mortgage, also judgment for the balance of account due. Judgment was accordingly given to both parties and the costs were adjusted, following Shrapnel v. Lang, 20 Q.B.D. 334, and Atlas Metal Co. v. Miller, [1898] 2 Q.B. 500.

L'Esperance v. Mollot, 31 W.L.R. 503.

(§ I A—5)—Wages.

A claim for wages can neither be made the subject of a set-off nor used as a defence to an action for tort.

Hamilton v. Vineberg, 4 D.L.R. 827, 3 O.W.N. 1337, 22 O.W.R. 238.

B. Recoupment.

(§ I B—10)—Action on note—Damages arising from contract for which cheque given—C.C.P. 191—C.C. Que. 1065.

The plaintiff sued on a cheque and note. The defendant proposed to offset the claim by damages due him by the plaintiff. As the damages were the direct result of non-fulfilment of the contract for works undertaken by the plaintiff, and of which the cheque and the note claimed represented the price and value, a set-off was allowed.

Peloquin v. Clermont, 16 Que. P. R. 167.

Set-off—Counterclaim for loss by fire caused by plaintiffs' negligence.]—Stephens v. Awalt, 9 E.L.R. 262.

C. Mutuality of claims.

(§ I C—15)—Debts—Trust fund—Winding-up Act.

Re Canadian Home Investment Co, 37 D.L.R. 598, 24 B.C.R. 294, [1917] 3 W.W.R. 629.

Mutual debts—Tort and contract—Liquidator.

A claim in detinue and a claim on a promissory note or on an account are not "mutual debts" within the meaning of s. 126 of the Judicature Act, R.S.O. 1914, c. 56; therefore a claim on a note or an account cannot be set off under s. 71 of the Winding-up Act, R.S.C. 1906, c. 144, against an action by a liquidator for the recovery of certain chattels and damages for their wrongful seizure, and the defendant is merely entitled to rank as a general creditor upon the assets in liquidation. [Eberle's Hotels & Restaurant Co. v. Jonas, 18 Q.B.D. 459, followed; Moody v. Can. Bank of Commerce, 14 P.R. (Ont.) 258, distinguished.]

Wade v. Crane, 27 D.L.R. 179, 35 O.L.R. 402. [Affirmed in 37 D.L.R. 412, 55 Can. S.C.R. 208.]

A third person brought into an action by the defendant's counterclaim against the plaintiff, cannot himself set up a counterclaim against the defendant.

Hamilton v. Vineberg, 4 D.L.R. 827, 3 O.W.N. 1337, 22 O.W.R. 238.

Exchange of lands — Enforcement — Counterclaim for damages.

An agreement for the exchange of lands is not unilateral, but mutually dependent on reciprocal acts, which will disentitle a party to counterclaim for damages if he is unable to carry out his part of the contract by reason of a defect in the title.

Williams v. Black, 23 D.L.R. 287, 8 W.W.R. 1139, 31 W.L.R. 844.

Mutuality of claims—Breach of warranty—Action on note of shareholder for goods sold to company.

Shareholders of a company, when sued on

their individual note given for part of the price of a machine sold the company, cannot set-off or counterclaim for a breach of the warranty accompanying the sale, which did not amount to a total failure of consideration, where the company retained and used the machine without objection, since there was no mutuality of contract between the plaintiff and the makers of the note.

Allis-Chalmers-Bullock v. Hutchings, 13 D.L.R. 241, 41 N.B.R. 441, 13 E.L.R. 277.

COMPENSATION—CLAIMS ANTERIOR TO THE SUIT—OPPOSITION DEBT EASILY LIQUIDATED—INSCRIPTION IN LAW—C.C., ART. 1188—C.P., ARTS. 217, 645.

A defendant sued in respect of any particular claim, may, if he chooses, defend the action on its merits, and is not obliged to set up counterclaim, in his favour, arising out of other transactions. Nothing prevents him subsequently opposing the latter by way of legal compensation, in an opposition to the seizure of his moveables. An inscription in law to such an opposition will be dismissed.

Weisman v. Eagle Publishing Co., 56 Que. S.C. 464.

MUTUALITY—UNLIQUIDATED—QUEBEC LAW—COMPENSATION.

A defendant sued for an amount due for goods kept in a cold storage establishment cannot demand compensation for damages to these goods, because his claim is unliquidated and not easy of proof, although these damages are connected with plaintiff's claim.

Dominion Fish & Fruit Co. v. Harris Abatoir Co., 15 Que. P.R. 72.

In an action for goods sold and delivered defendant sought to avail himself of a set-off against the person employed to manage the business on behalf of the plaintiff. It was held, that the burden was upon defendant to show that he believed the manager of the business to be the principal at the time the goods in question were purchased or that the plaintiff by his conduct induced such belief. Also, assuming a partnership to be established, defendant could not succeed inasmuch as, upon a settlement of the partnership accounts, there would be nothing coming to the partner against whom his claim was asserted.

Chapman v. Prest, 45 N.S.R. 231, 9 E.L.R. 201.

CROSS ACCOUNTS — SETTLEMENT — OVERDUE ACCEPTANCE—JUDGMENT FOR AMOUNT BY DEFAULT.

Densmore v. Hill, 9 E.L.R. 475.

D. AS AGAINST TRANSFEREE OR ASSIGNEE.

(§ I D—20)—TRUSTEE AND CESTUI QUE TRUST.

There may be a set-off against the trustee of a debt due from the cestui que trust in respect of the fund to which the latter would be entitled on its coming into the trustee's hands. [Bankes v. Jarvis, [1903] 1 K.B. 549, 72 L.J.K.B. 267, followed.]

Royal Trust v. Holden, 22 D.L.R. 660, 21 B.C.R. 185, 8 W.W.R. 500.

AS AGAINST ASSIGNEE—DAMAGES FOR FRAUD AND DECEIT.

In an action to recover the amount due on a mortgage given by defendant to secure the performance of an agreement of sale, a claim for damages for deceit inducing the making of the contract cannot be pleaded as a set-off, under 1 Geo. II. c. 22 (amended and made perpetual by 8 Geo. II. c. 24) either against the original party or against his assignee, but the proper remedy is by way of counterclaim under s. 291 of the King's Bench Act against the original contractor only.

Cummings v. Johnson, 13 D.L.R. 343, 23 Man. L.R. 740, 24 W.L.R. 144, 25 W.L.R. 31, 4 W.W.R. 543.

AS AGAINST ASSIGNEE—NONFULFILMENT OF CONTRACT SUED UPON.

Where receivers and managers of a manufacturing company, appointed in a bondholders' action with power to continue the business, proceeded to carry out the company's existing contracts for the supply of customers, but reserving the power afterwards to refuse to fulfil the same, their subsequent refusal to carry out a current contract gives rise to an immediate cause of action for damages against the company which the customer is entitled to counterclaim in an action for the price of goods sold and delivered under the contract, even as against assignees of the latter claim to whom it had been pledged as security for advances to the receivers as such, where notice of such assignment was not given to the customer until after the notice of refusal.

Parsons v. Sovereign Bank 9 D.L.R. 476, [1913] A.C. 160, reversing 24 O.L.R. 387.

E. BY OR AGAINST DECEDENT'S ESTATE.

(§ I E—25)—WHAT SUBJECT OF—ACTION ON BEHALF OF ESTATE—PERSONAL DEMAND AGAINST EXECUTOR.

A mere personal demand against an executor is not a proper subject of set-off against an indebtedness due him in his representative capacity.

Ayer v. Kelly, 11 D.L.R. 785, 41 N.B.R. 489, 12 E.L.R. 564. [Appeal to Supreme Court of Canada dismissed with costs.]

F. EFFECT OF INSOLVENCY.

(§ I F—32)—RECEIVER FOR BONDHOLDERS—GOODS SUPPLIED BY RECEIVER TO CUSTOMER—DAMAGES FOR BREACH OF CONTRACT.

Sovereign Bank v. Parsons, 24 O.L.R. 387, 19 O.W.R. 834.

COMPENSATION—PROMISSORY NOTE—UNLIQUIDATED DEBT.

Verdun v. Theoret, 12 Que. P.R. 265.

II. Of and against judgment.

(§ II—40)—As to costs—Jurisdiction at common law—English Law Act, R.S. B.C. 1911, c. 75.

Royal Bank v. Skeans, 36 D.L.R. 390, 24 B.C.R. 193, [1917] 2 W.W.R. 942.

Of and against judgments.

Where damages have been awarded in respect of part of the plaintiffs' claim and the defendants succeeded in part on their counterclaim for damages for breach of contract, the court may direct a set-off of the damages pro tanto.

Municipal Construction Co. v. Regina, 2 D.L.R. 690, 5 S.L.R. 78, 20 W.L.R. 405, 1 W.W.R. 958.

Where plaintiff obtains a judgment for a sum of money against defendant, and where, on an opposition to annul same, the defendant opposant sets up two certain accounts against plaintiff contestant exceeding in amount the judgment, and the opposition is maintained and the judgment declared compensated and extinguished; the right of the defendant opposant, in recourse against the plaintiff for the excess, will be adjudged in the same proceeding. A judgment may be extinguished by set-off (compensation) under C.C. (Que.), by an account when both are equally liquidated and demandable where the subject of each is a sum of money.

Reader v. Calumet Metals Co., 6 D.L.R. 496, 19 Rev. de Jur. 346.

Procedure—Damages — Compensation — Defence and cross-action—Right Inscription—C.C.P., art. 196 and 217.

A person cannot, by way of defence to an action, invoke a plea which, although being capable of reducing the amount claimed by the operation of judicial compensation, would not by its nature reduce or extinguish the right claimed. Such pleas should be invoked by a cross action even when they are based on the same contract as the principal action.

Landry v. Auger, 56 Que. S.C. 528.

Promissory note—Counterclaim — Damages for breach of warranty—Set-off of verdicts.

LaFleche v. Bernardin; Bernardin v. La Fleche, 21 Man. L.R. 315, 17 W.L.R. 394.

Default of defence to—Pleadings noted as closed.

Smith v. Ransom, 2 O.W.N. 921, 18 O.W.R. 916.

(§ II—41)—Judgments—Apportionment against various claims.

In directing a set-off of the amount recovered upon defendant's counterclaim against a much larger total allowed to the plaintiff in respect of the latter's several claims secured and unsecured, the court may direct the application of the set-off first upon the unsecured claim of the surplus, if any, proportionately in reduction of the secured claims.

Bureau v. Laurencelle, 11 D.L.R. 283, 24 W.L.R. 335.

SETTLEMENT.

See Compromise and Settlement.

Of decedents' estate, see Executors and Administrators, IV.

SEWERS.

See Drains and Sewers; Municipal Corporations.

SHAREHOLDERS.

See Companies.

SHELLEY'S CASE.

Rule in, see Deeds, II; Wills, III G.

SHERIFF.

See Levy and Seizure; Execution; Interpleader.

Liability for negligence or breach of duty, see Negligence.

(§ I—1)—Levy by, under execution — Judgment creditors' priority on moneys realized—Right to, out of sheriff's bank account—Trust.

While the relation of debtor and creditor exists between the sheriff who has levied money under an execution and the judgment creditor entitled thereto, there is also a fiduciary relation-hip between them, and the judgment creditor can follow the moneys so received by the sheriff at least where the actual cheques received by the latter were paid by him into his "in trust" bank account and so separated from his personal funds; and the judgment creditor is entitled to such moneys in bank in priority to a garnishment thereof attempted by the sheriff's personal creditor.

Stebbins v. Williams, 20 D.L.R. 275, 20 B.C.R. 240, 29 W.L.R. 448, 7 W.W.R. 141.

Liability.

The authority of a sheriff as to official acts, i.e., acts which a private individual could not do, is confined to the county of which he is sheriff.

Malouf v. Labad, 3 D.L.R. 755, 3 O.W.N. 1235, 22 O.W.R. 99.

Liability for negligence of deputies.

In Saskatchewan all the employees in the sheriff's office are appointed directly by the government, and the sheriff is not responsible for the negligence of any such employee.

Reum v. Rutherford, 37 D.L.R. 715, 10 S.L.R. 399, [1917] 3 W.W.R. 916.

Negligence — Land Titles Act — Execution.

Under Saskatchewan legislation a sheriff in that province occupies a position entirely different from that of a sheriff in England and in most of the other Canadian provinces: the sheriff's office in each district in Saskatchewan is a department of the civil service and, therefore, the doctrine of respondeat superior does not apply; the sheriff is responsible in respect to negligence only for his personal negligence and such negligence cannot be attributed to him while he

is lawfully on his vacation. [Great North Ins. Co. v. Young(32 D.L.R. 238, followed.] Nor does s. 118 of the Land Titles Act, which imposes upon "the sheriff or other qualified officer" the duty of transmitting to the registrar a copy, certified under his hand and seal, of a writ of execution placed with him apply to him while he is lawfully on his vacation at the time the writ is received at his office.

Reum v. Rutherford, 37 D.L.R. 715, 10 S. L.R. 399, [1917] 3 W.W.R. 916.

Money paid to a sheriff by the defendant upon arrest for debt under C.S.N.B., 1903 c. 30, s. 5, is held by the sheriff as a statutory trustee and the interest, if any, upon such money must be accounted for by him in the same way as the principal.

McKane v. O'Brien, 40 N.B.R. 392.

(§ 1—3)—Right to collect fees and charges.

The onus is on a sheriff claiming poundage, to satisfy the court that a compromise payment is the direct consequence of the seizure and not of an agreement entered into previously between the parties. A sheriff is not entitled to poundage or possession money under an execution, levied subsequently to a winding-up order under s. 23 of the Winding-up Act, R.S.C. 1906, c. 144, as the seizure is illegal. [Shaver v. Cotton, 23 A.R. (Ont.) 426; Keating v. Graham, 26 O.R. 361, applied.]

Richards v. Producers Rock & Gravel Co., 17 D.L.R. 588, 20 B.C.R. 109, 27 W.L.R. 890. [Appeal to B.C. Court of Appeal dismissed, June 25, 1914.]

Bailiff—Distress for rent—Charges.

Where a sheriff acting as a bailiff, distrains for rent, he is entitled to charge only the same fees as a bailiff or other person would be entitled to under schedule A of c. 65, R.S.B.C. 1911, and not to the usual sheriff's fees in a proceeding to collect money.

Bancroft v. Richards, 9 D.L.R. 77, 18 B. C.R. 38, 23 W.L.R. 73, 3 W.W.R. 825.

Poundage—"Sum made"—Expense.

Money expended upon property after seizure, in order to render it salable, forms no part of the "sum made" by the sheriff, within the meaning of the tariff of sheriff's fees, and the sheriff is not entitled to poundage upon the sums which he retains to cover his own expense.

Sturgeon v. Henderson, 37 D.L.R. 54, [1917] 3 W.W.R. 56.

Poundage—Withdrawal of execution.

Where execution creditors withdraw the execution, after a claimant has claimed property in the goods, the sheriff has no right to poundage under r. 495.

Imperial Elevator & Lumber Co. v. Hodel, [1917] 1 W.W.R. 1158.

Fees—Travelling expenses.

A sheriff who serves in one trip different writs on different defendants is entitled to his travelling fees on each writ served.

Trust & Loan Co. v. Manseau, 18 Que. P. R. 352.

Liability for taking excessive fees—Penalty.

Nicholas v. Creighton, 11 D.L.R. 835, 13 E.L.R. 275.

If a sheriff seizes land, which has been subdivided into lots according to a registered plan, he has a right to a fee each of the lots so subdivided even if the land is sold en bloc as being only a single holding.

Laurin v. Senecal, 18 Que. P.R. 4.

Fees—Sale of land.

The sheriff's fees on an order for sale of land should be taxed by the prothonotory of the district in which the writ was issued and not by that of the district for which the sheriff is appointed. If, pursuant to a judgment, several lots are sold en bloc as forming only one holding, the sheriff has a right to one fee only.

Senecal v. Dutrizac, 18 Que. P.R. 45.

Criminal justice returns—Fees—Liability of county corporation.

Re Mack and Board of Audit, 25 O.L.R. 121, 20 O.W.R. 454.

Right of sheriff to poundage—Rule 495.

Wherever the sheriff has made a seizure and no money has been made by him for any cause within r. 495 without any fault of his, he is entitled to his full fees, charges and poundage, unless deprived of same by an order of the court or judge.

Campbell v. Gimple, 7 W.W.R. 337.

Poundage fee—Interpleader.

A sheriff is not entitled to a poundage fee where the claimant of the goods seized succeeds on an interpleader issue, although the seizure was made under the explicit instructions of the solicitors for execution creditors.

McDonald v. Cushing, [1918] 3 W.W.R. 89.

Poundage — Taxation of sheriff's bill without formal appointment served on execution creditor — Retaxation unnecessary — Motion to reduce poundage — Forum — Costs — Unnecessary contest.

Carson v. Martin, 14 O.W.N. 76.

Sheriff's fees—Seizure of immovables.

A sheriff has no right to a fee for searches in the registry office, but may appoint a bailiff and pay him a fee and his travelling expenses. He may charge for his report. If the instructions to the sheriff divide the lots to be seized into blocks, without specifying that the lots should be sold as one property, and without any permission to sell en bloc being obtained, the sheriff has a right to a fee upon the additional lots.

Lamothe v. Dulude, 20 Que. P.R. 93.

SHIPPING.

I. In general; limitation of liability.
II. Ownership and employment of vessels.

III. Powers and liability of master.
IV. Offence under shipping laws.

See Collision; Admiralty; Seamen; Towage; Carriers.

Annotations.

Collision of ships: 11 D.L.R. 95.

Contract of towage; duties and liabilities of tug-owner: 4 D.L.R. 13.

Liability of a ship or its owner for necessaries: 1 D.L.R. 450.

Collisions on high seas; jurisdiction: 34 D.L.R. 8.

The duty of a tug to its tow: 49 D.L.R. 172.

I. In general; limitation of liability.

See Collisions; Admiralty; Towage.

Seizure for towage; "ship," what is, see Admiralty, II—8; Towage, I—5.

Damage to cargo, defective wharf, see Wharves, I—3.

Limitation of liability, "effects of climate," negligence, see Carriers, III G—467.

(§ I—1)—Negligent navigation—Gratuitous passenger—Skill of seamen.

While the law requires that a seaman should exhibit ordinary presence of mind and ordinary skill, an act or omission, in a moment of great peril, which contributes to a collision is not actionable negligence, although it turned out to have been the wrong thing to do, if it represented his best judgment at the moment of the emergency. Negligence of a gross description must be proved in an action for damages founded on negligent navigation resulting in injury to a passenger carried gratuitously in a motor boat.

Donaldson v. Acadia Sugar Refining Co., 21 D.L.R. 217, 48 N.S.R. 451.

Water Carriage of Goods Act—When applicable.

The Water Carriage of Goods Act, 1910 (Can.), does not apply in Admiralty cases, except when the vessel sails from a Canadian port. Quære: Has a party who has not, at the time of the happening of the event upon which action is based, paid for the goods lost or taken delivery of them, the right to maintain an action in respect of their loss?

Lannon v. S.S. Porter, 15 Can. Ex. 126.

Quarantine—Liability for medical services.

The owners of a small coasting vessel exempt from contribution to the Sick Mariners' Fund (Canada Shipping Act, R.S.C. 1906, c. 113, s. 403, are liable for professional services rendered by a Dominion quarantine physician in treating an outbreak of smallpox among the crew.

McKay v. Halifax & Sheet Harbour S.S. Co., 36 D.L.R. 320, 51 N.S.R. 120.

Ship—Sailboat.

A schooner, provided with sails, and habitually transported from one place to another by a tug and never using its sails, is not navigated by sails.

Quebec Salvage Co. v. Dallaire, 26 Que. K.B. 253.

Damage to tug—Forced on rock through breaking of boom being towed off shore by another tug—Inevitable accident—"Foul anchorage"—Tugs with tows of booms—Unusual action of tide and current.

Damage to plaintiff tug by being forced on rock through breaking of boom which was being towed off shore by defendant tug, held to have been caused by inevitable accident, and not by fault of anyone connected with defendant tug the master of the latter not having failed to take any reasonable precaution which ordinary skill and prudence could suggest. In certain circumstances where the question of safety to a ship, including her tow, is involved, she is justified in taking that degree of risk which the circumstances may justify; e.g., the rigour of the elements may impose a common risk upon all who seek refuge in a common harbour—and constitute "a cause which a ship could not resist." And in weighing these circumstances there must be considered the facts that tugs with tows of booms are of an unwieldy nature and the booms are easily broken up by rough water and they cannot face a state of weather which would present no damage to ordinary vessels; and in a haven require a considerable amount of space for a clear anchorage which may not be available in time of danger when many vessels are forced to resort to it for as much shelter as may be possible, in which circumstances it comes down to a question of good seamanship. A master is entitled to rely upon the ordinary action of tide and current where he has no reason to anticipate that the ordinary risk has been increased.

The "Jessie Mac" v. The "Sea Lion," [1919] 1 W.W.R. 1041. [See [1919] 2 W.W.R. 411.]

Damage to cargo—Evidence—"Apparent good order and condition"—"Seaworthiness"—Negligence—Limitation of liability.

In an action against a shipowner for damages for negligently injuring a cargo it is not necessary to prove that any acts of commission or omission of a negligent nature by the defendant were intentional, it is sufficient to show that ignorance governed his actions. [Hayn v. Culliford, 4 C.P.D. 182, followed.] Where a bill of lading admits the receipt of goods "in apparent good order and condition" and they are not so delivered, but there is no evidence to prove that they were in proper condition when loaded, negligence is not, therefore, to be presumed. The words quoted mean nothing more than that there was nothing specially noticeable about the goods which would require to be marked on the mate's receipts. [The Pearlmoor, [1904] P. 286, at p. 292.] Evidence adduced by a shipper as to the condition of a shipment at the time of loading held to be sufficient to make out a prima facie case which the defendant was required to meet and which, it was held,

the defendant did meet. Negligence of a shipowner relied upon as the basis of an action for damages because of deterioration of a cargo must be shown, even if proven, to have been the cause of such deterioration. [Smith v. Baker, 5 T.L.R. 518, followed.] In an action by a shipper against a shipowner for breach of a contract to deliver goods in apparent good order and condition, the onus is upon the defendant, upon proof of failure to so deliver, of showing that notwithstanding such fact, it is not liable. The fact that a cargo is improperly stowed in that it is not supplied with sufficient ventilation may be "unseaworthiness" as far as such cargo is concerned. [Rathbone v. McIver, [1903] 2 K.B. 378, followed.] Where a steamship line, operating presumably up-to-date ships manned by competent officers, has in carrying on its business for a number of years deliberately adopted a certain system as to the carriage of grain cargoes, without any apparent objection being raised thereto by shippers, such system should not be held to be improper, unless it is shown that a contrary system is well recognized as proper and necessary. In an action against a shipowner for failure to deliver a cargo in the condition it was in when shipped, evidence as to the condition in which other shipments of the same kind of goods, shipped over different lines, were in upon delivery at nearby ports during the same season should not be entirely ignored on the question of the sufficiency of ventilation given the cargo in question. The "seaworthiness" of a ship in the sense that it was fit and properly equipped to carry the cargo in question at the time and place where it was loaded held to have been proven. The fact that a cargo is insured does not affect the shipowner's liability for its deterioration. A clause in a bill of lading limiting the shipowner's liability for damage to a cargo, held merely to limit the total liability of the shipowner to the cash value of the goods at the point of shipment.

Balfour v. C.P.R., [1917] 3 W.W.R. 410.

CARRIAGE OF GRAIN—DAMAGE BY WATER—HOLE MADE IN BARGE BY COLLISION WITH DOCK — INSPECTION AND REPAIR — DUE DILIGENCE — NEGLIGENCE — PERIL OF NAVIGATION — WATER-CARRIAGE OF GOODS ACT, 9 & 10 EDW. VII. c. 61, s. 6 (D.)—MERCHANTS SHIPPING ACT.

Grain Growers' Export Co. v. Canada Steamship Lines, 11 O.W.N. 355.

CONTRACT—CAPACITY OF SHIP—KNOWLEDGE OF SHIPPER — "CARGO" — CORRESPONDENCE — DEFICIENCY IN TONNAGE — BREACH OF CONTRACT—DAMAGES.

Thompson v. Canada Pebble Co., 11 O.W.N. 396.

(§ I—2)—REGULATION OF PILOTAGE—REVOCATION OF LICENSE.

The granting and withdrawal of a pilot's license by the local pilotage authority under the Canada Shipping Act, R.S.C. 1906, c. 113, is a quasi-judicial act, and no action will lie for its error in proceeding ex parte on canceling a license unless malice is alleged and proved.

McGillivray v. Kimber, 23 D.L.R. 189, 48 N.S.R. 280. [Reversed, 26 D.L.R. 164, 52 Can. S.C.R. 146.

(§ I—3)—COLLISION—CHANNEL—BRIDGE—LIABILITY.

A steam vessel which fails to keep to the starboard side of a narrow passage between the piers of a bridge across a canal violates r. 17 of the "Canal Rules and Regulations," and if a collision occurs in consequence she is solely liable for the resulting damage.

Bonham v. The Ship "Honoreva," 32 D.L.R. 196; 54 Can. S.C.R. 51.

DAMAGE TO CARGO—VENTILATION—"ACCIDENT OF THE SEAS."

A ship properly equipped for ventilation is not liable for damage to a cargo of grain by overheating caused by decreasing the ventilation during inclement weather when good seamanship made that necessary; the damage was an "accident of the seas" within the meaning of the bill of lading. [The Thrunscoe, [1897] P. 301, followed.]

Donkin Creeden v. S.S. "Chicago Maru," 33 D.L.R. 38, 23 B.C.R. 551, 16 Can. Ex. 503.

COLLISION—RULES OF ROAD—NEGLIGENCE.

In case of a collision between vessels, when damage has accrued, the responsibility lies upon the ship guilty of negligent navigation in failing to observe the rules which should have governed her course and speed.

Starke v. S.S. Mack, 15 Can. Ex. 118.

II. Ownership and employment of vessels.

(§ II—5) — TUG AND BARGE — COMMON OWNERSHIP—COLLISION—LIABILITY OF SHIPS.

A tug having in tow a barge being engaged in the business of their common owner, and controlled by the officers and crew of the tug are regarded as one ship and each liable for the consequences of a collision by the tug with another barge.

"A. L. Smith" and "Chinook" v. Ont. Gravel Freighting Co., 23 D.L.R. 491, 51 Can. S.C.R. 39, affirming 22 D.L.R. 488, 15 Can. Ex. 111.

OWNERSHIP—EQUITABLE AND BENEFICIAL—RIGHTS OF EQUITABLE OWNER.

Where the beneficial owner of a vessel registers it in the name of another, the court will enforce equities in favour of the beneficial owner as against the registered owner, if the registration has not been so made for the purpose of defeating the policy of the law.

Farquharson v. Farquharson, 13 D.L.R. 534, 13 E.L.R. 66.

CHARTERING AT OWNER'S RISK — LIABILITY OF CHARTERER TO OWNER.

The charterer of a boat at the owner's risk is relieved from liability to the latter for the result of the negligence of an engineer employed by the charterer with the

approval of the owner, which was required by the charter party, since such approval recognized the competency of the engineer, and the charterer was not required to take any further precautions in respect thereto, notwithstanding the charter party provided that the latter should "take all reasonable precautions regarding the safety" of the vessel.

B.C. Canning Co. v. McGregor, 14 D.L.R. 555, 18 B.C.R. 663, 26 W.L.R. 18, 5 W.W.R. 543.

PART OWNER OF VESSEL—MANAGING OWNER —POWERS OF—CHANGE OF OWNERSHIP —INSURANCE POLICIES—ACCOUNTING—ADDING NECESSARY PARTIES.

Roop v. Pickels, 28 D.L.R. 800, 50 N.S.R. 59.

(§ II—7)—CHARTER PARTY—SIZE OF SHIP AND CARGO—DEMURRAGE.

Under a charter party contract, the shipowner is bound to supply a ship so constructed as to be capable of carrying the complete cargo set out in the contract. The duty of a charterer is carried out when he has supplied cargo in dimensions such as are usual at the port of loading for ships of the size of the chartered vessel. The charterer cannot be held liable under the demurrage clause of the contract for delay in loading and discharging the cargo caused by faulty construction of the ship.

Likely v. Duckett, 31 D.L.R. 194, 53 Can. S.C.R. 471, reversing 44 N.B.R. 12.

(§ II—8)—SEAWORTHINESS OF VESSEL — EXPENSE OF REPAIRING DURING VOYAGE.

Doran v. Labrador Pulp & Paper Co., 15 D.L.R. 151, 44 Que. S.C. 497.

CARRIAGE OF GRAIN — DAMAGE BY WATER — HOLE MADE IN SIDE OF SHIP—EVIDENCE AS TO CAUSE OF HOLE—"SEAWORTHINESS"—"DUE DILIGENCE"—NEGLIGENCE —PERILS OF NAVIGATION — WATER-CARRIAGE OF GOODS ACT, 9 & 10 EDW. VII. c. 61, SS. 6 AND 7 (D.)—FINDINGS OF TRIAL JUDGE—APPEAL.

"Seaworthiness" includes not only staunchness in the sense of being built to withstand the elements without injury to the hull, but also comprehends a condition which will include the safety of the cargo, both from perils of the sea as commonly understood, and from causes not accompanied by violence of the elements, such as leakage. A grain cargo must be carried dry, and the seaworthiness of a vessel in relation thereto will depend upon her capacity in that respect. The words "exercises due diligence to make the ship in all respects seaworthy," in s. 6, mean not merely a praiseworthy or sincere, though unsuccessful, effort, but such an intelligent and efficient attempt as shall make it so, as far as diligence can secure it. Under s. 7, Water Carriage of Goods Act, 9 & 10 Edw. VII., c. 61 (Can.), the shipowner must shew that the loss occurred from a danger of the sea or arose without his actual fault or privity or that of his agents, servants or employees. The onus is on him to bring himself within the exceptions. If a hole that was found in the side of a barge was made by striking the dock, owing to bad steering, it was not caused by a peril of the sea. [Lennard's Carrying Co. v. Asiatic Petroleum Co., [1915] A.C. 705, and Virginia Caroline Chemical Co. v. Norfolk & North American Steam Shipping Co., [1912] 1 K.B. 229, 243, 244, applied.]

Grain Growers Export Co. v. Canada Steamship Lines, 43 O.L.R. 330. [Affirmed, 52 D.L.R. 680, 59 Can. S.C.R. 643.]

III. Powers and liability of Master.

See Towage.

(§ III—10)—QUANTUM MERUIT—OVERHEAD CHARGES — CONTRACTOR'S PROFITS — COST OF CONSTRUCTION—WITNESSES—CREDIBILITY.

The plaintiffs were owners of marine construction works and shipyards and had large capital invested and had large contracts on hand from the Government for the construction of drifters and trawlers for war purposes. The work in question was accepted by the plaintiff only after pressing and urgent request from the defendant, whatever the cost might be, as emergency work and to oblige him, in order that the ship might get out of the river before the close of navigation. Plaintiffs were obliged to take men off other work and went behind on Government contracts. Held, that under all the circumstances of the case, and considering the abnormal state of business and the advanced prices prevailing during the war, 90 per cent of the cost of labour, as an overhead charge, plus 10 per cent on the total cost as contractor's profits, were fair and reasonable items to be added to the actual cost of labour and materials, in arriving at the valuation of the work done by plaintiff. That "cost of construction" includes, besides actual cost of labour and materials, an allowance for overhead expenses, and a profit on the capital employed in producing an article or doing a piece of work. That where the Trial Judge did not hear or see the witnesses, an Appellate Court is as competent to appreciate the facts and estimate the credibility of the evidence as the court of first instance.

Canadian Vickers Co. v. The "Susquehanna," 48 D.L.R. 461, 19 Can. Ex. 116, varying 44 D.L.R. 716, 18 Can. Ex. 210.

DEPRIVING VESSEL OF BERTH AT DOCK—LIABILITY FOR RESULTING INJURY.

Where, while the plaintiff was warping a boat into a berth at a dock with lines fastened to the dock, those in charge of the defendant vessel, knowing of the plaintiff's intention, so manoeuvred their boat with the aid of its auxiliary power, as to take possession of the berth and exclude the plaintiff's boat therefrom, so that the latter was compelled to lie in a dangerous position in a stream, and on the ebbing of

the tide, fell over and was wrecked, the defendant boat is answerable in damages; the taking of the berth away from the plaintiff's vessel under the circumstances was an unreasonable exercise of the right of navigation.

Graham v. "The E. Mayfield," 14 D.L.R. 505, 14 Can. Ex. 330.

ILLNESS OF SEAMAN—MEDICAL ATTENDANCE —SERVICE EX JURIS. . .

Although a vessel and its owners are under obligation to bear the expenses of the illness of a seaman in the services of the ship in addition to his wages while ill, at least so long as the voyage is continued, there is no implied contract in respect of the physician's charges between the shipowner and the physician called in by the seaman to attend him while visiting in port during the employment; and leave under N.S. Order 11, s. 1, to serve process out of the jurisdiction should be refused the physician suing the shipowner for the account where there was neither an express contract by the latter for the services rendered the seaman, nor circumstances from which a direct contract to pay could be implied. [The "Osceola," 189 U.S.R. 175; The "Iroquois," 194 U.S.R. 240, followed.]

Melanson v. Gorton Pew Fisheries Co., 23 D.L.R. 307, 48 N.S.R. 502.

BREACH OF DUTY—PROPERTY IN CHARGE OF MASTER OF VESSEL—LIABILITY FOR LOSS OR DESTRUCTION.

The master in charge of a small fishing vessel must prima facie account for the missing appurtenant property of the owner (for instance, fishing gear) entrusted to such master's charge; although the rule might be modified in larger vessels where such property is entrusted to the custody of various officers.

Brown v. "Alliance No. 2," 16 D.L.R. 413, 19 B.C.R. 529, 27 W.L.R. 704.

DISMISSAL OF PILOTS—WRONGFUL DISMISSAL.

A pilot, duly qualified and licensed as such under the Pilotage Act, s. 28, c. 80, R.S.C. 1886, now forming part of the Shipping Act, c. 113, R.S.C. 1906, s. 448, so long as he conforms to the regulations and has not been duly condemned for any of the offences for which the pilotage authorities may try him, and suspend or dismiss him, is quite independent of the pilotage authority, and entitled to follow his calling as provided by s. 38 of the Pilotage Act, now s. 459 of the Shipping Act, and the pilotage authority has no arbitrary authority to interfere with the tenure of his office or rights as a licensee. A pilotage authority, in dismissing a pilot for neglect and incapacity by resolution alone, without any complaint, notice, or investigation, has not complied with the statutory requirements and has not exercised any judicial functions and is liable for damages in an action by such pilot.

McGillivray v. Kimber, 26 D.L.R. 164, 52 Can. S.C.R. 146, reversing 23 D.L.R. 189, 48 N.S.R. 280. [Leave to appeal to Privy Council granted, 52 Can. S.C.R. VIII.]

PERSONAL INJURY—NEGLIGENCE—LIABILITY OF OWNER—"CANADA SHIPPING ACT," R.S.C. (1906), c. 113, s. 921.

Dominion Fish Co. v. Isbister, 43 Can. S.C.R. 637.

SALE OF RES UNDER MORTGAGE—LIQUIDATOR —CLAIMS FOR REPAIRS FOR "LAST VOYAGE"—PRIVILEGE.

St. Aubin v. The S.S. "Canada," 13 Can. Exch. 463.

IV. Officers under Shipping Laws.

See Collision.

(§ IV—20)—DESERTION.

Where a summary conviction of a seaman for desertion under the Canada Shipping Act, R.S.C. 1906, c. 113, s. 287, as amended by 1907, c. 46, does not shew that the ship was registered in one of the provinces at the time of the offence, the defendant will be discharged in habeas corpus proceedings from custody under the commitment following such conviction. It is not a ground for discharge on habeas corpus that the summary conviction and commitment purported to include as one offence the desertion of a seaman and also his refusal to do duty which are declared to be offences by the said Shipping Act, as amended.

Re Dalton, 30 D.L.R. 659, 26 Can. Cr. Cas. 142.

A certificate of discharge furnished by the master of a ship to the second officer under s. 176 of the Canada Shipping Act, R.S.C. 1906, c. 113 (Form K.) is not a certificate of service within s. 123 of that Act making it an offence for a person to fraudulently make use of a certificate of service to which he was not entitled. The offence of making a false representation for the purpose of obtaining a certificate of competency as master of a passenger steamer under the Act, is negatived if it appears that there was no guilty knowledge or intent on the part of the accused and that the only error in his application papers was that believing that service as second mate counted in like manner as would service as first mate, he represented that he had served as mate "on a certain boat for a year," whereas a part of the time had been served as second mate and the remainder as mate (i.e., first mate), particularly where the examining officer when called as a witness testified that he would have passed the applicant's papers had the actual facts been shewn.

The King v. Wright, 2 D.L.R. 768, 3 O.W.N. 851, 20 Can. Cr. Cas. 23, 21 O.W.R. 433.

One who complains of a breach of regulations under Part XIV. of the Canada Shipping Act, R.S.C. 1906, c. 113, is not required to shew any guilty intent on the

part of the person committing such breach or any actual damage resulting therefrom.
Eastaway v. Lavallee, 5 D.L.R. 229.

SHOPS REGULATION ACT.

See Municipal Corporations, II C—112.

SIDEWALKS.

See Highways.

SIGNALS.

See Automobiles; Railways; Carriers; Street Railways.
Warning to employees, see Master and Servant.

SIGNATURE.

As affecting notes, see Bills and Notes.
Of corporation, officers, see Companies.

Annotation.

Proof of handwriting and documents: 44 D.L.R. 170.

SITUS.

See Conflict of Laws.
For purposes of taxation, see Taxes.

SLANDER.

See Libel and Slander.

SOLDIERS.

See Military Law.
Volunteers and Reservists Relief Act, see Moratorium.
Insurance as to, see Insurance, VI D—385.
As to enlistment, see Militia; Habeas Corpus, I B—7.

Annotation.

Desertion from military unit, 31 D.L.R. 17.

SOLICITORS.

I. Right to practise.
  A. Admission.
  B. Disbarment.
II. Relation to client.
  A. In general; liability.
  B. Authority.
  C. Compensation; lien.
  D. Summary proceedings.
III. Remedies against; motions.

Annotation.

Acting for two clients with adverse interests, 5 D.L.R. 22.

I. Right to practise.

A. Admission.

(§ I A—1)—Right to practise.

A solicitor, whose name appeared on the roll of the Law Society of Saskatchewan, but who resided in Winnipeg, entered an appearance in this action on behalf of the defendant. The solicitor's address was not stated, but a proper address for service was given. On a motion to strike out the appearance on the grounds that no address was given, and that a solicitor resident out of the jurisdiction was not entitled to practise as such in the province. Held, that the omission to give an address was an irregularity which could be cured by amendment. (2) That anyone duly enrolled as a solicitor by the Law Society of Saskatchewan and in good standing is entitled to practise as such, notwithstanding that he may reside out of the Province.
Fraser v. G.T.P. Branch Lines Co., 4 S.L.R. 311, 19 W.L.R. 651, 1 W.W.R. 303.

(§ I A—6) — Women — Discretion of Board of Examiners.

By the common and public law in force in the Province of Quebec, women, on account of their sex, have always been excluded from the practice of the law, as it has been the case, from time immemorial, in England, France and other countries until, in some of them, special laws have permitted women to become members of the legal profession. Old prohibitive laws, in England, having that object, have never been repealed. The interpretive rule of the Civil Code, art. 17, s. 9, and of the R.S. 1909, art. 21, which declares that the masculine gender includes both sexes, has no application in such a case. The context of the law constituting and regulating the Bar of the Province of Quebec, shews that it is applicable to the masculine gender only. The power given to the council of each section of the Bar of the province of Quebec to appoint examiners is not a power delegated to them by the general corporation, but is a distinct power which appertains specially and exclusively to each of them. The Board of Examiners for the admission of candidates to the study or practice of the law must be guided in this decision by the principles of the law, and they have no absolute discretion to exert. A person of the female sex is not included within the purview of the Bar Act of the province of Quebec, and cannot be admitted either to the study of the law nor to the practice of the legal profession. A married woman could not be admitted to the practice of the law as a member of the Bar without the authorization of her husband or of a judge.
Langstaff v. Bar of Quebec, 25 Que. K.B. 11, affirming 47 Que. S.C. 131.

(§ I A—9)—Striking off for cause—Subsequent application to restore to roll.

In considering the question of restoring to the rolls a solicitor whose name had been stricken off by order of the court, the court will consider (a) the character of the charges which led to the disenrollment, (b) the sufficiency of the punishment by deprivation of the right to practise since the order was made; (c) the restoration made to the parties who had complained, (d) the probability of the solicitor not offending in the future.
Re Harris, 17 D.L.R. 103, 7 A.L.R. 272, 28 W.L.R. 671, 6 W.W.R. 628.

REINSTATEMENT AFTER ORDER STRIKING OFF —PROOF OF SUBSEQUENT GOOD CONDUCT AND OF RESTITUTION.

Although the default which was the basis of an order for striking a solicitor off the rolls has since been made good, the court, on a motion to reinstate, may postpone the application for 6 months or more if the gravity of the original charge were such as to make it appear that an insufficient period of subsequent good conduct had elapsed.

Re Solicitor, 14 D.L.R. 778, 26 W.L.R. 136.

B. DISBARMENT.

(§ I B—10) — NEGLIGENT INVESTMENT — SUMMARY ORDER.

Unwise investment of a client's funds and failure to implement an undertaking with respect to funds do not necessarily amount to misconduct warranting the striking of a solicitor from the rolls; he may merely incur the minor penalty of being summarily ordered to perform any undertaking which he may have made to his client.

Re Solicitor, 31 D.L.R. 86, 37 O.L.R. 310.

SUSPENSION—GROUNDS—FAILURE TO TURN OVER COLLECTIONS.

Re Solicitor, 23 D.L.R. 887, 32 W.L.R. 60.

BREACH OF BAR ACT—CIRCULARS.

The distribution by a person not holding a diploma of an advocate, of circulars by which he offers his services to conscripts to give them information upon the proceedings to take in order to obtain exemption from military service, constitutes a breach of the Bar Act of the province of Quebec.

Le Barreau de la Province de Quebec v. Picard, 54 Que. S.C. 455.

DISBARMENT — APPEAL — NOTICE — RULES OF LAW SOCIETY.

In order to constitute a valid notice of appeal from disbarment or disqualification by the Benchers of the Law Society, the grounds of appeal must be set forth as specified in r. 96 of the Rules of the Law Society and the failure to do so deprives the judges of the Supreme Court of jurisdiction to hear the appeal. There is no appeal from the refusal of the Benchers to reinstate a disbarred barrister or disqualified solicitor. Semble, s. 41 of the Legal Professions Act requires that all the judges of the Supreme Court must sit on an appeal from disbarment or disqualification by the Benchers.

Re Legal Professions Act and Hall, 24 B.C.R. 226.

(§ I B—11)—STRIKING OFF—GROUNDS FOR SECRET PROFIT ON REALTY SALE.

Where a solicitor, holding an option to purchase lands from a third party, conceals such option from the client whom he persuades to purchase the lands direct from the owner at an increase over the option price, under a secret arrangement with the latter whereby the solicitor is paid the difference on the completion of such sale, in carrying out which he had accepted the professional duty of looking after the client's interests, a case of professional misconduct is shewn which warrants the suspension of the solicitor's certificate to practise, or in a proper case, to strike his name from the rolls, although the client had recovered from the solicitor the excess in the price.

Re Blaylock, 16 D.L.R. 487, 7 A.L.R. 163, 27 W.L.R. 769, 6 W.W.R. 606.

SUSPENSION—GROUNDS FOR—NOT ACCOUNTING FOR CLIENT'S MONEY.

The suspension of a solicitor for not accounting for and paying over money due to a client may be extended notwithstanding a settlement in full made with the client.

Re D. H. Cole, 20 D.L.R. 502, 7 S.L.R. 263, 29 W.L.R. 392.

LAW SOCIETY ACT, R.S.M. 1913, C. 111, S. 82—STRIKING BARRISTER OFF THE ROLLS —UNPROFESSIONAL CONDUCT.

A barrister, who is not also a solicitor, may be struck off the rolls or otherwise punished for professional misconduct under s. 82 of the Law Society Act, R.S.M. 1913, c. 111, although the work in respect of which the complaint is made was not done in his capacity as a barrister if it was of a kind usually intrusted in this province to a solicitor. [Re P.E.H., 3 D.L.R. 706, 22 Man. L.R. 746, followed.] The accused, in order to make it appear that one Irvine, who was the owner of land subject to a number of registered judgments, had parted with his interest in the land before the registration of any of the judgments, procured or caused to be executed by Irvine, after the date of the last of such registrations, a quit claim deed of the land to himself but dated prior to the registration of any of the judgments. Held to be unprofessional conduct warranting the making of an order striking the accused off the rolls as a barrister.

Re Beatty, 29 Man. L.R. 388.

(§ I B—12) — STRIKING OFF ROLLS — PROVINCE OF COURT.

A court, in dealing with the moral fitness of solicitors to retain them on the Roll, is merely a court of discipline specially charged with the duty of guarding the honour of the legal profession and judging, not the legal rights, but the moral character of the individual, and is not bound by previous decisions.

Re Solicitor, 24 D.L.R. 443, 9 W.W.R. 480, 32 W.L.R. 705.

PRACTISE AS TO DISBARMENT.

The syndic (or attorney for the Council of the Bar) who lays a complaint in his professional quality has no right to sit as a member of the committee which investigates the charge, and the order of suspension by a committee including the syndic is illegal and against the fundamental principles of justice.

Gosselin v. Bar of Montreal, 2 D.L.R. 19.

DISBARMENT—MISAPPROPRIATION OF MONEY —RESTITUTION.

On a motion to strike a solicitor's name from the rolls in Alberta, alleged misconduct in another country where he had previously practised may be shewn in proof that he was not a fit and proper person to be admitted in Alberta, and if the evidence warrants it, the court may direct that he appear before it within a specified time and satisfy the court that he is doing what is reasonable and within his ability to satisfy the foreign claims and in default that he be struck off. [Bunny v. Supreme Court of New Zealand, 16 Moo, P.C. 164, 15 E.R. 455; Re Blaylock, 16 D.L.R. 487; Re Hopper, 34 Sol. J., 568, applied.]

Re Knox, 20 D.L.R. 546, 7 A.L.R. 409, 29 W.L.R. 1.

STRIKING OFF THE ROLLS—MISCONDUCT.

On application to strike a solicitor off the rolls, the court has to consider the respective rights of (a) the solicitor himself, (b) his client, (c) his profession. [Re Pyke, 34 L.J.Q.B. 121, applied.]

Re Blaylock, 16 D.L.R. 487, 7 A.L.R. 163, 27 W.L.R. 769, 6 W.W.R. 606.

(§ I B—14)—MISAPPROPRIATION OF FUNDS —SUSPENSION UPON PAYMENT — COMPROMISE.

A compromise with his clients on a percentage basis is a sufficient compliance with an order of court suspending the disenrollment of a solicitor upon his payment of the claims misappropriated in another jurisdiction.

Re Solicitor, 24 D.L.R. 443, 9 W.W.R. 480, 32 W.L.R. 705. [See 20 D.L.R. 546, 7 A.L.R. 409.]

II. Relation to client.

A. IN GENERAL; LIABILITY.

(§ II A—20)—RELATION TO CLIENT—TAKING CONVEYANCE FROM—STATING CONSIDERATION—DUTY OF SOLICITOR—VALIDITY AS TO ACTUAL INDEBTEDNESS.

The true consideration for a conveyance of property from a client to his solicitor must be expressed in the deed, since it cannot be otherwise shewn. In taking the conveyance, a solicitor assumes the heavy responsibility of shewing that he exercised as great diligence for the best interest of the vendor as though he were dealing with a stranger in the former's behalf. Notwithstanding the general rule that the misstatement of the true consideration in a deed from client to solicitor vitiates the conveyance, such a deed, when given as security for money actually due the attorney, will be upheld to that extent as an equitable mortgage, where no fraud in the transaction was alleged, and cancellation of the deed was not claimed.

Duffy v. Mathieson, 13 D.L.R. 587, 13 E.L.R. 73.

WHEN RELATION EXISTS—MISAPPROPRIATION BY—WHO MUST BEAR LOSS.

A solicitor employed by a vendor to prepare a conveyance of land is the agent of the latter and not of the purchaser, notwithstanding that he had been previously employed by the purchaser to investigate the title, and afterwards to prepare an order on a third person for the payment of the purchase money to the vendor; and, where the latter negligently permits the solicitor to obtain possession of the cheque given by such third person in payment of such order, the loss of the money through misappropriation by the solicitor falls on the vendor.

Cheesman v. Corey, 15 D.L.R. 445, 42 N.B.R. 409, 13 E.L.R. 469.

NEGLECT OF DUTY.

The burden of proving negligence is primarily upon the plaintiff suing a solicitor for neglect of duty, but when once established it is for the solicitor to prove that the client was not injured by it.

Marriott v. Martin, 21 D.L.R. 463, 21 B.C.R. 161, 30 W.L.R. 899, 7 W.W.R. 1291.

SALE OF INDIAN LANDS — SHARING COMMISSIONS.

Held, upon the facts, that an agreement to share an agency commission upon the sale of lands in an Indian Reserve, made with a solicitor by a client, was enforceable.

Cole v. Read, 26 D.L.R. 564, 52 Can. S.C.R. 176, 9 W.W.R. 1137, affirming 22 D.L.R. 686, 20 B.C.R. 365.

LIABILITY FOR NEGLIGENCE — MEASURE OF DAMAGES.

Registering a conveyance in disregard of his client's instructions, and neglect to insert a necessary and usual covenant for the protection of his client, render a solicitor liable for all the pecuniary loss the client sustains through the negligence and breach of duty.

Johnson v. Solicitor, 36 D.L.R. 239.

LIABILITY FOR NEGLIGENCE — NONCOMPLIANCE WITH INSTRUCTIONS AS TO REMITTANCES CAUSING ABORTION OF MORTGAGE SALE—MEASURE OF DAMAGES—COSTS OF ADVERTISING.

Canadian Mortgage & Inv. Co. v. Solicitors, 34 D.L.R. 769, 10 S.L.R. 94, [1917] 2 W.W.R. 181.

PROFESSIONAL MISCONDUCT—RETENTION OF CLIENT'S FUNDS.

A solicitor is not guilty of unprofessional conduct, or misconduct as a barrister, solicitor or attorney of the court, in retaining moneys placed in his hands by a person to whom, through mental and physical incapacity, a curator was subsequently appointed, the solicitor having guaranteed to a doctor and landlady the payment of sums of money for care of mentally afflicted person.

Re Law Society Act; Re Huggard, [1917] 2 W.W.R. 91.

FRAUD—PURCHASING PROPERTY OF JUDGMENT DEBTOR—TRUST.

A solicitor is not guilty of fraud in

purchasing the property of a judgment debtor of a client whose judgment is for interest, where the property when offered at public sale under the judgment would not sell, the solicitor does not release the judgment against it and the transaction realizes for the client, who wants money, not property, a sum sufficient to cover the judgment and the solicitor's costs and disbursements; under such circumstances the solicitor will not be declared a trustee of the property for the client.

White v. X., [1917] 3 W.W.R. 332.

SOLICITOR AND CLIENT—RETAINER—SUBSEQUENT PROCEEDINGS—HABEAS CORPUS—EVIDENCE.

Duff v. Lane, 48 Can. S.C.R. 508.

COSTS — ACTION FOR — RULE MICH., TERM 1800—3 JAC. 1, C. 7, S. 1 (IMP.)—RULE REQUIRING SERVICE OF BILL—TO WHAT SERVICES APPLICABLE—COUNSEL FEES.

Neither the rule of Mich. Term 1800, nor the statute of 3 Jac. 1, c. 7, s. 1 (Imp.), requiring an attorney to serve his client with an itemized bill before action, applies to services in the inferior courts or for services on a preliminary examination on criminal charge. Even if fees for services which only a counsel could render cannot be recovered in this province, an attorney is not barred from recovering for services properly rendered as such, merely because he is likewise a barrister.

Gerow v. Webber, 46 N.B.R. 358.

THEFT—SOLICITOR—MONEY ENTRUSTED TO, FOR INVESTMENT—IMPROPER SECURITY TAKEN IN SOLICITOR'S OWN NAME—EVIDENCE NOT WARRANTING CONVICTION FOR STEALING — STATED CASE — STATEMENT OF TRIAL JUDGE, WHETHER PROPERLY BEFORE APPELLATE COURT.

R. v. Loftus, 17 O.W.N. 256.

The following agreement: "J. I., advocate of Montreal, hereby agree to defend Mr. A.C. in all cases that may be instituted against him and in all good cases that he may institute against others, on condition that he pays me only the disbursements as they are needed; my fees will be paid by the other party in each law suit, and on the condition that he sends me all the cases of his clients that he may be able to send me," does not cover fees for services which are governed by the consent of the parties, nor those for consultations or other professional services, apart from law suits.

Cordasco v. Garneau, 56 Que. S.C. 1.

LIABILITY—MONEY GIVEN BY CLIENT FOR DEFINITE PURPOSE—APPLICATION—DAMAGES—C.C. QUE. ARTS. 1709, 1713, 1803.

A notary to whom a client has given money for the definite purpose of returning a loan and redeeming an estate, cannot use it to pay fees and disbursements. If he does so he is liable for the damages which his client suffers.

Hamel v. Savaria, 25 Rev. Leg. 466.

SALE TO CLIENT—SECRET PROFIT—DUTY TO DISCLOSE.

Amphlett v. Blaylock, 3 A.L.R. 61, 13 W.L.R. 515.

SOLICITORS—NEGLIGENCE.

Schoen v. Macdonell, 18 W.L.R. 329.

(§ II A—21) — SUBSTITUTION — CHANGE — RIGHT OF MAJORITY OF ADMINISTRATORS TO CHOOSE SOLICITOR FOR ESTATE—SOLICITOR'S CHARGES.

Re Solicitor, 1 D.L.R. 899, 21 O.W.R. 168.

MONEYS AND PAPERS OF CLIENTS — MOTION FOR DELIVERY TO NEW SOLICITORS — AUTHORITY OF CLIENT FOR APPLICATION—INQUIRY BY OFFICIAL GUARDIAN—PEREMPTORY ORDER UPON SOLICITOR—PENALTY IN CASE OF NONCOMPLIANCE.

Re Solicitor, 6 O.W.N. 170, 26 O.W.R. 190.

(§ II A—22)—LIABILITY.

A solicitor, who is retained to draft a mortgage, is responsible for damages resulting to his client in consequence of his failure to include in the instrument a sufficient provision for the yearly payment of interest thereon. [Whiteman v. Hawkins, 4 C.P.D. 13, applied.]

Finkbeiner v. Yeo, 25 D.L.R. 673, 26 Man. L.R. 22, 33 W.L.R. 195, 9 W.W.R. 891.

FIDUCIARY RELATIONSHIP—ACCOUNTING TO CLIENT—PROFITS.

A solicitor, who is retained by his client to assist him in procuring a tribal transfer of Indian lands and agreeing to an equal division of profits realized therefrom, stands in fiduciary relationship throughout the transaction and is bound to account to the client in respect of such profits though the transaction was later completed by the intervention of a third party at the instance of the solicitor.

Read v. Cole, 26 D.L.R. 564, 52 Can. S.C. R. 176, 9 W.W.R. 1137, affirming 22 D.L.R. 686, 20 B.C.R. 365.

CONTRACT TO DO A SPECIFIC ACT—LIABILITY—TORT DISTINGUISHED.

Where a client purchasing certain lands entrusts his solicitor with a cheque for the amount of the purchase money with specific instructions not to pay it over until the taxes on the land shall have been paid, the solicitor's undertaking to follow such instruction constitutes a positive contract to do a specific act and his subsequent breach thereof is so construed as distinct from a breach of a general duty, arising out of the retainer, to bring sufficient care and skill to the performance of the contract.

Burke v. Shaver, 14 D.L.R. 780, 29 O.L.R. 365.

NEGLIGENCE.

A solicitor is not to be held liable in a negligence action brought by his client against him, merely because his advice on the question of the applicability of a Statute of Limitations to the client's case against a municipal corporation may have been wrong or was not sustained by the

court, if the solicitor's opinion was honestly formed and given in good faith upon the question of law.

Howse v. Shaw, 9 D.L.R. 642, 4 O.W.N. 971, 24 O.W.R. 283.

AGREEMENT—PERSONAL LIABILITY—"ON BEHALF OF CLIENT."

The following undertaking "On behalf of our client G. we undertake to have the agreement arranged between us executed by S. or some third person acceptable to you and to pay you forthwith the cash payment of $300 as arranged. We may add that S. was in to sign the papers to-day but our Mr. K. being engaged in court did not look over the agreement," was an undertaking by the solicitors personally and not a mere undertaking by the client G., a man of no means.

Re Solicitors, 32 D.L.R. 387, 23 B.C.R. 442, [1917] 1 W.W.R. 520.

LIABILITY—NOTICE OF ACTION—PRESCRIPTION — LOAN — PAYMENT — DUTIES OF NOTARY—C.C. QUE. ARTS. 1053, 1709, 1710 — C.C.P. ART. 88 — R.S.Q. 1909, ARTS. 3384 to 3388.

A notary who acts as agent for a client in carrying out a loan, but who is not engaged as a notary, has no right to one month's notice of action accorded to a public officer, where he is sued for return of funds, intrusted to him, and not for damages. The limitation of 6 months in favor of judges of sessions, police magistrates, justices of the peace or any officers whatever, according to R.S.Q. 1909, arts. 3384 to 3388, does not apply to a notary so acting.

Ricard v. Labelle, 28 Que. K.B. 251.

LIABILITY—NOTARY — LOAN OF MONEY — NEGLIGENCE OF NOTARY — C.C. ART. 1053, 1701.

In the case where a woman aged 75 years, without experience or education, made a mortgage loan of $2800 on an apartment house giving to her notary instructions to see to the drawing of the deed to make sure that she had a first mortgage, to make sure that there was no claim registered against the property, and to take out a policy of insurance to guarantee her loan, and that later on it was discovered that she had been the victim of a swindler who had given her a mortgage on a vacant lot worth at most $650. The notary has carried out his instructions with negligence, and is liable for the damages which the lender has suffered.

Chaput v. Crépeau, 55 Que. S.C. 344.

(§ II A—23)—SOLICITOR COLLECTING MONEYS FOR CLIENT—ACCOUNT—EVIDENCE —ACTION BY EXECUTOR OF CLIENT.

Raikes v. Corbould, 6 O.W.N. 651.

(§II A—24)—RIGHT TO PAYMENT FOR SERVICES RENDERED AS DIRECTOR.

In the absence of an express promise by the client to pay for services rendered by a solicitor as director of a company incorporated by the client, no remuneration for such services will be allowed.

Re Solicitors, 7 D.L.R. 323, 4 O.W.N. 47.

B. AUTHORITY.

(§ II B—25)—OF SOLICITORS.

Where solicitors have appeared for a company and the action has been contested down to judgment, neither the company nor the plaintiff can then raise any question as to the authority of the solicitors on the ground of defects or omissions in the organization of the company of which the latter had no notice.

Campbell v. Taxicabs Verrals, 7 D.L.R. 91, 27 O.L.R. 141, 23 O.W.R. 6.

INSTRUCTIONS—ERROR IN PLEADING.

A misstatement of certain allegations of fact, made by a solicitor in drawing the plaintiff's pleading, owing to wrong or misleading instructions having been given, is merely a statement of fact made improperly by an agent, and cannot be read as evidence against his client after the pleading has been corrected by amendment.

O'Kelly v. Downie, 17 D.L.R. 395, 24 Man. L.R. 210, 28 W.L.R. 303, 6 W.W.R. 911, reversing 15 D.L.R. 158.

AUTHORITY—ACTION FOR TWO PARTIES—DISPUTE BETWEEN PLAINTIFFS AS TO RETAINER—EVIDENCE.

A solicitor acting for two parties in the same action need not prove a written retainer from the party disputing his authority if the question of retainer is between the two parties themselves and not between solicitor and client. [Wiggins v. Peppin, 2 Beav. 403, distinguished.]

Greene v. Dillabough, 50 D.L.R. 496.

AUTHORITY OF PLAINTIFF'S SOLICITOR TO BRING ACTION—APPLICATION TO DISMISS BY DEFENDANT — NOTICE OF MOTION TO PLAINTIFF.

An application by the defendant to dismiss an action on account of the alleged lack of authority to bring the same on the part of the plaintiff's solicitor, cannot succeed when proper notice of the motion is not served on the plaintiff.

Forestreet Warehouse Co. v. Van Der Linder, 50 D.L.R. 55, [1919] 3 W.W.R. 1056.

AUTHORITY AS TO VERBAL AGREEMENT FOR THE SALE OF LAND—SPECIFIC PERFORMANCE.

Paw v. McPhee, 33 D.L.R. 781, 50 N.S. R. 448.

AUTHORITY OF SOLICITOR TO RECEIVE MONEY FOR CLIENT—ABSENCE OF RATIFICATION OR ACQUIESCENCE—RIGHT TO RECOVER MONEY PAID TO SUPPOSED AGENT.

Murch v. Toronto, 9 O.W.N. 438, 10 O.W.N. 141. [Affirmed by Supreme Court of Canada: see 12 O.W.N. 368.]

AUTHORITY TO SUBSTITUTE COUNSEL—DISAVOWAL.

A contract between an attorney and his client is a mandate of a special nature and

differs from the ordinary principles of a mandate, in that it is presumed to exist and that the client can decline responsibility for what is done in his name only by disavowal. Thus, when an attorney specially retained in a case is replaced at the hearing by a colleague, the client cannot refuse to pay him the costs of the cause without disavowal, even though he denied at the hearing that the substituted attorney represented him.

Pélisser v. Houle, 48 Que. S.C. 341.

(§ II B—26)—Authority at sale under execution, how limited.

Where an execution creditor places the conduct of the advertised sale under the execution in the hands of his solicitor, this constitutes such solicitor the agent of the creditor, whether the solicitor was, or was not, the solicitor of record in obtaining the judgment basing the execution.

Corsbie v. Case Threshing Machine Co., 14 D.L.R. 55, 25 W.L.R. 466, 5 W.W.R. 153.

Unsued claim — Authority to consent that test case shall control.

An agreement entered into between plaintiff's solicitor and defendant's solicitor, although made with a view to avoid multiplicity of action, whereby plaintiff's solicitor agreed before action brought that the result of a pending action against the same defendant, in which he represented another plaintiff, should control the outcome of the unsued claim against the same defendant, will not be given effect to by the court where it appears (1) that the agreement in question was made under the mistaken belief that the material facts in the claim of the other plaintiffs and upon which the question of liability hinged, were identical with those in the pending case, and (2) where it appears that the plaintiff's solicitor had no authority to bind his clients to such an agreement.

Powell v. Hewer, 11 D.L.R. 347, 6 A.L.R. 61, 4 W.W.R. 626.

Settlement of litigation without notice to solicitor for one party—Absence of collusion—Absence of notice of lien — Application for payment of solicitor and client costs—Refusal of—Costs of application—Provision for payment of party and party costs.

Lochrie v. Kearney, 7 O.W.N. 567.

Authority to settle action—Disavowal.

One who, having a claim for damages in consequence of an accident, entrusts his cause to an attorney with instructions to effect a settlement of it the best he could without action, not wishing to take the risk of having to pay the costs, cannot disavow the authority of his attorney if the latter presents a petition for authority to sue under the Workmen's Compensation Act and afterwards settles the case for the costs only. It is essential, in the action in disavowal, for the client to prove that the act of which he complains works him a prejudice. On default of allegation and proof for this purpose, the action will be dismissed.

Fontaine v. Cabana, 48 Que. S.C. 230.

(§ II B—28)—To act for both parties.

A solicitor who acted for the plaintiff in a mortgage foreclosure proceeding, may act for a defendant therein, where it appears that the interests of the two parties are not adverse, or that the interest of the plaintiff in the subject-matter of the litigation had ceased. A motion on behalf of a subsequent mortgagee to obtain payment from the proceeds of the sale of the encumbered property under a prior mortgage, will be denied where the motion was made by the solicitor of record of the plaintiff in the foreclosure proceedings, without it appearing that the rights of the two mortgagees were not adverse, or that the plaintiff's interest in the litigation had ceased.

Allin v. Ferguson, 5 D.L.R. 19, 5 S.L.R. 204, 21 W.L.R. 246, 2 W.W.R. 327.

(§ II B—29)—To pay off judgment against client.

Where the plaintiff was acting as solicitor for the defendant and in the course of doing the latter's legal business paid certain registered judgments against his client, in order to enable him to transfer certain property that he desired to sell, the solicitor is entitled to be reimbursed for the money paid by him to discharge the judgments on proof of instructions to pay the judgments.

McLaws v. Wellband, 4 D.L.R. 24, 20 W.L.R. 657, 21 W.L.R. 592.

C. Compensation; lien.

See Costs, II—26.

(§ II C—30)—Quebec tariff.

The tariff of advocates for the Province of Quebec does not apply as between solicitor and client, but only as between the successful attorney and the losing party. Where an advocate acts as arbitrator and mediator at the request of his client, and without being appointed by authority of the court, he is entitled to recover his fees from his client on a quantum meruit basis irrespective of the tariff for advocates. Such services are professional services of an advocate and are recoverable as such.

Jacobs v. Wener, 8 D.L.R. 543.

Compensation — Litigation in wife's name—Husband's liability to solicitor.

Beck v. Lang, 16 D.L.R. 878, 6 O.W.N. 253.

Where the bill of costs of the solicitor against his client, brought in for taxation at the instance of the client, consists of a lump sum charged as a "fee on settlement," in addition to disbursements, and the amount allowed by the taxing officer in respect of such fee was based upon a percentage of the value recovered or preserved by the solicitor for the client, a question of the principle of taxation is raised and the client

may appeal from such allowance although he has not carried in written objections for review before the taxing officer, the rules as to written objections (Manitoba King's Bench Rules 968 and 969) not being applicable to questions of principle. [Sparrow v. Hill, 7 Q.B.D. 362, and Re Fletcher and Dyson, [1903] 2 Ch. 688, applied.]

Re Phillipps and Whitla, 1 D.L.R. 291, 22 Man. L.R. 150, 20 W.L.R. 229, 1 W.W. R. 840.

Unless there is a contract between a solicitor and his client for a percentage under s. 65 of the Legal Profession Act (Man.), the tariff promulgated under r. 990 of the Manitoba King's Bench Act, is the only measure of a solicitor's remuneration for litigious business. [Re Richardson, 3 Ch. D. R. 144, distinguished.]

Re Phillipps and Whitla, 1 D.L.R. 847, 22 Man. L.R. 154, 20 W.L.R. 533, 2 W.W. R. 195.

The Master in Chambers has no jurisdiction to entertain a motion by a client for delivery of a bill of costs under the Solicitors Act, 9 Edw. VII. (Ont.) c. 28, s. 33.

Re Solicitor, 3 D.L.R. 718.

Where no specific notice of any claim for a lien as to their costs appears to have been given at any time by the solicitors representing the prevailing party in an action to the party against whom judgment was rendered and who settled with the winning party at a sum less than that which the judgment called for, the court will, in the absence of evidence that there was collusion or improper conduct on the part of the losing party aiming to deprive the solicitors of their costs, refuse to grant a petition by such solicitors asking for an order declaring them entitled to a lien upon the judgment recovered by their client and for the payment of these costs by the losing party.

Grocers' Wholesale Co. v. Bostock, 4 D.L.R. 213, 22 O.W.R. 786.

Where a client delivers money to his solicitor not as a retainer but as security for the payment of his remuneration, the latter is bound to account therefor, and to deliver to the client a bill of his actual charges, which will be referred for taxation. A writing signed by a person in custody on a criminal charge which stated that "I hereby retain (a solicitor) to make application for my release from gaol, and hereby deliver him a cheque for $300 as retainer," the cheque being claimed by the solicitor as a retainer and not as remuneration for his services, is not an agreement in writing with the client respecting the "amount and manner of payment for the services of a solicitor in respect of the business done or to be done by him" within the meaning of the Law Reform Act, 9 Edw. VII. c. 28, s. 22 et seq., which permits agreements in writing between solicitor and client respecting the amount and manner of payment for either past or future services. A retainer is a gift of money by a client to his solicitor outside of and apart from his remuneration, which he is not bound to bring into account, but in order that it be construed as a retainer the former must know the true nature thereof as a gift. A solicitor cannot elect to render services gratuitously and keep as a retainer money received from his client, where the latter did not understand the nature of a retainer, and supposed such money was delivered as security for the remuneration of the solicitor, or as a part payment thereon.

Re Solicitor, 4 D.L.R. 217, 3 O.W.N. 1274, 22 O.W.R. 156.

BILL OF COSTS—SUFFICIENCY OF—IMPROPER STATEMENT—DISALLOWANCE OF ITEM—RECOVERY ON REMAINDER OF BILL.

The fact that the main item in a solicitor's bill of costs was improperly stated does not prevent him recovering from his client for such items as were properly stated. A lump charge by a solicitor in a bill of costs for litigation in a certain manner as settled by agreement between the parties, and as fixed by a private Act of Parliament at a designated sum, is not such a bill of fees, charges and disbursements as is required by s. 34 of the Solicitors Act (Ont.), 2 Geo. V. c. 28. [Williams v. Griffith, 6 M. & W. 32, distinguished.]

Gundy v. Johnston, 12 D.L.R. 71, 28 O.L.R. 121. [Affirmed, 15 D.L.R. 295, 48 Can. S.C.R. 516.]

FEES—TAXATION—SOLICITOR AND CLIENT—ALLOCATURE.

Rule 736 of the Saskatchewan Con. Rules of Practice, 1911, providing for solicitors' fees as set out in Sch. 1 of the tariff of costs, applies to control the fees chargeable by a solicitor to his client in respect of the court proceedings to which the tariff applies. The allocature of a judge is necessary for the taxation of increased counsel fees under the Saskatchewan tariff of costs, 1911, even as against the client on a solicitor and client taxation.

Re Solicitors: Ex parte Ould, 14 D.L.R. 231, 6 S.L.R. 116, 25 W.L.R. 498, 5 W.W.R. 78.

SOLICITOR AND CLIENT—BILL OF COSTS—SUFFICIENCY OF—LUMP STATEMENT—CHARGES PROPERLY ITEMIZED.

A bill of a solicitor's costs which, although itemized in respect to the services performed, does not state the amounts charged for each service, but instead claims a lump sum, does not comply with s. 34 of the Solicitors Act, R.S.O. 1897, c. 174, 2 Geo. V. c. 28 (R.S.O. 1914, c. 159). [Wilkinson v. Smart, 33 L.T.R. 573; Blake v. Hummell, 51 L.T.R. 430, followed. See also Gundy v. Johnston, 12 D.L.R. 71; Re Johnston, 3 O.L.R. 1, distinguished.]

Gould v. Ferguson, 14 D.L.R. 17, 29 O. L.R. 161.

The fact that there is no tariff of charges

provided therefor presents no obstacle to the taxation of a solicitor's bill of costs the principal items of which are for conveyancing. A judgment may be rendered in favour of a solicitor in an action on a bill of costs for such of the charges as are properly itemized and which, therefore, are subject to taxation; but if he takes such judgment to the exclusion of other charges which have not been properly itemized, he cannot afterwards deliver and tax a further bill in respect of the latter. [Re Davy, 1 C.L.J. N.S. 213, followed. See also Gundy v. Johnson, 12 D.L.R. 71, 28 O.L.R. 121.]

Gould v. Ferguson, 14 D.L.R. 17, 29 O.L.R. 161.

TAXATION — COSTS OF — ONE-SIXTH OFF —EFFECT.

The costs of a reference on a solicitor's bill of costs under s. 79 of the Legal Professions Act, R.S.B.C. 1911, c. 136, are against the solicitor whether the client attends on the taxation or not, if a sixth part is taxed off. [Compare s. 35 of the Solicitors Act, R.S.O. 1887, c. 147, 2 Geo. V. (Ont.) c. 28 (R.S.O. 1914, c. 159).] The costs of references on solicitors' bills of costs, provided for by s. 79 of the Legal Professions Act, R.S.B.C. 1911, c. 136, embrace all the references under ss. 76, 77, and 78, thus covering taxation when both sides were present as well as ex parte taxations.

Re Duncan and Carscallen, 13 D.L.R. 803, 18 B.C.R. 374, 25 W.L.R. 433, 5 W.W.R. 79.

FEES — WAGES — DUAL CAPACITY.

A lawyer employed as a collector at a weekly salary has the right, in addition to his wages, to taxed fees for services rendered in his professional capacity.

Jones v. Berliner Gramophone Co., 30 D.L.R. 299, 50 Que. S.C. 254.

BARRISTERS—FEES AND TAXATION.

There is no distinction, as regards the scale of fees and the rules of taxation, between the title of a barrister and that of a solicitor, neither of whom can change the scale by a stipulation.

Cookson v. Driscoll; Re Estate of Leahy, 27 D.L.R. 488, 50 N.S.R. 1.

TAXATION OF SOLICITOR'S BILL OF COSTS—FORM OF SUMMONS.

Re Phelan, 27 D.L.R. 729, 9 W.W.R. 1434.

TAXATION OF SOLICITOR AND CLIENT BILL OF COSTS—SCALE.

Re Boscowitz, 27 D.L.R. 721, 10 W.W.R. 948.

COSTS—PROBATE—FOREIGN LETTERS OF ADMINISTRATION.

Re Dobson, 27 D.L.R. 720, 9 A.L.R. 493, 34 W.L.R. 665, 10 W.W.R. 694.

TAXATION OF COSTS—APPEAL FROM.

In respect of a charge made in a solicitor and client bill for a service which by the tariff of costs is to be fixed in the discretion of the taxing officer, testimony of other solicitors practising in the same locality is not admissible to prove what would be a fair and usual charge for the service in question, but the taxing officer is to exercise his own discretion in the matter. [Howard v Burows, 7 Man. L.R. 181, distinguished.]

Where an appeal from a taxation between solicitor and client has been taken to the Court of Appeals, which court remits the matter to the taxing officer, with directions, the right of appeal still remains from the new certificate or report of the taxing officer following the rehearing of the matter before him.

Re Phillipps & Whitla, 21 D.L.R. 42, 25 Man. L.R. 173, 30 W.L.R. 360, 7 W.W.R. 1019.

COSTS—SECRET COLLUSIVE SETTLEMENT—POWER OF COURT.

Where the plaintiff and defendant make a settlement of the matter in litigation behind the back of the plaintiff's solicitor, and this is done collusively with the object of depriving the plaintiff's solicitor of his costs, the court may, on the latter's application, order the defendant to pay such costs in full; and such liability is not limited by the amount of the collusive settlement between the parties.

Dicarllo v. McLean, 21 D.L.R. 676, 33 O.L.R. 231.

TARIFF OF FEES—VALUE OF ADVOCATE'S SERVICES.

The advocate's tariff of fees is a reasonable estimation of the value of the services of an advocate, and there is a presumption that it shall apply in ordinary cases, but this presumption may be rebutted by shewing that the case was one of unusual or unexpected importance or duration, requiring speeal knowledge and preparation, and the advocate is entitled to recover the value of his services, taking into consideration the amount involved.

Duff v. Upton, 25 D.L.R. 466, 48 Que. S.C. 503.

TAXATION OF SOLICITOR'S BILL—EXAMINATION AS TO MEANS.

This was a matter wherein the clients had applied under the Legal Professions Act to tax a solicitor's bill. This bill had been taxed, and, on appeal, the taxation was fixed at $577 odd. Afterwards judgment was entered, and Hunter, C.J., on application, directed an examination of the clients in aid of judgment. In this order directing the examination it read that the clients were to disclose their property, means, etc., of paying the judgment without mentioning the fact that they were trustees, and this order had never been appealed against. On the examination of the client, he refused, on advice of his counsel, to answer any questions except such as related to the trust estate, and this motion was made to compel him to attend at his own expense and answer the questions as regards his property and means of paying this judgment. Murphy, J., held that the order, not having been appealed against, settled the question

of liability, and that the clients were personally responsible to the solicitor, but, outside of this, he was of the opinion that, under the authorities, the clients were personally responsible to the solicitor, citing Official Manager, G.T.R. v. Brodie, 22 L.J.Ch. 514, 3 De G. M. & G. 146; Muir v. Glasgow Bank, 4 A.C. 337.

Steers v. Szameitat, 8 W.W.R. 1081.

INCREASED COUNSEL FEE—REFUSAL OF.

An application for increased counsel fee will be refused; r. 222, 226 give the court power to reduce fees, but not to increase them.

Hewitt v. The "Skeena," 20 B.C.R. 481.

CLAIM FOR SERVICES—QUANTUM MERUIT—TARIFF.

According to the actual condition of the jurisprudence, an attorney has a right to claim from his client the value of his professional services as established by evidence, and not by the tariff, which has application only for determination of the amount that the party condemned should pay to the attorneys of his opponent.

Loranger v. Denis Advertising Signs, 48 Que. S.C. 19.

TARIFF OF ATTORNEY'S FEES—CHARGE FOR LETTER.

An attorney has a right to the fee established by art. 82 of the tariff of fees to attorneys for having written a letter to a debtor at the demand of the creditor who can refuse to accept the amount of the debt if these fees are not paid at the same time. In such case he should bring his action for the amount of the debt only, as the fees for the letter are not exigible when there is an action; and the offer of the defendant of the amount of the debt made before the action, although corresponding to the amount claimed, will in these circumstances be declared insufficient.

Perreault v. Breitman, 48 Que. S.C. 172.

APPEARANCE BEFORE PARLIAMENTARY AND GOVERNMENTAL BODIES—VALUE OF SERVICES—DISCRETION OF COURT.

One who needs the services of an attorney and benefits by those which are rendered is bound to pay their value. The courts have a discretion in appreciating the value of services rendered by attorneys in judicial matters. But when it is a matter arising outside of the domain of the administration of justice, such as appearing before governments and parliaments, the court cannot supplement the evidence given by the parties.

Perron v. Security Life Ins. Co., 48 Que. S.C. 439.

COSTS—TAXATION—APPEAL.

Re Solicitor, 8 O.W.N. 83.

TAXATION OF BILL OF COSTS AGAINST CLIENT — APPEAL — DISCRETION OF TAXING OFFICER — EXTRAORDINARY CHARGES — QUANTUM OF FEES—RETAINING FEES IN ACTION.

Re Solicitor, 8 O.W.N. 437.

LIEN ON DOCUMENTS FOR SERVICES RENDERED AS AFFECTED BY DISSOLUTION OF FIRM AND ASSIGNMENT OF DEBT TO NEW FIRM —EFFECT OF PROOF OF DEBT UNDER WINDING-UP PROCEEDINGS AGAINST CLIENT—WAIVER.

Re Solicitors, 37 D.L.R. 763, [1917] 3 W.W.R. 771.

COSTS—TAXATION—ORDER FOR, OBTAINED BY SOLICITORS — AMBIGUITY — LIABILITY OF ESTATE OF DECEASED PERSON — AMENDMENT.

Re Solicitors, 11 O.W.N. 319.

BILL OF COSTS—SOLICITORS ACT, R.S.O. 1914, CH. 159, S. 34—ITEMIZED BILL—LUMP CHARGE.

Re Solicitor, 12 O.W.N. 191.

BILL OF COSTS — TAXATION BETWEEN — SOLICITOR AND CLIENT — AGREEMENT — LUMP SUM—RETAINER-FEE—CONSULTATION-FEE—TARIFF OF COSTS—DISCRETION OF TAXING OFFICER—REVIEW.

Re Solicitor, 12 O.W.N. 386.

COSTS OF LITIGATION — CHARGING ORDER — FUND DEALT WITH BY JUDGMENT—CONSTRUCTION OF JUDGMENT.

Wilson v. Wilson, 13 O.W.N. 56.

SUM DUE BY SOLICITOR TO CLIENT—AGREEMENT — EQUITABLE ASSIGNMENT — VALIDITY—SOLICITOR'S LIEN.

Re G., A Solicitor, 13 O.W.N. 127.

REASONABLENESS OF CHARGES.

An advocate, who notifies his client in writing that he will not take his case less a certain retainer, and receives no answer, is justified in interpreting such silence as an acquiescence, and when the case is finished he has a right to his specified retainer particularly where it may be considered just and reasonable for the work done and the extra study required.

Fontaine v. Morrison, 51 Que. S.C. 81.

The plaintiffs were a firm of barristers and solicitors. A. of that firm was retained by defendant to act as counsel in a suit then pending. It was found that defendant agreed to pay for this the sum of $100 per day. The trial lasted seven days. One day was occupied in consultation and two days going and returning from the trial, and a proper bill for $1,000 was rendered. In an action to recover the balance due it was held, that the defendant, by agreeing to pay the fee stated, had contracted himself out of the Legal Profession Act, and the court could not order taxation, but must give judgment for the plaintiffs.

Allan v. Dangerfield, 4 S.L.R. 363.

COUNSEL FEE—TAXATION—QUANTUM—APPORTIONMENT OF FEE.

The quantum of a counsel fee to be allowed by a taxing master or judge should be the same, irrespective of whether it is taxed between party and party or between solicitor and client. The distinction between a solicitor and client taxation and one between party and party is that in the latter taxation only those charges will, as a gen-

eral rule be allowed which are strictly necessary for the prosecution of the litigation or are contained in the tariff of fees, while in the former a solicitor is entitled to be paid by his client for all services rendered by him at the express or implied request of the client, even though such services are not covered by the tariff or are not chargeable against the opposite party. A counsel fee may be apportioned between services in preparation of the argument and those in presentation of the agrument at the trial.

Imperial Elevator etc., Co. v. Olive, 27 S.L.R. 35, 6 W.W.R. 1104.

COMPENSATION—RETAINER—CONFLICT OF EVIDENCE BETWEEN SOLICITOR AND CLIENT.

On all questions as to the retainer of a solicitor, where there is no written retainer and there is a conflict of evidence as to the authority between the solicitor and the client without further circumstances, weight must be given to the denial of the party sought to be charged rather than to the affirmation of the solicitor.

MacGill v. Chin Yow You, 19 B.C.R. 241.

BILL FOR SERVICES RENDERED IN COUNTY WHERE SOLICITOR RESIDES—REFERENCE OF BILL TO TORONTO—IRREGULAR ORDER—OBJECTION NOT TAKEN AT PROPER TIME—CON. R. 1187, 311.

Re Solicitor, 23 O.W.R. 621.

ACTION FOR BILL OF COSTS—HUSBAND AND WIFE—ACTION BROUGHT IN NAME OF WIFE—LIABILITY OF HUSBAND—ABSENCE OF WRITTEN RETAINER—CREDIT GIVEN TO WIFE—FINDING OF FACT.

Beck v. Lang, 5 O.W.N. 900.

LIABILITY FOR PROFESSIONAL SERVICES.

Two business men, who together consult an attorney, are both liable for the payment of his fees unless they make the attorney understand that his services are required on account of another person.

Meagher v. Walsh, 24 Rev. Leg. 471.

A client who engages the services of an advocate practising apparently in partnership with other advocates, who pays for his services, cannot be called on to pay again to the partnership even though such advocate was only an employee.

Brodeur v. Duclos, 53 Que. S.C. 514.

SETTLING PARTNERSHIP ESTATE.

When an advocate has been appointed by a partner to settle the estate of the partnership jointly with another advocate, acting for the other partner, if it appears that he acted not only as an arbitrator, but also in his professional quality of advocate, he is entitled to claim from his client the value of services due in his quality of advocate and arbitrator.

Jacobs v. Wener, 14 Que. P.R. 188.

FIRM OF ADVOCATES—RETAINER—PERSONAL SERVICES.

A client who consults a member of a firm of advocates and commits a case to his care unconditionally, contracts with the firm, and is bound to accept the services of any one of its members for the conduct of his case. Hence, he cannot repudiate a claim for fees on the ground that he had expected the personal services of the member of the firm to whom he addressed himself, and that another had appeared and acted instead.

Pelissier v. Houle, 45 Que. S.C. 104.

COUNSEL FEES—SMALL DEBT ACTION.

In a small debt action there is no provision for counsel or solicitor fees, save where the action is formally terminated by judgment on default or otherwise and there is a successful party so determined.

Kitchen Overall & Shirt Co. v. Skeele, 7 W.W.R. 974.

COUNSEL FEE—QUANTUM TAXATION—APPORTIONMENT.

The quantum of a counsel fee to be allowed by a taxing master or judge should be the same, irrespective of whether it is taxed between party and party, or between solicitor and client. The distinction between a solicitor and client taxation and one between party and party is that in the latter taxation only those charges will, as a general rule, be allowed which are strictly necessary for the prosecution of the litigation or are contained in the tariff of fees, while in the former a solicitor is entitled to be paid by his client for all services rendered by him at the express or implied request of the client, even though such services are not covered by the tariff or are not chargeable against the opposite party. A counsel fee may be apportioned between services in preparation of the argument and those in presentation of the argument at the trial.

Imperial Elevator v. Olive, 6 W.W.R. 1104.

BARRISTERS AND SOLICITORS — COSTS — WHETHER SOLICITORS EMPLOYED BY DEFENDANT OR ONLY BY DEFENDANT'S SOLICITOR AS AGENTS.

Held, that plaintiff's assignors, a firm of solicitors, were employed by defendant and were entitled to recover costs from him; defendant claiming they were not retained by him but by his solicitor as agents.

Killey v. McDermott, [1919] 1 W.W.R. 660.

(§ II C—31)—CONTINGENT FEES.

In the absence of a contract made under the provisions of the Law Society Act (Man.,) between solicitor and client, there is no authority for fixing the remuneration of a solicitor upon the basis of a commission or percentage of the amount recovered; a solicitor's fee on settlement in a matter where large interests are involved may be taxed by analogy to the usual allowance for counsel fees.

Re Phillipps and Whitla, 21 D.L.R. 42, 25 Man. L.R. 173, 30 W.L.R. 360, 7 W.W.R. 1019, reversing 20 D.L.R. 314, 29 W.L.R. 639, 7 W.W.R. 350.

CONTRACT FOR CONTINGENT FEE.

One D retained a solicitor in connection with certain divorce proceedings pending in the United States, entering into an agreement for an expressed consideration to pay the solicitor $300 for such services. Subsequently the solicitor received the proceeds of a loan obtained by D, and was asked by the latter to account, whereupon he deducted $300 and paid over the balance. It did not appear that the proceedings in respect of which the solicitor had been engaged were terminated. On a motion to compel the solicitor to deliver a bill, it was held, that, notwithstanding an agreement to pay a fixed amount for fees in respect of any particular matter, the court, if not satisfied that the amount so agreed upon is reasonable under the circumstances, may direct a bill to be delivered and taxed. (2) But, as it was not shewn that the relationship of solicitor and client had been ended, or that the proceedings in respect of which the solicitor had been engaged had been terminated, no order could be made.

Re W. S. Walker, 4 S.L.R. 402.

AGREEMENT WITH CLIENT MADE IN FOREIGN COUNTRY—PROOF OF FOREIGN LAW—LEX LOCI CONTRACTUS—CONTINGENT FEE—SHARE OF ESTATE—AGREEMENT MADE AFTER RELATIONSHIP OF SOLICITOR AND CLIENT AROSE—DUTY OF SOLICITOR—ABSENCE OF INDEPENDENT ADVICE—ACTION TO SET ASIDE AGREEMENT—EVIDENCE—REMEDY UNDER SOLICITORS ACT—IMPOSSIBILITY OF PERFORMANCE OF AGREEMENT.

MacMahon v. Tangher, 7 O.W.N. 9.

(§ II C—33)—FEE ON SETTLEMENT—TAXATION—APPEAL REFERENCE BACK—NEW EVIDENCE—FINDING FOR SAME AMOUNT.

The allowance of an appeal from the taxation between solicitor and client of a lump sum (in this case $3,500), as a fee on settlement and a reference back for reconsideration will not invalidate another finding by the taxing officer of the same amount where new evidence has been taken by him to fix the value of the services in question.

Re Phillipps & Whitla, 20 D.L.R. 314, 29 W.L.R. 639, 7 W.W.R. 350. [Reversed 21 D.L.R. 42, 25 Man. L.R. 173, 30 W.L.R. 360, 7 W.W.R. 1019.]

SETTLEMENT NEGOTIATIONS — REMUNERATION.

In the taxation of a bill of solicitor and client for effecting a settlement of matters in litigation, and conducting such litigation, the taxing officer has a wide discretion as to the amount to be allowed to the solicitor as a "fee on settlement," and, in determining the amount of that fee, he should take into account all of the facts and circumstances, the amount involved in the litigation, the result achieved, the time spent in negotiations, etc., but the quantum should be fixed in accordance with the principles of the tariff promulgated under the King's Bench Act, and not upon the basis of a percentage in the absence of an express contract for a commission even if the latter be permissible under the Legal Profession Act, R.S.M. 1902, c. 95, s. 65, to cover such services. [Re Johnston, 3 O.L.R. 1; and Re Attorneys, 26 U.C.C.P. 495, distinguished.]

Re Phillipps and Whitla, 12 D.L.R. 106, 23 Man. L.R. 92, 24 W.L.R. 10, 4 W.W.R. 311, reversing 9 D.L.R. 79. [See 21 D.L.R. 42, 25 Man. L.R. 173, 30 W.L.R. 360, 7 W.W.R. 1019.]

(§ II C—35)—LIEN ON COSTS AWARDED CLIENT—ADVERSE GARNISHMENT.

Fife v. McLaren, 14 D.L.R. 697, 5 W.W.R. 653.

LIEN ON FUND IN COURT FOR PROFESSIONAL SERVICES—PAYMENT OUT.

Canada Carriage Co. v. Lea, 12 D.L.R. 840, 4 O.W.N. 1594.

SOLICITOR'S LIEN—ON JUDGMENT BY HIS EXERTIONS—PRIORITY.

A solicitor's lien upon a judgment in his client's favour recovered by his exertions will take priority over a garnishee order attaching the judgment debt. [Dallow v. Garrold, 14 Q.B.D. 543, applied.]

Ritchie v. Snider, 20 D.L.R. 185, 7 A.L.R. 433, 7 W.W.R. 129.

LIEN—RIGHTS IN FUND OR PROPERTY.

A solicitor's agreement to divide with his law partner remuneration that he was to receive under a contract with a third person in respect to a real estate purchase, is not affected by the Law Society Act, R.S.M. 1902, c. 95.

McLaws v. Smith, 5 D.L.R. 559, 21 W.L.R. 780.

LIEN ON MONEY PAID INTO COURT—SETTLEMENT.

In the absence of collusion between the parties to an action, to deprive a solicitor of his costs, he is not entitled to a lien on moneys paid into court to abide the event of the action, upon subsequent settlement by the parties themselves.

Tropox v. Droney, 39 D.L.R. 133, 13 A.L.R. 39, [1918] 1 W.W.R. 540.

LIEN — GARNISHMENT — CREDITORS RELIEF ACT.

Solicitors securing the payment into court of a sum of money under garnishment proceedings on a judgment recovered by them, the fund never having been in their possession or control, have no lien upon it for their costs, nor are they entitled, under r. 689, "to a charge upon the property recovered or preserved through their instrumentality," and under the Creditors Relief Act (R.S.O. 1914, c. 81, ss. 4-6), the fund is distributable ratably among all creditors, subject to the payment thereout of the costs of the attachment proceedings. [Bell v. Wright, 24 Can. S.C.R. 656; Union Bank v. Stewart, 3 Terr. L.R. 342, distinguished.]

Dales v. Byrne, 27 D.L.R. 453, memo. in 26 D.L.R. 747, 35 O.L.R. 495.

NATURE OF LIEN ON CLIENT'S DOCUMENTS—PRODUCTION—WINDING-UP.

Solicitors merely have a "passive" or "retaining" lien on documents coming into their hands in the general course of business for a client and not in the course of any action or proceedings or such as to entitle them to a charging order; and the production of such documents "without prejudice" to such lien under s. 22 (16), of the Companies Winding-up Act, R.S.S., 1909, c. 78, does not thereby, in any wise, affect that lien so as to entitle it to priority over the claims of other creditors. [Re Rapid Road Transit Co., [1909] 1 Ch. 96; Re Meter Cabs, [1911] 2 Ch. 557, distinguished.]

Executors & Administrators Trust Co. v. Seaborn, 27 D.L.R. 427, 9 S.L.R. 232, 34 W.L.R. 112, 10 W.W.R. 343.

LIEN FOR COSTS ON BOOKS OF COMPANY—EVIDENCE—POSSESSION IN COURSE OF BUSINESS—COMPANIES ACT (B.C.), ART. 104.

Re Alpha Mortgage & Invest. Co., 22 B.C.R. 513, 34 W.L.R. 483, 10 W.W.R. 652.

LIEN FOR COSTS—COUNTERCLAIM—SET-OFF.

Where a plaintiff obtains judgment for part of his claim with costs, except the costs of certain issues upon which the defendant succeeds, which are given to the defendant, and the defendant obtains judgment for part of his counterclaim with costs, except the costs of certain issues upon which the plaintiff succeeds, which are given to the plaintiff, the counterclaim is not to be regarded as a separate action so as to give the plaintiff's solicitor a lien for costs upon the amount recovered for his client so as to defeat the defendant's right to a set-off.

Lesperance v. Mollot, 34 W.L.R. 242, 10 W.W.R. 292.

FUND IN COURT — ASSERTION OF LIEN OR RIGHT TO EQUITABLE INTERVENTION OF COURT TO ENABLE SOLICITOR TO OBTAIN PAYMENT OF COSTS—FUND NOT CREATED OR PRESERVED BY SOLICITOR—RIGHT OF SOLICITOR — SECURITY FURNISHED BY CLIENT—NATURE OF CLAIM FOR COSTS—COUNTERCLAIM.

Oshawa Lands & Investment v. Newsom, 10 O.W.N. 360. [See also 27 D.L.R. 744.]

RETENTION OF MONEYS OF CLIENT IN SETTLEMENT OF COSTS AND DISBURSEMENTS—AGREEMENT WITH CLIENT—BILL OF COSTS NOT DELIVERED—MOTION FOR ACCOUNT AND DELIVERY OF BILL MADE AFTER LAPSE OF FIFTEEN YEARS—CLAIM AGAINST SOLICITORS FOR NEGLIGENCE—STATUTE OF LIMITATIONS — DISMISSAL OF PREVIOUS APPLICATION.

Re Solicitors, 5 O.W.N. 671.

LIEN FOR COSTS—PROPERTY RECOVERED OR PRESERVED BY SOLICITOR'S EFFORTS — ARBITRATION—PAYMENT OF MONEY INTO COURT—CLAIMANTS—PRIORITY.

Linden v. Bastedo, 7 O.W.N. 602.

CHARGING ORDER UPON LAND—RIGHT OF BONA FIDE PURCHASER.

V., a solicitor, was retained by J. to take action against M. for rescission of an agreement for sale and for removal of a caveat filed by M. The agreement was set aside and the caveat removed. Pending the action referred to, J. agreed to sell the same lands to D., and D. filed a caveat based on his agreement, also paying a portion of the purchase money. Held, that V. was entitled to a charging order upon deceased's interest in the land sold.

Varley v. Commonwealth Trust Co., 9 W.W.R. 911.

(§ II C—36) — DIRECT ACTION (QUEBEC PRACTICE).

The attorney for a plaintiff is by the institution of suit placed in the position of incidental plaintiff against defendant for recovery of his costs, and he has a direct action therefor subject, however, to the same fate as the main action of his client either in the court of instance or in appeal.

Seale v. Bowers, 1 D.L.R. 632.

D. SUMMARY PROCEEDING.

(§ II D—40)—RETENTION OF MONEY OF CLIENT — ORDER FOR PAYMENT WITHIN LIMITED TIME—PENALTY ON DEFAULT—STRIKING OF NAME FROM ROLL.

Re Solicitor, 37 O.L.R. 310, 10 O.W.N. 181.

REMUNERATION — AGREEMENT — ACTION TO ENFORCE — NO BILL DELIVERED.

Belcourt v. Crain, 22 O.L.R. 591, 17 O.W.R. 1067.

MUNICIPAL CORPORATIONS — EMPLOYMENT OF COUNSEL—SERVICES AT CIVIC INVESTIGATION—ABSENCE OF BY-LAW AND OF CONTRACT UNDER SEAL.

Manning v. Winnipeg, 17 W.L.R. 329.

TAXATION OF COSTS — SOLICITOR AND CLIENT—ONE CHARGE FOR SEVERAL ITEMS.

Re Solicitor, 18 O.W.R. 366.

III. Remedies against; motions; taxation of costs.

(§ III—45)—MOTION AGAINST SOLICITOR.

The word "summons" in s. 52 of the Legal Profession Act is equivalent to "notice," and no leave to serve it out of the jurisdiction upon a barrister and solicitor upon whom charges have been preferred is necessary; no question of territoriality arises, since a barrister and solicitor is an officer of the court wherever resident, so long as he remains in good standing.

Re A.B., a solicitor, 4 A.L.R. 17.

NEGLIGENCE—ADMINISTRATION OF ESTATE—PRIORITY.

There is no privity of contract between beneficiaries under a will and the solicitor employed by the executors and such beneficiaries have no direct remedy against the solicitor for any negligence or erroneous advice on the part of the solicitor, nor, in an action by the beneficiaries against the executor for the removal of the executor

and an accounting of all dealings in connection with the estate, can such beneficiaries recover fees paid out of the estate by the executor to the solicitor. Quære: Whether the solicitor of an executor by actively and knowingly assisting the latter in improperly dealing with the estate gives a cause of action to the beneficiaries of such estate against such solicitor.

Perry v. Perry, 28 Man. L.R. 1, [1917] 1 W.W.R. 174.

TAXATION FOR COSTS — BETWEEN SOLICITORS AND CLIENTS WITHIN MEANING OF THE STATUTE—TWO BILLS GROWING OUT OF SAME MATTER.

Re Solicitors, 20 O.W.R. 282.

TAXATION OF COSTS — APPEAL TO COURT OF APPEAL — QUESTION OF PRINCIPLE.

Re Solicitors, 19 O.W.R. 936.

COSTS — TAXATION BETWEEN SOLICITOR AND CLIENT.

Re Solicitor, 12 O.W.R. 1094, and Murphy v. Corry, 7 O.W.R. at p. 336, followed.

Re Solicitors, 19 O.W.R. 753.

TAXATION OF COSTS OF SURROGATE COURT PROCEEDINGS — REFERENCE TO TAXING OFFICER IN TORONTO.

Re Solicitor, 19 O.W.R. 965.

COUNSEL FEE —ACTION FOR — TARIFF OF COSTS.

Allan v. Dangerfield, 18 W.L.R. 184.

CHARGING ORDER — COSTS — RECOVERY OR PRESERVATION OF PROPERTY — INCUMBRANCES—PRIORITY.

Striemer v. Nagel, 17 W.L.R. 189.

PRAECIPE ORDER FOR DELIVERY OF BILL OF COSTS — UNDERTAKING TO PAY AMOUNT TAXED.

Desaulniers v. Johnston, 20 Man. L.R. 431, 17 W.L.R. 635.

ORDER FOR DELIVERY OF BILL — TERMINATION OF EMPLOYMENT — AGREEMENT TO PAY LUMP SUM — REASONABLENESS.

Re Solicitor, 19 W.L.R. 249.

SOLICITOR AND CLIENT—RETAINER—SETTLEMENT FOR PROFESSIONAL SERVICES RENDERED—FURTHER PROCEEDINGS — ESTOPPEL.

Lane v. Duff, 45 N.S.R. 338, 9 E.L.R. 484.

SPECIAL ASSESSMENTS.

See Taxes; Municipal Corporations, II H.

SPECIFIC PERFORMANCE.

I. RIGHT TO REMEDY.
A. In general.
B. Oral contracts.
C. Subject-matter of contracts in general.
D. Contracts relating to personal property.
E. Contracts for real property.
II. DECREE OF JUDGMENT.

Annotations.

Ground for refusing the remedy, 7 D.L.R. 340.

Jurisdiction; contract as to lands in a foreign country, 2 D.L.R. 215.

Oral contract; Statute of Frauds; effect of admission in pleading, 2 D.L.R. 636.

Sale of lands; contract making time of essence; equitable relief, 2 D.L.R. 464.

When remedy applies between vendor and purchasr, 1 D.L.R. 354.

Specific performance of agreements for company debentures, 24 D.L.R. 373.

Vague and uncertain contracts, 31 D.L.R. 485.

I. Right to remedy

A. IN GENERAL.

(§ I A—1)—RIGHT TO REMEDY.

In an action for specific performance, the plaintiff's readiness and eagerness to perform his part of the contract must be judged as of the time the action is commenced.

Evans v. Norris, 8 D.L.R. 652, 5 A.L.R. 320, 22 W.L.R. 818, 3 W.W.R. 532.

AGAINST CROWN—REMEDY FOR DAMAGES.

Specific performance cannot be decreed against the Crown, and where there is a valid contract which it refuses to carry out, the only remedy is damages for breach of the contract.

Gauthier v. The King, 33 D.L.R. 88, 15 Can. Ex. 444. [Affirmed, 40 D.L.R. 353, 56 Can. S.C.R. 176.]

WHEN PRECLUDED BY RIGHT TO DAMAGES—PURCHASE OF REAL ESTATE FROM NON-OWNER.

The purchaser of real estate from a party who is not the owner, but a lessee in process of becoming such by payment of rentals during an unexpired term, can have no action against the seller for specific performance; but his proper remedy is for recovery of damages for breach of contract.

Moquin v. Dingman, 44 Que. S.C. 341.

(§ I A—2)—MUTUALITY OF OBLIGATION OR REMEDY.

One cannot be compelled to specifically perform a contract for the sale of land owned by him, which was made by a person who acted without instructions from or the authority of the owner.

Boland v. Philp, 5 D.L.R. 81, 3 O.W.N. 1562, 22 O.W.R. 849.

MUTUALITY — CONDITIONS — EXECUTORY AGREEMENT—SALE OF BUSINESS.

It was a term in an agreement for the sale of G.'s business, etc., to B. and D.; that B. should pay $10,000 in cash, and that D. should pay $10,000 in the manner therein set forth. B. did not pay his $10,000. The document was left with a solicitor acting for both parties:—Held, that specific performance could not be obtained by G. against D.; inasmuch as the payments by D. and B. were mutually conditional. Held, also, that the agreement was never concluded.

Dow v. Body, 30 W.L.R. 248.

(§ I A—3)—Certainty of terms.

Where the terms of a contract are reasonably certain and complete so far as essentials are concerned, though the manner of payment is left open for adjustment between the parties, specific performance will be decreed.

Martin v. Jarvis, 31 D.L.R. 740, 37 O.L R. 269.

Where it appears that the terms of a written agreement are indefinite or uncertain, specific performance will not be decreed. Specific performance of a written instrument will not be decreed where it is shewn that the instrument did not contain the whole agreement of the parties, but that it was the intention of the parties at the time of the execution of the instrument that a formal agreement should be later entered into between them. If two parts of a contract are mutually exclusive, specific performance of one part may be decreed if specific performance of the whole is impossible. But where the two parts are dependent one upon the other, and it is impossible to decree specific performance of the one part, it will be denied as to the entire agreement.

Treadgold v. Rost, 7 D.L.R. 741, 22 W.L.R. 300.

Certainty and definiteness.

A memorandum of sale of land which recites a consideration of $2,700 and provides for 6 yearly payments aggregating $2,400 only, does not contain all of the terms of the contract between the parties so as to satisfy the requirements of s. 4 of the Statute of Frauds, when the document is silent as to the manner of paying the remaining $300 whether in cash or otherwise, nor can it be presumed even as against the vendor that such balance was to be paid in cash, although the purchaser assents thereto by his pleading.

Fenske v. Farbacher, 2 D.L.R. 634, 5 S. L.R. 283, 21 W.L.R. 53, 2 W.W.R. 216.

Specific performance will not be decreed of an agreement containing terms that are vague or uncertain, such as "to give back an agreement on the land" in part payment.

Campbell v. Barc, 31 D.L.R. 475, 27 Man. L.R. 191, [1917] 1 W.W.R. 283.

Certainty and definiteness — Timber measurement.

A contract for the sale of standing timber which states that the price to be "on the basis of fifty cents a thousand stumpage net," but making no provision for the method by which, or the persons by whom, such measurement is to be made, is not enforceable by specific performance.

McMillan v. Cameron, [1917] 2 W.W.R. 946, 24 B.C.R. 176. [Affirmed, 24 B.C.R. 509.]

(§ I A—5)—Default on initial payment —When remedy applies.

Where a lease, not under seal, contains a clause giving to the lessee an option to purchase the premises for a certain sum, of which part is to be paid in cash, and the remainder secured by mortgage, and a letter is written within the time prescribed, notifying the lessor of the exercise of the option by the lessee, but no tender is made of the cash payment, an action for specific performance will fail, because of the absence of any tender, and the plaintiff cannot rely upon a tender made on the day following the issue of the writ.

Miller v. Allen, 7 D.L.R. 438, 4 O.W.N. 346.

Where a purchaser, under an agreement to purchase lands, insists upon something unprovided for in the agreement as a sine qua non of his performing his own express obligations under the contract, he thereby raises an impassable barrier to his own action for specific performance. Where an agreement for the sale of land expressly requires payment of $10,000 on the purchase price contemporaneously with the execution of the document and where the purchaser prior to the execution thereof knew of an outstanding mortgage amounting to much less than the subsequent instalments of the purchase price, his explicit refusal to comply with the provisions for the $10,000 payment gives his vendor the right to treat such refusal as an abandonment, or, at least, a repudiation of the agreement entitling the vendor to rescind. Where an agreement for the sale of land expressly stipulates for a down payment of $10,000 on a $33,750 purchase, and there is outstanding a mortgage (of which the purchaser had notice prior to the agreement) which amounts to less than the balance of the purchase price, if the purchaser refuses on an objection to title based upon the outstanding mortgage to make the down payment, the vendor is entitled upon reasonable notice to cancel the contract, and where such notice is given and the purchaser still refuses to comply he cannot afterwards enforce specific performance.

Cushing v. Knight, 6 D.L.R. 820, 46 Can. S.C.R. 555, 2 W.W.R. 704, reversing 1 D.L. R. 331, 4 A.L.R. 123, 20 W.L.R. 28.

(§ I A—9)—Knowledge of plaintiff as to defendant's inability to perform.

Where house premises were sold for a lump sum and the purchaser knew that the vendor had title only to the frontage of 20 feet occupied by the dwelling, and a right-of-way jointly with an adjoining owner over and upon a passageway 8 or 9 feet wide at the side of the house, but the property was in good faith described in the contract of sale as having a frontage of "24½ feet more or less" (that frontage being the basis of the tax assessment) the purchaser who has declined either to receive back his deposit or to accept the property as it stands without abatement in price and who has insisted upon his requisition of title for the full 24½ feet frontage

or compensation for a deficiency of 4½ feet without reference to the value of the right-of-way, will not be allowed, after the dismissal of his action for specific performance against the vendor tried upon that issue, to change his position upon an appeal from such dismissal and to then elect to take specific performance without compensation, if such claim would raise a new cause of action not upon the record, especially where there was no evidence that the value of the 20 feet frontage and of the vendor's rights over the passageway which the vendor offered to convey was any less than would have been the value of the frontage contracted for, and where the contract provided that the agreement should be null and void if any objection to title was insisted upon, which the vendor was unable or unwilling to remove.

Bullen v. Wilkinson, 2 D.L.R. 190, 3 O.W.N. 859, 21 O.W.R. 427.

VENDOR AND PURCHASER.

Specific performance of an agreement for sale of land with abatement will not be granted where the vendor has expressly represented that he was not the owner of all the land conveyed and could not sell all of it without having his act ratified.

Wilson v. Patterson, 39 D.L.R. 642, 14 A.L.R. 162, [1918] 1 W.W.R. 999.

(§ I A—11)—PERSONS ENTITLED TO ENFORCE—PLAINTIFF DISQUALIFYING HIMSELF.

One who has disqualified himself from performing a contract to give $1,500 and a particular lot for a certain farm property by conveying the lot to a third person, cannot compel specific performance by the other party.

Smith v. Kilpatrick, 11 D.L.R. 161, 42 N.B.R. 103, 12 E.L.R. 557.

Where the terms of an agreement for the sale of a mine are uncertain, and it further appears that this agreement was not the final agreement but that a more formal agreement was to be drawn up later, the fact that part of the purchase price has been paid by the purchaser, is not such part performance of the contract as would entitle him to specific performance, and he will have to avail himself of another remedy for the recovery of the moneys so paid.

Treadgold v. Rost, 7 D.L.R. 741, 22 W.L.R. 300.

In an action by the purchaser for specific performance of an agreement to sell land, if it appears that the vendor has a part interest only in the land, the purchaser is entitled to specific performance to the extent of such interest, with compensation in respect of any outstanding estate. [Kennedy v. Spence, 24 O.L.R. 535, 3 O.W.N. 76, followed.]

Gottesman v. Werner, 3 D.L.R. 296, 3 O.W.N. 1042.

SALE—ENFORCING PARTIAL PERFORMANCE—ONE OF SEVERAL JOINT OWNERS.

Where the proposed purchaser knew that the vendor was not the sole owner and the vendor did not assume to contract as such on taking a deposit and giving a receipt embodying the terms of sale expressed to be "subject to owners' approval," the purchaser, on the co-owners' rejection of the agreement, is not entitled to specific performance pro tanto for even the partial interest which his vendor had.

Tremblay v. Dussault, 8 D.L.R. 348, 23 Man. L.R. 128, 22 W.L.R. 716, 3 W.W.R. 467. [Affirmed, 10 D.L.R. 500, 23 Man. L.R. 128, at 135, 4 W.W.R. 235.]

SUBSTANTIAL PERFORMANCE.

Although, in an action for specific performance, the court cannot order a defendant to execute a deed of sale which is not in conformity with the conditions of the agreement of sale, nevertheless the defendant is not thereby relieved from the execution of his obligation; upon being placed in default, he may be ordered to sign a deed in conformity with the stipulations of the contract, and to pay costs.

Ménard v. Thuot, 50 Que. S.C. 289.

(§ I A—12)—PERSONS ENTITLED TO ENFORCE PERFORMANCE.

An injunction will not be granted to enforce specific performance of a contract or to prevent the other contracting party securing others to perform what was to be done, when the party claiming that relief had wrongfully refused to carry out his part of the contract and still persisted in so doing.

Wills v. Central R. Co., 19 D.L.R. 174, 24 Que. K.B. 102.

Where land is described in a letter from the owner to a real estate broker, which letter also contains the words, "I hereby give you the right to sell the above property," and the broker arranged for a sale thereof with the plaintiff, who executed a formal agreement of sale, and where the subsequent conduct of all the parties and the evidence in the case shews that the ordinary meaning of the word "sell" was considered as modified or restricted, the plaintiff is not entitled to specific performance of the said agreement of sale as against the owner.

Schaefer v. Millar (Battleford Realty Co.), 8 D.L.R. 706, 22 W.L.R. 745, 3 W.W.R. 515. [Affirmed, 11 D.L.R. 417, 6 S.L.R. 395, 4 W.W.R. 490, 23 W.L.R. 913.]

Though payment of a cash deposit on a purchase of land is not such part performance as to remove the case from the operation of the Statute of Frauds, yet a receipt given for said deposit which sets out a sale by an agent, upon terms authorized by his written instructions from the owner, may furnish the written memorandum of the sale required by the statute, so as to warrant specific performance as against the owner.

Lloy v. Wells, 3 D.L.R. 315, 5 S.L.R. 281, 21 W.L.R. 50, 2 W.W.R. 219.

A trifling deficiency in the amount ten-

dered as the balance due under an agreement for the sale of land, will not necessarily disentitle the purchaser to specific performance of the agreement.

Gillespie v. Wells, 2 D.L.R. 519, 22 Man. L.R. 355, 21 W.L.R. 231, 2 W.W.R. 272.

The granting of relief in a proceeding for the specific performance of a contract, lies in the discretion of the court, and will not be exercised arbitrarily or capriciously, but only where it would be inequitable to deny such relief.

Fuller v. Maynard, 5 D.L.R. 520, 3 O.W.N. 1602, 22 O.W.R. 809.

PERSONS ENTITLED TO — DEFAULT ON INSTALMENTS—REALTY SALE.

In a speculative land purchase payable by instalments, the purchaser not being in possession, his failure to meet the purchase instalments either because of holding off to watch the ebb and flow of the land market or through gross negligence, disentitles him to specific performance, where he has not shewn himself "ready or eager" to perform his part of the contract.

Verma v. Donohue, 14 D.L.R. 749, 18 B.C.R. 468, 26 W.L.R. 257, 5 W.W.R. 555.

(§ I A—13)—TENDER—OFFER TO PERFORM.

Tender of a deed of land to be given by the vendee in exchange as part of the purchase money and of the balance of the adjustment money, is waived by the vendor's unwarranted notice to the vendee that the vendor considered the contract off, and the purchaser's action for specific performance is not barred by the failure to make the tender. [Cudney v. Gibbs, 20 O.R. 500, applied.]

Norman v. McMurray, 10 D.L.R. 757, 4 O.W.N. 1256, 24 O.W.R. 532.

A party cannot call upon a court of equity for specific performance unless he has shewn himself ready, desirous, prompt and eager, to perform his own part of the contract.

Edgar v. Caskey, 7 D.L.R. 45; 5 A.L.R. 245, 22 W.L.R. 91, 2 W.W.R. 1036.

(§ I A—14)—CONDITIONS OF CONTRACT—CLAIMANT NOT HIMSELF IN DEFAULT.

An action for specific performance at the suit of the alleged purchaser is defeated by nonperformance by him of one of the essential conditions of his right under the contract, such as punctual payment under an option; and the fact that the vendor had during the currency of the option, conveyed the land to another will not excuse the plaintiff from strict performance on his part of the conditions of the agreement unless he can shew that the defendant's default had prevented him.

Roots v. Carey, 17 D.L.R. 172, 49 Can. S.C.R. 211, 6 W.W.R. 27. [Leave to appeal to Privy Council refused May 7, 1914.]

A court of equity may either relieve against, or enforce specific performance, notwithstanding failure to keep the dates assigned by the contract either for completion or for the steps towards completion, if it can do justice between the parties and if there is nothing in the express stipulations between the parties or in the nature of the property of surrounding circumstances which would make it inequitable to interfere with and to modify the legal right.

Hicks v. Laidlaw, 2 D.L.R. 460, 22 Man. L.R. 96, 20 W.L.R. 479, 1 W.W.R. 1008.

A claim for specific performance must fail where the alleged contract failed to become complete because of failure to accept the offer within reasonable time.

Kelly v. Holley, 8 D.L.R. 176, 22 Man. L.R. 601, 22 W.L.R. 587, 3 W.W.R. 412.

FAILURE AS TO TIME.

Under an agreement to sell lands, where the purchaser, by his continued default on an instalment of the purchase price, placed upon the contract the earmarks of abandonment, and thereby entitled the vendor to cancel the contract, but, instead of cancelling, the vendor brought action to compel payment of the purchase-price under the terms of the agreement, this election by the vendor entitled the purchaser (had he acted promptly) to have the sale carried out.

Dunlop v. Bolster, 6 D.L.R. 468, 4 A.L.R. 408, 21 W.L.R. 695, 2 W.W.R. 550.

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DEFERRED PAYMENTS—PENALTY CLAUSE—RELIEF AGAINST FORFEITURE.

As against a penalty clause intended to secure punctual payment of the deferred payments under a land purchase agreement which purported to authorize the vendor on certain defaults to repossess the property and to absolutely forfeit all payments made, equity will relieve upon the purchaser promptly taking action to reinstate his right and offering to perform the obligations of which the penalty clause was intended to secure performance, unless the purchaser has by conduct making such a course inequitably precluded himself from that relief; and specific performance may be granted against the vendor still in control of the property he has claimed to repossess. [Wallace v. Hesselein, 29 Can. S.C.R. 171, distinguished.]

Bark Fong v. Cooper, 16 D.L.R. 299, 49 Can. S.C.R. 14, 27 W.L.R. 174, 5 W.W.R. 633, 701, reversing 11 D.L.R. 223, 18 B.C.R. 271, 24 W.L.R. 294.

A decree for specific performance of an agreement of sale will not be refused because of any misrepresentations by the purchaser, unless they are material, that is, relate to some part of the contract or its subject-matter. Misrepresenting the seller's chance of sale or the probability of his getting a better price for his property than the buyer offers is not a material misrepresentation. [Archer v. Stone, 78 L.T. 34, and Vernon v. Keys, 12 East. 632, 4 Taunt. 488, followed.]

Dart v. Rogers, 21 Man. L.R. 721, 19 W.L.R. 326.

B. ORAL CONTRACTS.

See Solicitors, II B—25.

(§ I B—15)—ORAL AGREEMENT OF VENDOR TO REPURCHASE—STATUTE OF FRAUDS AS A DEFENCE—ACTION BY VENDEE FOR SPECIFIC PERFORMANCE.

An agreement whereby the original purchaser was to resell the lands to the original vendor may be set up by the latter as a defence to such purchaser's action for specific performance although the resale agreement was upon terms which did not effect a rescission of the original contract and would not be enforceable in a separate action because not sufficiently evidenced in writing to comply with s. 4 of the Statute of Frauds.

Frith v. Alliance Investment Co., 20 D.L.R. 356, 49 Can. S.C.R. 384, affirming 10 D.L.R. 765, 6 A.L.R. 197, 4 W.W.R. 88, 23 W.L.R. 830, which affirmed 5 D.L.R. 491, 4 A.L.R. 238, 1 W.W.R. 907, 20 W.L.R. 551.

VERBAL CONTRACT—PART PERFORMANCE—STATUTE OF FRAUDS.

Beck v. Duncan, 12 D.L.R. 762, 6 S.L.R. 353, 4 W.W.R. 1319, 25 W.L.R. 11, affirming 8 D.L.R. 648, 6 S.L.R. 353, 22 W.L.R. 878, 3 W.W.R. 613.

PAROL AGREEMENT—PART PERFORMANCE—STATUTE OF FRAUDS—REALTY SALE.

A verbal arrangement for the sale of land, indefinite in its terms (for example, as to description and rights of way), falling short of an agreement ad idem is not sufficient basis on which to decree specific performance upon acts of part performance referable thereto, which, had they referred to a definite contract, might have taken it out of the Statute of Frauds.

Kerr v. Cunard, 16 D.L.R. 662, 42 N.B. R. 454, 14 E.L.R. 231.

STATUTE OF FRAUDS—SPECIFIC ENFORCEMENT OF ORAL CONTRACT—MOTHER AND SON.

Specific performance of an agreement between a mother and son, whereby the mother promised to buy the son a farm, "when he got married and wanted to set up for himself," if he would stay at home and work the farm she possessed till all the debt were paid, will be decreed, on its being clearly proved that the son had worked on the farm without wages, and completely satisfied his part of the contract, and that a farm had been bought for him of which he had possession, the acts of performance being sufficient to satisfy the Statute of Frauds and corroborate the agreement.

The court will not hesitate to enforce a family agreement admittedly calculated to promote the interest of the whole family, but the evidence must clearly establish that such an agreement was arrived at, and the necessary formalities complied with as though the contract were between strangers, so that the agreement must either be in writing to satisfy the Statute of Frauds or there must have been done such acts of part performance as to take the case out of the statute. [Williams v. Williams, L.R. 2 Ch. App. 294; Orr v. Orr, 21 Gr. 425; Jibb v. Jibb, 24 Gr. 487, followed.]

Douglas v. Douglas, 15 D.L.R. 596, 24 Man. L.R. 420, 26 W.L.R. 556, 5 W.W.R. 962. [Affirmed, 24 Man. L.R. 420 at 430, 28 W.L.R. 481.]

STATUTE OF FRAUDS—PART PERFORMANCE—CORPORATE SEAL—COMPLETENESS.

Taking possession of land and removing gravel therefrom in pursuance of a parol agreement for a lease are acts of part performance which take the case out of the Statute of Frauds, and specific performance of the agreement will be decreed; where there is part performance, invalidity of the agreements cannot be set up because of the want of the corporate seal of the lessee, or the absence of seals to municipal resolutions authorizing it. The agreement is not incomplete because it provided that a survey or description of the land, and the demise thereof, should be prepared by the municipality's clerk.

King (Tp.) v. Beamish, 30 D.L.R. 116, 36 O.L.R. 325.

LEASE — ORAL — PART PERFORMANCE — EQUITIES ARISING—DECREE.

Although an agreement for a 5-year lease is not in writing if there has been a sufficient part performance unequivocally referable to the agreement, and equities have arisen from the acts of part performance which render it unjust not to decree specific performance, such specific performance will be decreed.

Bell v. Chartered Trust Co.; Chartered Trust Co. v. Bell, annotated, 49 D.L.R. 113, 46 O.L.R. 192. [Reversed on another point, 50 D.L.R. 45, 46 O.L.R. 192 at 196.]

ORAL PROMISE OF MOTHER TO BEQUEATH PERSONAL PROPERTY TO SON—CONSIDERATION—SUPPORT OF MOTHER BY SON—FULFILMENT OF OBLIGATION BY SON—EVIDENCE—STATUTE OF FRAUDS—PART PERFORMANCE REFERABLE TO RELATIONSHIP—ALLOWANCE FOR BOARD AND LODGING OF MOTHER—CLAIM AGAINST ADMINISTRATOR—SET-OFF OF AMOUNT DUE ON MORTGAGE OF LAND MADE BY SON TO MOTHER ALTHOUGH REMEDY BARRED BY LIMITATIONS ACT—COSTS.

Noecker v. Noecker, 41 D.L.R. 138, 41 O.L.R. 296.

OF RECTIFIED INSTRUMENT ON PAROL EVIDENCE—MISTAKE.

The court has jurisdiction (in any case in which the Statute of Frauds is not a bar) in one and the same action to rectify a written instrument upon parol evidence of a mistake and to order the agreement to be specifically performed. [Rudd v. Manahan, 5 A.L.R. 34; Olley v. Fisher, 34 Ch. D. 367, followed.]

Howard v. Stewart, 31 W.L.R. 204, 8 W.W.R. 616.

PART PERFORMANCE OF VERBAL CONTRACT—AGREEMENT FOR SALE OF LEASEHOLD—STATUTE OF FRAUDS.

When a contract resting on parol or partly on parol has been partly performed by the purchaser, the vendor will be precluded from setting up the Statute of Frauds, and specific performance will be decreed if the contract is proved; so where the court found that the plaintiffs had entered into an agreement with the defendants, which was not entirely in writing, for the sale of a leasehold property, and had put them in possession and the defendants had paid part of the purchase price, made repairs to the property and collected the rents, specific performance was decreed.

Moses v. French, 43 N.B.R. 1.

CONTRACT—ORAL PROMISE OF FATHER TO CONVEY LAND TO SON—CONSIDERATION—SERVICES OF SON—EVIDENCE—CORROBORATION—POSSESSION GIVEN TO SON — PART PERFORMANCE — STATUTE OF FRAUDS—SUBSEQUENT ACCEPTANCE OF LEASE BY SON — UNDUE INFLUENCE — LACK OF INDEPENDENT ADVICE—SUMMARY EJECTMENT OF SON BY ORDER UNDER OVERHOLDING TENANTS PROVISIONS OF LANDLORD AND TENANT ACT—DAMAGES FOR, NOT RECOVERABLE — ORDER STANDING UNREVERSED — CLAIM FOR TIMBER TAKEN BY FATHER—SPECIFIC PERFORMANCE OF AGREEMENT—ALTERNATIVE CLAIM FOR WAGES — AMENDMENT.

Harris v. Harris, 16 O.W.N. 216.

CONTRACT—EXCHANGE OF PROPERTIES—SPECIFIC PERFORMANCE — STATUTE OF FRAUDS—UNTRUE REPRESENTATION.

Hailliday v. Roy, 7 O.W.N. 546.

C. SUBJECT-MATTER OF CONTRACTS IN GENERAL.

(§ I C—20)—CONTRACT — EXCHANGE OF PROPERTIES — SPECIFIC PERFORMANCE — MISREPRESENTATION — WARRANTY —DAMAGES.

Johnson v. Hanna, 7 O.W.N. 524.

(§ I C—24)—CONTRACT TO LEASE.

The failure to carry out an agreement to lease a hotel for a year and to sell its furniture and fixtures does not present a case for specific performance of contract, there being an ample remedy in damages.

Dulmage v. Lepard, 3 D.L.R. 542, 3 O.W.N. 986.

CONTRACT TO DEVISE LAND—LEGACY IN LIEU —ELECTION.

A monetary bequest in lieu of a contract to devise land puts the legatee to election between specific performance of the devise or the acceptance of the legacy in lieu thereof; but specific performance will not be decreed unless the legatee is first willing to disclaim the legacy.

Central Trust & Safe Deposit Co. v. Snider, 25 D.L.R. 410, [1916] 1 A.C. 266, 35 O.L.R. 246, reversing 6 O.W.N. 337, sub nom. Snider v. Carlton.

AGREEMENT TO DEVISE FARM—SERVICES RENDERED BY EXPECTANT DEVISEE—REMUNERATION—ACTION TO ENFORCE AGREEMENT AGAINST EXECUTORS—EVIDENCE—CORROBORATION—INTENTION OF TESTATOR — FAILURE TO PROVE CONTRACT—STATUTE OF FRAUDS—QUANTUM MERUIT —ALLEGED GIFT OF CHATTELS AND PROMISSORY NOTE—POSSESSION NOT CHANGED —COSTS.

Herries v. Fletcher, 6 O.W.N. 587.

D. CONTRACTS RELATIVE TO PERSONAL PROPERTY.

Of subscription or sale of shares, see Companies, V F—263; Contracts, I C—29; Parties, II A—87.

(§ I D—25)—MUTUAL MISTAKE AS TO LOCATION OF CHATTEL SOLD.

Specific performance of a contract for the sale of a lumber company's moveable machinery and equipment will be denied, in the absence of an express agreement for their delivery to the purchaser, where there was a mutual mistake as to the location of the chattels; and the purchaser did not promptly notify the seller of his inability to find them, and refused to make any effort to recover or to aid the seller in recovering the chattels from the person who had wrongfully taken possession of them.

Hamilton v. Smyth, 13 D.L.R. 55, 24 O.W.R. 809.

MISREPRESENTATION—EFFECT.

Specific performance of a contract to purchase a livery stable business will not be decreed where the vendee was induced to enter into the agreement by the vendor's misrepresentations as to the profits of the business, the ages of the horses, the condition of the building, and the habits of his only competitor.

Johnston v. Dowsett, 13 D.L.R. 57, 23 Man. L.R. 492, 24 W.L.R. 759, 4 W.W.R. 971.

SALE OF POTATOES OF CERTAIN BRAND AT SPECIFIED PLACE.

Fraser v. Sam Kee, 9 W.W.R. 1281.

(§ I D—26)—SALE OF SHARES—BY WHOM ENFORCEABLE.

A contract for the sale and purchase of company shares is enforceable by specific performance not only at the suit of the

company but at the suit of an individual holder of shares already issued.

David v. Dow, 27 D.L.R. 689, 9 A.L.R. 499, 34 W.L.R. 666, 10 W.W.R. 674.

AGREEMENT FOR SUBSCRIPTION OF BONDS.

An underwriting agreement providing for subscriptions to an issue of debentures, whereby subscribers agree to give money by instalments or otherwise in exchange for debentures or bonds is tantamount to an agreement to borrow and loan money, and hence is not susceptible of specific performance.

Dorchester Elec. Co. v. King; Dorchester Elec. Co. v. Thomson; Dorchester Elec. Co. v. Industrial Securities Co., 24 D.L.R. 373, 48 Que. S.C. 471, 22 Rev. de Jur. 27.

CONTRACT—TRANSFER OF SHARES.

Lebrun v. Gruninger, 49 D.L.R. 686, affirming 27 Que. K.B. 210.

AGREEMENT TO ALLOT SHARES IN MINING PROPERTY WHEN COMPANY INCORPORATED — ADVANCES TO OWNER OF MINING CLAIMS—PARTIES.

Howe v. Irish, 10 O.W.N. 455.

UNDERTAKING TO REPURCHASE COMPANY SHARES — DISTINCTION BETWEEN CORPOREAL AND INCORPOREAL PERSONAL PROPERTY IN REGARD TO REMEDY.

Helwig v. Siemon, 10 O.W.N. 296.

COMPANY SHARES—SETTLEMENT OF FORMER ACTION.

Tinsley v. Schacht Motor Car Co., 5 O. W.N. 547.

(§ I D—27)—PARTNERSHIP — AGREEMENT FOR ONE PARTNER BUYING OUT THE OTHER.

While an agreement for the purchase by one partner of the other's share may be the subject of specific performance in a proper case, that remedy must be refused where the alleged agreement was vague and uncertain as to whether the liabilities were to be assumed or divided and as to other material points.

Mitchell v. Alberta Steam Laundry, 16 D.L.R. 846.

E. CONTRACTS FOR REAL PROPERTY.

See Vendor and Purchaser, II—30; Solicitors, II B—25.

(§ I E—30)—AGENT'S RECEIPT—PURCHASER IN POSSESSION—PRINCIPAL'S INSTRUCTIONS—FORMAL AGREEMENT.

Specific performance may be ordered in respect of a sale of land evidenced by an agent's receipt for the cash payment, which in itself shewed the total price, the terms of the deferred payments and the rate of interest thereon, where the purchaser had been let into possession and the money he had paid had been retained by the vendors for an unreasonable time without repudiating the sale made by the agent, and by other acts recognizing the purchaser as such, although such sale may not have conformed with his principal's instructions, and the principal was not named therein, and although the agent's receipt had stipulated that it was a "voucher for the money paid pending the execution of the formal printed agreement of vendors," and that, in default of execution by vendors, money was "to be repaid on demand;" the reference to the formal agreement (which never was executed) may be treated as a mere expression of the vendor's wish that the agreement should be put into more formal terms than were contained in the receipt.

McDonald v. Leadly, 20 D.L.R. 157.

RIGHT TO REMEDY—PERFORMANCE OR OFFER TO PERFORM.

In order to entitle a party to a land contract to specific performance, he must shew himself to have been prompt in the performance of the covenants entered into by himself or shew his willingness to perform them within a reasonable time. [Wallace v. Hesslein, 29 Can. S.C.R. 171, at 174, followed.]

Tytler v. Genung, 16 D.L.R. 581, 27 W.L.R. 330, 6 W.W.R. 191, 24 Man. L.R. 148.

NOTICE OF RESCISSION—RIGHT TO REMEDY.

A vendor suing for a declaration that the sale had been rescinded and payments made had been forfeited for the purchaser's default by reason of notice given under the contract or in the alternative for specific performance, is not barred from the latter remedy by its allegation in the pleadings that notice of rescission had been duly given where this was denied by the defendant's pleading and no proof was adduced that the notice had been given.

Manufacturers' Life Ins. v. Walsh, 20 D. L.R. 504, 8 A.L.R. 90, 7 W.W.R. 808.

CONVEYANCE OF FARM BY PARENTS TO SON —BOND FOR MAINTENANCE—CONSIDERATION.

Prier v. Prier, 17 D.L.R. 832, 7 O.W.N. 22.

OBJECTIONS TO TITLE—REFUSAL TO ACCEPT CONVEYANCE.

Fine v. Creighton, 16 D.L.R. 872, 6 O.W. N. 115.

One of two owners of partnership real property, holding a power of attorney from the other partner authorizing him to lease the property and to consent to the assignment of an existing lease upon said property, which lease contained an option to purchase exercisable at any time during the term of the lease, may bind the other partner to an agreement consenting to the assignment of that lease and giving a new option for the same amount and with a like limitation as to time as was contained in the original lease, especially where the agreement made by the one partner was shewn to the other and no objection was interposed for several months.

Morrison v. Bernhardt, 7 D.L.R. 278.

Where, under an executory contract for the sale of land providing for the payment of the purchase price in instalments, the vendee made default in the payment of an instalment when due, though it was ex-

pressly agreed that time should be of the essence of the contract, and notice was given by the vendor to the vendee declaring that the agreement was terminated pursuant to the terms of the contract, yet a forfeiture will not be allowed by the court where it appears that a substantial amount, both absolutely and relatively to the whole purchase price, has been paid and the default had continued for only two months after the notice was given, at which time the vendee tendered the amount in which he was in default, and the vendee may notwithstanding be declared entitled to specific performance of the contract.

Chadwick v. Stuckey, 8 D.L.R. 357, 5 A.L.R. 145, at 153, 3 W.W.R. 549, 22 W.L.R. 787, reversing 6 D.L.R. 250, 5 A.L.R. 145, 2 W.W.R. 671, 21 W.L.R. 788.

Under an agreement to sell lands, where the vendor after default on an instalment of the purchase-price brought action demanding, under an acceleration clause, payment of the full balance of purchase-money, and the purchaser tenders only the amount of the defaulted instalment when the vendor was entitled to the full balance, this shews on the purchaser's part a want of readiness and eagerness to carry out the contract and is in effect an abandonment of it, and when followed up by a notice of rescission from the vendor, a subsequent action by the purchaser for specific performance must fail. [Harris v. Robinson, 21 Can. S.C.R. 404, applied.]

Dunlop v. Bolster, 6 D.L.R. 468, 2 W.W.R. 550, 21 W.L.R. 695, reversing 4 D.L.R. 451, 4 A.L.R. 408, 20 W.L.R. 561, 1 W.W.R. 981.

Where a completed agreement for the sale of land, of which there is a sufficient memorandum in writing to satisfy the Statute of Frauds, is varied by a subsequent parol agreement, the parol variation may be ignored, and specific performance may be granted of the original agreement; but if the plaintiff admit the parol variation and the defendant insist upon it, specific performance may be refused, unless the plaintiff allows to the defendant the benefit of the variation.

Maloughney v. Crowe, 6 D.L.R. 471, 26 O.L.R. 579, 22 O.W.R. 635.

In a speculative purchase of vacant lands where the purchaser on the monthly instalment plan makes a few small monthly payments, and then for some years is neither ready nor willing to make any further payments and makes none, and where the vendor urges him to keep up the payments but without effect, and where, upon a tender subsequently of the balance of the purchase price the vendor refuses to accept it or to carry out the contract, a suit by the purchaser for specific performance or in the alternative a refund cannot be maintained, and this especially where time was expressly of the essence. Where a purchaser buys vacant land on the small monthly instalment plan and after a few monthly payments shews no further intention during a period of three or four years of continuing the payment of the instalments, such conduct on the part of the purchaser not only disentitles him to the equitable relief of specific performance but amounts to a repudiation of the contract.

Handel v. O'Kelly, 8 D.L.R. 44, 22 Man. L.R. 562, 22 W.L.R. 407, 3 W.W.R. 367.

A summary application under the Vendors and Purchasers Act, 10 Edw. VII. (Ont.) c. 58, is substituted for an action for specific performance of a contract to sell lands when the contract is admitted and the only question is as to title.

Re Jones and Cumming, 2 D.L.R. 77, 3 O.W.N 672, 21 O.W.R. 248.

Specific performance cannot be granted to enforce against his personal interest in the lands a contract to which the defendant was not a party made by a person deceased, of whose estate he is the personal representative where the suit is brought against him in his representative capacity only.

Adolph v. Good, 1 D.L.R. 750, 5 S.L.R. 106, 20 W.L.R. 401, 1 W.W.R. 936.

Where the Statute of Frauds is pleaded in an action for specific performance of an agreement for the sale of land, the question raised is really one of fact as to the intention of the parties; if their intentions were that the existing writing should contain the whole agreement, and nothing more was contemplated than is expressed therein, the statute affords no defence, notwithstanding that it was intended that a more formal agreement should be drawn up subsequently; but, if it was contemplated that such formal agreement should include material provisions not contained in the existing writing, the statute is a good defence, because a memorandum, to satisfy the statute, must contain the whole of the terms agreed upon.

Strickland v. Ross, 5 D.L.R. 706, 5 S. L.R. 347, 21 W.L.R. 945, 2 W.W.R. 887.

Where the only written evidence of an agreement for the sale of lands is in the form of a receipt for part payment of the purchase price which does not purport to contain all the terms of the agreement made by the parties and does not state the time when the balance of the purchase price shall be payable, specific performance cannot be ordered if a plea of the Statute of Frauds is raised by the vendor, even though the purchaser offers to pay cash instead of deferring any payments. [May v. Platt, [1900] 1 Ch. 616, 622, applied.] Where the written evidence of a contract for the sale of lands is a mere receipt, and where the terms including interest on deferred payments are missing therefrom and were oral only, if the defendant is not obliged to seek any special equitable favour in defending himself against the plaintiff's claim for specific performance, the court under its equitable jurisdiction, cannot impose terms upon him to prevent effect being given to his plea of the Statute of

Frauds. Green v. Stevenson, 5 O.W.R. 761, applied; Martin v. Pycroft, 2 DeG. M. & G. 785, 42 English Reports 1079, distinguished.]

Rogers v. Hewer, 8 D.L.R. 288, 5 A.L.R. 227, 22 W.L.R. 807, 3 W.W.R. 477, reversing 1 D.L.R. 747, 5 A.L.R. 227, 19 W.L.R. 868, 1 W.W.R. 481.

Where, under a contract for the sale of land providing for payment in four instalments and making time of the essence of the contract, the vendee defaults in the payment of the last two instalments, though the first two instalments amounted to one-half of the entire purchase price, he is guilty of such laches, in waiting three years before bringing his action, as will defeat his right to specific performance.

McGreevy v. Hodder, 8 D.L.R. 755, 4 O.W.N. 536, 23 O.W.R. 699.

Specific performance may be granted of a contract for the sale of land at the suit of a purchaser who failed to pay the purchase price when due, though time was made of the essence of the contract in that regard, where it appeared that the vendor who, to the knowledge of the purchaser, was merely a holder of an agreement for the purchase of the land from the owner, refused a request for inspection of such agreement, and ignored a subsequent demand for a solicitor's abstract of title, both the request and demand being made by the purchaser before the first instalment of the purchase price was due. [Cushing v. Knight, 6 D.L.R. 820, 46 Can. S.C.R. 555, distinguished.]

Newberry v. Langan, 8 D.L.R. 845, 47 Can. S.C.R. 114, 23 W.L.R. 93, 3 W.W.R. 42, affirming 2 D.L.R. 298, 20 W.L.R. 826, 2 W.W.R. 10.

The purchaser under a contract for the sale of land whereby it was stipulated that the price was to be fixed later by officials of a railway company acting in the same interests as the vendor, is not entitled to specific performance if he has rejected the prices fixed by those officials, and in consequence the parties came to no agreement as to the price.

Frewen v. Hays, 8 D.L.R. 715, 106 L.T. 516, 2 W.W.R. 861, affirming 16 B.C.R. 143.

OMISSION OF MATERIAL TERM.

Specific performance of a contract for the sale of land will be refused where the vendor was led to believe by her agent and by the vendee on signing the contract that a clause had been inserted therein in accordance with the agreement between the vendor and the vendee, that the former might recede from the bargain within 10 days if she desired to do so.

Sheardown v. Good, 11 D.L.R. 318, 24 O.W.R. 658, 4 O.W.N. 1344.

UNDISCLOSED COAL RESERVATION—DEDUCTION FOR.

Where a vendee agreed in a contract for the sale of lands, to give such title as his original Crown grant contained, and produced a certificate of title shewing a reservation by another of the coal under the lands, and the vendee, who at the time of entering into the contract was unaware of such reservation, did not demand rescission of the agreement on that ground, specific performance may be ordered against an assignee of the vendee who will be required to pay the amount due under the contract, less compensation for the value of such coal rights.

Dagenais v. Denis, 11 D.L.R. 676, 24 W.L.R. 441, 4 W.W.R. 839.

AGENT'S RELATIONSHIP WITH PURCHASER.

It is a ground for refusing specific performance to the alleged purchaser that the latter is an employee of the vendor's real estate agent who made the contract, although such employee's compensation may have been upon a commission basis only and not on salary, if the business relationship of the purchaser to the agent was not disclosed to the vendor who lived in a distant city and was not aware of same. [McGuire v. Graham, 16 O.L.R. 431, applied.]

Arnold v. Drew, 11 D.L.R. 72, 24 W.L.R. 51, 4 W.W.R. 435.

PAYMENTS — FAILURE TO MAKE WITHIN STIPULATED TIME—DEFAULT—WAIVER.

Specific performance of a contract to sell land will be ordered after the default of vendee as to time, notwithstanding it was made the essence of the contract, where after such default, the vendor recognized the validity and continued existence of the contract by negotiating with the vendee in relation to the sale.

Dahl v. St. Pierre, 11 D.L.R. 775, 4 O.W.N. 1413, 24 O.W.R. 705. [Affirmed, 14 D.L.R. 514, 25 O.W.R. 261.]

WRITTEN CONTRACT OF SALE—ADJUSTMENT OF REBATE CLAIM — SMALLER SUM ACCEPTED IN LIEU OF LARGER.

Where the first deferred payment on a sale of lands was settled between the parties by the acceptance of a promissory note for a lesser sum in satisfaction thereof as an adjustment of the purchaser's claim for a rebate founded upon equitable grounds, the purchaser may obtain specific performance of the written contract as varied by the adjustment so made.

Friedman v. Mayer, 14 D.L.R. 154, 7 A.L.R. 60, 25 W.L.R. 551, 5 W.W.R. 168.

TIME OF ESSENCE—RELIEF FROM FORFEITURE.

Where the payment of the purchase money and interest will compensate the vendor for default in payment under a contract for the sale of land and the vendee has not disentitled himself by laches or delay from seeking relief from a forfeiture, specific performance may be decreed at the suit of the vendee, notwithstanding conditions of the agreement that time should be of the essence, that on default the vendor might treat the contract as cancelled, and that all payments made should be forfeited; the latter stipulation being regarded as a provision for a penalty. [Re Dagen-

ham (Thames) Dock Co., L.R. 8 Ch. 1022; Kilmer v. B.C. Orchard Lands, 10 D.L.R. 172, [1913] A.C. 319, followed; Labelle v. O'Connor, 15 O.L.R. 519, not followed.]

Boyd v. Richards, 13 D.L.R. 865, 29 O.L.R. 119.

OPTION FOR PURCHASE OF LAND—IMPROVIDENCE.

Specific performance of an option agreement for the sale of land will not be refused merely because of inadequacy of price as a result of appreciation in value before the exercise of the option; or improvidence in making it on the part of the vendor, who, although well able to transact business, was physically incapable of attending in person to the details thereof.

Matthewson v. Burns, 12 D.L.R. 236. [Reversed in 18 D.L.R. 287, 30 O.L.R. 186.]

RIGHT OF ASSIGNEE — COVENANT AGAINST ASSIGNMENT—CONTINUED READINESS TO PERFORM.

Specific performance of a contract for the sale of land assigned by the vendee in defiance of a covenant against assignment, will not be decreed on behalf of the assignee in the absence of the vendor's consent to the assignment. Specific performance of a contract for the sale of land will not be decreed where the plaintiff does not allege or shew that he has made and is and always was ready and willing to make the stipulated payments and otherwise to perform his part of the contract.

Goode v. Buro, 12 D.L.R. 263, 6 S.L.R. 92, 24 W.L.R. 569, 4 W.W.R. 1009.

ABANDONMENT—BECOMING TENANT.

Specific performance of a parol contract for the sale of lands, which had been sufficiently performed so as to take it out of the Statute of Frauds, will be denied where the vendee, by payment of rent and otherwise, abandoned all rights under the contract and became merely a tenant.

Edmonton Construction Co. v. Maguire, 12 D.L.R. 376, 6 A.L.R. 91, 24 W.L.R. 672, 4 W.W.R. 1062.

NONPAYMENT—BETTERMENTS — READINESS TO PAY.

Where a vendee, who had greatly increased the value of land by his labour and expenditures, although he had not met his stipulated payments, was excluded by the vendor from the land because of such default, specific performance will be decreed, although the time for payment may not have arrived, where the vendor, who had received a substantial portion of all the crops raised on the land, refused to accept payment for the land, which the vendee was ready and willing to make, except on conditions he could not rightfully impose.

Tytler v. Genung, 12 D.L.R. 426, 24 W.L.R. 560, 4 W.W.R. 797. [Reversed 16 D.L.R. 581, 24 Man. L.R. 148, 27 W.L.R. 330, 6 W.W.R. 191.]

FORFEITURE—RELIEF—LACHES.

Specific performance of a contract for the sale of land will be denied where the vendee does not seek relief or tender payment for more than 3 years after notice of the forfeiture of the contract for nonpayment.

Frederiksen v. Stanton, 12 D.L.R. 565, 6 S.L.R. 105, 24 W.L.R. 891, 4 W.W.R. 1224.

INADEQUACY OF PRICE.

Specific performance of a contract for the sale of land will not be denied to the purchaser on the ground that an unconscionable advantage was taken of the vendor, or of inadequacy of consideration, where the statement of defence admits that the defendants had asked the plaintiff to carry out his agreement and set up in answer to the action that he had then refused to complete the purchase.

Baxter v. Bradford, 12 D.L.R. 581, 18 B.C.R. 369, 24 W.L.R. 973, 4 W.W.R. 1325.

FAILURE OF VENDEE TO TENDER DEED AND MAKE CASH PAYMENT — TIME AS ESSENCE OF THE CONTRACT.

Specific performance of a contract for the sale of land of which the vendee was in possession, although he had not made expenditures in reliance on the agreement, will be denied where the contract, of which time was of the essence, was cancelled by the vendor for the failure of the vendee to prepare and tender a deed for execution, or to make the stipulated cash payment and give a mortgage for the deferred payments, within the time and manner specified in the agreement.

Brickles v. Snell, 30 D.L.R. 31, [1916] 2 A.C. 599, [1917] 1 W.W.R. 1059, reversing 20 D.L.R. 209, 49 Can. S.C.R. 360.

VENDOR READY AND WILLING TO COMPLETE—REPUDIATION BY PURCHASER.

Reynolds v. Foster, 9 D.L.R. 836, 4 O.W.N. 694, affirming 3 D.L.R. 506.

An agreement to assign a contract for the sale of land with all arrears and taxes paid is not complied with by assigning a contract in default, where such default might be a bar to the enforcement of the contract in an action for specific performance, as it would be when time was expressly made of the essence of the agreement. [Brickles v. Snell, 30 D.L.R. 31, followed.]

Douglas v. Sharpe, 32 D.L.R. 101, 9 S.L.R. 411, [1917] 1 W.W.R. 577.

LAND OPTIONS—REVOCABILITY.

An option to purchase land for a fixed time for which no consideration is given creates merely a personal right revocable at any time before it has been formally accepted, and is, therefore, not subject of specific performance.

Clendenning v. Cox, 26 D.L.R. 729, 49 Que. S.C. 71, reversing 45 Que. S.C. 157.

PROPERTY SITUATE IN FOREIGN COUNTRY.

An agreement to sell land situated in a Province of Canada may be ordered by a court thereof to be specifically performed by a vendor resident in the province despite the fact that a part of the price to be paid is land situated in a foreign jurisdiction: there is mutuality of remedy when the par-

ties can obtain similar remedies in different jurisdictions.

Jones v. Tucker, 30 D.L.R. 228, 53 Can. S.C.R. 431, 10 W.W.R. 1117, affirming 25 D.L.R. 278, 8 S.L.R. 387, 33 W.L.R. 1, 9 W. W.R. 620.

SETTLEMENT OF ACTION—JUDGMENT—NON-COMPLIANCE.

Where an action coming for trial is settled by the parties, and the terms of settlement are incorporated in a formal judgment providing for an exchange of properties which the plaintiff has failed to comply with, the defendants' remedy is in an action for specific performance and not by an order directing an assessment of damages.

McTavish v. McLeod, 26 D.L.R. 272, 9 W. W.R. 1121.

WHEN REMEDY REFUSED—TIME AS ESSENCE.

In an action for specific enforcement of an agreement for the sale of land, courts of equity, which look at the substance as distinguished from the letter of agreements, no doubt exercise jurisdiction which enables them to decree specific performance in cases where justice requires it, even though liberal terms of stipulations as to time have not been observed; but they never exercise this jurisdiction where the parties have expressly intimated in their agreement that it is not to apply, by providing that time is to be of the essence of their bargain, unless the parties have expressly or by implication waived such provision. [Kilmer v. B.C. Orchard Lands Co., 10 D.L.R. 172, [1913] A.C. 319, distinguished.]

Steedman v. Drinkle, 25 D.L.R. 420, [1916] A.C. 275, 9 W.W.R. 1146, 33 W.L.R. 483, reversing 14 D.L.R. 835, 7 S.L.R. 20, 5 W.W.R. 706.

MISDESCRIPTION OF QUANTUM.

A contract of sale which describes the land as having a "frontage of approximately 73 feet on Queen Street," which, in fact, only had a frontage of 70 feet, constitutes a misdescription materially affecting the value of the subject-matter, of which the court will not decree specific performance.

Floyd v. Hanson, 24 D.L.R. 320, 48 N. B.R. 339.

DEFICIENCY IN VALUE—MISDESCRIPTION.

On a contract for the sale of land where the vendor is able to perform the contract in substance, but not completely, he is nevertheless entitled to compel specific performance by the purchaser, the vendor making compensation for the deficiency in value. [Flight v. Booth, 1 Bing. (N.C.) 370, applied.] This principle is not limited to cases in which the vendor is protected by the ordinary condition as to misdescription.

Springer v. Anderson, 9 W.W.R. 922.

EXCHANGE OF LANDS—PROPERTY SITUATE IN FOREIGN COUNTRY.

The court has jurisdiction to decree specific performance of a contract for the exchange of lands situated within the jurisdiction of the court, at the instance of a foreign plaintiff whose land is situated in a foreign country and who is ready and willing to perform his part of the contract.

Tucker v. Jones, 25 D.L.R. 278, 8 S.L.R. 387, 9 W.W.R. 620, 33 W.L.R. 1. [Affirmed, 30 D.L.R. 228, 53 Can. S.C.R. 431, 10 W.W. R. 1117.]

SALE OF LAND BY COTRUSTEE—BINDING EFFECT ON OTHERS.

An agreement for the sale of land made by one of the trustees named in a will is not binding upon the other, and cannot be specifically enforced against him, regardless of a direction in the will of the deceased trustee that the agreement made by him should be carried out.

Chisholm v. Chisholm, 24 D.L.R. 679, 49 N.S.R. 174.

EXCHANGE OF LANDS—MISE EN DEMEURE—PROOF OF OWNERSHIP AND TENDER OF DEED—SUFFICIENCY.

In an action for an order to execute a conveyance, the plaintiff, purchaser, or vendor should first put en demeure the other party; this proceeding should be such as to put him in a position to defend himself and to know that he can himself fulfil his obligations. Thus, if it is a case of an exchange of property, he should establish that he is owner of the immoveable exchanged and tender a deed signed by him, accompanied by his documents of title, and if there is a payment it should be made by a legal tender. A document for exchanging properties which does not mention where the immoveable exchanged is situated, does not give its official number nor refer to any evidence of title, if it is only an agreement for sale sous seing privé signed by a company not a party to the exchange, is informal, and cannot be used to prove the contract in favour of the owner of the immoveable.

Trudel v. Marquette, 24 Que. K.B. 279.

FORMATION OF CONTRACT—OFFER — NEGOTIATIONS — POSSESSION TAKEN BY PURCHASER—INCOMPLETE AGREEMENT.

Kempenfeldt Land Co. v. Fox, 9 O.W.N. 80.

REGISTERED PLAN.

A purchaser who agrees to purchase lots according to a registered plan is bound by the agreement; whether the registered plan creates a restrictive covenant or not is immaterial; if the vendor offers the purchaser exactly what he agreed to buy specific performance will be enforced.

Sumner v. McIntosh, 40 D.L.R. 301, 11 S.L.R. 152, [1918] 2 W.W.R. 293, affirming 35 D.L.R. 336, 10 S.L.R. 63, [1917] 1 W.W. R. 1404.

TIME OF ESSENCE — EXTENSION.

Specific performance of an agreement for sale of land will be enforced, notwithstanding a clause making time of the essence, and that the contract is to be null and void if the interest is not promptly paid when due; if the vendor agreed to an extension of the time of payment and the notice definite-

ly fixing the time in which payment must be made is unreasonable in the circumstances. [Kilmer v. B.C. Orchard Lands, 10 D.L.R. 172, [1913] A.C. 319, followed.]

Tooley v. Hadwen, 41 D.L.R. 190, 13 A.L.R. 447, [1918] 2 W.W.R. 812.

ONE PURCHASE CONTEMPLATED — DIFFERENT PARCELS OWNED BY HUSBAND AND WIFE SEPARATELY — WIFE NOT JOINED AS PARTY — STATUTE OF FRAUDS.

Kidd v. Millar, 40 D.L.R. 729, 13 A.L.R. 282, [1918] 2 W.W.R. 366.

Plaintiff, through an agent, applied to purchase certain land from defendant. A price was quoted and accepted, and a deposit paid. It was also understood that a formal contract was to be drawn up. Several letters passed between the parties after the acceptance of the price quoted, and in these letters terms were discussed; but it did not appear that the plaintiff specifically agreed to the terms quoted. No formal contract was ever drawn up. In an action for specific performance it was held (1) When a proposal is made and accepted and reference therein made to a formal contract, although not expressly stated to be subject to such formal contract being prepared and executed, it becomes a question of construction whether the parties intended that the terms agreed on should merely be put into form or whether they should be subject to a new agreement, the terms of which are not expressed in detail. (2) The parties here having contemplated a formal contract being prepared and there being many necessary matters as to which no agreement had been concluded, it must be held that there was no concluded contract of which specific performance could be ordered.

Ross v. Eastern Saskatchewan Land Co., 4 S.L.R. 346.

NONCOMPLIANCE WITH ESSENTIAL TERMS.

Specific performance of an agreement for the exchange of lands will not be specifically decreed at the instance of a party who is in default in respect of an essential term of the agreement. [Brickles v. Snell, 30 D.L.R. 31, followed.]

Douglas v. Sharpe, 32 D.L.R. 101, [1917] 1 W.W.R. 577. [Affirmed by Supreme Court of Canada, [1917] 2 W.W.R. 1177.]

DESCRIPTION—ENCROACHMENT.

Where an agreement of sale of land sufficiently describes the land, a minor encroachment upon the land does not prevent the vendor from making title in accordance with the contract, specific performance will be decreed.

Foster v. Goodacre, 34 D.L.R. 42, [1917] 2 W.W.R. 636.

A purchaser of land from A, whose only title to the land is under an agreement of purchase from B the owner, may, after default of A in carrying out his contract with B, on notifying B of his interest and tendering the full amount owing to him by A, if it be refused, maintain an action against both A and B for specific performance and for an order that B convey to him on payment of the amount due under his agreement with A. [Smith v. Hughes, 5 O.L.R. 245; Dyer v. Pulteney, Barn (Ch.) 160, and Fenwick v. Bulman, L.R. 9 Eq. 165, followed. Dictum of Perdue, J.A., in Hartt v. Wishard Langan Co., 18 Man. L.R. at 387, not followed.]

Sveinsson v. Jenkins, 21 Man. L.R. 746.

REVOCATION—ONUS—FAILURE TO SATISFY—SPECIFIC PERFORMANCE.

Aikins v. McGuire, 23 O.W.R. 959.

REFUSAL TO DECREE SPECIFIC PERFORMANCE —SALE OF LAND.

Beckman v. Wallace, 24 O.W.R. 263.

SALE OF LAND—SPECIFIC PERFORMANCE—PRINCIPAL AND AGENT.

Foran v. Martel, 23 O.W.R. 626.

SALE OF LAND—SPECIFIC PERFORMANCE—CONVEYANCE TO WIFE.

Mussellwhite v. Lucas, 23 O.W.R. 605.

CONTRACT FOR SALE OF GRAVEL-PIT—DEFAULT BY PURCHASER IN PAYMENT OF PURCHASE-PRICE — TERMINATION OF CONTRACT BY NOTICE GIVEN BY VENDOR——ACQUIESCENCE — DISCRETION OF COURT—REFUSAL OF SPECIFIC PERFORMANCE—RETURN OF PART OF PURCHASE-MONEY PAID—COSTS.

Meharry v. Auburn Woollen Mills Co., 16 O.W.N. 238.

SALE OF LAND—SPECIFIC PERFORMANCE—NO WRITTEN AGREEMENT—PART PERFORMANCE—DAMAGES—EFFECT OF JUDICATURE ACT, ss. 41, 58 (10).

McIntyre v. Stockdale, 4 O.W.N. 482.

ACTION FOR SPECIFIC PERFORMANCE—PARTIES NOT AD IDEM—TERMS OF AGREEMENT—MORTGAGE—DISMISSAL OF ACTION — COSTS — RETURN OF CASH DEPOSIT.

Blackwell v. Scheinman, 5 O.W.N. 887.

DEFENCES — STATUTE OF FRAUDS — MEMORANDUM IN WRITING—AUTHORITY OF AGENT—EFFECT OF SUBSEQUENT SALE BY VENDOR TO ANOTHER—SECOND PURCHASER IN POSSESSION WITHOUT CONVEYANCE—JUDGMENT FOR SPECIFIC PERFORMANCE.

Tinney v. Wright, 16 O.W.N. 274.

ACTION BY DEFENCES—FAILURE OF—SUBSEQUENT SALE BY VENDOR TO BONA FIDE PURCHASER FOR VALUE—REGISTRATION OF CONVEYANCE—DAMAGES IN LIEU OF SPECIFIC PERFORMANCE.

McRae v. Sutherland, 16 O.W.N. 289.

MISREPRESENTATIONS BY VENDOR—FAILURE TO PROVE — PURCHASER ACTING UPON HIS OWN JUDGMENT — INSPECTION OF LAND—IMPOSSIBILITY OF PLACING PARTIES IN ORIGINAL POSITIONS—FAILURE OF CLAIM FOR RESCISSION—FINDINGS OF TRIAL JUDGE—APPEAL.

Ferris v. Edwards, 15 O.W.N. 361.

AGREEMENT FOR SALE OF LAND NOT IN ONTARIO—ACTION FOR BALANCE OF PURCHASE-MONEY — SPECIFIC PERFORMANCE —JURISDICTION OF SUPREME COURT OF ONTARIO—ABILITY TO SHEW GOOD TITLE AND TO CONVEY—REFERENCE.

Thompson v. Gatchell, 13 O.W.N. 449.

AGREEMENT FOR SALE OF LAND NOT IN ONTARIO — COVENANTS FOR PAYMENT OF PURCHASE-MONEY—ACTION UPON — DEFENCE—FRAUDULENT REPRESENTATIONS AND PROMISES — FAILURE TO PROVE — EQUITABLE DEFENCE—HARDSHIP—WANT OF MUTUALITY — RELIEF AGAINST ENFORCEMENT OF AGREEMENT BY IN EFFECT AWARDING SPECIFIC PERFORMANCE — MODIFICATION OF JUDGMENT FOR PAYMENT OF PURCHASE-MONEY BY PROVIDING THAT UPON PAYMENT TITLE MUST BE SHEWN.

McMillan v. Pink, 14 O.W.N. 212.

TITLE — EARNEST — COMMENCEMENT OF PROOF IN WRITING—PAROL EVIDENCE—C.C. QUE. 1233, 1477.

In an action to compel the execution of a deed of sale, a cheque dated on the day of the sale, made by the purchaser to the order of the vendor and bearing the words "on account of a sale of his property," which cheque the vendor keeps in his possession, is a commencement of proof in writing sufficient to allow parol evidence of the sale, especially when those facts are corroborated by admissions of the party itself. At the time of the proposed deal, either the earnest which has been given may be abandoned by the party who has given it, if he desists from his promise, or else the party who has received it must pay double the amount of the earnest if it is he who withdraws from the agreement. But when the earnest is given after the contract has been made, the parties are no longer free to withdraw, and the giving of the earnest serves to establish the making of the contract.

Bricot v. Brien, 23 Que. K.B. 565.

AGREEMENT OF SALE—REGISTRATION.

The recourse of the purchaser in the case of breach of agreement of sale, which has not been followed by possession, is by action for specific performance. Such breach does not give rise to a petitory action, it confers merely a personal right or one between debtor and creditor, and it does not permit of any registration.

Greaves v. Cadieux, 50 Que. S.C. 361.

AGREEMENT FOR SALE OF LAND—ACTION BY PURCHASER — DISCRETION — ADVANTAGE TAKEN OF VENDOR — AGREEMENT TO RESCIND—FAILURE TO ESTABLISH—LACHES—INABILITY OF VENDOR TO CONVEY—FINAL ORDER OF FORECLOSURE IN FORMER ACTION—CONVEYANCE OF LAND BY MORTGAGEE—PARTIES.

McLaughlin v. Mallory, 10 O.W.N. 47.

PURCHASE-MONEY PAYABLE BY INSTALMENTS —DEFAULT—TIME OF ESSENCE—TENDER —SPECIFIC PERFORMANCE—FORFEITURE.

Enkema v. Cherry, 16 W.L.R. 480. [Affirmed 18 W.L.R. 641, 5 S.L.R. 61.]

CONTRACT FOR SALE OF MINING LANDS—POSSESSION — DAMAGES — MECHANICS' LIENS.

Hitchcock v. Sykes, 19 O.W.R. 964.

SPECIFIC PERFORMANCE—SUBSEQUENT SALE TO BONA FIDE PURCHASER WITHOUT NOTICE—REGISTRATION OF CAVEAT.

Alexander v. Gesman, 4 S.L.R. 111, 17 W.L.R. 184. [Affirmed, sub nom. McKillop v. Alexander, 1 D.L.R. 586, 45 Can. S.C.R. 551, 1 W.W.R. 871.]

SPECIFIC PERFORMANCE—SALE BY AGENT—PAYMENT OF PURCHASE-MONEY TO AGENT—ACQUIESCENCE.

Taylor v. Helgeson, 3 S.L.R. 461, 15 W.L.R. 273.

AGREEMENT FOR SALE—SPECIFIC PERFORMANCE—LANDLORD AND TENANT.

Power v. McGillivray, 9 E.L.R. 548.

PURCHASE-MONEY PAYABLE BY INSTALMENTS — DEFAULT — TERMINATION OF CONTRACT — SPECIFIC PERFORMANCE — RELIEF AGAINST FORFEITURE.

Dalziel v. Homeseekers' Land Co., 16 W.L.R. 406.

VENDOR AND PURCHASER — CONTRACT FOR SALE OF LAND AND CHATTELS—SPECIFIC PERFORMANCE—MISREPRESENTATION BY PURCHASER.

Lane v. Rice, 18 W.L.R. 557.

CONTRACT FOR SALE OF LAND—RIGHT TO TRANSFER — PAYMENT OF PURCHASE-MONEY.

Robertson v. Matthews, 17 W.L.R. 552.

INTERIM RECEIPT—SPECIFIC PERFORMANCE—STATUTE OF FRAUDS—NAMES OF PARTIES—AGENT.

Rathom v. Calwell, 16 B.C.R. 201, 18 W.L.R. 281.

SPECIFIC PERFORMANCE—POSSESSORY TITLE —FAILURE TO REGISTER—PRIORITY OF REGISTRATION—NOTICE—FRAUD.

Chapman v. Edwards, 16 B.C.R. 334, 19 W.L.R. 266, 1 W.W.R. 59.

ACTION FOR SPECIFIC PERFORMANCE—DWELLING-HOUSES INFESTED WITH COCKROACHES.

Labelle v. Bernier, 18 O.W.R. 444.

AGREEMENT FOR SALE OF FARM—PURCHASE MONEY—FAILURE TO STRICTLY OBSERVE TERMS OF CONTRACT.

Snider v. Snider, 19 O.W.R. 773.

OPTION — ACCEPTANCE — DOWN-PAYMENT NOT MADE—CONTRACT NOT COMPLETED.

Lowes v. Herron, 3 A.L.R. 438, 18 W.L.R. 167.

BENEFICIAL INTEREST OF VENDOR NOT SPECIFICALLY ALLOCATED—SPECIFIC PERFORMANCE WITH ABATEMENT OF PURCHASE-MONEY—LIEN FOR IMPROVEMENT.

Boudreau v. Reneault, 3 A.L.R. 333, 17 W.L.R. 542.

SALE OF LAND — PAYMENT OF PURCHASE-MONEY TO VENDOR'S AGENT—AUTHORITY TO COMPLETE SALE CONTAINED IN LETTER.

Hendry v. Wismer, 19 O.W.R. 204.

CONTRACT FOR SALE OF LAND—LOT FRONTING ON RIVER—MISREPRESENTATION AS TO QUALITY—SURVEY.

Rodgers v. Fisher, 20 O.W.R. 196.

CONTRACT FOR SALE OF LANDS—ALTERNATIVE FOR DAMAGES—AGENCY—ORDER FOR POSSESSION.

Morgan v. Johnson, 20 O.W.R. 509.

MEMORANDUM OF AGREEMENT—STATUTE OF FRAUDS—VARIANCE IN PRICE—MISREPRESENTATION — REFUSAL OF SPECIFIC PERFORMANCE.

Calgary Realty v. Reid, 19 W.L.R. 649, 1 W.W.R. 218.

CONTRACT FOR SALE OF LAND—MISREPRESENTATIONS OF AGENT FOR PURCHASER—REFUSAL OF SPECIFIC PERFORMANCE.

Lowes v. Nicholls, 19 W.L.R. 646, 1 W.W.R. 209.

CONTRACT FOR SALE OF LAND—OPTION TO PURCHASE OR TO SELL AS AGENT—ELECTION TO PURCHASE AFTER RESALE AT PROFIT.

Naismith v. Bentley, 19 W.L.R. 273, 1 W.W.R. 24.

(§ I E—31)—EFFECT OF DOWER INTERESTS — INTEREST OF NONREGISTERED GRANTEES.

The purchaser's interest under a contract of sale registrable under the B.C. Land Registry Act, 1906, c. 23, in the register of charges, is only such an interest in the lands as is commensurate with the relief which equity would give by way of specific performance; and his contract with the registered owner of an indefeasible fee will not be effective as against a claim under a valid but unregistered deed admitted by the vendor whereby her title was reduced to a claim for dower and the fee belonged of right to another whose title was shewn in answer to the purchaser's action for specific performance; section 75 of the Act made the deed inadmissible in disproof of the purchaser's title to a charge under his contract, but it remained properly admissible on the question of the extent to which specific performance ought to be granted under that contract.

Howard v. Miller, 22 D.L.R. 75, [1915] A.C. 318, 20 B.C.R. 227 at 230, reversing Sup. Ct. of Can. 4 W.W.R. 1193. [Applied in Central Trusts v. Snider, 25 D.L.R. 410.]

(§ I E—32) — RIGHT TO REMEDY — PURCHASE OF LAND WITH NOTICE OF OUTSTANDING OPTION.

Carey v. Roots, 11 D.L.R. 208, 5 A.L.R. 125 at 133, 23 W.L.R. 890, 4 W.W.R. 354, affirming 5 D.L.R. 670, 5 A.L.R. 125, 2 W.W.R. 678, 21 W.L.R. 795.

OPTION TO PURCHASE—FAILURE OF CONSIDERATION.

An option given by defendant to plaintiffs to purchase land is nudum pactum and unenforceable where the consideration therefor is not paid.

McGregor v. Chalmers, 11 D.L.R. 157, 24 W.L.R. 176, 4 W.W.R. 256.

OPTION—CONTRACTS.

When $5 has been paid for an option for purchase of land under which a first payment of $1,000 is stipulated to be made if the option is exercised, a tender of $995 on the last day of the option is bad, unless the option stipulates that the consideration therefor shall in the event of sale be applied on the deposit.

Archdekin v. McDonald, 1 D.L.R. 664, 20 W.L.R. 595, 1 W.W.R. 1014.

An agency contract between the owner and a real estate agent is not necessarily established by the owner's answer quoting price sent in reply to a telegram from the real estate agent asking the best cash price although it also stated a reason for an immediate answer that the sender had a man "who will buy this if he can get it right," and the owner may still shew that his negotiations with the sender of the telegram were only as with a prospective purchaser.

Locke v. Snyder, 7 D.L.R. 457, 22 W.L.R. 287.

ESCROW—CONDITION—CONSENT OF MORTGAGEE—FAILURE TO NOTIFY—DELAY—ACTION FOR SPECIFIC PERFORMANCE—DISCRETION OF COURT — RETURN OF DOWN-PAYMENT—COSTS.

Denton v. Tossy, 7 O.W.N. 156.

OPTION OR OFFER—TIME-LIMIT FOR ACCEPTANCE—REPUDIATION BY VENDOR BEFORE EXPIRY.

McKay v. Wayland, 2 O.W.N. 741.

(§ I E—33)—NOTICE TO COMPLETE.

Facts known to the vendor, at the time the contract was made, as having influenced the purchaser to agree to the time fixed for completion in a contract for sale of land, will be considered in determining what is a reasonable notice where the contract does not provide that time shall be of the essence of the contract.

Mitchell v. Wilson, 2 D.L.R. 714, 5 S.L.R. 161, 20 W.L.R. 671, 2 W.W.R. 124.

RESCISSION—NOTICE—TENDER OF TITLE—REASONABLE TIME.

A letter by the purchasers to the vendor, giving notice of intention to rescind the contract if completion should be delayed beyond a named reasonable time, having been made impracticable by the act of the vendor's agent in stating a wrong address in the agreement, and the vendor's neglect to rectify the error, prevents such vendor from insisting on this condition of the right of rescission. The failure of the vendor to

prepare and tender, within a reasonable time, the transfer which was to have been prepared disentitles such vendor to ask for specific performance of the agreement.

Simson v. Young, 41 D.L.R. 258, 56 Can. S.C.R. 388, [1918] 2 W.W.R. 62, reversing 33 D.L.R. 220, 10 A.L.R. 310, [1917] 1 W. W.R. 1141.

(§ I E—35)—Doubtful titles.

Where the vendor has contracted to sell subject to an unmatured incumbrance or charge which by the terms of the contract he represents to be subject to a privilege of prepayment at any time, not however contained in the mortgage, and the contract does not reserve to the vendor the right to rescind if he shall be unable or unwilling to remove an objection to title, the vendor is not entitled to rescind on the purchaser insisting on specific performance of the contract under the best conditions procurable; the vendor in such case must either obtain the mortgagee's consent to prepayment or give some equitable indemnity securing the purchaser against loss in respect of the refusal of the privilege guaranteed under the contract. [Wilson v. Williams, 3 Jur. N.S. 810, and Nimmons v. Stewart, 1 A.L.R. 384, followed.]

Knight v. Cushing, 1 D.L.R. 331, 4 A.L. R. 123, 20 W.L.R. 28, 1 W.W.R. 563.

Absence of title in vendor—Innocent mistake.

Specific performance will not be granted, where a widow, in the honest belief that she could deal with the property of her deceased husband, entered into an agreement for the sale of certain lands belonging to the estate of the deceased, of which she was administrator in another province but not in the province where the lands were situate and in which she had upon her husband's intestacy a beneficial interest to the extent of one-third only after the debts of the estate should be paid.

Meighen v. Couch, 9 D.L.R. 829, 23 Man. L.R. 117, 23 W.L.R. 523, 4 W.W.R. 64.

Specific performance of a contract to sell real estate will not be ordered where the prospective vendors are executors and trustees of the individual estate of their testator who held the property as a trustee only if the court considers the will was insufficient in form to constitute the vendors trustees with power to convey the trust estate, although it was stipulated by the contract that the purchaser would accept a transfer from the vendors as executors and trustees on their having the probate resealed under Manitoba laws.

Mansfield v. Toronto General Trusts Co., 1 D.L.R. 503, 22 Man. L.R. 49, 20 W.L.R. 344.

Doubtful titles — Decision on vendor and purchaser application.

A dismissal of a summary application made by a vendor under the Vendors and Purchasers Act (Ont.), is not decisive on the question of title so as to preclude the vendor from bringing an action for specific performance, since the whole case is not exhaustively treated on a vendor and purchaser summons, but the proceedings merely deal with isolated points arising out of or in connection with the contract of sale.

Cameron v. Hull, 9 D.L.R. 843, 23 O.W.R. 736.

Doubtful title—Waiver by purchaser—Discretion of court.

Where the title to land is doubtful the court will refuse specific performance of a contract to purchase, unless the purchaser has by his conduct waived his ordinary equitable right to a good title; acts of ownership do not necessarily constitute such a waiver, if satisfactorily explained and the court may in its discretion allow the purchaser to repudiate notwithstanding such acts.

Belder v. Whitney, 49 D.L.R. 153, [1919] 3 W.W.R. 627.

Doubtful title—Caveat—Removal.

Where a vendor within a reasonable time removes a caveat against the title founded on an agreement imposing burdens on the land he is entitled to specific performance of the agreement of sale. [Greer v. Clarke, 27 D.L.R. 699, 9 A.L.R. 533, followed.]

Pugh v. Knott, 36 D.L.R. 52, 12 A.L.R. 399, [1917] 3 W.W.R. 95.

Land situated in another province — Title.

In an action for the specific performance of an agreement for sale of lands situated in another province, where the plaintiff shewed a prima facie title to the land, a reference should be directed to the Master to report as to whether the plaintiff had a good title. Under the circumstances the plaintiff was not debarred from specific performance because he had not title at the time agreed upon for completion, nor by the fact that his vendor had conveyed the property to a third party.

Fort George & Fraser Valley Land Co. v. Wilson, [1917] 2 W.W.R. 351.

Exchange of lands—Doubtful titles.

Where in an action for specific performance of a contract for exchange of lands the issue of title is raised, but not prominently put forward in the pleadings, the court will direct a reference to the local registrar to afford the parties an opportunity of taking all proper objections on that ground. [Mayberry v. Williams, 3 S.L.R. 350; Lucas v. James, 7 Hare 410, followed.]

Tucker v. Jones, 25 D.L.R. 278, 8 S.L.R. 387, 133 W.L.R. 1, 9 W.W.R. 620. See also 30 D.L.R. 228, 53 Can. S.C.R. 431, 10 W.W.R. 1117.

Exchange of lands—Defective title.

A party seeking specific performance of an agreement for the exchange of lands is not entitled to the remedy if he delays the perfecting of his title for an unreasonable time.

Williams v. Black, 23 D.L.R. 287, 8 W.W.R. 1139, 31 W.L.R. 844.

VENDOR ABLE TO CONVEY MOIETY ONLY — SPECIFIC PERFORMANCE WITH ABATEMENT.

Kennedy v. Spence, 24 O.L.R. 535, 20 O.W.R. 61.

POSSESSION TAKEN BY PURCHASER—VENDOR WITHOUT PATENT FOR LAND — TIME OF ESSENCE OF CONTRACT — PURCHASER FAILING TO MAKE PAYMENTS.

Devlin v. Radkey, 22 O.L.R. 399, 17 O.W.R. 665.

(§ I E—36)—IMPOSITION OF TERMS—COMPENSATION OR ABATEMENT.

On an application to discharge the purchaser from the contract for want of a good title in the vendor following a decree obtained by the latter for specific performance, a discharge should be refused in respect of trifling defects of title if the vendor submits to make compensation or to permit an abatement of the purchase money. [Halkett v. Dudley, [1907] 1 Ch. 590, followed.]

Lee v. Sheer, 19 D.L.R. 36, 8 A.L.R. 161, 30 W.L.R. 273, 7 W.W.R. 927.

IMPOSITION OF TERMS UPON ORDER COMPLETING SALE.

An interim order may be made, in an action of specific performance brought by the vendor, in which both the purchaser and an adverse claimant are joined as defendants, allowing a sale of lands to be carried out pending the trial of the adverse claim against the vendor (notice of which is the sole objection to the purchaser closing) on proper terms to secure the claimant if he should substantiate his claim at the trial, and a vesting order may be made thereon in favour of the purchaser as to all the estate and interest in the lands of the other parties to the action.

Jennison v. Copeland, 3 D.L.R. 52, 21 O.W.R. 689.

JUDICIAL DISCRETION—JUDGMENT IN THE ALTERNATIVE.

In an action for specific performance of an agreement for the sale of land, where it appears that the agreement in question was drawn up by the plaintiff, and prepared in such a manner as to leave room for want of understanding on the part of the defendant of the meaning which the plaintiff asserts it was intended to convey, and where the terms in regard to a purchase money mortgage on the land contained in the agreement are ambiguous, the court may in its discretion order specific performance according to the defendant's interpretation or in the alternative a dismissal of the action.

Gertzbein v. Bell, 9 D.L.R. 833, 23 O.W.R. 958.

DEFAULT BY PURCHASER — CANCELLATION OF CONTRACT—NOTE GIVEN FOR PAYMENT IN DEFAULT.

Midgeley v. Bacon, 4 S.L.R. 152.

INVITATION TO PUBLIC TO COMPETE FOR PRIZES—STATED VALUE THEREOF—MISREPRESENTATION.

Cockwell v. Standard Publishing Co., 4 S.L.R. 132.

II. Decree or Judgment.

See Vendor and Purchaser; Land Titles.

(§ II—40)—ORDER FOR—FORM AND SCOPE OF—EMBODYING ORDER TO PAY IN PURCHASE MONEY.

In an action by a vendor against a purchaser, an order for specific performance and an order for the payment into court by the purchaser of the balance due and owing for purchase money may be embodied in the same judgment. [Robinson v. Galland, 37 W.R. 396, followed; Schurman v. Ewing, 7 W.L.R. 610, and Hargreaves v. Security Co., 19 D.L.R. 677, disapproved.]

Lee v. Sheer, 19 D.L.R. 36, 8 A.L.R. 161, 30 W.L.R. 273, 7 W.W.R. 927.

DISCRETION OF COURT TO GRANT—TITLE ACQUIRED PENDENTE LITE—RESCISSION—PLEADINGS.

The right of the plaintiff to a decree for specific performance is an equitable right and is always a matter for the just discretion of the court. A vendor suing for specific performance is not entitled as of right to a reference as to title or to prove his title acquired pendente lite; the court may refuse specific performance although title had been got in by the plaintiff before the trial, if he had unreasonably neglected to obtain the title which he had the right to call for after the purchaser had made an offer to complete the sale, and did not in fact have a title to convey until after the purchaser had pleaded the rescission of the agreement.

Krom v. Kaiser, 21 D.L.R. 700, 8 A.L.R. 287, 31 W.L.R. 742, reversing 18 D.L.R. 226, 7 A.L.R. 467, 7 W.W.R. 185.

WHEN GRANTED—CONFIRMATION OF TITLE—RIGHT OF VENDEE TO COSTS.

A vendor suing for specific performance may make title even at the trial and if he does so and there has been no repudiation, he is entitled to a decree for specific performance, but the defendant purchaser, where title has not previously been made, is entitled to costs up to and including confirmation of report on title. [Halkett v. Dudley, 76 L.J. Ch. 330, [1907] 1 Ch. 590, followed.]

Magrath-Holgate v. Countryman, 22 D.L.R. 684.

VENDOR'S ACTION.

In a vendor's action for specific performance where the purchaser has defaulted in his payments, the judgment may direct payment of the arrears with interest and costs to be made by the defendant purchaser to the plaintiff or into court within a limited time with leave to the parties to apply.

Prevey v. Security Coal Mines Co., 11 D.L.R. 33, 24 W.L.R. 342, 4 W.W.R. 636.

ENFORCEMENT ON STRICT TERMS AS TO DILATORY PLAINTIFF.

Where a purchaser of realty is clearly in default, in that although he has accepted the title he has not tendered the conveyance nor the overdue balance of the purchase money, while his claim against the vendor for specific performance may be enforced, such enforcement will be made subject to strict terms of prompt performance on his part.

Strathy v. Stephens, 15 D.L.R. 125, 29 O.L.R. 383.

In an action to enforce specific performance of a contract for the sale of land which stipulated that the purchaser upon completing payment should have a Torrens title to the land, the court has the power to decree a conveyance in respect of such title as the defendant has and also to award damages for breach of the agreement to give a Torrens title even though the land is not within its jurisdiction and though the defendant did not own the land at the time the contract was entered into, if he took over the vendor's rights in the agreement and received the greater part of the purchase money with full knowledge that the plaintiff's contract with the owner called for a Torrens title.

Smith v. Ernst, 3 D.L.R. 736, 22 Man. L.R. 363, 2 W.W.R. 498, 21 W.L.R. 483, affirming 2 D.L.R. 213, 20 W.L.R. 772, 1 W.W.R. 1250.

Where in addition to a claim for specific performance of a contract for the sale of land, a claim is made by the purchaser for compensation for an alleged deficiency in the quantity, a court of equity has a discretion to refuse the relief sought and to leave the purchaser to his rights at law if any.

Bullen v. Wilkinson, 2 D.L.R. 190, 21 O.W.R. 427.

DAMAGES IN LIEU OF—ENFORCEMENT PREVENTED BY DEFENDANT'S WRONG.

A court possessing the former jurisdiction both of the common-law courts and of the courts of equity may, in an action brought by the purchaser for specific performance, award in lieu thereof damages for nonperformance in addition to the return of purchase money paid, where there had been a part performance by admitting the purchaser into possession and the vendor was the owner able to give title but resold to another in fraud of the plaintiff, notwithstanding that there was no contract in writing under the Statute of Frauds. [Lavery v. Pursell, 39 Ch.D. 508; Re Northumberland Avenue Hotel Co., 23 Ch.D. 16, distinguished; Elmore v. Pirrie, 57 L.T. 333, applied.]

McIntyre v. Stockdale, 9 D.L.R. 293, 27 O.L.R. 460, 23 O.W.R. 586.

PARTIAL TITLE — CY-PRÈS EXECUTION WITH COMPENSATION.

The court will not order specific performance cy-près with compensation of a contract made in her individual capacity only by the widow of the deceased owner for the sale of the fee where her interest was in fact only a one-third share after the payment of the debts of the estate.

Meighen v. Crouch, 9 D.L.R. 829, 23 Man. L.R. 117, 23 W.L.R. 523, 4 W.W.R. 64.

PERFORMANCE PRO TANTO AND COMPENSATION —VENDOR AND PURCHASER.

Where the defendant, who had agreed to exchange real estate with the plaintiff, was unable to convey a small parcel of the lands to the plaintiff, the latter is entitled to be placed as nearly as possible in the same position as he would have occupied had the defendant carried out his agreement: the plaintiff may elect to take specific performance pro tanto with an abatement in price in respect of the part for which title cannot be given, but the abatement will be based upon the actual value and not upon the inflated value assigned to such parcel in the exchange agreement.

Silvert v. Carlson, 17 D.L.R. 714, 24 Man. L.R. 790, 28 W.L.R. 413.

VENDOR NOT SOLE OWNER OF PROPERTY AGREED TO BE CONVEYED—ABATEMENT IN PRICE FOR PORTION TO WHICH TITLE CANNOT BE GIVEN.

If a man having only a limited interest in one parcel of land, but entitled to the entire fee in another, chooses to enter into a contract for the sale of the whole, representing it all as his own, it is not competent for him subsequently to set up his lack of ownership in the whole as a reason for nonfulfillment of the contract. The purchaser is entitled to have the contract carried out so far as possible, with an abatement in price for the portion for which title cannot be given.

Halldorson v. Holizki, 47 D.L.R. 613, [1919] 3 W.W.R. 86, affirming [1919] 1 W.W.R. 472.

(§ II—43)—BINDING EFFECT ON PARTIES.

Where the plaintiff brought an action upon an agreement entered into between him and the defendant to have the same cancelled and to have a cash payment made thereon declared forfeited, and the defendant, by counterclaim resisting the plaintiff's claim, sets up an agreement to sell or purchase land and asks the court to order specific performance, he necessarily submits on his part to perform it and the judgment which he afterwards succeeds in obtaining is as binding upon him as it is upon his opponent. When in such a case judgment goes for the defendant, he cannot, when the litigation has finally ceased, complain that owing to the delay caused by the litigation, which was wholly due to his opposition to the plaintiff's claim, the property has so much decreased in value that it is now inequitable to compel him to accept it.

Leckie v. Marshall, 4 D.L.R. 94, 3 O.W.N. 1527, affirming with a variation, 20 O.W.R. 117.

(§ II—45)—Judgment—Order for possession—Time limited to remedy default.

Under ordinary circumstances where the court allows a purchaser, in possession under a contract for sale of lands, a period of time within which to remedy his default in payment of the purchase price, it will not include in the judgment for specific performance in favour of the vendor a direction that the purchaser deliver up possession to the vendor at an earlier date than the expiry of that period, although the contract gave the purchaser a right to possession only "until default."

Walker v. Barker, 13 D.L.R. 349, 6 A.L.R. 244, 25 W.L.R. 331, 5 W.W.R. 5.

Contract to sell land—Injunction by foreign court as defence.

DeVenne v. Warren, 45 N.S.R. 8, 8 E.L.R. 453.

SPEED.

See Automobiles Railways; Street Railways.

SPEEDY TRIAL.

See Criminal Law; Summary Convictions.

STARE DECISIS.

See Courts, V.

STATUTE OF FRAUDS.

See Contracts.

Specific performance of oral contract, see Specific Performance.

As to trusts, see Evidence, VI—567.

STATUTE OF LIMITATIONS.

See Limitation of Actions; Adverse Possession.

STATUTE OF USES.

See Deeds, II E—50.

STATUTES.

I. Enactment; validity.
- A. Enactment.
- B. Time of passage and taking effect.
- C. Validity; in general.
- D. Judicial examination; legislative journals.
- E. Entitling; expression of subject.
- F. Plurality of subjects.
- G. Local or special legislation.

II. Construction; operation; effect.
- A. In general; use of words.
- B. Strict or liberal construction.
- C. Adopted or re-enacted statutes.
- D. Prospective or retrospective operations.

Annotations.

In pari materia — Interpretation: 49 D.L.R. 50.

I. Enactment; validity.

A. Enactment.

(§ I A—1)—Saskatchewan School Assessment Act — Separate Schools — Taxes—Companies.

Section 93a of the School Assessment Act, R.S.S. c. 101, as added by 1912-13, c. 36, whereby in default of notice being given by a company under s. 93 for an apportionment of its school taxes after notice from a separate school board, such taxes shall be divided between the public and separate schools on the basis of the ratio of non-corporate assessments to each is within the legislative power of the Legislature.

Regina Public School v. Gratton Separate School and Regina, 18 D.L.R. 571, 7 S.L.R. 451, 6 W.W.R. 1088, 7 W.W.R. 7. [Reversed 21 D.L.R. 162, 50 Can. S.C.R. 589, 31 W.L.R. 82, 7 W.W.R. 1248, 8 W.W.R. 156, 29 W.L.R. 221, 399.]

Prohibition—Commission Dec. 21, 1918, under Public Inquiries Act—Commissioner not a court—Remedy of prohibition not available.

Appeal from judgment allowing the issue of a writ of prohibition against Clement, J. as Commissioner proceeding with the inquiry as to unlawful importations of liquor into British Columbia, and unlawful sales of liquor within the province under the Royal Commission dated Dec. 21, 1918, issued under the Public Inquiries Act, on the ground that the said commission was ultra vires. Held, that prohibition did not lie because the commissioner was in no way acting judicially; he was in no sense a court.

Re Clement and Public Inquiries Act, [1919] 3 W.W.R. 309, reversing [1919] 1 W.W.R. 372. For decision of British Columbia Court of Appeals as to the Constitutionality of the Act, and of the appointment of Mr. Justice Clement as Commissioner see 48 D.L.R. 237, [1919] 3 W.W.R. 115.

Wilful violation of provincial statute —Restriction of appeal.

The King v. McMurrer; McMurrer v. Jenkins, 18 Can. Cr. Cas. 385.

Sunday observance — Statutory permission to certain classes of dealers — Legislative authority — —Negativing criminal intent.

Attorney-General of Ontario v. Hamilton Street R. Co., [1913] A.C. 524, distinguished.

Kennedy v. Couillard, 17 Can. Cr. Cas. 239.

C. Validity; in general.

(§ I C—20)—Workmen's Compensation Act—Payment of compensation—Accident to sailors on ship in foreign waters—Constitutionality.

That part of the Workmen's Compensation Act (B.C.) (6 Geo. V., 1916, c. 77) which purports to warrant the payment of compensation to seamen or their dependents for accidents or death by accidents upon

ships in foreign waters is in no way ultra vires the provincial legislature. [Royal Bank v. The King, 9 D.L.R. 337, [1913] A.C. 283, distinguished.

Workmen's Compensation Board v. C.P.R. Co., 48 D.L.R. 218, [1920] A.C. 184, [1919] 3 W.W.R. 167, reversing 47 D.L.R. 487.]

INJURY TO WORKMAN—ACTION—REMEDY—WORKMEN'S COMPENSATION ACT, 6 GEO. V., 1916 (MAN.) CH. 125—DISMISSAL OF ACTION — APPEAL — CONSTITUTIONALITY OF ACT—B.N.A. ACT, SS. 96, 99, 100.

The enactment of legislation establishing a Workmen's Compensation Commission or Board is within the competence of a provincial legislature. But the provisions of such enactment in relation to the appointment and payment of the salary of the Board are ultra vires as they conflict with the powers reserved to the Dominion under ss. 96, 99, 100 of the B.N.A. Act.

Kowhanko v. Tremblay, 50 D.L.R. 578, [Reversed, 51 D.L.R. 174.]

ERROR—FRAUD—POWER OF COURT.

The court cannot annul an Act of the Legislature on the ground that it was obtained by error or fraud.

Prévost v. Montreal, 52 Que. S.C. 349.

MUNICIPAL CORPORATIONS—TAXATION—B.C. MUNICIPAL ACT, 1914, c. 52, s. 133—COUNCIL OF MUNICIPALITY PASSING BY-LAWS NOT TO COMPLETE WORK AUTHORIZED BY EARLIER BY-LAW—ASSESSMENT FOR WORK PARTIALLY COMPLETED—NO JURISDICTION EXCEPT UNDER S. 10, C. 45 OF 1916.

Council of defendant municipality in 1911 passed by-law no. 1147 authorizing certain street construction work. In Dec. 1915, the council under s. 133 of c. 52 of 1914 (Municipal Act), passed by-law no. 1868 reciting that said work had been carried out in part and that the council deemed it inadvisable to complete it, and enacted that an assessment be made on the lands benefited by the work so carried out in part, and submitted it to the Lieut. Governor in council for approval. In Sept. 1916, the council passed by-law no. 1925 which, reciting the steps previously taken, levied and fixed the assessment necessary to provide for the proportion of the costs of the work to be borne by the owners of the property immediately to be benefited and the city respectively, and such by-law received the sanction of the Lieut. Governor-in-council. In passing by-law no. 1925 the council proceeded under said s. 133. Section 10 of c. 45 of 1916 which became law May 31, 1916, says the council may provide under certain conditions that work undertaken and carried out in part shall not be completed, a condition being that if the special assessment roll with respect to the work undertaken has not been made and confirmed (and this had not been done in the case in question) the council may pass a by-law amending the by-law authorizing the construction of the work in so far as it related to the extent of such work. Held, the council had no jurisdiction to pass said by-law no. 1925. The original by-law no. 1147 should have been amended to effect the necessary substitution in accordance with said s. 10 of c. 45 of 1916, which confers the sole power of an assessment such as was attempted.

Mason v. Victoria, [1919] 1 W.W.R. 562.

(§ I C—25)—INVALID IN PART.

The provisions of the Extra Provincial Corporations Act, R.S.O. 1914, c. 179, except the latter part of s. 16 (1) are intra vires in so far as they apply to a company incorporated under the Dominion Companies Act, R.S.O. 1906, c. 79, for carrying on business in Ontario, and with its chief place of business in Ontario, such company is precluded from carrying out its objects and undertakings in Ontario until it becomes licensed; it is subject to the penalties prescribed in the Act for carrying on business, and is prohibited from holding lands for the purposes of its business without being licensed under the Act. That part of s. 16 which provides that so long as a company remains unlicensed it shall not be capable of maintaining any action or other proceeding in any court in Ontario in respect of any contract made in whole or in part within Ontario in the course of or in connection with business carried on contrary to the provisions of s. 7 is ultra vires. [John Deere Plow Co. v. Wharton, [1915] A.C. 330, 18 D.L.R. 353, distinguished.]

Currie v. Harris Litho. Co., 41 D.L.R. 227, 41 O.L.R. 475, reversing 40 O.L.R. 290.

ASSIGNMENTS ACT, S. 52 — PUNISHMENT FOR CONCEALING OR MAKING AWAY WITH PROPERTY, ULTRA VIRES—EXAMINATION OF ASSIGNOR AND PUNISHMENT FOR NON-ATTENDANCE, ETC., INTRA VIRES.

Section 52 of the Assignments Act, R.S.M. 1913, c. 12, in so far as it provides for punishment of the assignor for concealing or making away with property in order to defeat creditors is ultra vires of the provincial legislature. The Assignments Act is not bankruptcy legislation and does not trench upon Dominion rights. It is a wise provision against the disposition of property beyond the control of creditors and a protection generally against a preference to any favoured creditor. It is therefore a subject of property and civil rights within the province, and an examination of the assignor as provided for by the Act, and (under the B.N.A. Act, s. 92, subs. 15) the enforcement thereof by the imposition of punishment as provided for under said s. 52, is within the power of the provincial legislature.

Re Churchill, [1919] 2 W.W.R. 541.

G. LOCAL OR SPECIAL LEGISLATION.

(§ I G—75)—STRICT OR LIBERAL CONSTRUCTION.

The requirements of s. 16 of the Placer Mining Act, 1896, that every extension of a

grant of water for mining grounds leased must be recorded in the Record of Water Grants, imports, when read with s. 14, that no such extension can be effected except by express words.

Lightning Creek v. Hopp, 17 D.L.R. 641, 19 B.C.R. 586, 28 W.L.R. 110.

(§ I G—82)—Municipal Assessment Act —Immaterial omission.

The Municipal Assessment Act (R.S.M. 1913, c. 134) although in part adopted from the Ontario Act, differs from it in that it contemplates that resident and nonresident owners shall be put upon a practical equality; the omission of the assessor to insert the word "nonresident" in the column for names of owners as required by s. 20 of the Manitoba Act is a formal not a material matter, and when the address is inserted after the name the defect is cured by s. 63 of the Act. [Berlin v. Grange, 1 E. & A. 279, distinguished.]

Bifrost v. Houghton, 39 D.L.R. 650, 28 Man. L.R. 484, [1918] 1 W.W.R. 797.

(§ I G—86)—Roads, bridges and ferries.

Power granted under 43 Vict. (Man.) c. 36 to a company to "break up, dig, and trench so much and so many of the public streets, roads, squares, highways, and other public places in any municipality . . . as may at any time be necessary or required for laying down or erecting [or repairing] the mains, pipes or wires to conduct" gas or electricity, will permit the erection of poles therein to carry wires necessary for the conveyance of electricity.

Winnipeg Electric R. Co. v. Winnipeg, 4 D.L.R. 116, [1912] A.C. 355, 1 W.W.R. 964, reversing 20 Man. L.R. 337, 16 W.L.R. 62.

A clause in a general Act making it a condition precedent to the erection of electric light poles and wires, in a municipality, that the consent of the municipal council shall be first obtained and that the whole work incident to the erection of the poles shall be under the supervision of an appointee of the council, is not inconsistent with nor superseded by special provisions contained in the Act of incorporation of an electric light company conferring upon it the power to erect poles in a street, and to operate the business of the company and making the company responsible for damages caused in carrying on or maintaining their works.

Toronto & Niagara Power Co. v. North Toronto, 2 D.L.R. 120, 25 O.L.R. 475, 21 O.W.R. 175. [Reversed in 5 D.L.R. 43, [1912] A.C. 834, 14 Can. Ry. Cas. 392.]

II. Construction; operation; effect.

A. In general; use of words.

General and Special statutes, see Municipal Corporations, II C—105.

Ejusdem generis, see Master and Servant, V—340.

(§ II A—95)—Companies Act—Instruments—Signature.

Section 76 of table A of the Companies Act, R.S.B.C. 1911, c. 39, requires an instrument not only to be signed by two directors but also by a secretary who is not one of such directors, and the seal only becomes effective to bind the company when accompanied by compliance with such requirement. [Aggs v. Nicholson, 25 L.J. Ex. 348; City Bank v. Cheney, 15 U.C.Q.B. 400; Re Barneds Banking Co., L.R. 3 Ch. 105, distinguished.]

Re Land Registry Act, 28 D.L.R. 354, 22 B.C.R. 507, 34 W.L.R. 466.

King's Bench Act, Man.—Discretion as to costs.

No further power is conferred upon the judge by r. 952 of the King's Bench Act, (Man.), in regard to the disposition of the costs than was previously conferred by r. 934, which was the original rule conferring discretion as to costs and was taken from O. 65, r. 1, of the English Judicature Act; r. 952 is to be construed along with r. 934 and not as repealing or being substituted for the latter. [Shillinglaw v. Whillier, 19 Man. L.R. 149, distinguished.]

Gibson v. Snaith, 21 D.L.R. 716, 25 Man. L.R. 278, 8 W.W.R. 247.

Local Improvement Act — Amendment —Intention.

The amendment to the Local Improvement Act, R.S.O., 1914, c. 193, made by the statute 4 Geo. V. (Ont.), c. 21, s. 42, is intended to give dissentient land owners a remedy analagous to those given by counter-petition and by notice to the council, and provides an appeal from the discretion of the council in undertaking the work at all or in respect of some detail of the work such as the apportionment of the cost; but when the work has been executed in assumed conformity with the council's declared intention, an appeal does not lie to the Ontario Railway and Municipal Board to review the council's discretion.

Re Kemp and Toronto, 21 D.L.R. 833, 7 O.W.N. 704.

Grain Act—Application.

Section 218 of the Canada Grain Act (Can.) 1912, c. 27, applies only to transactions in which the buyer purchases grain in car lots irrespective of quantity; not to purchases of a definite quantity.

Tainter v. McKinnon, 39 D.L.R. 483, 13 A.L.R. 54, [1918] 1 W.W.R. 776.

Dog Tax and Sheep Protection Act — Right of claimant.

A claimant under the Dog Tax and Sheep Protection Act (R.S.O. 1914, c. 246) has a right of action to compel the council and valuer to comply with the provisions of the Act, as far as may be necessary to give effect to a valid claim; but has no right of action in the nature of an appeal against the determination of the council or the

valuation of the valuer. [Re Hogan v. Tudor, 34 O.L.R. 571, distinguished.]

Hogle v. Ernesttown, 41 D.L.R. 123, 41 O.L.R. 394.

MORTMAIN ACTS — DOMINION COMPANY — "HIS MAJESTY."

A Dominion company is subject to and bound to obey the statutes of the province as to mortmain. The words "of a statute for the time being in force" contained in s. 3 of the Mortmain and Charitable Uses Act, R.S.O. c. 103, apply only to a statute of the Province, and the words "His Majesty," where they first occur in the same section, mean His Majesty acting by the Lieutenant-Governor of the province, and where they occur the second time, mean His Majesty in right of the province. The Act is an Act of general application.

Currie v. Harris Lithographing Co., 41 D.L.R. 227, 41 O.L.R. 475, reversing 40 O.L.R. 290.

CALGARY CHARTER ACT—AMENDMENT—BY-LAW.

The Act to amend the Calgary Charter Act, 1917 (Alta.) c. 45, s. 19, which provides that a by-law to enforce the early closing of retail shops, shall, before coming into force, be submitted to the "electors" and carried by a "majority vote" of said electors requires that the by-law be carried by a majority of the electors actually voting, not of those entitled to vote. A special provision of the legislature in regard to the submission of a by-law to the electors, avoids the necessity for compliance with the general provisions relating to the same class of by-law.

Re Young and Glanvilles, 39 D.L.R. 629, 13 A.L.R. 265, [1918] 2 W.W.R. 352.

OBSCURE LANGUAGE IN ENACTING AGREEMENT—HOW REGARDED.

A section in an Act of the Legislature, enacted to confirm an agreement, which repeats some portion of the agreement in clumsy and obscure language, should be regarded rather as by way of identification than by way of conferring actual or independent rights.

Toronto v. Toronto R. Co. 29 D.L.R. 1, [1916] 2 A.C. 542, 37 O.L.R. 470, affirming 26 D.L.R. 581.

APPEAL—ARBITRATOR'S AWARD — QUESTION OF LAW OR FACT—WRITTEN NOTICE—RAILWAY ACT (CAN.).

An appeal from the arbitrators' award under s. 209 of the Railway Act, 1906, upon any question of law or fact, as distinguished from a motion to set aside an award, is too late if taken more than one month after the other party to the proceedings had served a writ and petition in appeal therefrom under the Quebec law, although no "written notice" had been given by any of the arbitrators of the making of the award.

Lachine, Jacques-Cartier, etc., R. Co. v. Kelly, 20 D.L.R. 587.

SUBDIVISON OF LAND—SALE OF LOTS—NO COMPACT PIECE—SEVERANCE OF ENTIRE BLOCK — DAMAGES — ARBITRATION — RAILWAY ACT (CAN.).

Where many of the lots in a registered subdivision have been sold and the remainder owned by the subdivided do not form a connected compact piece of land he may be treated as having himself made a severance of the entire block as shewn on the plan so as to disentitle him to damages for injurious affection of lots no part of which are taken for the railway in an arbitration under the Railway Act (Can.) in addition to compensation for entire lots taken, where there is no severance of any one lot. [Cowper-Essex v. Local Board, 14 A.C. 153, distinguished.]

C.N.R. Co. v. Holditch, 20 D.L.R. 557, 50 Can. S.C.R. 265, 19 Can. Ry. Cas. 112.

TECHNICAL COMPLIANCE — NO ONE PREJUDICED—MECHANICS' LIEN ACT (SASK.).

Technical compliance with the directions of the Mechanics' Lien Act (Sask.) may be excused where no one is prejudiced by the defects and there is a substantial compliance under s. 19. [Barrington v. Martin, 16 O.L.R. 635; Robock v. Peters, 15 Man. L.R. 124, applied.]

Manitoba Bridge and Iron Works v. Gillespie, 20 D.L.R. 524, 7 S.L.R. 208, 29 W.L.R. 394.

CREEK—MEANING OF—LOSES ITS IDENTITY WHEN—PLACER MINING ACT (YUKON) —INTERPRETATION.

After the stream of a creek has passed beyond the jaws of that creek, and entered the valley of another stream, it loses its identity as a "creek" within the meaning of the Placer Mining Act (Yukon), and becomes absorbed in the valley of the river or stream which it has entered.

Landreville v. Boulais, 20 D.L.R. 515, 29 W.L.R. 466.

MASTER AND SERVANT—DEMAND FOR WAGES —MAGISTRATE'S JURISDICTION — MASTER AND SERVANT ORDINANCE (ALTA.).

A previous demand for the wages is a condition precedent to the exercise of the magistrate's jurisdiction to award wages in a summary proceeding taken under the Master and Servants Ordinance, 1904 (Alta.).

Re Lawler and Edmonton, 20 D.L.R. 710, 7 W.W.R. 291, 29 W.L.R. 661, 7 A.L.R. 376.

NEWSPAPER ACT (MAN.), 1913, C. 143—REQUIREMENTS UNDER THE ACT.

Information as to both printer and publisher and the place of abode of each is required to be published in a newspaper under the Newspaper Act, R.S.M. 1913, c. 143. The statement in a newspaper of its address as the corner of named streets is not a sufficient compliance with the Newspaper Act, R.S.M. 1913, c. 143, unless the name of the city or town is also given; it is not to be left as a matter of inference.

Skryha v. Telegram Printing Co., 20 D.

L.R. 692, 7 W.W.R. 167, 24 Man. L.R. 725, 29 W.L.R. 505.

PLACER MINING ACT—ILLEGAL OR FRAUDULENT—MORTGAGEE—TITLE OF.

If the staking of a placer mining claim under the Yukon Placer Mining Act is illegal or fraudulent, the purchaser or mortgagee thereof takes no better title than that held by his grantor or mortgagor. An action to vacate the staking of a placer mining claim under the Yukon Placer Mining Act, and the grant issued thereunder by the Mining Recorder, may be maintained by a plaintiff who is an adverse claimant if brought with the consent of the Commissioner of the Yukon Territory, under s. 44 of that Act.

Landreville v. Boulais, 20 D.L.R. 515, 29 W.L.R. 466.

WAGES — AWARD IN ADDITION—DISMISSAL FOR CAUSE.

The right conferred under the Master and Servants Ordinance, 1904 (Alta.), as amended by 1911-12, c. 4, to award in addition to wages earned a sum in respect of the interval between the dismissal and the hearing of the complaint, applies to a case where the dismissal is sought to be justified on the ground of good and sufficient cause and not to a case where the dismissal was in pursuance of a legal right to dismiss without assigning cause.

Re Lawler and Edmonton, 20 D.L.R. 710, 7 A.L.R. 376, 29 W.L.R. 661, 7 W.W.R. 291.

CONSTRUCTION OF—EXCHEQUER COURT—ACTION IN—BOARD OF COMMISSIONERS—NEGLIGENCE—AUTHORITIES PROTECTION ACT, 1893.

Harbour Commissioners of Montreal v. Sydney, Cape Breton & Montreal S.S. Co., 20 D.L.R. 990, 49 Can. S.C.R. 627, affirming 20 D.L.R. 828, which reversed 11 D.L.R. 814.

CONSTRUCTION OF—EXCHEQUER COURT—ACTION IN—BOARD OF COMMISSIONERS—NEGLIGENCE—AUTHORITIES PROTECTION ACT, 1893.

The six months' prescription imposed by the Public Authorities Protection Act, 1893 (Imp.) 56 & 57 Vict. c. 61, does not apply to an action in the Exchequer Court of Canada against a board of harbour commissioners for alleged negligence resulting in injury to a ship.

Sydney, C.B. etc., S.S. Co. v. H. C. of Montreal, 20 D.L.R. 828, 15 Can. Ex. 1, reversing 11 D.L.R. 814. [Affirmed in 20 D. L.R. 990, 49 Can. S.C.R. 627.]

"HEREINAFTER"—"HEREINBEFORE."

In order to give effect to the obvious intent of a statute (the Workmen's Compensation Act, R.S.B.C. 1911, c. 244, s. 9), the word "hereinafter" may be read as "hereinbefore."

Morris v. Structural Steel Co., 35 D.L.R. 739, 24 B.C.R. 59, [1917] 2 W.W.R. 749.

SETTING OUT AGREEMENT.

An agreement set out in a schedule to a statute has the same effect as if it were a clause in the statute.

Canadian Northern Pacific R. Co. v. New Westminster, 36 D.L.R. 505, [1917] A.C. 602, affirming 25 D.L.R. 28, 22 B.C.R. 247, 32 W.L.R. 779, 9 W.W.R. 425.

The articles of the Quebec Code of Civil Procedure being derived from the English law, the terms and expressions used therein are to be interpreted according to English practice and jurisprudence.

Feigleman v. Montreal Street R. Co., 3 D.L.R. 125. [Reversed, on another point, 7 D.L.R. 6, 19 Rev. Leg. 451, 22 Que. K.B. 102.]

JUDGMENT CREDITOR — TRUST DEED FILED WITH REGISTRAR OF JOINT STOCK COMPANIES—LAND REGISTRY ACT, R.S.B.C. 1911, c. 127.

Gregory v. Princeton Collieries; Re Execution Act, 40 D.L.R. 739, 25 B.C.R. 180, [1918] 1 W.W.R. 265.

PUBLIC OR PRIVATE STATUTES.

A statute which has not been declared to be a private Act is a public Act; however, if it only concerns a locality on the private rights of a group of individuals, it is not general and cannot affect the rights of third persons who are not specially named. The application of a statute should be kept within the limits of the objects which it embraces and for which it is enacted.

Dutremblay v. Lanouette, 53 Que. S.C. 6.

WAR RELIEF ACT—APPLICATION UNDER S. 13 MADE AFTER ORDER FOR SUBSTITUTIONAL SERVICE — MAY BE INVOKED AT ANY STAGE—B. C. STATS. 1917, C. 74, S. 9.

Section 13 of the War Relief Act, B.C. 1916, c. 74, as enacted by B.C., 1917, c. 74, s. 9, may be invoked in an action at any stage of the proceedings.

McLennan v. Colpitts, 25 B.C.R. 459.

Applicant, a Hindu, came to British Columbia in January, 1910, not by continuous voyage from his own country, and was admitted as a tourist, in which capacity he traveled in Canada, reaching British Columbia again in October following. The law governing immigration had been changed in the meantime, and he was held under the new law for deportation, but without any inquiry being held as to his status as provided by the amended law:—It was held, that the Act was not retrospective in this regard and did not apply and as the old Act contained no provision for the deportation of such a person, he could not be deported thereunder.

Re Rahim, 16 B.C.R. 469, 471.

CRIMINAL LAW—ASSENT OF ATTORNEY-GENERAL TO PROSECUTION — INSUFFICENCY OF FORM—PROHIBITION.

The assent of the Attorney-General to the prosecution of one as a member of an unlawful association under order in council, Sept. 28, 1918 (P.C. 2384) in form as given held insufficient and writ of prohibition directed.

R. v. Seto Kin Kui, [1919] 3 W.W.R. 318.

THE RAILWAY ACT, SS. 300-305—APPOINTMENT OF RAILWAY CONSTABLES—AUTHORITY THROUGHOUT DOMINION.

Constables appointed under s. 300 of the Railway Act 1906, have, under s. 301, authority throughout the Dominion wherever the Dominion railway runs, within the prescribed limit of distance from the railway. R. v. O'Brien, [1919] 3 W.W.R. 469.

COURTS—SMALL DEBTS RECOVERY ACT—APPEAL—INTERPRETATION OF PROVISIONS OF ACT.

Sections 37 to 44 of the Small Debts Recovery Act cover everything necessary in procedure on appeal under said Act. Section 750 (c) of the Criminal Code as to deposit with the justice of the amount adjudged to be paid has no application. The only evidence which can be adduced on the appeal is the certified copy of the evidence taken by the justice below.

Griffith v. Fleck, [1919] 2 W.W.R. 56.

HAWKERS AND PEDLERS—TAKING CONTRACT FOR AND INSTALLING LIGHTNING RODS.

A person going around with a helper and the necessary supplies and tools and procuring a contract for and installing a lightning rod system, the work of installation being a very essential part of the contract, is not a hawker or pedler under c. 37 of 1912 (Sask.), as amended in 1917. R. ex rel Van Corder v. Standall, [1919] 2 W.W.R. 632.

INTERPRETATION OF STATUTES — SPECIAL WAR REVENUE ACT 5 GEO. V. C. 8—VICARIOUS RESPONSIBILITY OF MASTER FOR OFFENCE COMMITTED BY SERVANT IN DISREGARD OF INSTRUCTIONS.

Minister of Inland Revenue v. Huot, 25 Rev. de Jur. 119.

ENQUIRY INTO PROFESSIONAL MISCONDUCT—ONTARIO MEDICAL ACT.

Re Stinson & Medical Council, 18 Can. Cr. Cas. 396; also reported sub nom. Re Stinson and College of Physicians, 22 O. L.R. 627.

DOMINION LANDS ACT. (R.S.C. 1886, C. 54) —ROADS ALLOWANCES—NORTHWEST IRRIGATION ACT—AUTHORITY TO INTERSECT ROAD ALLOWANCES WITH CANALS —OBLIGATION TO BUILD BRIDGES AT POINTS OF INTERSECTION.

The King v. Alberta R. and Irrigation Co., [1912] A.C. 827, reversing 44 Can. S.C.R. 505.

(§ II A—96)—PUBLIC INQUIRIES ACT—INTENT—"GOOD GOVERNMENT"—"ADMINISTRATION OF JUSTICE IN THE PROVINCE"—B.N.A. ACT—CRIMINAL LAW—JURISDICTION OF PROVINCE.

The expression "good government," as used in the Public Inquiries Act (R.C.B.C. c. 110) as amended by c. 30, 1917, is not to be taken in the wide sense which such expression bears in the B.N.A. Act in relation to the powers of the Dominion, but rather to the exercise of the executive and ministerial functions and to the management and conduct of official business, within the scope of the power given to the Province by s. 92 (16) of the B.N.A. Act, to legislate in respect of merely local matters within the Province. By the expression "administration of justice in the Province" in the Act 1917, c. 30 (3), it must be assumed that the legislature did not intend to include any matter not included in the phrase as used in the B.N.A. Act. By the B.N.A. Act, s. 91 (27) the criminal law, including the procedure in criminal matters, is assigned to the Dominion. Such a commission in so far as it is created for the purpose of inquiring into punishable violations of law, and ascertaining the malefactors with a view to prosecution, is also in violation of Imperial statutes 16 Chas. I., c. 10, and of 42 Edw. III., c. 3, which statutes are still in force in Canada and the provinces except so far as altered by a competent legislature.

Re Gartshore; R. v. Clement, 44 D.L.R. 623, 30 Can. Cr. Cas. 309 [1919] 1 W.W.R. 372. [Reversed in 48 D.L.R. 237, [1919] 3 W.W.R. 115.]

EMPLOYERS' LIABILITY ACT — LEGISLATIVE INTENT.

A statute such as an Employers' Liability Act should not, upon any assumption or presumption of mistake or omission on the part of the legislature in the expression of its intention, be treated as extinguishing rights of action which it does not expressly or by necessary implication abrogate. [Commissioners v. Pemsel, [1891] A.C. 531, 549; Cowper Essex v. Acton Local Board, 14 A.C. 153, 169, applied.]

Lamontagne v. Quebec R., L., H. & P. Co., 22 D.L.R. 222, 50 Can. S.C.R. 423.

PROVINCIAL AND DOMINION STATUTES—CONFLICT.

When a given field of legislation is within the competence both of the Parliment of Canada and of the Provincial Legislature, and both have legislated, the enactment of the Dominion must prevail over that of the province where the two are in conflict.

R. v. Thorburn, 39 D.L.R. 300, 41 O.L.R. 39, 29 Can. Cr. Cas. 329.

LIQUOR ACT—REPEAL—EFFECT.

The repeal of s. 40 of the Liquor Act (Alta.) as it stood in 1917 and the substitution of the new s. 40 of 1918 has the effect of confining within the new section a conviction against s. 23 before the defendant can be charged with having committed a second offence.

R. v. Fox, 42 D.L.R. 650, 13 A.L.R. 535, [1918] 3 W.W.R. 197, 30 Can. Cr. Cas. 232.

SUPREME COURT ACT—AMENDMENT.

The amendment of the Supreme Court Act of 1915 was intended to ameliorate the position of a defendant against whom a judgment is recovered. The amendment does not give the court power to commit a

debtor for contempt of court in not obeying an order for the payment of money by instalments in cases not provided for by ss. 15, 19 of the Arrest and Imprisonment for Debt Act (R.S.B.C. 1911, c. 12).

Royal Bank v. McLennan, 41 D.L.R. 27, [1918] 2 W.W.R. 225, 25 B.C.R. 183.

OPIUM AND DRUG ACT—VALIDITY OF CONVICTIONS UNDER.

The Opium and Drug Act, Geo. V. 1911 (Can.), c. 17, s. 3, contemplates that a penalty shall be imposed on each person offending, not that each offence shall be punished; a conviction against two or more persons jointly and a joint order to pay a fine are therefore invalid and will be quashed.

The King v. James, 39 D.L.R. 377, 29 Can. Cr. Cas. 204, 52 N.S.R. 244.

The language of the Railway Act, 1906, expresses an intention to preserve intact all powers conferred by previous special Acts of incorporation upon companies within its scope, except where otherwise specifically mentioned. Section 248 of the Act, shews that, where Parliment intended by that Act to interfere with the powers of companies other than railway companies, it has done so by special provision.

Toronto & Niagara Power Co. v. North Toronto, 5 D.L.R. 43, 28 T.L.R 563, [1912] A.C. 834, 14 Can. Ry. Cas. 392, 23 O.W.R. 85.

In an action on a promissory note which, but for part payment, would be barred by the Statute of Limitations, where a legislature re-enacts that portion of the English statute of 21 James I. which places a time limitation upon actions for simple contracts, without making any reference to established judicial interpretations of that statute, and without embodying them in the Legislative Act itself; it will be presumed that the legislature must have intended those judicial interpretations to be applied.

Sawyer-Massey Co. v. Weder, 6 D.L.R. 305, 5 A.L.R. 362, 22 W.L.R. 150, 2 W.W.R. 965.

LATER STATUTE TO CONTROL—ACTS OF SAME SESSION—REPUGNANCY.

If there be a repugnancy between two statutes passed at the same session of the legislature, the later statute will prevail, and where there is no other mode of distinction as to date, the chapter of the annual statutes bearing the higher number may be presumed to be later in date. [R. v. Justices of Middlesex, 2 B. & Ad. 818, approved.]

B.C. Electric R. Co. v. Stewart, 14 D.L.R. 8, [1913] A.C. 816, 109 L.T. 771, 25 W.L.R. 227, 5 W.W.R. 25.

REFERENCE TO SUBSEQUENT ACT.

A subsequent statute dealing with the same subject matter may be looked at and referred to in aid of the construction of the former Act.

Att'y-Gen'l of Canada v. Sydney, 9 D.L.R. 282, 46 N.S.R. 527, 12 E.L.R. 427.

STATUTE OF FRAUDS AMENDMENT ACT—CONSTRUCTION—APPLICATION.

Section 6 of the Statute of Frauds Amendment Act (1828) applies to fraudulent misrepresentation only. It does not apply in an action where damages are claimed for negligence and breach of duty in giving advice as to an investment in the course of business, where no fraud is charged.

Banbury v. Bank of Montreal, 44 D.L.R. 234, [1918] A.C. 626.

LEGISLATIVE INTENT.

Violence must not be done to the express language of a statute in order to comply with a view entertained as to the intention of the legislature which enacted it.

Drewry v. Drewry, 30 D.L.R. 581, [1916] 2 A.C. 631, [1917] 1 W.W.R. 266, reversing 27 D.L.R. 716, 34 W.L.R. 103, 33 W.L.R. 73, 423.

INTENTION OF LEGISLATURE — DUTY OF COURT.

The rule by which the courts are to be guided in construing Acts of Parliament is to look at the precise words, and to construe them in their ordinary sense, unless it would lead to any absurdity or manifest injustice, and if it should, so to vary and modify them as to avoid that which certainly could not have been the intention of the legislature. Where the legislature has used in the enactment in question language so free from ambiguity and so clear and explicit as to leave no doubt as to its meaning, the court must construe the enactment according to its expressed intention. Held, that under the Act respecting public streets in the city of Saint John (1917, 8 Geo. V. c. 48, N.B.) the city had jurisdiction to pass a by-law forbidding the construction or maintenance of any surface opening in any sidewalk or the use for vaults, . . . of the space beneath the sidewalks . . . unless a permit was first obtained, and vesting the land under the sidewalks in the corporation, notwithstanding that the Act deprived the owner of land vested in it before the passing of the Act.

The King v. Bank of Montreal, 49 D.L.R. 288.

VANCOUVER INCORPORATION ACT — "JUDGE OF THE SUPREME COURT"—JUDGE ACTING AS "PERSONA DESIGNATA."

Section 127 of the Vancouver Incorporation Act, 1900, provides that any person interested may apply to "any judge of the Supreme Court," and on production of certain specified evidence the judge, "after at least 10 days' service on the corporation of a rule to shew cause," may quash the by-law for illegality. On an application under this section a judge acts persona designata and not judicially.

Re Vancouver Incorporation Act, 1900;

Chandler v. Vancouver, 45 D.L.R. 121, [1919] 1 W.W.R. 605.

CHINESE IMMIGRATION ACT—CONSTRUCTION OF—ORIGINAL ENTRY—DEPARTURE FROM CANADA FOR SHORT PERIOD—RE-ENTRY.

Section 27 (a) of the Chinese Immigration Act, R.S.C. 1906, c. 95, as amended by 7 & 8 Edw. VII. c. 14, s. 6, has relation to the original act of landing. A Chinaman who has regularly landed and paid the tax and been granted the certificate to which he is entitled is not liable under the provisions for re-entry (ss. 20 & 21, c. 95) for an isolated and, perhaps inadvertent, act of departure from Canada for a short time, without giving notice thereof.

R. v. Fong Soon, 45 D.L.R. 78, 31 Can. Cr. Cas. 78, [1919] 1 W.W.R. 486.

CONSTRUCTION OF STATUTES—SPECIAL SURVEY ACT (MAN.).

Peterson v. Bitulithic & Contracting Co., 12 D.L.R. 444, 23 Man. L.R. 136, at 147, 24 W.L.R. 19, 4 W.W.R. 223, reversing 7 D.L.R. 586, 22 W.L.R. 398, 3 W.W.R. 377.

AMBIGUITY—ENCROACHMENT ON PREVIOUS RIGHT.

Gundy v. Johnston, 12 D.L.R. 71, 28 O.L.R. 121, affirming in part, 7 D.L.R. 300.

POWER OF COURTS TO QUESTION THE REASONABLENESS OF THE ENACTMENT.

Kerley v. London & Lake Erie R. and Transportation Co., 13 D.L.R. 365, 28 O.L.R. 606, reversing 6 D.L.R. 189.

RAILWAY COMMISSION—JURISDICTION—OCCUPATION OF LANDS BY RAILWAY.

Jurisdiction is not conferred on the Railway Board under the Railway Act, 1906, s. 176, to authorize a railway operated under Dominion law to use or occupy lands which at the time of the application for the approval and of the approval of the location of the Dominion railway had become the property of a railway operated under provincial law.

Montreal Tramways Co. v. Lachine, Jacques-Cartier, etc., R. Co., 20 D.L.R. 854, 50 Can. S.C.R. 84, 18 Can. Ry. Cas. 122.

LANDLORD AND TENANT—STATUTE 8 ANNE, C. 14, S. 1—REASON FOR PASSING—PROTECTION OF LANDLORD—CREDITORS—COLLUSION OF—JUDGMENT—BY LANDLORD—EFFECT OF.

The statute 8 Anne, c. 14, s. 1, was passed to protect the landlord against frauds which might be committed by his tenants, particularly by those colluding with creditors to issue writs of execution; it contemplates only executions issued by third parties, and does not entitle the landlord to a preference in respect of rent for which he himself had taken judgment and issued the execution under which the fund in question in the sheriff's hands was realized. [Taylor v. Lanyon, 5 Bing. 224, followed.]

Douglas v. Carrington, 20 D.L.R. 919; 7 S.L.R. 80, 29 W.L.R. 90, 7 W.W.R. 59.

ACTION AGAINST HEIRS OF DECEASED PERSON—PLEAS—EXCEPTION TO FORM—QUE. C.P. 135, 606.

Article 135, C.C.P., was introduced into the Code of Procedure to give the creditors of an estate a prompt and easy way of summoning before the courts the heirs, whoever they may be, known or unknown, of that estate. That article gives a right of action which is more of the nature of an action ad rem rather than in personam; therefore such an action is not taken against a particular heir, but against the assets of the estate, as provided for in C.C.P. 606. Those assets are often, during the delays of acceptation, in danger of disappearing, or in some similar danger, and the legislature wished to give to the creditors the benefit of an immediate seizure. From that indetermination, and from the particular character of the action resulting therefrom, it follows that the person receiving the summons can set up only two pleas, viz.:—his lack of right to inherit, or that the claim is ill-founded. But, as no personal judgment can be pronounced against him, he cannot plead to the form, since the attacked proceeding cannot cause him any prejudice.

Bank of Montreal v. Crete Heirs, 16 Que. P.R. 376.

GENERAL WORDS.

The general language of the City Act, 1915, (Sask.), c. 16, s. 204, as to licensing businesses and callings is to be read as subject to the specific legislation controlling the practice of law contained in the Legal Profession Act, R.S.S. 1909, c. 104, and to exclude any power by the municipality to impose an annual license fee upon practising barristers and solicitors; a summary conviction of a barrister for nonpayment of a business license tax in respect of his office premises was therefore quashed.

R. v. Macdonald, 28 Can. Cr. Cas. 311, 33 D.L.R. 770, 10 S.L.R. 138, [1917] 2 W.W.R. 269.

When there is an evident conflict between the spirit and the letter of the law, the courts, by logical interpretation, will endeavour to give effect to the intention of the legislature by making it prevail over the text incompatible with the object of the law.

Bouchard v. Jailer of Three Rivers, 52 Que. S.C. 456.

(§ II A—97) — INCONSISTENT DEPARTMENTAL RULES—LICENSE TO CUT STANDING TIMBER.

Any regulation or contract whereby the Crown binds itself to grant a license to cut timber on Indian lands from year to year, practically in perpetuity, is ultra vires, as being contrary to the terms of R.S.C. 1886, c. 43, and the later revision R.S.C. 1906, c. 81, since the lands in question are held by the Crown in trust for the Indians and the only right conferred by the statute is the granting of a license for one year.

Booth v. The King, 10 D.L.R. 371, 14

Can. Ex. 115, 12 E.L.R. 144. [Affirmed, 21 D.L.R. 558, 51 Can. S.C.R. 20.]

(§ II A—98)—Giving effect to entire statute.

Statutes are to be construed in accordance with the ordinary rules of the common law and are not presumed to make any alteration therefrom further than what the statute itself expressly declares: hence the Workmen's Compensation Act must be read together with C.C. (Que.) arts. 1053, 1054, which lay down the general rules as to responsibility.

Houle v. Asbestos and Asbestic Co., 3 D.L.R. 466, 42 Que. S.C. 176.

Municipal ordinance (Alta.) — Construction of.

The purport of s. 87 of the Municipal Ordinance (Alta.) is referable to the actual physical condition of the traveled roadbed and while a town could, no doubt, under s. 85, erect street lights, as the words used in s. 87 except the general word "works" all refer to the actual roadbed, the word "works" itself should also be confined to things done in the way of improving that roadbed, as distinguished from anything done to furnish better lights thereon, which form only an incidental feature of the system erected as a commercial undertaking by the town not in exercise of its governmental functions but in its capacity as a quasi private corporation, under powers given it in its incorporating ordinance (see Ord. 43 of 1901).

Salt v. Cardston, 46 D.L.R. 179, [1919] 1 W.W.R. 891.

In deciding a question of statutory construction, a court of justice is not entitled to speculate as to which of two conflicting policies was intended to prevail, but must confine itself to the construction of the language of the relevant statutes taken as a whole.

Toronto & Niagara Power Co. v. North Toronto, 5 D.L.R. 43, 23 O.W.R. 85, [1912] A.C. 834, 14 Can. Ry. Cas. 392.

Giving effect to entire statute.

Although the language of s. 193 of the Ontario Railway Act, 1906 (now R.S.O. 1914, c. 185), is wide enough to embrace all street railways, tramways, and electric railways situate within the province, it must be read with ss. 3, 5, as based upon s. 79 of 4 Edw. VII. c. 10, and by virtue thereof applies only to railways subject as such to provincial jurisdiction.

Kerley v. London & Lake Erie Ry. & Transportation Co., 13 D.L.R. 365, 28 O.L.R. 606, 15 Can. Ry. Cas. 337, reversing 6 D.L.R. 189, 14 Can. Ry. Cas. 111, 22 O.W.R. 646, 26 O.L.R. 588.

Looking to its entirety.

To interpret a statute the effects which result from the whole of its provisions should be considered whatever may be the expressions used, unless the latter are not very clear.

Association of Architects v. Paradis, 48 Que. S.C. 220.

(§ II A—100)—Ambiguity—Reasonableness.

Upon a question of construction of certain words in a statute, if the words in themselves are susceptible of either of two meanings, the court will adopt the more reasonable construction.

R. v. Ley, 7 D.L.R. 764, 20 Can. Cr. Cas. 170, 2 W.W.R. 849.

(§ II A—101) — Penalty for infraction under both federal and provincial law.

Where an act which is not an offence, at common law is the subject of a distinct, absolute prohibition by provincial statute on public grounds, the offence so created is one for the wilful commission of which an indictment will lie under Cr. Code, s. 164, where no other mode of punishment is expressly provided by law.

R. v. Durocher, 9 D.L.R. 627, 28 O.L.R. 499, 24 O.W.R. 140. [Affirmed, 13 D.L.R. 243, 28 O.L.R. 499, 21 Can. Cr. Cas. 382.]

Exception to a rule—Pari materia.

When a statute creates an exception to a rule for a special case, this exception cannot be extended to another case even one in pari materia.

Cedars Rapids Mfg. & Power Co. v. Lacoste, 24 Que. K.B. 207.

(§ II A—103) — Contemporaneous and practical construction.

The rule as to giving to the words of a statute their plain and ordinary meaning, when applied with due regard to the law existing in Canada at the time of the passing of the B. N. A. Act, gives to the words "solemnization of marriage" as contained in subjects which a provincial legislature has jurisdiction under subs. 12 of s. 92, of the Act, an effect in the nature of a limitation upon the words "marriage and divorce" as contained in subs. 26, s. 91, of the Act as regards the constitutional power of the Parliament of Canada to legislate upon the subject of marriage. The words, "the solemnization of marriage in the province" as used in subs. 12, s. 92, of the B.N.A. Act, prima facie, import all that was ordinarily meant by solemnization in the systems of law in force in the various provinces of Canada at the time of the passing of the Act, including conditions which affect the validity of the marriage.

Re Marriage Law of Canada, 7 D.L.R. 629, 11 E.L.R. 255, [1912] A.C. 880.

(§ II A—104)—Meaning of words—Mandatory or directory.

In s. 20 of the Motor Vehicle Act, 2-3 Geo. V. (Alta.) c. 6, the expression "greater speed than one mile in four minutes" means any speed for any distance less than a mile which if continued would result in a full mile being covered in less than four

minutes, the word "speed" as therein used meaning rate of motion, and the words "one mile in 4 minutes" simply supplying the measure of the same.

R. v. Ley, 7 D.L.R. 764, 20 Can. Cr. Cas. 170, 2 W.W.R. 849.

"MAY."

The infliction of the penalty provided in s. 3 of c. 34 of Con. Ord. N.W.T., 1898, to the effect that if greater or other than statutory costs be taken by the person making a distress, the court "may" order such person to pay the party aggrieved treble the amount of moneys taken in excess, is permissive only.

McHugh v. Union Bank, 10 D.L.R. 562, 23 W.L.R. 409, [1913] A.C. 299, 3 W.W.R. 1052.

BILLS OF SALE ORDINANCE (N.W.T. CON. ORD. C. 43)—"CREDITORS"—MEANING OF AS USED IN ORDINANCE.

The word "creditors," as used in s. 17 of the Bills of Sale Ordinance (N.W.T. Con. Ord. c. 43), means all the creditors of the mortgagor and not merely the execution creditors. [Security Trust Co. v. Stewart, 39 D.L.R. 518, overruled.]

G.T.P.R. Co. v. Dearborn, 47 D.L.R. 27, 58 Can. S.C.R. 315, [1919] 1 W.W.R. 1005.

MUNICIPAL ACT (B.C.)—IMPERATIVE AND DIRECTORY CLAUSES—INTERPRETATION.

The provision of s. 53 (176) par. 2, R.S. B.C. 1911, c. 170 (the Municipal Act), requiring every by-law passed under the provisions of the subsection, before coming into effect, to be published in the "Gazette," etc., is not complied with by publishing merely a notice of such by-law, and stating that it is on file and may be inspected at the office of the clerk of the Municipal Council. [Victoria v. Mackay, 41 D.L.R. 498, followed.]

Att'y-Gen'l of B.C. v. Bailey, 44 D.L.R. 338, [1919] 1 W.W.R. 191.

MANDATORY OR DISCRETIONARY.

Quebec, Montreal & Southern R. Co. v. The King, 20 D.L.R. 987, 15 Can. Ex. 237.

LAND TITLES ACT (ALTA.)—MEANING OF WORD "LAND."

The word "land" in par. (a) of s. 2 of the Land Titles Act (Alta.), includes any interest in land.

Setter v. The Registrar, 20 D.L.R. 166, 7 W.W.R. 901, 8 A.L.R. 191, 30 W.L.R. 256.

LAND TITLES ACT (ALTA.)—MEANING OF WORDS "AFTER A CERTIFICATE OF TITLE HAS BEEN GRANTED THEREFOR."

The words "after a certificate of title has been granted therefor," in s. 105 of the Land Titles Act (Alta.), mean "after land has been brought under the Act."

Setter v. The Registrar, 20 D.L.R. 166, 7 W.W.R. 901, 8 A.L.R. 191, 30 W.L.R. 256, disapproving on this point, 18 D.L.R. 789.

MUNICIPAL CLAUSES ACT—IMPERATIVE AND DIRECTORY CLAUSES.

Subsection 142 of s. 50 of the Municipal Clauses Act of British Columbia (c. 32 B.C. 1906), which provides that "every by-law . . . shall before coming into effect be published in the "British Columbia Gazette," and in some newspaper published in the municipality," is imperative and not merely directory; publication is a necessary condition to the validity of the by-law.

Victoria v. Mackay, 41 D.L.R. 498, 56 Can. S.C.R. 524, [1918] 2 W.W.R. 610, reversing 39 D.L.R. 450, [1918] 1 W.W.R. 863, 25 B.C.R. 23, [1918] 1 W.W.R. 863.

DIVISION COURTS ACT—SUM IN DISPUTE.

The words "sum in dispute" in s. 125 of the Division Courts Act, R.S.O. 1914, c. 63, mean "sum in dispute in the action"—"the sum sought to be recovered" mentioned in s. 106.

Marshall v. Holliday, 43 D.L.R. 245, 42 O.L.R. 597.

CONSTRUCTION—COAL AND PETROLEUM ACT, S. 3—APPLICATION FOR PROSPECTING LICENSE—DISCRETION OF MINISTER—NO APPEAL.

Under s. 3 of the Coal and Petroleum Act, R.S.B.C. 1911, c. 159, there is no appeal from the discretion of the Minister of Lands in granting or refusing a prospecting license; the intention of the legislature having been clearly indicated by the substitution of "may" for "shall" in the amendment made by c. 33 of 1910.

Re Coal and Petroleum Act; Johnston v. Minister of Lands, [1919] 3 W.W.R. 81.

RULES OF COURT.

Crown rules made under Cr. Code, s. 576, have the same effect as though embodied in the Code, and are to be so construed.

R. v. Dean, 37 D.L.R. 511, 28 Can. Cr. Cas. 212, [1917] 2 W.W.R. 943.

DEFINITION OF WORDS.

The definition of a word in one Act may be used as explanatory of or ancillary to the definition of that word in another Act.

Coleman v. Head Syndicate, 11 A.L.R. 314, [1917] 1 W.W.R. 1074.

DOMINION AND PROVINCIAL STATUTES.

When a Dominion Act declares that it will not affect the provincial Acts in force on the same subject, it will similarly not affect those which may be subsequently adopted upon the same subject by the provincial legislature.

Caldwell v. Staughnessy, 51 Que. S.C. 146.

(§ II A—105)—"OR OTHER SAWN LUMBER"—EJUSDEM GENERIS RULE.

The words "or other sawn lumber" following the expression "boards, deal, joists, lath, shingles" in the B.C. Forest Act, 1912, s. 100, are limited in their application by the "ejusdem generis" rule of construction, and the sawn product to which the general words apply must fall within the same class as the particular products to which reference is made.

Excelsior Lumber Co. v. Ross, 16 D.L.R. 593, 6 W.W.R. 367, 27 W.L.R. 467, 19 B.C. R. 289, affirming 13 D.L.R. 740.

EJUSDEM GENERIS — SPECIFIC WORDS OF SAME NATURE—QUEBEC LICENSE LAW.

A general word which follows particular and specific words of the same nature as itself takes it meaning from them and is presumed to be restricted to the same genus as those words; so in s. 1292 (a) added in 1915 to the Quebec License Law, R.S.Q. 1909, the requirements of a license fee for any "travelling troupe or organization exhibiting trained animals, or acrobatic feats, or curios and freaks or giving concerts and minstrel shows or any other similar shows" is to be interpreted, both as to the word "concerts" and the term "other similar shows," by reference to the class of show specifically mentioned and as not applying to high-class entertainments given by artists distinguished in their profession.

Collector of Revenue v. Paquet, 25 Can. Cr. Cas. 83.

EJUSDEM GENERIS RULE OF CONSTRUCTION—LEGISLATIVE INTENTION.

The King v. Barber Asphalt Paving Co., 18 Can. Cr. Cas. 261, 23 O.L.R. 372, 2 O.W.N. 819, 18 O.W.R. 778.

(§ II A—106)—PUNCTUATION.

Punctuation in a statute does not follow settled rules and does not, therefore, change the usual sense of the words used nor affect what results from the context and from a comparison of the French and English versions. In the expression "lands vacant, and used for purposes of agriculture," the comma does not enlarge the copulative value of the conjunction "and" nor introduce the disjunctive sense of two kinds of land.

Jacques-Cartier Park Co. v. Quebec, 43 Que. S.C. 508.

(§ II A—107)—EFFECT OF MARGINAL HEADINGS.

The marginal notes to the sections of a statute are not to be looked at to limit the plain meaning of the text.

R. v. Battista, 9 D.L.R. 138, 21 Can. Cr. Cas. 1.

RECURRING PHRASES IN SAME STATUTE.

In the interpretation of the Criminal Code, where the same words occur in different sections, they should be given the same meaning unless a contrary intention appears.

R. v. Romer; R. v. Johnson; R. v. Farrell, 23 Can. Cr. Cas. 235.

B. STRICT OR LIBERAL CONSTRUCTION.

(§ II B—110)—IMPERATIVE WORDS — "APPEALS SHALL BE DETERMINED."

The provision of subs. 7, s. 204, of the Village Act, R.S.S. 1909, c. 86, that "all appeals shall be determined before the 30th day of September," is imperative, and the judge has no jurisdiction to hear the appeals or give his judgment after the date so fixed. [Re Nottawasaga & Simcoe, 4 O.L.R. 1, applied.]

Fares v. Rush Lake, 28 D.L.R. 539, 9 S.L.R. 115, 33 W.L.R. 978, 10 W.W.R. 13.

Subsection 5 of s. 3 of the Workmen's Compensation for Injuries Act, R.S.O. 1897, c. 160, making the employer liable where the injury is caused "by reason of the negligence of any person in the service of the employer who has the charge or control of any points, signal, locomotive, engine, machine or train upon any railway, tramway or street railway," should receive a liberal construction in the interests of the workman.

Martin v. G.T.R. Co., 8 D.L.R. 590, 27 O.L.R. 165, 15 Can. Ry. Cas. 1.

If the liability expressly imposed upon the "employer" or "undertaker" by the Workmen's Compensation Act, 2 Edw. VII. (B.C.) c. 74, now R.S.B.C. 1911, c. 244, for injury to a workman by accident arising out of and in the course of employment is to be cut down at all, or if the "employer" or "undertaker" is to be relieved from it to any extent, this must be done either by some statutory provision express or implied, and not by any conjecture as to the policy of the Act which its language does not suggest, even where that conjecture may be that the purpose of the Act in question is a shifting from the province to the employer as a quasi duty to provide for the destitute.

Krzus v. Crow's Nest Pass Coal Co., 8 D.L.R. 264, [1912] A.C. 590, 2 W.W.R. 726.

STRICT CONSTRUCTION — LEGISLATION EXTENDING CLASSES OF PROPERTY SUBJECT TO EXECUTION.

Clarkson v. Wishart, 13 D.L.R. 730, 24 O.W.R. 937, [1913] A.C. 828, reversing 6 D.L.R. 579, 27 O.L.R. 70, 22 O.W.R. 901.

CONSTRUCTION — CROWN COSTS ACT, S. 2 — SUMMARY CONVICTIONS ACT, S. 80 — NO COSTS ON APPEAL IN FAVOUR OF OR AGAINST CROWN.

Section 80 of the Summary Convictions Act providing that upon any appeal the court to which the appeal is made "may make such order as to costs to be paid by any party as it thinks fit" does not authorize an order as to costs in favour of or against the Crown within the exception in s. 2 of the Crown Costs Act.

R. v. Volpatti, [1919] 1 W.W.R. 358.

(§ II B—111)—PENAL STATUTES.

When the legislature has plainly said that a certain act shall not be done, the legal consequences following a violation of that provision are neither greater or less by reason of the fact that the legislature has or has not imposed a penalty for such violation. [Melliss v. Shirley, 16 Q.B.D. 446, distinguished; and see Stat., Alta., 1913, 2nd session, c. 2, s. 9.]

Veilleux v. Boulevard Heights, 20 D.L.R. 858, 29 W.L.R. 940, 7 W.W.R. 616. [Affirmed, 24 D.L.R. 881, 8 A.L.R. 441, 31 W.L.R. 10, 8 A.L.R. 16.]

PENAL OR CRIMINAL STATUTES.

The provisions of the Nova Scotia Temperance Act 1910, c. 2, s. 44, respecting proceedings for offences against part 1 of the

Act in case of previous conviction or convictions are applicable to the procedure only and as such are directory and not imperative.

R. v. McNutt, 7 D.L.R. 651, 20 Can. Cr. Cas. 174, 46 N.S.R. 209, 12 E.L.R. 85.

PENAL STATUTE — INTERPRETATION — STRICT READING — GAME ACT, ALTA. (1907, 7 EDW. VII. c. 14.)

The power given to a justice of the peace to declare a forfeiture under s. 34 of the Game Act, 1907, 7 Edw. VII. (Alta.) c. 14, and amendments thereto is, by a strict reading of the Act, limited to "game," and under the interpretation given to that word by subs. 1 of s. 2 of the Act "beaver" are not game. The court will not read additional words into a statute for the purpose of extending a penal clause.

Re Edmonton Hide & Fur Co., 48 D.L.R. 181, [1919] 3 W.W.R. 53.

LITERAL CONSTRUCTION.

The literal construction of a section of a statute should not be adopted if it results in an absurdity or an inconsistency with the intention of the legislature as apparent from the whole statute. [Ex parte Walton, 50 L.J. Ch. 657, followed.]

Re Richard Brothers Co.; Stuart Mfg. Co. and Whitaker, 11 A.L.R. 495, [1917] 2 W. W.R. 722.

PENAL STATUTE.

In penal legislation, the words of a statute must be interpreted favourably to the persons supposed to have incurred the penalty.

Association of Architects v. Gariepy, 50 Que. S.C. 134.

(§ II B—112)—STATUTES IN DEROGATION OF COMMON LAW.

In applying a statute making exigible what was not exigible at common law, attention must be paid to the exact wording of the statute; and, when the statute prescribes a method of procedure, that method must be followed, at least in substance. [Goodwin v. Ottawa & Prescott R. Co., 22 U.C.R. 186, followed.]

Malouf v. Labad, 3 D.L.R. 753, 3 O.W.N. 1235, 22 O.W.R. 99.

Where a statute creates an obligation not existing at common law, and provides the means by which that obligation is to be enforced, the jurisdiction is exclusive of any other jurisdiction.

School Com. of St. Joseph-de-Bordeaux v. Gagnon, 51 Que. S.C. 175, 18 Que. P.R. 149.

STATUTORY POWER — PERMISSIVE OR OBLIGATORY — RULE OF COURT.

Piper v. Burnett, 14 B.C.R. 209.

CONSTRUCTION — GRANT OF CROWN LANDS TO RAILWAY COMPANY — PREVIOUS RESERVATION OF PORTION FOR SCHOOLS.

Attorney-General for British Columbia v. Esquimalt & Nanaimo R. Co. (1911), 19 W.L.R. 693.

(§ II B—113)—MUNICIPAL POWER IN REFINING BOUNDARIES OF PROPERTY.

The Special Survey Act, R.S.M. 1902, c. 158, authorizing a survey by a municipality for the purpose of correcting errors in prior surveys and for the purpose of defining and establishing the boundaries of property is not a statute which confiscates property, but is curative, remedial and beneficial in its purpose, and as such should receive a generous interpretation so as, if possible, to carry out the intention of the legislature in making certain and defining property rights.

Peterson v. Bitulithic & Contracting Co., 12 D.L.R. 444, 24 W.L.R. 19, 4 W.W.R. 223, 23 Man. L.R. 136, reversing 7 D.L.R. 586, 22 W.L.R. 398, 3 W.W.R. 377.

STATUTORY GRANTS.

Where the legislature requires that privileges shall be granted by by-law, they cannot be granted or acquired in any other manner, e.g., by overt act, waiver or acquiescence either by a committee of the council or by the whole municipal council itself.

Montreal Street R. Co. v. Montreal, 3 D. L.R. 812, 23 Que. S.C. 412.

STATUTES OF LIMITATION.

Statutes of Limitation are to be interpreted as beneficial statutes inasmuch as they are "Acts of peace," and the rule of strict construction does not apply to them.

Noble v. Noble, 9 D.L.R. 735, 27 O.L.R. 342.

STATUTORY GRANTS — EMINENT DOMAIN.

Statutes purporting to confer a power to acquire land compulsorily under eminent domain process for the benefit of a power company or the like, are to be construed strictly.

Thomson v. Halifax Power Co., 16 D.L. R. 424, 47 N.S.R. 536.

REMEDIAL LEGISLATION.

The construction of a statute which, although the apparent logical construction of its language leads to results which it is impossible to believe those who framed or passed the statute contemplated, and from which the judgment recoils, should not be held to be the true construction of the statute. [Reg. v. Clarence, 22 Q.B.D. 23, followed.] Remedial statutes should receive a benevolent construction.

Re Drewery Estate, 9 W.W.R. 628, 956, 33 W.L.R. 73.

(§ II B—114)—AMENDMENT — REPEAL — EXEMPTION.

Where a statute merely intercepts a particular class of cases from a general prior law which continues in force, a repeal of the intercepting statute returns that class of cases to the operation of the general law.

Ex parte Bradbury; R. v. Chief Constable of Halifax, 27 Can. Cr. Cas. 68, 30 D.L.R. 756, 50 N.S.R. 298.

(§ II B—115)—Making void a legitimate transaction.

The Bills of Sale and Chattel Mortgage Act, 10 Edw. VII. (Ont.) c. 65, being one which makes void perfectly legitimate and proper transactions, must be read strictly.

Re Canadian Shipbuilding Co., 6 D.L.R. 174, 22 O.W.R. 585, 26 O.L.R. 564.

(§ II B—116)—Taxes.

An Act legalizing and confirming all assessments made in rural municipalities in a designated year, when based upon the assessment rolls of the previous year, does not validate an assessment not made according to law.

Minto v. Morrice, 4 D.L.R. 435, 21 W.L.R. 255, 617, 2 W.W.R. 374, 22 Man. L.R. 391.

A taxation statute is to be construed strictly. [Cox v. Roberts, 3 App. Cas. 473, applied.]

Sturgeon Falls v. Imperial Land Co., 7 D.L.R. 352, 23 O.W.R. 170, 31 O.L.R. 62.

A taxing statute receives strict construction and full effect is given to imperative language. Where a statute creates a tribunal or officer with limited authority and confers jurisdiction, the conditions and qualifications annexed by the statute to the exercise of the jurisdiction must be strictly complied with.

Sterling v. Cumberland School Trustees, 49 N.S.R. 125.

(§ II B—117)—Threshers' Lien Act.

A remedial statute giving threshers a lien for their services on grain threshed (R.S.M. 1902, c. 167) is to be liberally construed.

Hill v. Stait, 14 D.L.R. 158, 23 Man. L.R. 832, 25 W.L.R. 475, 5 W.W.R. 225.

Strict construction of "Miners' Lien Ordinance, Y.T." — Invalidation for irregularities.

Bradshaw v. Saucerman, 9 D.L.R. 439, 23 W.L.R. 33, 3 W.W.R. 761, 18 B.C.R. 41, affirming 4 D.L.R. 476, 21 W.L.R. 65.

(§ II B—118)—Corporations.

The conversion of a public company into a private company is not to be deemed to be impliedly prohibited under the maxim "expressio unius" by reason of a statutory enactment as to the method of converting private companies into public companies where the purpose of the enactment is merely to make provision for publicity in constituting public companies.

Leiser v. Popham, 6 D.L.R. 525, 17 B.C.R. 187.

Municipal power to expropriate adjoining lands in widening streets.

Peterson v. Bitulithic & Contracting Co., 12 D.L.R. 444, 23 Man. L.R. 136, 24 W.L.R. 19, 4 W.W.R. 223, reversing 7 D.L.R. 586, 22 W.L.R. 398, 3 W.W.R. 377.

(§ II B—119)—Duties — Customs.

In construing customs and revenue laws, the intention of the legislature, in the imposition of duties, must be clearly expressed, and, in cases of doubtful interpretation, the construction should be in favour of the importer, nor are duties or taxes to be imposed upon terms of vague or doubtful interpretation. [The Queen v. Ayer, 1 Can. Ex. 232, 270, 271; Cox v. Rabbits, 3 A.C. 473; Partington v. Att'y-Gen'l, L.R. 4 H. L. 100, applied.]

Foss Lumber Co. v. The King; and The British Columbia Lumber Co., 8 D.L.R. 437, 47 Can. S.C.R. 130, 3 W.W.R. 110, 23 W. L.R. 76.

C. Adopted or re-enacted statutes.

(§ II C—120)—In any case where an ancient English statute has been the subject of a long series of judicial interpretations, and a settled rule of English law adopted by the highest courts in England has been laid down in regard to that statute, a jurisdiction, whose legislature has enacted a statute in practically the same terms, is bound by those judicial interpretations, in the construction of its own new statute enacted in the same terms as such ancient statute.

Sawyer-Massey Co. v. Weder, 6 D.L.R. 305, 5 A.L.R. 362, 22 W.L.R. 150, 2 W.W.R. 965.

(§ II C—120) — Statute adopted from England — Admiralty crimes.

Section 591 Cr. Code having been taken from s. 3 of the Territorial Waters Jurisdiction Act, 1878 (Imp.), it should be construed according to the application and definitions to which the corresponding enactment in the latter Act was subject.

R. v. Neilson, 40 D.L.R. 120, 30 Can. Cr. Cas. 1, 52 N.S.R. 42.

Effect of English decisions.

A statute practically copied from an English Act is taken subject to judicial decisions upon it given in England.

Pettit v. C.N.R. Co., 11 D.L.R. 316, 23 Man. L.R. 213, 15 Can. Ry. Cas. 272, 24 W.L.R. 196, 4 W.W.R. 566, varying 7 D. L.R. 645, 14 Can. Ry. Cas. 293, 22 W.L.R. 265, 3 W.W.R. 74.

The effect of the amendment to the Division Courts Act, 4 Edw. VII. (Ont.) c. 12, s. 1, respecting claims the amount of which is ascertained by the signature of the defendant (see now 10 Edw. VII. (Ont.) c. 32, s. 62), was to declare the law as previously laid down, and it was not intended to narrow the jurisdiction already conferred.

Renaud v. Thibert, 6 D.L.R. 200, 27 O.L. R. 57, 22 O.W.R. 923.

Adopted statutory rules and orders — English practice rules in Alberta.

The effect of the Alberta statute of 1910, c. 2, s. 3, amending the Judicature Ordinance c. 21 (Alta.), s. 21, is to introduce the English Practice Rules thereafter passed from time to time so far as they can be applied subject to the provisions of that ordinance and the Alberta rules of court.

Royal Bank v. McPhee, 10 D.L.R. 801, 24 W.L.R. 166, 4 W.W.R. 571, 6 A.L.R. 69.

RE-ENACTED STATUTES — ORIGINAL CONSTRUCTION, EFFECT OF.

Where a statute has been re-enacted, a construction given to the former statute by the courts ought to be adopted or at least it is a circumstance to which weight must be given.

Laursen v. McKinnon, 9 D.L.R. 758, 18 B.C.R. 10, 23 W.L.R. 1, 3 W.W.R. 717.

SETTLED INTERPRETATION IN ANOTHER PROVINCE.

Where a statutory provision is adopted from another jurisdiction after having been in force there for a long period, the judicial decisions of that jurisdiction upon its interpretation should be followed unless there are very strong reasons for a contrary view. [Ward v. Serrell, 3 A.L.R. 138; Bennefield v. Knox, 17 D.L.R. 398; Witsoe v. Arnold, 15 D.L.R. 915, followed.]

B. & R. Co. v. McLeod, 18 D.L.R. 245, 7 A.L.R. 349, 28 W.L.R. 778, 6 W.W.R. 1299, reversing 7 D.L.R. 579.

Where a provincial legislature enacts a provision taken from a statute of another province in which the statute has received a settled construction, it will be presumed to have intended that such provision should be understood and applied in accordance with that construction.

Witsoe v. Arnold, 15 D.L.R. 915, 27 W.L.R. 259, 6 W.W.R. 4. [Followed in B. & R. Co. v. McLeod, 18 D.L.R. 245, 7 A.L.R. 349, 28 W.L.R. 778, 6 W.W.R. 1299.

PROVINCIAL LAW COPYING PROVISIONS OF STATUTE OF ANOTHER PROVINCE — JUDICIAL INTERPRETATION.

Ward v. Serrell, 3 A.L.R. 138.

D. PROSPECTIVE OR RETROSPECTIVE OPERATIONS.

Of Farm Implement Act; see Garnishment, II E—55.

(§ II D—125)—CONSTRUCTION — CHATTEL MORTGAGE — RENEWAL STATEMENT FILED BY ORDER — VALIDITY — RIGHTS OF EXECUTION CREDITOR.

The effect of s. 25 of the Bills of Sale Act, R.S.S. c. 144, is that where an order is made to file a renewal statement subsequently to the date fixed by the Act, and that renewal statement is filed, the mortgage retains its validity, and is only void because of the delay as against those who had acquired rights during the interval between the date upon which the renewal should have been filed and the date upon which it was actually filed; a creditor of the mortgagor must have taken out execution in order to acquire such intervening right.

Rogers Lumber Co. v. Dunlop, 20 D.L.R. 154, 7 W.W.R. 975, 30 W.L.R. 209, 7 S.L.R. 421.

RETROACTIVE IN TERMS — EFFECT — CONTRACT FOR SALE BY LAND COMPANY.

Section 68 of the Manitoba Joint Stock Companies Act, being in terms retroactive and applicable to past transactions, has the effect of declaring invalid executory contracts of sale by a land company made prior to its passing as to which there was neither the authorization of a shareholder's meeting or of a director's by-law specially authorizing such agreement.

Houghton Land Corp. v. Ingham, 18 D.L.R. 660, 24 Man. L.R. 497, 28 W.L.R. 826, 6 W.W.R. 1275, reversing 14 D.L.R. 773, 5 W.W.R. 544, 25 W.L.R. 962.

RETROSPECTIVE OPERATION — EFFECT ON EXISTING CONTRACTS.

The "Farm Machinery Act" (Alta. 1913, c. 15), whereby every "farm machinery" contract includes a warranty as to (a) good material, (b) proper construction, (c) good working order, (d) freedom from defects, and (e) durability, is not construed so as to have a retrospective effect and cannot therefore be applied to a "farm machinery" contract made prior to the enactment.

Benson v. International Harvester Co., 16 D.L.R. 350, 6 W.W.R. 242, 27 W.L.R. 513.

RETROACTIVE OPERATION — CERTIORARI — APPEAL.

Where a revised statute declares that a conviction under the prior law shall be considered as a conviction for a similar offence against the revised Act, this implies retroactivity of the new law as to the remedy against a conviction rendered after the revised Act came into effect upon a complaint laid before that time.

Hudson Bay Co. v. Dion, 38 D.L.R. 477, 52 Que. S.C. 69, 28 Can. Cr. Cas. 265.

MARRIED WOMEN'S RELIEF ACT — REPEAL — VESTED RIGHTS.

The repeal of s. 10 of the Married Women's Relief Act (Alta. 1910, 2nd sess., c. 18), which removes the qualifications as to the right to relief, is of no retroactive effect as to rights adjudicated upon and vested prior to the repeal.

Re Drewry, 36 D.L.R. 197, 12 A.L.R. 386, [1917] 3 W.W.R. 85. [See also 30 D.L.R. 581, [1916] 2 A.C. 631, [1917] 1 W.W.R. 266, reversing 27 D.L.R. 716, 9 A.L.R. 363, 34 W.L.R. 103.]

HIGHWAYS — 59 VICT. C. 11 — TRANSFER FROM ONTARIO TO DOMINION — HIGHWAYS POTENTIALLY EXISTING AT TIME — CONSTRUCTION.

The proper construction of s. 2 of 59 Vict. c. 11, authorizing the transfer from the Government of Ontario to that of the Dominion of any lands theretofore taken by the railway company for its roadbed is, that such transfer shall not affect or prejudice the rights of the public with respect to the only common and public highways which were in existence at that time, namely, those potentially existing in the 5 per cent acreage reserved in all government lands by the Order-in-Council of 1866.

C.P.R. Co. v. Department of Public Works (Ont.), 45 D.L.R. 413, 24 Can. Ry. Cas. 231, 58 Can. S.C.R. 189.

A proceeding to ascertain by arbitration the compensation for land taken for a pub-

lic street, which has been referred to a single arbitrator by the Court of King's Bench by virtue of a provision of a city charter under which the proceedings were instituted, constitutes a "legal proceeding or other remedy for ascertaining or enforcing" a liability, which was exempted by 1 Geo. V. c. 13, s. 2, in repealing rr. 773, 774, pertaining to the power of the Courts of King's Bench to deal with awards on motion, as to any rights acquired or liabilities incurred before the coming into effect of the repealing Act.

McNichol v. Winnipeg, 4 D.L.R. 379, 22 Man. L.R. 305, 21 W.L.R. 351, 2 W.W.R. 470.

An Act is presumed to be prospective and not retrospective, unless there is some clear and unequivocal declaration of intention by the legislature, or unless there are some circumstances rendering it inevitable that the other view should be taken. [Gardner v. Lucas, 3 A.C. 601, followed.]

Toronto v. Hill, 10 D.L.R. 639, 24 O.W.R. 388, 4 O.W.N. 1076.

RETROACTIVE OPERATION — MATTERS OF PROCEDURE — FIRE INSURANCE.

The amendments to Insurance Act, R.S.O. 1897, c. 203, made by s. 194, subs. 22, of the Ontario Insurance Act, 1912, 2 Geo. V. c. 23, making the loss under a policy of fire insurance payable in 60 days after the completion of the proofs of loss, unless a shorter period is provided by the contract, and by s. 199 to the effect that no objection to the sufficiency of such proof shall be allowed as a defence by the insurer, are retroactive and apply to an action commenced before such amendments were passed, since they are mere matters of procedure.

Strong v. Crown Fire Ins. Co., 10 D.L.R. 42, 28 O.L.R. 33, 23 O.W.R. 701. [Affirmed, 13 D.L.R. 686, 29 O.L.R. 33.]

SUBSTANTIVE RIGHTS DISTINGUISHED FROM PROCEDURE, RETROACTIVE EFFECT.

In a matter of substantive rights, as distinguished from mere matters of procedure or practice, a statute is not presumed to be retroactive.

Richards v. Collins, 9 D.L.R. 249, 27 O.L.R. 390, 22 O.W.R. 592, 23 O.W.R. 499.

A statutory enactment that gives the right to litigants, in certain cases, to carry a suit from an inferior to a superior court or jurisdiction, is not a law concerning procedure, but deals with and confers a substantive right. It is not, therefore, retroactive and can only apply to cases that arise after it has come into force.

Montreal v. Delisle, 44 Que. S.C. 412.

RETROSPECTIVE OPERATION.

A statute should not be construed so as to have a retrospective operation unless its language is such as plainly to require such a construction.

Collector of Revenue v. Boisvert, 24 Can. Cr. Cas. 138.

FARM MACHINERY ACT — RETROACTIVE OPERATION.

The Farm Machinery Act (Alta.), 1913, c. 15, is of retroactive operation and applies to agreements entered into before the passage of the Act. [Benson v. International Harvester Co., 16 D.L.R. 350, not followed; West v. Gwynne, [1911] 2 Ch. 1, followed.]

Chapin v. Matthews, 24 D.L.R. 457, 9 A.L.R. 209, 9 W.W.R. 301, 32 W.L.R. 663, reversing 22 D.L.R. 95.

FARM IMPLEMENT ACT.

Section 19 of the Farm Implement Act, 1915, c. 28, is not retroactive. [Vachon v. Prince Albert, 34 W.L.R. 107, followed; Chapin v. Mathews, 24 D.L.R. 457, distinguished.]

Canadian Bank of Commerce v. Nelson, 34 W.L.R. 415.

LAW SHORTENING TIME OF APPEAL — RETROACTIVE OPERATION OF.

A law shortening the time to appeal does not apply to cases pending before a lower court at the time the law passed. [Lefebvre v. Wilder, 23 Que. K.B. 25, followed.]

Quebec & Lake St. John R. Co. v. Vallieres, 23 Que. K.B. 171.

An Act which shortens the time for appealing does not apply to judgments rendered in actions of which a lower court has been seized, and which have been before it prior to the Act coming into force. [Couture v. Bouchard, 21 Can. S.C.R. 281, and Lawrence v. Hodgson, 1 V. & I, 372, followed.]

Lefebvre v. Wilder, 23 Que. K.B. 25.

(§ II D—126)—RETROSPECTIVE OPERATION — ACTION AGAINST MUNICIPALITY FOR DEFECTS IN HIGHWAY.

Glynn v. Niagara Falls, 16 D.L.R. 866, 31 O.L.R. 1, affirming 15 D.L.R. 426, 29 O.L.R. 517, 5 O.W.N. 285.

(§ II D—127)—CHANGES OF PROCEDURE — RETROACTIVE.

Whether an action to be brought against a municipality for the reimbursement of a government fund for moneys chargeable to the municipality should be brought in the name of one public officer or of another, is a mere matter of procedure as to which statutes are ordinarily retrospective; and the amending statute, 4 Edw. VII. (Can.), c. 23 s. 86, vesting in the Crown instead of in the militia officer a right of action for the expense of troops requisitioned in case of riots, enables the Attorney-General of Canada to sue for reimbursement of the Consolidated Revenue Fund (Canada) for such expenses incurred prior to the amendment.

Attorney-General of Canada v. Sydney, 16 D.L.R. 726, 49 Can. S.C.R. 148.

III. Repeal; Amendment; Revision, Re-enactment.

Repeal by implication, see Municipal Corporations, II A—30; Costs, II—28.

(§ III—130)—STATUTE TO REVISE AND CONSOLIDATE — OMISSION.

The omission in an Act to revise and consolidate existing statutes on a given matter, of an enactment in one of the revised and consolidated Acts, is not an implied re-

peal thereof and it remains in force. Hence, if an existing Act, a right to redeem property sold for taxes by a city, is given, with a proviso that privileged and hypothecary claims shall thereby revive, a subsequent Act "to revise and consolidate the different acts of the legislature relating to that city," that embodies the enactments for the sale of property for taxes and its redemption, but omits the proviso for the revival of privileged and hypothecary claims, will not be deemed to repeal the latter by implication and it continues in force and vigour.

Kennedy v. Godmaire, 44 Que. S.C. 323.

(§ III—131)—General and special laws.

In construing a remedial Act of Parliament the construction should be a liberal one giving effect, if possible, to all parts of the Act. A remedial statute relieving mortgagors in default from acceleration clauses, which covers by the express statutory provision "any mortgage" is not limited to mortgages made subsequent to the passing of the Act.

Wasson v. Harker, 8 D.L.R. 88, 5 S.L.R. 364, 22 W.L.R. 609, 3 W.W.R. 218.

Chapter 22 R.S.B.C. 1897, as to a surviving husband's tenancy by the courtesy in his wife's lands is to be interpreted as subject to the modifications introduced by the same Act as that by which the R.S.B.C. were declared to come into force and effect expressly subject to the amendments accompanying such declaratory Act.

Romang v. Tamourni, 2 D.L.R. 295, 20 W.L.R. 825, 1 W.W.R. 1109.

Special and general provisions — Prevailing effect.

A special section of a statute (subs. 160 of s. 54 of the Municipal Act, B.C. 1914, c. 52), prevails over a general one (subs. 27 and 155 of s. 54), and a section which imposes a restriction must prevail over one which is silent as to the restriction.

Meldrum v. Black, 27 D.L.R. 193, 34 W.L.R. 314, 10 W.W.R. 519, 22 B.C.R. 574.

Amendments to general Act — Private Acts — Expropriation.

Amendments to a general statute cannot affect the same sections which are included in a private statute. The Act 3 Geo. V. c. 42, enacts that expropriations in the future, shall be made by a judge; it does not apply to companies previously incorporated by private statute which mentions the special form of expropriation with experts.

Provincial Light, Heat & Power Co. v. Litchtenheim, 16 Que. P.R. 140.

(§ III—132)—Temperance Act — Amendment — Offence prior.

As regards an offence committed prior to the Nova Scotia statutes of 1915, c. 30, the provision contained in the latter statute implying that a liquor licensee in the city of Halifax might be convicted under ss. 9 and 30 of the Nova Scotia Temperance Act 1910, c. 2, as amended by N.S. Acts 1911, c. 33, of sending intoxicating liquor into a prohibited district, is not to be taken into account in construing the Temperance Act as it stood at the time of the alleged offence.

Kelly v. Scriven, 26 Can. Cr. Cas. 187, 28 D.L.R. 319, 50 N.S.R. 96.

(§ III—134)—Effect on existing proceedings.

A statute amending the law as to the selection of names to be summoned for the jury panel for criminal trials will be presumed not to affect a trial at an assize for which the panel of jurors had already been summoned under the former law then in force.

R. v. McNamara, 16 D.L.R. 356, 22 Can. Cr. Cas. 351, 27 W.L.R. 33, 19 B.C.R. 175, 193.

The Interpretation Act of Ontario, 7 Edw. VII. c. 2, s. 7 (52), has changed the previous rule of law by enacting that a re-enactment, revision or consolidation of a statute shall not be deemed an adoption of the judicial construction which the same or similar words in the prior statute had received.

National Trust Co. v. Miller; Schmidt v. Miller, 3 D.L.R. 69, 46 Can. S.C.R. 45, 22 O.W.R. 485. [Reversed in 15 D.L.R. 755, [1914] A.C. 197, 25 O.W.R. 756.]

The rights of a lessee to cut timber acquired under a lease from the Crown, pursuant to R.S.O. 1897, c. 36, s. 40, are not affected by the repeal of the said Act in 1906, 6 Edw. VII. c. 11, s. 222, as the latter statute provided that such repeal should not affect any rights acquired or any act or thing done under the repealed statute, nor are such rights affected by the terms of the later Act, the Mines Act, 1908, 8 Edw. VII. c. 21. [Gordon v. Moose Mountain Mining Co. (1910), 22 O.L.R. 373, followed.]

Phillips v. Conger Lumber Co., 5 D.L.R. 188, 3 O.W.N. 1436, 22 O.W.R. 436.

Claim against township for injury to sheep — Dog Tax and Sheep Protection Act, R.S.O. 1914, c. 246 — Act repealed by 8 Geo. V. c. 46 — Cause of action arising before repeal — Effect of repeal — Damage assessed by corporation — Application for mandatory order to award — Appeal.

The repeal of a statute does not affect the rights of complainants which arose before such repeal, but the prerogative writ of mandamus cannot be awarded in an action to enforce the rights in question. On a proper application the complainants are entitled to a mandamus to the members of the township council ordering them to make the necessary inquiry and award under the statute (R.S.O. 1914, c. 246, s. 18).

Hudson v. Biddulph, 49 D.L.R. 476, reversing 45 O.L.R. 432.

Repeal of — Effect on existing rights and remedies.

A statement of claim based upon the nullity of a law should be upheld, although in the interval between its filing and the

judgment of the court, the law attacked has been repealed by the legislature.

Carrier v. Roy, 46 Que. S.C. 122.

(§ III—136)—Temperance Act.

The provision of the Interpretation Act, R.S.N.S., c. 1, s. 8, to the effect that the repeal of any enactment "shall not revive any Act or provision of law repealed by such enactment or prevent the effect of any saving clause therein" does not prevent Part II. of the Nova Scotia Temperance Act, 1910, being applicable in the city of Halifax upon Part I. becoming applicable in that city, notwithstanding the form of amending statutes, N.S. 1911, c. 33 and N.S. 1916, c. 22.

Ex parte Bradbury; R. v. Chief Constable of Halifax, 27 Can. Cr. Cas. 68, 30 D.L.R. 756, 50 N.S.R. 298.

(§ III—139)—New section introduced with number and letter designation — Criminal Code.

Section 242A Cr. Code which was inserted by the Code Amendment Act, 1913, is not to be considered a subs. of s. 242, but as an entirely independent section.

R. v. Allen, 17 D.L.R. 719, 23 Can. Cr. Cas. 67, 50 C.L.J. 543.

Jurisdiction to award costs to Crown—B.C. Crown Rule (criminal) No. 1—Crown Costs Act (B.C.) 1910.

The King v. Jones, 18 Can. Cr. Cas. 414, 16 B.C.R. 117.

STAY OF PROCEEDINGS.

I. Jurisdiction to grant generally.
II. Delay in prosecuting generally.
III. Quebec practice.

Actions affected by war, see Moratorium.

Stay of execution, see Execution.

Of winding-up proceedings, see Companies, VI E—341.

Of actions by alien enemies, see Aliens, III—19.

Stay pending appeal, see Appeal, XI—720.

For purpose of arbitration, see Arbitration, I—2.

Conditions of being allowed to proceed, see Judgment, II B—76.

Annotations.

Actions by alien enemies: 23 D.L.R. 375.

Actions affected by moratorium: 22 D.L.R. 865.

Pending motion for new trial—Terms.

There is no general rule governing the terms which the court or a judge should impose on granting an application to stay proceedings pending a motion for a new trial.

Farnell v. Conway, 45 N.B.R. 6.

I. Jurisdiction to grant generally.

(§ I—5)—First action dismissed — Second action vexatious — Judgment—Time limit for bringing second action — Ontario Insurance Act, R.S. O. 1914, c. 183, s. 194.

Where the issue in an action has been determined, a second action for the same cause is vexatious, and the court may stay proceedings in this action. A judgment in the first action will have the effect of determining all issues which are, or might be, raised, as far as the claim set up in the action is concerned.

Ross v. Scottish Union, 50 D.L.R. 356. [See Ross v. Scottish Union and National Ins. Co., 39 D.L.R. 528, 46 D.L.R. 1, 58 Can. S.C.R. 169.]

Arbitration clause in contract — Onus of displacing.

The party opposing a motion to stay proceedings because no arbitration had taken place under the arbitration clause of a construction contract must adduce proofs by affidavit of the genuineness of his contentions that the arbitration clause no longer applies, or that he should not be bound thereby; it is not sufficient merely to allege in the statement of claim facts which, if proved, would shew a case for the exercise of a judicial discretion to refuse a stay.

Northern Electric & Mfg. Co. v. Winnipeg, 13 D.L.R. 251, 23 Man. L.R. 225, 24 W.L.R. 547, 4 W.W.R. 862.

Master of Supreme Court exceeding jurisdiction — Restraining on motion.

The Supreme Court of Nova Scotia can stay the action of a Judge of a County Court, when acting as a Master of the Supreme Court, in releasing without authority a person from custody under the Liberty of the Subject Act, R.S.N.S. 1900, c. 181, since a County Judge acting as Master of the Supreme Court is an officer thereof, and, under order 54, may be restrained on motion from any unauthorized exercise of power.

Re Noble Crouse; R. v. Crouse, 11 D.L.R. 749, 47 N.S.R. 64, 21 Can. Cr. Cas. 231, 12 E.L.R. 416.

Under s. 37 of the Mechanics' and Wage Earners' Lien Act, 10 Edw. VII. (Ont.) c. 69, all things necessary to work out mechanics' liens, quoad the land, are within the jurisdiction of the officer hearing the mechanics' lien actions; but such officer has no power, merely because there are mechanics' lien actions already pending against both the contractor and the owner, to stay proceedings in an action by the contractor against the owner for damages for breach of an alleged agreement to supply materials to carry on a construction contract made between them, in which action the contractor is not claiming a lien.

Dick v. Standard Cable Co., 7 D.L.R. 64, 4 O.W.N. 57, 23 O.W.R. 19.

Until a judgment of the Supreme Court

of Canada has been certified to the court below, a judge of the Supreme Court has jurisdiction to order a stay of proceeding pending an appeal to the Privy Council. Where the plaintiffs in an action have succeeded at the trial and in the Provincial Appellate Court, and the defendants have elected to appeal to the Supreme Court of Canada, in which also they have been unsuccessful, and, while the Supreme Court still had jurisdiction over the case, a judge of that court has refused a stay of proceedings pending an appeal to the Privy Council, and it appears that there has not been any miscarriage of justice through accident, mistake or otherwise, but that every question in dispute has been fully considered, and that the case involves merely a question of fact and nothing of public importance, and that the Privy Council is likely to refuse leave to appeal a Judge of the Provincial Court of first instance should not grant a stay of proceedings pending an appeal to the Privy Council.

Alfred v. G.T.P.R. Co., 6 D.L.R. 147, 5 A.L.R. 447, 22 W.L.R. 65, 2 W.W.R. 1061.

CRIMINAL PROSECUTION.

In provinces where there is no grand jury system and therefore no indictment the case is not in the provincial Supreme Court for trial until a formal charge in lieu of an indictment has been preferred, and a stay of proceedings by the Attorney-General cannot be entered under Cr. Code, s. 962, in the event of no formal charge having been laid. [Note that for purposes of s. 962 the term "indictment" includes a formal charge under s. 873 A by the interpretation clause, s. 2 (16), as amended 1907.]

R. v. Weiss, 23 D.L.R. 710, 23 Can. Cr. Cas. 460, 8 S.L.R. 74, 7 W.W.R. 1160, 30 W.L.R. 458.

TO ENABLE SUMMONING PRINCIPAL DEBTOR—ACTION ON GUARANTY UPON DISSOLUTION OF PARTNERSHIP.

If, on dissolution of a partnership, one partner guarantees a debt due to his copartner, he becomes a surety for the debtor, and if he is sued by his copartner he has a right to a stay of proceedings by dilatory exception in order that he may summon the principal debtor in warranty. The formal abandonment by a creditor of the benefit of seizure, deprives him of the right, in an action brought against him, to a stay of proceedings in order that he may seize and sell the property of the original debtor as provided by art. 177 C.C.P. par. 5.

Findlay v. Howard, 24 D.L.R. 229, 24 Que. K.B. 59.

APPEAL PENDING — TERMS AS TO COSTS.

On an application for a stay of proceedings on a verdict pending an appeal, the stay was refused except on terms of payment of the amount of the verdict to the successful party and the taxed costs to his solicitor, the former giving security for repayment in case of the appeal being successful, or consenting that the amount be paid into court, and the latter giving an undertaking to repay the costs if so ordered by the Appeal Court.

Porter v. O'Connell, 43 N.B.R. 611.

VOLUNTEERS AND RESERVISTS RELIEF ACT.

A stay of proceedings under s. 62a (18) of the Land Titles Act on the grounds that the person making the application is entitled to the protection of the Volunteers and Reservists Act should be granted. A stay under that section contemplates the imposition of terms and the possibility of the cancellation of the stay and is to be granted not as a matter of right, but as a matter of discretion.

Re Land Titles Act; Re Anderson, [1917] 1 W.W.R. 828.

PENDING MOTION FOR NEW TRIAL—TERMS.

There is no general rule governing the terms which the court or a judge should impose on granting an application to stay proceedings pending a motion for a new trial.

Farnell v. Conway, 45 N.B.R. 6.

ADMISSION OF LIABILITY—NO PAYMENT INTO COURT—ASSESSMENT OF DAMAGES—APPEAL FROM—MOTION FOR STAY—TERMS OF STAY.

Bowen v. C.N.R. Co., [1918] 2 W.W.R. 536.

MOTION FOR — MENTAL CAPACITY OF PLAINTIFF—AUTHORITY FOR CONTINUANCE OF ACTION—COSTS.

Thede v. Hessenauer, 15 O.W.N. 111.

DILATORY EXCEPTION—WARRANTY.

A defendant cannot obtain the suspending of proceedings against him in order to call in warranty a party against whom he has instituted a principal action on the ground mentioned in his dilatory exception and still pending.

Banque Nationale v. Jean, 19 Que. P.R. 207.

ACTION BY CORPORATION — ACTION AGAINST WILL OF MAJORITY — STAY.

When an action is commenced in the name of a company without the sanction of a directors' meeting or a shareholders' meeting, and the majority of the directors and shareholders are opposed to the continuance of the action, then the action must be stayed [La Compagnie de Mayville v. Whitley, [1896] 1 Ch. 788, followed.]

Standard Construction Co. v. Boggs, 7 W.W.R. 154.

JURISDICTION TO GRANT — PROCEEDINGS IMPROPERLY INSTITUTED.

An order to stay proceedings instituted without proper authority may be made on the application of the person against whom such proceedings are taken. [Nurse v. Durnford, 13 Ch. D. 764; Geilinger v. Gibbs, [1897] 1 Ch. 479, followed.]

Standard Construction Co. v. Crabb, 7 S.L.R. 365, 7 W.W.R. 719, 30 W.L.R. 151.

PRACTICE — ABUSE OF PROCESS — FORUM DELICTI—MAIN OFFICE OF CORPORATION.

An action taken by crippled and penni-

less persons in a forum where the plaintiffs are domiciled and a defendant company has a head office, though not the proper forum or the forum delicti, will not be stayed as an abuse of the process of the court.

Wagner v. G.T.P., 6 W.W.R. 1126.

REFERENCE — STAY PENDING APPEAL TO SUPREME COURT OF CANADA — DISCRETION — BALANCE OF CONVENIENCE — PRACTICE.

Saskatchewan Land & Homestead Co. v. Moore, 6 O.W.N. 262.

JURISDICTION TO GRANT.

When a claim appears to have been made the subject of another action actually pending in the Court of Review and inscribed for appeal to the Court of King's Bench a motion to suspend proceedings in the later action will be granted.

Molson's Bank v. Klock, 13 Que. P.R. 202.

II. Delay in prosecuting generally.

(§ II—11)—Even if marginal r. 973 of the English judicature rules is in force in Alberta, a plaintiff who has not taken a step in the cause for a year and who by that rule of court is required to give a month's notice if he desires to proceed, is not subject to have his action entirely stayed on the defendant's motion; the remedy of the latter is to apply to set aside the proceeding next taken by the plaintiff.

Evans v. Evans, 5 D.L.R. 546, 21 W.L.R. 925, 2 W.W.R. 795, 5 A.L.R. 4.

IMPRISONMENT FOR DEBT — ABANDONMENT OF PROPERTY — DELAY FOR CONTESTING — SUSPENSION OF PROCEEDINGS.

Leclerc v. Boucher, 12 Que. P.R. 367.

(§ II—12)—WANT OF AUTHORITY TO PLAINTIFF'S SOLICITOR.

Notice of an application by the defendant to stay the action on the ground that the solicitor purporting to act for the plaintiff is not authorized to do so, must be served upon the plaintiff personally as well as upon the solicitor who is prosecuting the action and the court will so order although no objection to the want of notice is taken by the solicitor whose authority is in question.

Ross v. Webb, 2 D.L.R. 416, 21 W.L.R. 254, 22 Man. L.R. 257.

(§ II—13)—NONPAYMENT OF COSTS.

An action will not be stayed by the court merely on the ground that the costs of another action between the same parties awarded against the present plaintiff had not been paid, unless the prior action was for the same cause or for a cause of action substantially the same.

Evans v. Evans, 5 D.L.R. 546, 21 W.L.R. 925, 5 A.L.R. 4, 2 W.W.R. 795.

OF PREVIOUS ACTIONS.

Rickert v. Britton, 6 D.L.R. 887, 4 O.W.N. 258, 23 O.W.R. 814.

OF PRIOR ACTION—GROUND FOR STAYING SECOND ACTION.

Wasserman v. Gold, 7 D.L.R. 934, 1 W.W.R. 1025.

IN SIMILAR ACTION.

To justify an order staying an action on the ground that costs awarded in favour of the same defendant against the same plaintiff in a previous action had not been paid, the second action must be for the same or substantially the same cause of action as the first. [Higgins v. Woodhall, 6 T.L.R. 1, followed.]

Moore v. Deal, 22 D.L.R. 697, 21 B.C.R. 243, 8 W.W.R. 774, 31 W.L.R. 176.

CAVEATS — SECOND ACTION — NON-PAYMENT OF COSTS.

Otis v. Otis, 24 D.L.R. 897, 9 W.W.R. 141, 32 W.L.R. 402.

COSTS OF APPEAL IN FORMER ACTION BETWEEN SAME PARTIES UNPAID—RELIEF CLAIMED IN BOTH ACTIONS PRACTICALLY THE SAME.

Davidovitch v. Swartz, 9 O.W.N. 246.

UNPAID COSTS—VEXATIOUS ACTION—DISCRETION OF COURT.

Rickert v. Britton, 9 D.L.R. 128, 4 O.W.N. 499, 23 O.W.R. 979.

(§ II—21) — PENDING CRIMINAL PROSECUTION—FUGITIVE FROM JUSTICE.

A stay of proceedings of a civil action until after a trial for a criminal offence arising out of the same transaction will not be granted when the defendant is a fugitive from the jurisdiction and resists every attempt to bring him back.

Attorney-General v. Kelly, 24 D.L.R. 660, 25 Man. L.R. 696, 9 W.W.R. 492, 32 W.L.R. 771.

Where a party raises by his pleading a point of law to be decided at a hearing before the trial, the court will not, as a rule, stay the trial of the issues of fact, pending an appeal from the decision upon the point of law.

Imperial Life Ass'ce Co. v. Audett, 5 D.L.R. 355, 4 A.L.R. 204, 20 W.L.R. 372, 1 W.W.R. 819.

An action in Ontario by the personal representative of a deceased person for an accounting against a person alleged to be indebted to the estate in respect of foreign lands held in trust, will not necessarily be stayed because of an action pending in the foreign jurisdiction brought by the beneficiaries against the same defendant to declare the trusts.

Greer v. Greer, 4 D.L.R. 169, 3 O.W.N. 584, 21 O.W.R. 139.

OTHER PENDING LITIGATION—RES JUDICATA.

Pending action by second mortgagee—New action by first mortgagee—Multiplicity of suits—Sask. rr. 180, 181.

Haig v. Rogers, 7 D.L.R. 930, 3 W.W.R. 24.

When one action is pending, bring another action claiming similar relief, and if he does so the court will interfere by directing a stay there is no rule that the second action will be stayed, and if the circumstances shew that it would be more

equitable to stay the first and permit the second to proceed, the court can do so.
Milloy v. McGill, 4 S.L.R. 399.

SUMMARY JUDGMENT — COUNTERCLAIM — STAY OF EXECUTION PENDING TRIAL OF COUNTERCLAIM.
Wells v. Knott, 20 Man. L.R. 146, 15 W.L.R. 285.

ANOTHER ACTION FOR SAME CAUSE PENDING—APPLICATION FOR STAY—REFUSAL.
Toronto Developments v. Kennedy, 5 O. W.N. 927.

PENDING APPEAL TO SUPREME COURT OF CANADA FROM JUDGMENT DIRECTING REFERENCE—"FINAL JUDGMENT"—3 & 4 GEO. V. C. 51, S. 1 (D.), AMENDING SUPREME COURT ACT, R.S.C. 1906, C. 139, S. 76(d)—DISCRETION.
Davison v. Forbes, 10 O.W.N. 398.

STAY OF PROCEEDINGS PENDING APPEAL TO PRIVY COUNCIL.
Huson v. Haddington Island Quarry Co., 16 B.C.R. 264, 16 W.L.R. 226.

MOTION TO SET ASIDE ORDER TO PROCEED TO TRIAL—STAY OF TRIAL UNTIL AFTER SIMILAR CASE IS HEARD BY PRIVY COUNCIL—CON. RE. 396, 398.
Stavert v. Barton; Stavert v. Macdonald, 3 O.W.N. 265, 20 O.W.R. 447.

(§ II—25)—RES JUDICATA.
Prior judgment against company without assets—Estoppel—Negligence.
Campbell v. Verral; Gibson v. Verrals, 6 D.L.R. 898, 4 O.W.N. 300, 23 O.W.R. 275.

(§ II—30) — STAY PENDING APPEAL — ASSESSMENT FOR SCHOOL TAXES.
Fort Frances v. Ontario & Minnesota Power Co., 22 D.L.R. 884, 9 O.W.N. 4.

ACTION FOR COMPENSATION IN EXPROPRIATION BY RAILWAY—ARBITRATION PENDING.
Stay of proceedings in an action against a railway company pending arbitration refused, on the ground that the statement of claim disclosed a case for compensation independently of that which the arbitrator would have power to award the plaintiff under the Railway Act.
Bengert v. C.N.R. Co., 9 W.W.R. 283.

DELAY IN PROSECUTION OF REFERENCES AND IN BRINGING ON PENDING INTERLOCUTORY MOTIONS FOR DETERMINATION—DEATH OF PLAINTIFF—FAILURE OF EXECUTOR TO REVIVE ACTION—LOCUS PŒNITENTIÆ.
Hull v. Allen, 8 O.W.N. 577.
Where the County Court Judge adjourns argument for extension of time for appeal from a decision of a magistrate, all proceedings in the magistrate's court will be stayed until the motion for extension is determined.
R. v. White, 19 Can. Cr. Cas. 156, 10 E.L.R. 297.

PRIOR QUESTION TO BE FIRST DETERMINED.
A person sued for an account, under the terms of a document, in this case a will, which the plaintiff seeks to have annuled, is entitled to have the proceedings stayed by a dilatory exception, until the legality or illegality of the will is decided.
Derrick v. Elvidge, 14 Que. P.R. 63.

III. Quebec Practice.

(§ III—60)—JOINDER OF ACTIONS.
An application under art. 291, C.C.P., for the joiner of actions does not effect a stay of proceedings, and the party making it is not entitled to have the hearing in either action postponed on the ground that the court has not disposed of his application.
Rousseau v. Cliche, 44 Que. S.C. 179.
Several actions were brought against the defendant company, each to recover a sum which it claimed represented the same debt as the others. One plaintiff acted as the original principal creditor and the others fire insurance companies, as having paid him insurance on a loss by fire alleged to have been caused by the negligence of the defendant:—Held, that the defendant could not, by dilatory motion, obtain a stay of proceedings in each cause until the plaintiffs in the others should be mis en cause.
Vandry v. Quebec R., Light, Heat & Power Co., 43 Que. S.C. 382.
The grevé de substitution who is sued in revendication of an undivided part of one of the immovables devised is entitled to bring the appelés into the cause to discharge him from his obligations towards them (conversation of the substituted property, etc., arts. 2059, 2060 C.C. Que.). He can then demand, by dilatory motion, that the proceedings be stayed until he has served them with a summons in the manner provided for bringing in warrantors.
Montminy v. Montminy, 43 Que. S.C. 377.
A defendant sued for an amount due under a deed of sale of real estate by an action wherein it is prayed that the property sold be declared hypothecated for the amount sued for, cannot, by dilatory exception, ask that proceedings be stated until the plaintiffs have made a party to the suit the purchaser of an undivided portion of such property, particularly if the deed of sale is not filed and the registration thereof is only proved by defendant's affidavit.
Fairbanks v. Mussen, 14 Que. P.R. 209.

STENOGRAPHER.

COMPENSATION TO.
A stenographer is not obliged to transcribe his notes before being paid for making them.
Picotte v. Montreal Tramways Co., 18 Que. P.R. 413.

STIPENDIARY MAGISTRATE.

See Justice of the Peace.

STOCK.

Shares of stock, see Companies.

STOCK BROKERS.

See Brokers.

STORAGE.

See Warehouseman.

STREAM.

See waters.

STREET RAILWAYS.

I. Franchises; construction.
II. Motive power.
III. Operation.
A. In general.
B. Duty and care of railway company.
C. Contributory negligence.

See also Carriers: Railways.

As to safety of place and appliances, see Master and Servant.

Findings of jury as to negligence, see Trial.

As to safety of highway between tracks, see also Highways.

Improperly packed frog in track as cause of accident, see Trial. V C-285.

Annotation.

Reciprocal duties of motormen and drivers of vehicles crossing the tracks: 1 D.L.R. 783.

I. Franchises; construction.

(§ I—1)—Exclusive franchise—Antecedent rights—Termination.

An agreement granting an exclusive franchise for a period of years over a defined area, and, so far as the grantor can, over another area in which a third party has existing rights, will take effect so as to confer on the grantee an exclusive franchise within the second area when the antecedent rights terminate.

Toronto v. Toronto R. Co., 29 D.L.R. 1, 37 O.L.R. 470, [1916] 2 A.C. 542, affirming 26 D.L.R. 581, 34 O.L.R. 456.

Tickets "for benefit of working people."

The Act incorporating the Nova Scotia Tramways & Power Co. (N. S. 1914, c. 180, s. 22, as amended by 1917, c. 53, s. 2), providing that the company shall, "for the benefit of the working people," issue tickets at a certain price to be used during special hours, subject to such terms and conditions as the Board of Commissioners of Public Utilities may approve, does not justify the Board in making an order requiring the company to issue such tickets for the benefit of any person presenting them who boards the cars during those hours.

Re Nova Scotia Tramways & Power Co., 39 D.L.R. 657, 52 N.S.R. 17.

Agreement—Rate per mile—Liability—Damages.

A railway company which is obligated under a by-law granting it the right under certain conditions to construct, maintain and operate an electric railway, to pay an agreed rate for every mile or pro rata for a portion of a mile of railway operated, is liable to pay only for the portion of railway actually operated if, however, the effect of the by-law is that the whole railway is to be operated, the company is liable in damages for non-performance of this condition, the damage being equal to the amount the company would have had to pay had the whole line been operated.

Wentworth v. Hamilton Radial Elec. R. Co., 41 D.L.R. 199, 41 O.L.R. 524, 23 Can. Ry. Cas. 209, affirming 12 O.W.N. 379.

Agreement with city corporation—Percentage of gross receipts—Action for — Counterclaim — Account — Items—Interest—Costs.

City of Toronto v. Toronto R. Co., 15 O.W.N. 1.

Agreement with municipal corporation—Removal of tracks—Injunction.

New Toronto Board of Trade v. New Toronto, 14 O.W.N. 326.

(§ I—3)—Agreement between railway and county—Jurisdiction of provincial board—Use of highways—Switches.

It is within the jurisdiction of the chairman of the Ontario Railway and Municipal Board to construe an agreement between a county corporation and a railway company granting power to enlarge the number of switches operated by the railway company upon a highway.

A stipulation in an agreement between a county corporation and the railway company which deals in several respects with the entire line of an electric railway, that the company may construct, put in, and maintain such switches, and turn-outs, as may from time to time be found necessary for the operating of the company's line of railway on a named street, is to be construed as of general application to the whole of the line upon the street named and not merely to the line of extension of the railway on that street which the agreement authorized.

Re Waddington and Toronto & York Radial R. Co., 9 D.L.R. 81, 4 O.W.N. 617, 15 Can. Ry. Cas. 82, 23 O.W.R. 775.

Rights in, and use of, streets and highways.

Paragraph (b) of s. 8 of the Railway Act, 1906, purporting to subject to the Dominion Railway Act the through traffic upon any railway or street railway authorized by special Act of a provincial legislature which connects with a Dominion railway, although such provincial railway or street railway had not been declared by Dominion statute to be a work for the general advantage of Canada, is ultra vires of the Parliament of Canada.

Montreal v. Montreal Street R. Co., 1 D.L.R. 681, 10 E.L.R. 281, 13 Can. Ry. Cas. 541, [1912] A.C. 333, affirming on this point 43 Can. S.C.R. 197, 11 Can. Ry. Cas. 203.

Alteration of route — Municipal consent.

The Toronto & York Radial R. Co., by the terms of its franchise and by legislation, is authorized to deflect its line from

Yonge St. Toronto, to a private right of way owned by it; the deflection is for the purpose of enabling it to operate the railway already located and constructed, and therefore municipal consent is not necessary.

Toronto & York Radial R. Co. v. Toronto, 31 D.L.R. 627, 38 O.L.R. 88, reversing 26 D.L.R. 244, 35 O.L.R. 57.

REPAIR OF ROADWAY — "TRACKS" — POWERS OF RAILWAY BOARD.

The obligation imposed upon a street railway company by its agreement with a municipality, that the former should "keep clean and in proper repair that portion of the travelled road between the rails, and for eighteen inches on either side thereof," does not extend to the doing of works which would give the roadway between the rails a new character, and the word "tracks" in s. 3 of the Ontario Railway and Municipal Board Amendment Act, 1910, does not include the roadway between the rails, under which the Board has no jurisdiction to order the street railway company to pave that part of a road used by the railway.

Toronto Suburban R. Co. v. Toronto, 24 D.L.R. 269, [1915] A.C. 590, reversing 13 D.L.R. 674, 29 O.L.R. 105, 16 Can. Ry. Cas. 65.

EXTENSION OF LINES UPON STREETS OF CITY — OPERATION OF RAILWAY — WANT OF AUTHORITY — ONTARIO RAILWAY ACT, 3 & 4 GEO. V. C. 36, SS. 6, 250, 251 — MUNICIPAL FRANCHISES ACT, 2 GEO. V. C. 42, S. 4 — TRESPASS — DECLARATION OF RIGHT — INJUNCTION — DAMAGES — APPEAL — COSTS.

Windsor v. Sandwich, Windsor & Amherstburg R. Co., 13 O.W.N. 1, varying 10 O.W.N. 205.

MUNICIPAL BY-LAW REGULATING ERECTION OF WIRES AND POLES IN STREETS — PERMIT — REVOCATION — COMPENSATION — REMOVAL OF POLES AND WIRES.

Re Winnipeg Electric R. Co. and Winnipeg, 16 W.L.R. 654.

(§ I—5)—AGREEMENT WITH CITY CORPORATION — NEGLECT OF RAILWAY TO REMOVE SNOW AND ICE — REMOVAL BY CORPORATION — DAMAGES.

Under ss. 21, 22 of the Ontario Railway Municipal Board Act, R.S.O. 1914, c. 186, the defendant company is liable for expense incurred by the plaintiff in removing snow and ice from the streets of the city, which it was the duty of the defendant company to remove. The refusal of the plaintiff's engineer to instruct the defendant company as to where such snow should be deposited does not release it from its liability for non-removal.

Toronto v. Toronto R. Co., 46 D.L.R. 435, 24 Can. Ry. Cas. 255, 44 O.L.R. 308, affirming 42 O.L.R. 603. [Affirmed by Privy Council 51 D.L.R. 48, [1920] 1 W.W.R. 761.]

REGULATION BY CITY BY-LAW.

A requirement of a city by-law that a street railway company should keep and maintain its engines, machinery and power houses within the city limits, is complied with by the maintenance therein of a substation containing apparatus for the reduction of the voltage of electricity generated beyond the city limits, and also for transforming it into a direct current.

Winnipeg Elec. R. Co. v. Winnipeg, 4 D.L.R. 116, [1912] A.C. 355, 1 W.W.R. 964.

(§ I—6)—LAYING RAILS ON STREETS UNDER AUTHORITY OF BY-LAW NOT SUBMITTED TO ELECTORS — STATUTORY REQUIREMENT — ACTION BY PERSONS AFFECTED TO RESTRAIN LAYING OF RAILS AND TO COMPEL REMOVAL — LOCUS STANDI — SPECIAL AND PARTICULAR INJURY — PARTIES — JURISDICTION — ONTARIO RAILWAY AND MUNICIPAL BOARD.

Mitchell v. Sandwich, Windsor & Amherstburg R. Co., 6 O.W.N. 659.

(§ I—7)—EXCLUSIVE FRANCHISE — TERMINATION OF OTHERS.

A municipal corporation granting a street railway company the exclusive right to operate surface street railways in the city, for a term of years, subject to certain restrictions, effected by the franchises of other railways, cannot, after the removal of restrictions upon the termination of the other franchises, within the period of the grant, withhold its consent to the right to operate upon the portion of a street vacated by another franchise, in the same manner as upon the other streets of the city. [Toronto R. Co. v. Toronto, [1906] A.C. 117, affirming 5 O.W.R. 130, 132, followed.]

Re Toronto R. Co. and Toronto, 26 D.L.R. 581, 19 Can. Ry. Cas. 323, 34 O.L.R. 456. [Affirmed, 29 D.L.R. 1, [1916] 2 A.C. 542, 37 O.L.R. 470, 20 Can. Ry. Cas. 115.]

OBSTRUCTING REGIMENT ON MARCH—STREET CAR AT STREET CROSSING — ACCIDENTAL OBSTRUCTION.

The King v. McIntosh, 17 Can. Cr. Cas. 295.

II. Motive power.

(§ II—15)—NEGLIGENCE — ESCAPE OF ELECTRIC CURRENT — JURISDICTION OF COMMISSIONER — APPEALS FROM—CONSTITUTIONALITY — APPOINTIVE POWERS.

On the hearing of this appeal five chief points were considered:—(1) Was the appellant company liable for damage resulting from its negligence, (2) was it liable aside from negligence, (3) was the order of the commissioner within his powers, in directing certain specific things to be done, (4) is the statute intra vires the legislature, or does it conflict in part with s. 91 of the B. N.A. Act, 1867, (5) can the Supreme Court hear, on an appeal under the statute, an objection to the jurisdiction of the commissioner, on the ground that the part of the statute which provides for his appointment is ultra vires, or is that a point of law as to which the decision of the commissioner cannot be appealed from? The commission-

er decided that the company was liable for negligence, and the effect of the equal division of the Judges of Appeal was, of course, to leave his judgment undisturbed. The general effect of the marked difference of opinion is to leave unsettled all the questions.

Winnipeg Elec. R. Co. v. Winnipeg; Re Public Utilities Act, 30 D.L.R. 159, 26 Man. L.R. 584, [1917] 1 W.W.R. 9.

SALE OR LEASE OF SURPLUS ELECTRICITY—56 VICT. C. 97, S. 9—RIGHT TO PLACE POLES AND WIRES ON HIGHWAY — EVIDENCE—JUDGMENT OF APPELLATE COURT —EFFECT OF.

Sandwich, Windsor & Amherstburg R. Co. v. Windsor, 15 O.W.N. 15.

III. Operation.

A. IN GENERAL.

(§ III A—20)—TRACKS—ALTERATION OF GRADE—MUNICIPAL REGULATION.

Where the pattern of rails laid by a street railway company is approved by the municipal authorities, a removal of the tracks by the municipality for the purpose of altering the grade of the street does not give it authority to order the company to replace them with rails of a different pattern, but it may require the company to keep its tracks level with the altered grade on a sufficient foundation, although it cannot require the use of any particular foundation.

St. John R. Co. v. St. John, 24 D.L.R. 596, 43 N.B.R. 417.

(§ III A—20)—BY MUNICIPALITY—GROOVED RAIL—NEGLIGENCE—NUISANCE.

The use of a grooved rail at street intersections by a municipal corporation authorized by statute to build and operate a street railway, is not negligence, such a rail being in common use and necessary for its purpose. Neither, in the use of such a rail, can the corporation be deemed to maintain a public nuisance, for the legislature, in authorizing the construction and operation of the railway, must be taken to have authorized the use of such rails as were necessary for its reasonable operation.

Regina Cartage Co. v. Regina, 29 D.L.R. 420, 9 S.L.R. 313, 10 W.W.R. 1299, 34 W.L.R. 1141.

EXTENSION OF LINES UPON STREETS—WANT OF AUTHORITY—ONTARIO RAILWAY ACT, 3 & 4 GEO. V. C. 42, S. 4—TRESPASS—DECLARATION OF RIGHT—DAMAGES — INJUNCTION.

Windsor v. Sandwich, Windsor & Amherstburg R. Co., 10 O.W.N. 205.

(§ III A—24)—ORDER OF ONTARIO RAILWAY AND MUNICIPAL BOARD TO PUT ON ADDITIONAL CARS—FAILURE TO COMPLY —WAR CONDITIONS—ORDER TO RESCIND NOT APPLIED FOR UNDER ACT—LIABILITY.

It is no answer to an order made by the Ontario Railway and Municipal Board to a street railway company to place additional cars upon its system, that the company had made all possible efforts to do so, but that owing to the war and other conditions compliance was impossible, where the company has not applied to the Board under s. 25 of the Railway and Municipal Board Act (R.S.O. 1914 c. 186) to rescind or vary the order or under s. 42 for an extension of time for compliance.

Re Toronto R. Co and Toronto, 46 D.L.R. 547, 44 O.L.R. 381, 24 Can. Ry. Cas. 278, [Reversed 51 D.L.R. 69, [1920] 1 W.W.R. 755.]

B. DUTY AND CARE OF RAILWAY COMPANY.

Duty of conductor not to annoy passenger, see Assault, I–1.

Injury from sudden stop of car, see Carriers, II G–70.

(§ III B—25)—AS TO ALIGHTING—PREMATURE STARTING.

Starting a tram car before ascertaining that a passenger has safely alighted, even on the signal "all right" of a person on the rear vestibule, is negligence which will render the tram company liable for injuries sustained by the passenger falling off the car.

Fraser v. Pictou County Elec. Co., 28 D.L.R. 251, 50 N.S.R. 30, 20 Can. Ry. Cas. 400.

SPECIAL CAR — EJECTION — LIABILITY.

The conductor of a "Special car" not receiving any passengers is not justified in throwing off a person while the car is in motion, after the latter had safely boarded the car in disregard of that fact, and his doing so will render the street railway company liable for injuries resulting therefrom.

Nolan v. Montreal Tramways Co., 26 D.L.R. 527, 49 Que. S.C. 163.

Apart from statutory enactment, a street car and other vehicles have equal rights of the same kind to the concurrent use of the streets, the rights and duties of both are reciprocal and mutual, and each is bound to the exercise of reasonable care in self-protection, and in avoiding harm.

Carleton v. Regina, 1 D.L.R. 778, 5 S.L.R. 90, 1 W.W.R. 953, 20 W.L.R. 395.

OPENING DOOR WHEN NOT AT REGULAR STOPPING PLACE—INVITATION TO ALIGHT—SPEED OF CAR—QUESTION FOR JURY—NEGLIGENCE—NEW TRIAL.

The door of a street car being opened by the conductor when the car was not at a regular stopping place, it is a question of fact to be decided by the jury in an action for damages for injuries received by a passenger in alighting from the car, whether the car was moving so fast that the motion would be perceptible to any reasonable passenger, and so negative an invitation to alight which might be implied by the opening of the door. This question can not be summarily dealt with by the Trial Judge. [Gazey v. Toronto R. Co., 38 D.L.R. 637;

G.T.R. Co. v. Mayne, 39 D.L.R. 691, applied.]

Jarvis v. London Street R. Co., 48 D.L.R. 61, 45 O.L.R. 167. [See 46 O.L.R. 141.]

INJURY TO PASSENGER ALIGHTING—TERMINAL—RUSH—LIABILITY.

A street railway company is liable for an injury to a passenger while alighting from a street car at a terminal stopping place, occasioned by the on rush of passengers on both sides of the car, even though the terminus or stopping place was on land of a municipal corporation.

Williams v. Toronto & York Radial R. Co., 48 D.L.R. 346, 45 O.L.R. 387.

NEGLIGENCE—RES IPSA LOQUITUR—JERKS AND JOLTS.

A jerk or jolt of a street car while receiving passengers, resulting in a passenger being thrown off and injured while attempting to board the car, is primâ facie proof, without more, that the accident was caused by the negligence of the railway company, to which the principle of res ipsa loquitur applies.

Johnson v. Halifax Electric Tramway Co., 36 D.L.R. 56, 51 N.S.R. 274.

NEGLIGENCE—HORSE BEING DRIVEN ACROSS TRACK ON HIGHWAY STRUCK BY ELECTRIC CAR—EVIDENCE—FINDINGS OF JURY—EXCESSIVE SPEED — NEGLECT TO GIVE WARNING OF APPROACH OF CAR—FAILURE TO AVOID RUNNING INTO HORSE AFTER DANGER OF COLLISION MANIFEST—CONTRIBUTORY NEGLIGENCE — ULTIMATE NEGLIGENCE.

Mitchell v. Toronto & York Radial R. Co., 12 O.W.N. 249.

INJURY TO PERSON ATTEMPTING TO ENTER MOVING CAR — INVITATION—SUDDEN INCREASE OF SPEED—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE — EVIDENCE — FINDINGS OF JURY.

Hill v. Toronto R. Co., 40 O.L.R. 393.

INJURY TO PASSENGER—EXTENDING ARM THROUGH WINDOW.

Unless a tramway company has been guilty of negligence in some other respect, a passenger who puts his arm on the sill of the car window in such a way that it projects beyond the side of the car, and is struck by a car going in the opposite direction, cannot recover damages for such injuries.

Montreal Tramways Co. v. Lefebvre, 24 D.L.R. 278, 24 Que. K.B. 83.

STRUCK BY STEP OF CAR.

A plaintiff suing a street railway company for being hit by the step of a car while at the side of the track is not entitled to have the question of negligence submitted unless he has established by some reasonable proof want of due care by the company or its servants.

Dunham v. Cape Breton Electric Co., 21 D.L.R. 38, 48 N.S.R. 287.

INJURY TO PERSON ON HIGHWAY — NEGLIGENCE—EVIDENCE—FINDINGS OF JURY—MOTION FOR NONSUIT—SPEED OF CAR—SOUNDING WHISTLE—ONTARIO RAILWAY ACT, R.S.O. 1914, c. 185, s. 155—CONTRIBUTORY NEGLIGENCE—ULTIMATE NEGLIGENCE.

Humberstone v. Toronto & York Radial R. Co., 7 O.W.N. 711.

NEGLIGENCE—INVITATION TO ALIGHT WHILE CAR MOVING.

The opening of the door of a street car by the conductor at a regular stopping place is primâ facie an invitation to alight; and if the car is moving slowly so that a reasonably careful passenger thinks the car has stopped, it is negligence on the part of the company.

Gazey v. Toronto R. Co., 38 D.L.R. 637, 40 O.L.R. 449, 22 Can. Ry. Cas. 233.

NEGLIGENCE — CAUSAL CONNECTION BETWEEN INJURY AND OCCURRENCE.

Montreal Tramways Co. v. Mulhern, 39 D.L.R. 758, 55 Can. S.C.R. 621, affirming 26 Que. K.B. 456.

INJURY TO PERSON FALLING IN CROSSING TRACK — NEGLIGENCE OF MOTORMAN — DISTANCE OF CAR FROM PLACE OF FALL — FINDING OF JURY — DAMAGES — ASSESSMENT BY JURY OF LARGE BUT NOT EXCESSIVE SUM—MONEY-LOSS—LOSS OF EARNING POWER—PAIN AND SUFFERING —PERMANENT INJURY—AGED WOMAN.

Racicot v. Ottawa Electric Co., 14 O.W.N. 210.

DUTY TO WOMAN PASSENGER—PREGNANCY —RIOT—VERDICT — DAMAGES — NEW TRIAL.

A tramway conductor who permits a woman to enter the car during disorder or not, makes the tramway company liable; and if in the tumult the woman receives a blow which causes her a miscarriage, the company is liable for the damages which ensue. A miscarriage resulting from a fall is not too remote an injury to entitle the victim recourse; it is a direct injury which gives a right to compensation. There is nothing contradictory in a jury's verdict declaring that a woman was injured as the result of a wound inflicted on her by the conductor in pushing her back, and the fault of the company consisted in the conductor allowing the victim to get into the car when there was a brawl; the first act being the cause of the accident, the second is the fault of the company. A new trial, on the ground of error of the Trial Judge, will not be granted unless actual prejudice has been caused thereby.

Montreal Tramways Co. v. McDonnell, 27 Que. K.B. 566.

INEXCUSABLE FAULT — SPEED — EVIDENCE —SIMILAR ACCIDENTS.

In a collision between a car of a tramways company and an emergency wagon, both going at an immoderate speed, at a dangerous street crossing, where several accidents had already occurred, it is inexcus-

able fault for which the tramways company is responsible, due to the negligence of the motorman to diminish his speed. Acts which would not have constituted an inexcusable fault if the attention of the employer had not been called to them, become such fault if, for the purpose of economy and increase of its profits, it has neglected to take measures which were pointed out to it for the protection of its employees or the public. A plaintiff suing in damages by reason of a collision at a street crossing can give evidence of several accidents having already occurred at that place, and that the defendant had done nothing to prevent them, an inscription in law made to such evidence will be refused.

Montreal Tramways Co. v. Savignac, 27 Que. K.B. 246.

DERAILMENT OF CAR—LIABILITY.

The responsibility of a tramway company for an accident caused by the derailment of one of its cars, does not arise under art. 1054 C.C. (Que.) but is subject to art. 1053.

Fortin v. Montreal Tramways Co., 54 Que. S.C. 428.

DAMAGES—NEGLIGENCE—JURY — ANSWERS TO QUESTIONS—MEANING OF UNCERTAIN —NEW TRIAL—COUNTY COURT — NEW TRIAL ORDERED AT CLOSE OF HEARING— JURISDICTION—COSTS.

In an action in the county court for damages for injuries sustained from a fall when alighting from a street car, the plaintiff claimed that after the car had stopped at its usual stopping place at a road crossing, it started again before she had got down from the step and threw her to the ground. The evidence of the conductor on the car was that she stepped off the car as it was slowing down and before it had reached the crossing. The jury found the defendant guilty of negligence and the plaintiff not guilty of contributory negligence, but in answering a question as to what the defendant's negligence was, stated "in allowing plaintiff to alight while car in motion as claimed to be by conductor." The Trial Judge ordered a new trial. Held, on appeal (1) that in view of the uncertainty of the meaning of the jury's answer as to what the defendant's negligence was, coupled with the finding that the plaintiff was not guilty of contributory negligence, there should be a new trial. (2) That the Trial Judge in ordering a new trial at the close of the case, was acting without jurisdiction. (3) That the appellant, although obtaining an order for a new trial, having failed in all its grounds of appeal and the respondent having an order he did not ask for, there is good cause for disposing of the costs otherwise than following the event, and the order should be costs in the cause.

Woolston v. B.C. Electric R. Co., 25 B.C.R. 518.

The refusal of a conductor of a street railway to change a $5 bill, which was offered by a passenger to permit the latter to pay his fare, and at the same time warning the passenger that he should either pay or leave the car, does not constitute an injury which will give the passenger a right of action for damages against the company, as responsible for the act of its employees. The company will be held to change a reasonable amount not exceeding $2 but it will not be held to change $5 or any other bill of a greater amount which the passenger may offer in payment.

Cadieux v. Montreal Street R. Co., 18 Rev. de Jur. 42.

CARE AND SAFETY OF PASSENGERS.

A tramway company is liable in damages for injury sustained by a passenger in one of its cars: if it permits an obstruction there; if it does not keep it in good condition; if, on the happening of an accident, its employees instead of calming the passengers order them to disembark, thus increasing their fright and causing a panic.

Montreal Tramways Co. v. McNeil, 25 Que. K.B. 90.

INJURY TO BICYCLIST — NEGLIGENCE OF MOTORMAN—EVIDENCE—FINDINGS OF JURY.

Carswell v. Sandwich, Windsor & Amherstburg, R. Co., 17 O.W.N. 286.

NEGLIGENCE—COLLISION OF STREET CAR WITH AUTOMOBILE — NEGLIGENCE OF MOTORMAN—NEGLIGENCE OF CHAUFFEUR —FINDINGS OF JURY—EVIDENCE—CONTRIBUTORY NEGLIGENCE—ULTIMATE NEGLIGENCE.

Ontario Hughes-Owens v. Ottawa Electric R. Co., 15 O.W.N. 413. [Affirmed, 16 O.W.N. 54.]

INJURY TO PERSON AND PROPERTY—COLLISION OF STREET CAR AND WAGON—EVIDENCE—FINDINGS OF JURY—DAMAGES.

Williams v. Toronto R. Co., 2 O.W.N. 39, 20 O.W.R. 3.

INJURY TO PASSENGER WHILE ATTEMPTING TO BOARD CAR—FINDINGS OF JURY — EVIDENCE—DAMAGES.

D'Eve v. Toronto R. Co., 3 O.W.N. 38, 20 O.W.R. 5.

USUAL STOPPING PLACE—NEGLIGENTLY RUNNING PAST STATIONARY CAR.

A passenger who had just alighted from a street car which was being met on a parallel track by another, at a point where cars usually stopped to discharge and receive passengers, and where, to the knowledge of the railway company, it was the custom or habit of persons alighting from cars to cross a parallel track in order to reach another street, is not necessarily guilty of contributory negligence, where the fact that another passenger warned the plaintiff, a woman, to look out for the car, might well have flurried and perturbed her, as witnesses said, and led her to lower her head in the face of a strong wind, as she went around the rear of the car from which she had just alighted, and attempted to cross the parallel track, where she was struck by a car which was negligently run

past the stationary car at an unusually high rate of speed.

Cooper v. London Street R. Co., 9 D.L.R. 368, 4 O.W.N. 623, 15 Can. Ry. Cas. 24, 49 C.L.J. 235, 23 O.W.R. 767, affirming 5 D.L.R. 198, 14 Can. Ry. Cas. 91, 22 O.W.R. 87.

CARS PASSING STREET CROSSING.

It is the duty of a motorman in taking his car over a crossing to keep a reasonable lookout for pedestrians and vehicles using the same crossing.

Carleton v. Regina, 1 D.L.R. 778, 5 S.L.R. 90, 1 W.W.R. 953, 20 W.L.R. 395.

DUTY WHEN APPROACHING A CROSSING.

It is quite a frequent and expected practice for the public to cross a street behind a car stopped at a corner of a street. This crossing being dangerous on account of a car which may be coming in the opposite direction, it ought to be the object of special precaution on the part of the employees of the company. And a car passing another car at rest, discharging passengers, ought to go at such a speed as to enable it to be stopped almost instantly. And a motorman, at a moment when, by the presence of another car at rest, is unable to see persons approaching from the other side of the street, ought to keep his attention absolutely rivetted so as to be able to avoid any danger which might arise.

Burton v. Montreal Tramways Co., 51 Que. S.C. 74.

DUTIES AS TO SPEED AND SIGNALS—AGREEMENT WITH MUNICIPALITY AS TO — RIGHT OF PEDESTRIAN TO ASSUME COMPLIANCE—NEGLIGENCE.

When by an agreement between a municipal corporation and a company operating street cars, it is provided that the company will not run its cars at a greater rate of speed than ten miles an hour within city limits, without the permission of the corporation, and that a gong shall be sounded within 50 feet of each crossing. A person crossing the road where the street cars are operated has the right to assume that the drivers of the cars will comply with these regulations. [Simington v. Moose Jaw Street R. Co., 5 W.W.R. 759, followed.]

Brown v. Moose Jaw Electric Co., 7 W.W.R. 695.

PASSENGER ON "THROUGH" CAR—REFUSAL TO STOP CAR TO SET DOWN PASSENGER AT INTERMEDIATE POINT — ACTION FOR BREACH OF CONTRACT—ACT OF INCORPORATION OF DEFENDANT COMPANY, 39 VICT. (O.), c. 87, ss. 8, 13—AGREEMENT WITH CITY CORPORATION — BY-LAW — ONTARIO RAILWAY ACT, 3 & 4 GEO. V. c. 36, ss. 54, 105, 161—ONTARIO RAILWAY AND MUNICIPAL BOARD—RIGHT OF COMPANY TO OPERATE "THROUGH" CARS.

Fielding v. Hamilton & Dundas Street R. Co., 6 O.W.N. 474.

CARS PASSING AT CROSSING—COLLISION—INJURY TO PASSENGER.

Rose v. Toronto R. Co., 4 O.W.N. 833, 1069, 24 O.W.R. 84, 531.

(§ III B—27)—CROSSINGS — COLLISION WITH AUTOMOBILE.

An action for injury to an automoblie by a collision with a street car on turning a corner cannot be maintained against the electric railway if there was no evidence to warrant the jury in finding that the motorman, by exercising reasonable care, could have stopped his car and have avoided the collision after he had become aware or ought to have become aware that danger was imminent.

Gooderham v. Toronto R. Co., 22 D.L.R. 898, 8 O.W.N. 3.

SPUR TRACK—LIABILITY FOR INJURIES CAUSED BY CARS RELEASED BY CHILDREN —COLLISION.

A street railway company, which is supplying material for a street construction company, and has for that purpose a spur line connecting with the main track by a knife switch, which allows cars upon the spur line to run down the grade and out on to the main line, is responsible for injuries caused by boys releasing the cars on the spur line, thus causing a collision with the car on the main line on which the plaintiff was travelling. [McDowall v. Great Western R. Co., [1903] 2 K.B. 331, distinguished.]

Green v. B.C. Electric R. Co., 25 D.L.R. 543, 9 W.W.R. 75, 32 W.L.R. 393, 19 Can. Ry. Cas. 240. [Affirmed in 10 W.W.R. 614.]

NEGLIGENCE—COLLISION BETWEEN STREET CAR AND AUTOMOBILE—DERAILMENT OF CAR—RES IPSA LOQUITUR—EVIDENCE—FINDINGS OF JURY.

Curry v. Sandwich, Windsor & Amherstburg R. Co., 8 O.W.N. 287.

NEGLIGENCE—COLLISION BETWEEN STREET RAILWAY CAR AND AUTOMOBILE—WHICH PARTY AT FAULT—FINDINGS OF JURY — DANGEROUS CROSSING—HIGH RATE OF SPEED—EVIDENCE—DAMAGES—COSTS.

Seguin v. Sandwich, Windsor & Amherstburg R. Co., 9 O.W.N. 108.

NEGLIGENCE—BRAKES ON CARS RELEASED BY CHILDREN.

A company which, by its employees, without the authority of the owners of a railway, moves cars placed on a track at the top of a grade for the purpose of being unloaded further down the grade, and merely hand brakes them, without securely air braking and blocking them, assumes the risk of the cars being started down the grade by mischievous boys releasing the brakes, and is responsible for all resulting damage to life or property.

Geall v. Dominion Creosoting Co.; Salter v. Dominion Creosoting Co., 39 D.L.R. 242, 55 Can. S.C.R. 587, [1918] 1 W.W.R. 280, reversing 10 W.W.R. 617, 620 and restoring the trial judgment 25 D.L.R. 543, 19 Can. Ry. Cas. 240, 9 W.W.R. 75, 32 W.L.R. 393. [See 43 D.L.R. 547, 57 Can. S.C.R. 226.]

REAR END COLLISION.

Where it appears from plaintiff's own evi-

dence that he was familiar with a rule of the railway company calling for a five minute interval between cars and he, as motorman of a car, failed to observe that rule, which failure on his part caused a collision with a car ahead, a verdict by the jury in his favour will be set aside and the action dismissed on appeal.

Daynes v. B.C. Electric R. Co., 7 D.L.R. 767, 14 Can. Ry. Cas. 309, 17 B.C.R. 498, 3 W.W.R. 193, 22 W.L.R. 549. [Reversed 19 D.L.R. 266, 49 Can. S.C.R. 518, 18 Can. Ry. Cas. 146.]

(§ III B—28)—Collision with automobile—Theatres—Speed.

Running a street car at a high rate of speed at a place where people were leaving a theatre, thereby colliding with an automobile proceeding out from thereabouts, is negligence for which the railway company is responsible; where both are at fault the company may be condemned to pay half of the damages claimed.

Fairbanks v. Montreal Street R. Co., 31 D.L.R. 728.

Accident at street crossing—Excessive speed of car.

It is actionable negligence to run a tramcar toward an intersecting street at an unlawful rate of speed without attempting to slacken speed on discovering an automobile on or near the track in a position of danger.

Berry v. B.C. Electric R. Co., 12 D.L.R. 258, 18 B.C.R. 175, 24 W.L.R. 773.

Collision—Speed and signals—Incompetent motorman—Findings of jury.

Where the only finding of the jury on the question of negligence in a collision case against an electric railway company was, that the defendants were negligent in appointing an incompetent motorman, it is to be assumed that the jury found in defendants' favour on the other questions raised in the case, such as the speed of the car, the failure to sound the gong, the sufficiency of the brakes, and the alleged operation of the car on the wrong track of a double track system.

Mehner v. Winnipeg Electric Co., 21 D.L.R. 786, 25 Man. L.R. 384, 18 Can. Ry. Cas. 179, 8 W.W.R. 517.

Rate of speed.

Where a municipal by-law fixes a limit of speed, e.g., 8 miles an hour, for the street cars of a company, such company is not thereby authorized to run its cars at such maximum speed regardless of conditions and circumstances; hence a speed of not more than 5 or 6 miles an hour may be imprudence on a dark, rainy night on slippery rails and on a dimly lighted street, and if such car causes injury to a person crossing at the intersection of streets the company will be liable in damages.

Montreal Street R. Co. v. Conant, 7 D.L.R. 261, 14 Can. Ry. Cas. 305, 22 Que. K.B. 212, 19 Rev. Leg. 71.

Excessive speed and lack of warning—Crossing street with reasonable care.

Where the substance of the jury's findings in an action against a street railway for running down and killing a foot passenger crossing the street, is that the death was caused by negligence in operating their car at an excessive rate of speed and in failing to give due warning of the approach of the car, and that the deceased, having looked up and down the street and seen no car, had exercised reasonable care, judgment must be entered for the plaintiff, if there was evidence upon which reasonable men might find, as the jury did, that defendants were guilty of negligence and that the deceased had exercised reasonable care. [Cooper v. London Street Ry. Co., 9 D.L.R. 368, 15 Can. Ry. Cas. 24, 4 O.W.N. 623, applied.]

Ramsay v. Toronto R. Co., 17 D.L.R. 220, 30 O.L.R. 127, 17 Can. Ry. Cas. 6.

Excessive speed — Contributory negligence—Causa causans.

A carriage driven by plaintiff was overtaken and run into by one of the defendant's tram cars, with the result that plaintiff was severely injured and his carriage damaged. The Trial Judge found that the car was being run at an excessive rate of speed under the circumstances, but that plaintiff was guilty of contributory negligence in that he did not look or listen to see whether a car was approaching, and that the motorman did everything possible after he became aware of the danger to avert the accident, and dismissed plaintiff's action. Held, allowing plaintiff's appeal. The accident was wholly due to the negligence of defendant and there was no evidence of contributory negligence on the part of plaintiff. Assuming plaintiff to have been guilty of contributory negligence the decisive cause of the accident was the excessive speed at which defendant's car was running as the result of which the motorman was disabled from avoiding the accident after he saw that it was imminent.

Morris v. Halifax Electric Tramway, 50 N.S.R. 451.

(§ III B—29)—Stopping points for boarding car—Signals.

If a person desirous to get on a car signals a motorman to stop at a place other than at regular stopping point, this latter is not obliged to pay attention to him. But if the motorman returns the signal, and slakens the speed of the car, he thereby assumes the obligation of seeing that the passenger is safely embarked; if he starts the car before the passenger is safely aboard and the passenger sustain injury, the tramways company is liable for all damages suffered.

McGill v. Montreal Tramways Co., 49 Que S.C. 326. [Affirmed 30 D.L.R. 487, 53 Can. S.C.R. 390.]

DANGEROUS PLACING OF POLE — WANT OF LIGHTS—COLLISION.

A street railway company is not liable for injuries resulting from a collision of an automobile driven at night with a wire pole erected between the tracks, where the placing of the pole was done in pursuance of a municipal by-law and under the supervision of the city engineer, and there being no municipal regulation as to lighting the pole.

Hamilton Street R. Co. v. Weir, 25 D.L.R. 346, 51 Can. S.C.R. 506, 19 Can. Ry. Cas. 233, reversing 22 D.L.R. 155, 32 O.L.R. 578.

COLLISION WITH AUTOMOBILE—FAILURE TO DISPLAY LIGHT AND SOUND GONG—ABSENCE OF CONTRIBUTORY NEGLIGENCE.

Jones v. Niagara, St. Catharines & Toronto R. Co., 10 O.W.N. 460.

(§ III B—30)—CONDUCTOR GIVING PERMISSION TO INTENDING PASSENGER TO RIDE ON STEPS OF CAR—KNOWLEDGE OF COMPANY.

Williams v. B.C. Electric R. Co., 12 D.L.R. 770, 18 B.C.R. 295, 4 W.W.R. 1294, 25 W.L.R. 77, affirming 7 D.L.R. 459, 9 W.W.R. 61, 22 W.L.R. 377.

RIDING ON PLATFORM—PLATFORM PART OF CAR.

Dynes v. B.C. Electric R. Co., 15 B.C.R. 429.

(§ III B—31)—EQUIPMENT OF CARS.

A street railway company is obliged to use the best known appliances to conduct its business with safety to the public, and the use of the ratchet brake instead of the more modern electric air brake is in itself a fault.

Edmunds v. Montreal Street R. Co., 8 D.L.R. 772, 15 Can. Ry. Cas. 19.

UNUSUAL JOLTING OF CAR—DUTY OF SERVANTS IN CHARGE—NEGLIGENCE—INJURY —DAMAGES—EVIDENCE.

If there is unusal jolting or bumping of a street car it is the duty of the servants in charge of the car to ascertain why the bumping is going on. Failure to do this is negligence for which the company is liable in case of injury to a passenger, caused by the sudden stopping of the car, owing to the falling of a brake-shoe. Where there is enough in the evidence to make it a fair question for the jury whether the injury was the cause of the disease or merely aggravated it, or whether the injury and the disease were is anyway connected, there is sufficient evidence on which they may properly find a verdict for the injured person.

Scott v. Toronto R. Co., 48 D.L.R. 569, 45 O.L.R. 511.

NEGLIGENCE—LOOSE TROLLEY ROPE.

Allowing a rope attached to a trolley pole to hang loose, and capable of being blown out by the wind and entangling persons waiting for cars, is negligence, for which a person injured in consequence thereof may recover.

Wilkes v. Saskatoon, 32 D.L.R. 42.

NEGLIGENCE—EMPLOYEE OF RAILWAY TRAVELLING ON A PASS—ONUS ON COMPANY TO PROVE ISSUE OF PASS.

Wilkinson v. B.C. Elec. R. Co., 16 B.C.R. 113, 17 W.L.R. 482.

INJURY TO PASSENGER — ELECTRIC EXPLOSION — INSPECTION — WRITTEN REPORT.

Fleming v. Toronto R. Co., 25 O.L.R. 317.

(§ III B—33)—PASSENGER — ALIGHTING TO TRANSFER — OBSTRUCTION AT STOPPING PLACE — INJURY BY SWING OF CAR ROUNDING CURVE — NEGLIGENCE — LIABILITY.

The obligation of a street railway company to a passenger who has not completed his journey but who has alighted for the purpose of transferring to another car is greater than it would be to a passenger who has completed his journey, but even as to such a passenger the company is bound to provide a stopping place at which the passenger can proceed to the sidewalk without having to pass through a deep pool of water or subjecting him to the danger before he has reached the sidewalk, assuming that he has not unnecessarily delayed in crossing, of being struck by a car when swinging around a curve existing at the stopping place.

Barr v. Toronto R. Co. and Toronto, 49 D.L.R. 444, 46 O.L.R. 64, affirming 46 D.L.R. 722, 44 O.L.R. 232.

DUTY AS TO PERSONS ON OR NEAR TRACK.

A motorman seeing a vehicle driving at right angles to his track, as if to cross, is justified in not reversing his controller until he sees that the driver of the vehicle does not intend to stop at the track and allow the car to pass, but the moment he perceives that there is danger it is his duty to act as promptly as he can to avert the danger.

Carleton v. Regina, 1 D.L.R. 778, 5 S.L.R. 90, 1 W.W.R. 953, 20 W.L.R. 395.

COLLISION WITH PERSON CROSSING STREET — SIGNALS — PROXIMATE CAUSE.

Sitkoff v. Toronto R. Co., 29 D.L.R. 498, 36 O.L.R. 97.

PERSON KILLED BETWEEN TRACKS AND PLATFORM — TRESPASSER OR LICENSEE—NEW TRIAL.

Carruthers v. Toronto & York Radial R. Co., 19 O.W.R. 983, 3 O.W.N. 14.

STREET CAR CONDUCTOR — TRANSFER OF PASSENGER AT DANGEROUS PLACE.

Schnell v. B.C. Electric R. Co., 15 B.C.R. 378, 14 W.L.R. 586.

DUTY ON SEEING PERSON OR VEHICLE ON OR NEAR TRACK.

It is the duty of a street railway company to run its electric cars on city streets under such control and at such rate of speed and accompanied by such warning, that the motorman will be enabled to take reasonable precautions to avoid a collision when an

emergency arises by a vehicle necessarily turning upon the tracks in a crowded street.

Durie v. Toronto R. Co., 15 D.L.R. 747, 5 O.W.N. 829, 16 Can. Ry. Cas. 334, 25 O. W.R. 789.

DUTY ON SEEING PERSON NEAR TRACK — WARNINGS — ULTIMATE NEGLIGENCE.

A motorman approaching a crossing, who has given the statutory warnings, is not bound to give additional warnings to persons approaching it, unless he had reason to believe that they were oblivious of his presence and of danger in crossing the track; his failure to do so, in the circumstances, does not constitute ultimate negligence.

Honess v. B.C. Electric R. Co., 36 D.L.R. 381, 23 B.C.R. 90, 21 Can. Ry. Cas. 238.

DUTY OF MOTORMAN WHEN SEEING PERSON ON OR NEAR TRACK — COLLISION — PROXIMATE CAUSE.

Proulx v. Montreal Tramways Co., 37 D.L.R. 200, 52 Que. S.C. 6.

(§ III B—35)—NEGLIGENCE TOWARDS PASSENGERS.

The fact that the motorman and the conductor exchanged places on a street car in contravention of the company's rules, and that the conductor so permitted to drive the car allowed it to collide with another car either from negligence or incompetence, may form the basis of an action by a passenger for the resulting personal injuries he received.

Winnipeg Electric R. Co. v. Hill, 8 D.L. R. 106, 46 Can. S.C.R. 654, 22 W.L.R. 628, affirming Hill v. Winnipeg Electric R. Co., 21 Man. L.R. 442.

INJURY TO PASSENGER — FALL CAUSED BY BREAKING OF STRAP — PRIMA FACIE NEGLIGENCE — RES IPSA LOQUITUR — ABSENCE OF EVIDENCE OF INSPECTION — FINDING OF JURY — NONDIRECTION — NEW TRIAL — HUSBAND JOINED AS COPLAINTIFF.

The fact that the strap by which the plaintiff was supporting herself, standing in the car, broke when called on to bear the strain, cast upon the company the burden of shewing that the breaking was not due to any negligence on its part. The case was one for the application of the rule res ipsa loquitur. [McPhee v. Toronto, 9 O.W.N. 150; Sangster v. Eaton, 25 O.R. 78, 21 A.R. (Ont.) 625; Eaton Co. v. Sangster, 24 Can. S.C.R. 708, and Toronto R. Co. v. Fleming, 47 Can. S.C.R. 612, followed.] The company adduced evidence for the purpose of rebutting the prima facie presumption which arose from the breaking of the strap, but made no attempt to shew that the strap had been inspected or tested, or that any system of inspection or testing was in use, nor to shew how long the strap which broke had been in use. The jury should have been instructed that the burden of rebutting the presumption of negligence which arose from the breaking of the strap was upon the company, and that unless that burden had been satisfied the plaintiffs were entitled to succeed; and, the jury not having been so instructed, and their findings as to negligence being unsatisfactory, the ends of justice would be best served by setting aside the judgment and directing a new trial.

Brawley v. Toronto R. Co., 46 O.L.R. 31, 49 D.L.R. 452, reversing 44 O.L.R. 568.

(§ III B—36)—INJURY TO DOG—CONTRIBUTORY NEGLIGENCE.

For the plaintiff suing an electric railway company for having run down and killed a valuable dog owned by him, to have allowed the dog to follow the rig in which he was driving along the street car track in a city at a distance of 100 feet or more is such contributory negligence as will disentitle him to recover where the jury has found that the plaintiff did not have his dog in proper control while on the street.

Lucas v. Toronto, 22 D.L.R. 601, 8 O.W. N. 253.

(§ III B—37)—OPERATION OF STREET RAILWAY—FRIGHTENING HORSES—DAMAGES—QUANTUM—FINDINGS.

The defendants were held by the Trial Judge liable in damages to the plaintiff for injury to a team of mares, owned by him, which were frightened upon the highway by the negligent operation of an electric car of the defendants and injured; and the damages were assessed at $100. Upon the defendants' appeal, the court en banc refused to interfere with the finding of negligence; and upon the plaintiffs' cross-appeal to increase the damages, the court also declined, upon the evidence, to vary the Trial Judge's assessment.

McCarthy v. Moose Jaw Electric R. Co., 29 W.L.R. 271.

(§ III B—39)—PROTRUDING RAILS—AUTOMOBILE COLLISION—MUNICIPALITY.

A municipal corporation operating a street railway is liable for a collision of a street car with an automobile which had become stalled owing to rails protruding at a highway crossing.

Kuusisto v. Port Arthur, 31 D.L.R. 670, 37 O.L.R. 146.

ACCIDENT TO PERSON ON STREET RAILWAY TRACK — GUARD RAIL — IMPROPER HEIGHT OF RAIL.

Chisholm v. Halifax Tramway Co., 9 E.L. R. 291.

C. CONTRIBUTORY NEGLIGENCE.

(§ III C—40)—BOARDING CAR WHILE IN MOTION—WARNINGS AGAINST.

Disregard of a warning prominently displayed at the point of entrance to a street car that persons should not get on the car while it is moving, may constitute contributory negligence on the part of the passenger which will prevent his recovering damages for injury to his foot by having it caught in the step riser which was defectively and improperly built, if it appears that the plaintiff's foot could not have slipped into the opening left in the riser

had he boarded the car when it was stationary.

Black v. Calgary, 24 D.L.R. 55, 31 W.L.R. 191, 8 W.W.R. 646.

ULTIMATE NEGLIGENCE—EXCESSIVE SPEED.

Running a street car at an excessive speed can only become ultimate negligence, for which there is liability notwithstanding the plaintiff's contributory negligence, in cases where the motorman could, or should have, avoided the accident, but failed to do so.

Smith v. Regina, 34 D.L.R. 238, 10 S.L.R. 72.

ATTEMPT TO BOARD CROWDED CAR—CONTRIBUTORY NEGLIGENCE.

Clarey v. Ottawa Electric R. Co., 33 D. L.R. 586, 38 O.L.R. 308, 21 Can. Ry. Cas. 281.

BOARDING MOVING CAR—JOLT—VERDICT—EVIDENCE.

Plaintiff, a passenger, got on the lower step of one of the defendant company's tramcars. She was warned by the conductor not to get off until the car stopped, but was thrown off, as she claimed, by a jolt of the car. Assuming such jolt to have occurred there was nothing to shew that it was not one of the ordinary incidents of operating the car and no negligence on the part of the company was disclosed. Held, that plaintiff was not entitled to recover damages for injuries sustained and that the verdict rendered by the jury in plaintiff's favour, contrary to instructions of the Trial Judge, must be set aside.

Whitford v. Nova Scotia Tramways Co., 52 N.S.R. 105.

INJURY TO PASSENGER ALIGHTING FROM MOVING CAR—NEGLIGENCE OF SERVANTS OF RAILWAY COMPANY OPERATING CAR—OVERCROWDING—EXIT-DOOR LEFT OPEN—ABSENCE OF CONTRIBUTORY NEGLIGENCE—FINDINGS OF JURY.

Setterington v. Sandwich, Windsor & Amherstburg R. Co., 16 O.W.N. 123.

INJURY TO PASSENGER ALIGHTING FROM CAR—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—FINDINGS OF JURY—FORM OF QUESTION LEFT TO JURY—EVIDENCE.

Brown v. Toronto R. Co., 6 O.W.N. 182.

(§ III C—42)—DUTY OF MOTORMAN—REVERSING OF POWER—INJURY AVOIDABLE NOTWITHSTANDING CONTRIBUTORY NEGLIGENCE—"LAST CLEAR CHANCE"—ULTIMATE NEGLIGENCE.

Harnovis v. Calgary, 11 D.L.R. 3, 6 A.L. R. 1, 4 W.W.R. 263, 23 W.L.R. 847, varying 7 D.L.R. 789, 2 W.W.R. 312.

COLLISION WITH VEHICLE—ULTIMATE NEGLIGENCE.

In a personal injury action arising from a street car colliding with a rig, where both the plaintiff and the defendants' motorman were guilty of negligence, each in not seeing the danger and avoiding the injury of a collision, if it appears that when the motorman first saw the impending danger it was too late to prevent the injury, the plaintiff's action fails.

Herron v. Toronto R. Co., 11 D.L.R. 697, 28 O.L.R. 59, 15 Can. Ry. Cas. 373, reversing 6 D.L.R. 215, 14 Can. Ry. Cas. 124, 22 O.W.R. 933.

COLLISION AT CROSSING—FAILURE TO LOOK—INJURY AVOIDABLE NOTWITHSTANDING CONTRIBUTORY NEGLIGENCE.

An inoperative brake on a car which is incapable of arresting its movement when running at an excessive speed will render the railway company liable for personal injuries resulting from a collision of the car with a vehicle at a level crossing, notwithstanding the contributory negligence of the injured in not looking out to see whether the road was clear.

B.C. Electric R. Co. v. Loach, 23 D.L.R. 4, 20 Can. Ry. Cas. 309, [1916] 1 A.C. 719, 32 W.L.R. 169, affirming 16 D.L.R. 245, 19 B.C.R. 177, 6 W.W.R. 322, 27 W.L.R. 407.

COLLISION—ULTIMATE NEGLIGENCE.

The failure of a motorman to avoid a collision, when he could have done so, after seeing that the plaintiff was about to cross, is the ultimate negligence and the proximate cause of the accident, despite the plaintiff's contributory negligence in failing to look. [Calgary v. Harnovis, 15 D.L.R. 411, 48 Can. S.C.R. 494, followed.]

Banbury v. Regina, 35 D.L.R. 502, 10 S. L.R. 297, [1917] 3 W.W.R. 159.

DEFECTIVE BRAKES—SPEED.

Defective brakes on a street car incapable of arresting its speed when approaching a highway crossing is negligence which will render the railway company liable for a collision, notwithstanding the plaintiff's contributory negligence. [B.C. Electric R. Co. v. Loach, 23 D.L.R. 4, [1916] 1 A.C. 719, followed.]

Columbia Bitulithic v. B.C. Electric R. Co., 37 D.L.R. 64, 55 Can. S.C.R. 7, [1917] 2 W.W.R. 664, 21 Can. Ry. Cas. 243, reversing 31 D.L.R. 241, 23 B.C.R. 160, [1917] 1 W.W.R. 227.

INJURY TO AUTOMOBILE—PERSONAL INJURIES—CONTRIBUTORY NEGLIGENCE—ULTIMATE NEGLIGENCE—FINDINGS OF JURY—DAMAGES—COSTS—NEW TRIAL.

Nairn v. Sandwich, Windsor & Amherstburg R. Co., 11 O.W.N. 91, 394.

MAN ON BICYCLE STRUCK BY CAR—CONTRIBUTORY NEGLIGENCE—ULTIMATE NEGLIGENCE.

Roswell v. Toronto R. Co., 11 O.W.N. 41.

(§ III C—43)—COLLISION WITH AUTOMOBILE—RULE OF ROAD.

Driving an automobile contrary to the rule of the road as required by a municipal traffic by-law, particularly the reckless proceeding out from behind a street car in a diagonal course thereby hiding from view a street car approaching from an opposite direction, constitutes contributory negligence which will preclude recovery for in-

juries sustained in consequence of a collision with the street car.

Tait v. B.C. Electric R. Co., 27 D.L.R. 558, 22 B.C.R. 571, 20 Can. Ry. Cas. 408, 34 W.L.R. 684, 10 W.W.R. 523. [Appeal quashed, 32 D.L.R. 378, 54 Can. S.C.R. 76, [1917] 1 W.W.R. 544.]

COLLISION—NEGLIGENCE OF JITNEY DRIVER.

Where in the agony of imminent collision caused by a jitney driver's recklessness, a motorman increases speed, in the hope of avoiding an accident, the railway company is not liable for injuries occasioned thereby to a passenger of the jitney.

Moore v. B.C. Electric R. Co., 35 D.L.R. 771, 24 B.C.R. 314, [1917] 2 W.W.R. 729.

(§ III C—46)—PERSONS UNDER DISABILITY.

A passenger's failure to see, while alighting, that the car was in motion, is not necessarily contributory negligence, if the passenger is an old person with perceptive faculties less acute than those of youth.

Fraser v. Pictou County Electric Co., 28 D.L.R. 251, 50 N.S.R. 30, 20 Can. Ry. Cas. 409.

(§ III C—47)—PERSON CROSSING TRACK.

Where a street car approaches a stopping place at an excessive speed, and there are persons waiting to board the car, and the car slackens speed as though to stop, but does not stop, and the highway is in such a condition as to demand the close attention of any one making use of it, an attempt to cross in front of the car does not necessarily constitute contributory negligence, but the question must be left to the jury.

Slingsby v. Toronto R. Co., 3 D.L.R. 453, 3 O.W.N. 1161, 21 O.W.R. 980.

INJURY TO PERSON CROSSING TRACK—FAILURE TO LOOK FOR CARS.

Failure to look for approaching cars before crossing a street car track will defeat an action for the death of a pedestrian who, had he used ordinary care, would have seen the car that struck him, which could not have been stopped by the motorman after discovering the peril of the deceased in time to avoid striking him. [London Street R. Co. v. Brown, 31 Can. S.C.R. 642, applied.]

Ryder v. St. John R. Co., 13 D.L.R. 11, 42 N.B.R. 89, 13 E.L.R. 81.

PERSON CROSSING TRACK TO BOARD CAR—QUESTION FOR JURY.

A judgment against a street railway company for injuries sustained by the plaintiff by being struck by a street car while crossing a track to board another car, will not be disturbed on appeal on the ground that the plaintiff's negligence contributed to his injury, where, under all the circumstances of the case, the question of the defendant's negligence as well as the plaintiff's contributory negligence, were proper questions for the jury. [Finegan v. London & N.W.R. Co., 5 T.L.R. 598; Ruddy v. London, & S.W.R. Co., 8 T.L.R. 658, and Toronto R. Co. v. King, [1908] A.C. 260, followed.]

Ogle v. B.C. Electric R. Co., 12 D.L.R. 261, 18 B.C.R. 692, 4 W.W.R. 519. [Affirmed by Supreme Court of Canada, 6 W.W.R. 683.]

AT CROSSINGS—LOOKING BOTH WAYS.

A person about to cross a railway track is under a duty not to be guilty of negligence, but what is the exercise of reasonable care is a question of fact to be decided by the jury, according to the facts of the case, and failure to look just before crossing a street railway track is not, as a matter of law, negligence per se.

Ramsay v. Toronto R. Co., 17 D.L.R. 220, 30 O.L.R. 127, 17 Can. Ry. Cas. 6.

PERSON CROSSING TRACK—SCOPE OF "STOP, LOOK AND LISTEN" DOCTRINE.

Where a person on foot is about to cross a street railway track, having taken the precaution to look once and having reasonably formed the opinion that it is safe to cross the track because an approaching car is at such a distance that, if operated in a usual and proper manner, the pedestrian can safely cross; the Trial Judge is in error, if he states the law as imposing a duty to look again, or continue looking and keeping the car in sight, as a condition precedent to any right of recovery.

Myers v. Toronto R. Co., 18 D.L.R. 335, 30 O.L.R. 263, reversing 10 D.L.R. 754, 30 O.L.R. 263, 24 O.W.R. 452.

PERSON CROSSING TRACK — CONTRIBUTORY NEGLIGENCE.

Ramsay v. Toronto R. Co., 5 O.W.N. 20, 24 O.W.R. 953.

DEATH OF PERSON STRUCK BY CAR IN ATTEMPTING TO CROSS TRACKS — NEGLIGENCE — CONTRIBUTORY NEGLIGENCE — ULTIMATE NEGLIGENCE—FINDINGS OF JURY—APPEAL.

Hayes v. Ottawa Electric R. Co., 8 O.W.N. 407. [Reversed by Supreme Court of Canada. See 9 O.W.N. 494.]

(§ III C—48)—COLLISION WITH VEHICLE—LOOKOUT—LIGHTS.

In an action for damages because of a collision between an oil tank and a tram car:—Held, while the drivers of both vehicles were probably negligent in not keeping a sufficient lookout up to the time when they found themselves in danger of collision, and, moreover, the plaintiff's wagon was not carrying the light required by by-law, there were no factors of excessive speed or defective appliance, there was no subsequent negligence on the part of the motorman.

Jackson v. B.C. Electric R. Co., 38 D.L.R. 145, 24 B.C.R. 484, [1917] 3 W.W.R. 1046.

ACCIDENT AT STREET CROSSING—EXCESSIVE SPEED OF CAR—FAILURE TO SOUND GONG—COLLISION WITH AUTOMOBILE.

That the driver of an automobile, when about to cross a street railway track at a street intersection where his view was obstructed by a fence at the edge of the side-

walk, erected about a building in course of construction, could have seen an approaching car had he looked a second sooner, does not establish contributory negligence sufficient to defeat a recovery for a collision with the car, which was running, in violation of a municipal regulation, at a high rate of speed without its gong being sounded. [Toronto R. Co. v. King, [1908] A.C. 260, applied.]

Simington v. Moose Jaw Street R. Co., 15 D.L.R. 94, 6 S.L.R. 409, 5 W.W.R. 659 and 759, 26 W.L.R. 167.

ACCIDENT AT STREET CROSSING—EXCESSIVE SPEED OF CAR—COLLISION WITH AUTOMOBILE.

Contributory negligence sufficient to prevent a recovery against a street railway company for a collision with the plaintiff's automobile, is not shewn from the facts that, on approaching an intersecting street, the plaintiff reduced the speed of his automobile so as to avoid a slowly moving westbound car without discovering an eastbound car approaching at an unlawful rate of speed until his automobile was near or on the track, and in the emergency, he increased speed and attempted to pass in front of both cars, when his automobile was struck by the eastbound car, the speed of which was not slackened after the motorman discovered the plaintiff's danger.

Berry v. B.C. Electric R. Co., 12 D.L.R. 258, 18 B.C.R. 175, 24 W.L.R. 773.

DRIVERS OF VEHICLES AND PERSONS THEREIN.

It is contributory negligence for the driver of a horse-drawn vehicle not to look, immediately before attempting to cross a street railway crossing to see that he has plenty of time to cross in safety and before any properly operated car can approach dangerously close to him.

Carleton v. Regina, 1 D.L.R. 778, 5 S.L.R. 90, 20 W.L.R. 305, 1 W.W.R. 953.

DRIVER OF MOTOR CAR—NEGLIGENCE OF—NEGLIGENCE OF STREET CAR CONDUCTOR PROXIMATE CAUSE OF INJURY—DAMAGES.

The negligence of the plaintiff in misjudging the speed of an oncoming street car will not prevent him from recovering damages for injuries caused by his car being hit by such street car, where the real proximate and decisive cause of the injury was that the motorman was running the car at such an excessive rate of speed that he could not stop the car within a reasonable distance and avoid the result of the plaintiff's negligence which might have been anticipated.

Parsons v. Toronto R. Co., 48 D.L.R. 678, 45 O.L.R. 627.

INJURY TO PERSON CROSSING TRACK—NEGLIGENCE — CONTRIBUTORY NEGLIGENCE — ULTIMATE NEGLIGENCE — FINDINGS OF JURY.

Jones v. Toronto & York Radial R. Co., 13 Can. Ry. Cas. 107, 25 O.L.R. 158, reversing 23 O.L.R. 331, 12 Can. Ry. Cas. 436.

RESPONSIBILITY — TRAMWAY — COLLISION —AUTOMOBILE—IMPRUDENCE OF MOTORMAN—C.C. ART. 1053.

There is negligence which gives a right to damages against the defendants when its motorman sees, or is able to see, in front of his car an automobile which was forced to cross his track in order to avoid striking a rig standing near the sidewalk, but the motorman does not stop or moderate his car, and a collision occurs between the car and the automobile.

Massé v. Montreal Tramways Co., 25 Rev. Leg. 246.

RESPONSIBILITY — TRAMWAYS — ORDINARY VEHICLE—PRIVILEGE—C.C. ART. 1053.

The Montreal Tramways Company has no greater right for its tramways in the streets of Montreal than the drivers of ordinary vehicles. Under the city by-laws, carriages going north and south have the right-of-way over those going east and west.

Rondeau v. Montreal Tramways Co., 25 Rev. Leg. 403.

LIABILITY — COLLISION — MAINTENANCE OF RAILS—MUNICIPAL BY-LAW — COMMON FAULT—C.C. QUE. ART. 1053, R.S.Q. 1909, ART. 6605.

Under art. 6605, R.S.Q. 1909, a tramway company is bound to maintain, at its own expense, unencumbered and in good state of repair, the part of the streets between the rails and 18 inches on each side, unless otherwise directed by the municipal council. When a municipal by-law limits this liability to 6 inches, and such by-law is replaced by another which does not make any mention of such maintenance, the common-law obligation continues; and the tramway company which is sued for damages for an accident caused on account of default in maintaining the street at this place, cannot call the city in warranty as having charge of maintaining the rest of the street. There is a common fault in a collision accident, resulting from the neglect of a tramway company to keep its way in good repair and from that of an automobile driver who, seeing this bad condition of the street becomes stuck in the rails on the approach of a tramcar.

Charland v. Montreal Tramways Co., 55 Que. S.C. 340.

INJURY TO PERSON DRIVING WAGON ON TRACK —CONTRIBUTORY NEGLIGENCE — PRIMARY NEGLIGENCE — ULTIMATE NEGLIGENCE.

Sim v. Port Arthur, 2 O.W.N. 864.

PERSON CROSSING TRACK—NEGLIGENCE—EXCESSIVE SPEED OF CAR—CONTRIBUTORY NEGLIGENCE — CROSSING BEHIND CAR WITHOUT LOOKING.

Rice v. Toronto R. Co., 22 O.L.R. 446, 12 Can. Ry. Cas. 98, 17 O.W.R. 770.

CONTRIBUTORY NEGLIGENCE—ULTIMATE NEGLIGENCE.

Rayfield v. B.C. Electric R. Co., 15 B.C.R. 361, 14 W.L.R. 414.

STRIKES.

Annotation.

Sedition—Treason: 51 D.L.R. 35.

INCITING TO GO ON STRIKE—INDUSTRIAL DISPUTES—STRIKE PREARRANGED WITHOUT DEMAND FOR BETTER TERMS.

To constitute the criminal offence of inciting to strike under the Industrial Disputes Investigation Act, 1907, Can., c. 20, ss. 56, 60, there must have been a "dispute" under s. 2 (e) on account of which the strike was incited; the offence may consist of inciting miners to go on strike after the strike has started although there had been no previous demand by the miners upon their employers for different conditions or wages, but it is not made a crime under that Act to incite the commencement of a strike before any demand for better terms of employment.

R. v. Holowaskawe; R. v. Croft; R. v. Cleary, 24 Can. Cr. Cas. 224.

SUBCONTRACTORS.

See Mechanics' Liens.

SUBLEASE.

See Landlord and Tenant.

SUBROGATION.

I. RIGHT TO SUBROGATION GENERALLY.
II. AS TO LOAN.
III. ON PAYMENT OF DEBT OR NOTE.
IV. AS TO JUDGMENTS.
V. AS TO MORTGAGES.
VI. OF SURETY OF GUARANTOR.
VII. TO VENDOR'S LIEN.
VIII. TO TAX LIEN.

Of lender of money used in payment of just debt, see Companies, IV S-79.

Annotation.

Surety; security for guaranteed debt of insolvent; laches; converted security: 7 D.L.R. 168.

I. Right to subrogation generally.

(§ I—1)—VENDEE'S DEFAULT—RIGHT OF PURCHASER FROM VENDEE.

Where the defendant, a vendee, in a contract for the sale of land, without the assent of his vendor as the contract required, sold the benefit of his contract to the plaintiff, but the original vendor purported to cancel the original contract for the defendant's default, the plaintiff will be subrogated to the defendant's rights in so far as concerns money paid by the plaintiff to the defendant and by the latter paid to the original vendor, and in so far as concerns any relief against the forfeiture of the money so paid.

Bayda v. Canada North Dakota Land Co., 13 D.L.R. 1, 25 W.L.R. 159, 4 W.W.R. 1333.

SATISFACTION OF LIEN BY ONE OF SEVERAL DEVISEES—RIGHTS AGAINST OTHERS.

Where one of the devisees, under a devise to several persons separately of certain properties to each, has paid more than his equitable share of a lien or charge in favour of a third person which by the terms of the will is imposed jointly upon all the properties in priority to the devisees, such devisee is entitled to be subrogated as against the others to the claim of the lienor in respect of the excess paid over and above his rightful share.

Gass v. Dickie, 22 D.L.R. 521, 48 N.S.R. 482.

II. As to loan.

CONVENTIONAL SUBROGATION — DEBT — SECURITIES, ART. 1155 C. C. (QUE.).

Under art. 1155, C. C. (Que.) subrogation by a person who pays the debt of another to his creditor doubtless carries with it the security which that debtor has deposited with his creditor for the payment of his debt. However, this principle does not apply where the debt paid is not an indebtedness of the debtor, who borrows the money, but that of his vendor who transferred, previously to the sale, a balance of price to the creditor as collateral security.

René v. Berman, 56 Que. S. C. 460.

III. On payment of debt or note.

(§ III—10)—DEPRECIATION OF SHARES—PAYMENT OF LOSS BY—RIGHT TO SHARES.

Trustees who make good a loss in respect to shares of stock held by them in breach of trust, until they became valueless, are entitled to the benefit of the securities.

Re Nicholls v. Wildman, 14 D.L.R. 244, 29 O.L.R. 206.

Where certain directors of a company personally paid off a claim against the company secured by collaterals (the property of the company), but, instead of taking over such collaterals to themselves, had them transferred by the creditor then being paid off to certain other creditors of the company, who were pressing for payment, as collateral security for their claims, in the bona fide belief that such arrangement was in the best interests both of the general creditors and of the company, such directors are properly allowed a preferential claim, in subsequent winding-up proceedings taken on the company's insolvency, upon the proceeds of such collateral securities so far as realized by the liquidator in excess of the amount collected in payment of their claims by the creditors who held such collaterals, but are not entitled to any preferential lien upon the general assets of the company in respect of such advances.

Re Okotoks Milling Co., 8 D.L.R. 76.

UPON PAYMENT OF NOTE—PRINCIPAL AND AGENT.

An agent who, having endorsed an instrument as surety to his principal (the vendor), pays the amount thereof upon default of the maker, is subrogated by law in the rights of the vendor, and is entitled to the ownership of the moveable sold under such agreement.

Dorval v. Carrier, 51 Que. S.C. 343.

ON PAYMENT OF DAMAGES—LANDLORD AND TENANT.

An amount paid for damages by an own-

er, whose house was burned, to a neighbour, to indemnify him for injury caused by water, cannot be claimed by such owner from his lessee, charged with being in fault, without subrogation of the rights of the neighbour.

Séminaire de Saint Sulpice v. Frothingham, 51 Que. S.C. 214.

V. As to mortgages.

(§ V—20)—RELOAN OF BORROWED MONEY—EQUITIES.

Where the father mortgages his property to lend the proceeds to his son and takes from the latter a mortgage on the son's land for the amount of the loan and a prior indebtedness, and the two mortgages are upon different terms of payment, the transaction negatives the theory that there was an agreement by the son to indemnify the father from the mortgage made by the latter nor is such an agreement to be presumed because of the son having consented to apply his payments by paying them directly to the father's mortgagee; and on the father's death his devisee of the incumbered lands or a transferee from such devisee has no right to subrogation in respect of the security held by the father against the son.

Bancroft v. Milligan, 16 D.L.R. 648, 30 O.L.R. 113.

ASSIGNMENT—NOTICE.

Subrogation to the position of a mortgagee will not be ordered where the party seeking the order has been guilty of negligence in not giving notice of the assignment of an agreement of sale of the lands covered by the mortgage.

Grace v. Kuebler, 38 D.L.R. 149, 12 A.L.R. 392, [1918] 1 W.W.R. 182. [See 33 D.L.R. 1, 11 A.L.R. 295, [1917] 1 W.W.R. 1213, 39 D.L.R. 39, 56 Can. S.C.R. 1, [1917] 3 W.W.R. 983.

VI. Of surety or guarantor.

(§ VI—25)—Where a surety of a debt for an insolvent debtor pays it off and by subrogation takes over from the creditor an assignment of the debtor's book debts, but instead of collecting them himself allows the debtor to retain and collect and appropriate same, he cannot demand as a preferred claim against the estate as against the other creditors the amount by which the insolvent estate had been enhanced in value by the mixing with it of the sum so collected and appropriated when no portion of the fund is earmarked to any specific asset.

Stecher Lithographic Co. v. Ontario Seed Co., 7 D.L.R. 148, 46 Can. S.C.R. 540, varying 24 O.L.R. 503, 22 O.L.R. 577. [Affirmed & sub nom. Uffelmann v. Stecher Lithographic Co., 20 D.L.R. 619.]

PRIVILEGE — SUBROGATION — PAYMENT BY CHIEF CONTRACTORS OF WAGES DUE TO LABOURERS HIRED BY A SUBCONTRACTOR.

Harris Mfg. Co. v. McGovern, 39 Que. S.C. 340.

SUBSTITUTION.

(Que. Law). See Wills.

REVOCABILITY—GIFT INTER VIVOS—REGISTRATION—RENEWING.

Under the authority of legislation prior to the Civil Code, a substitution, created by donation inter vivos in favour of children of the institute, is revocable by the mutual consent of the donor and donee, notwithstanding the prior acceptance of the latter. The contrary provision, contained in the fourth paragraph of art. 930 C. C. (Que.) is new law, even though not placed within brackets. Registration of a substitution need not be renewed after the bringing into force of the cadastral survey in order to preserve the rights of the substitutes.

Proulx v. Le Blanc, 27 Que. K.B. 103.

HYPOTHEC — LOAN — INTEREST — WILL — LEGISLATIVE AUTHORIZATION—SUBSTITUTE—MUNICIPAL TAXES.

Although an Act adopted by the Quebec legislature, and a will creating a substitution, authorize the institute to borrow on the real estate substituted, without mentioning that the loan shall be made with interest, it must be construed that the institute is authorized to borrow by affecting the real estate for the payment of the interest. The capital and interest thus borrowed are chargeable to the substitute after the institute's death, both personally and hypothecarily. But they are liable for a sum borrowed by the institute without the assistance of the curator to the substitution. That debt is due by the institute's estate. If the money has been spent on the substituted assets, the recourse of the institute or his heirs against the substitute is governed by arts. 581, 582. 958 C.C. (Que.); that is, the substitutes have the right to have the improvements or greater repairs made by the institute removed; and if it cannot be done without deteriorating the property, they remain the property of the substitutes without indemnity. The debt created by the imposition of a municipal tax, subsequent to the creating of a substitution, cannot in any way be considered as a previous debt, or privileged over the substitutes' right.

Perodeau v. Lacombe, 54 Que. S.C. 351.

SUBSTITUTIONAL SERVICE.

See Writ and Process.

SUCCESSION.

See Descent and Distribution; Wills; Executors and Administrators.

Succession duty, see Taxes, V.

SUFFRAGE.

See Elections.

SUMMARY CONVICTIONS.

I. GENERALLY.

II. JURISDICTION AND DUTY OF MAGISTRATE.

III. PROCEDURE.

IV. Effect.
V. Penalties and costs.
VI. Record of conviction and proceedings.
VII. Amendment.
VIII. Duplicity and uncertainty.

Annotations.

Notice of appeal; recognizance; appeal: 19 D.L.R. 323.

Order for further detention on quashing conviction: 21 D.L.R. 649.

Appeal by "party aggrieved": 27 D.L.R. 645.

Pre-requisites on appeals from: 28 D.L.R. 153.

Prosecution for same offence after conviction or commitment quashed on certiorari: 37 D.L.R. 126.

Amendment of summary convictions: 41 D.L.R. 53.

I. Generally.

See Criminal Law; Certiorari; Indictment; Costs.

Jurisdiction to entertain: Appeals from see Appeal, II C-50; Service of Notice of Appeal, see Appeal, III E-91.

(§ I—10)—Provincial crimes—Reasonable doubt.

The principle that an accused person ought not to be convicted unless, upon the whole case, it is shewn that he is guilty beyond a reasonable doubt, is applicable to summary conviction proceedings for an offence created by provincial law and punishable thereunder by fine or imprisonment.

R. v. Covert, 34 D.L.R. 662, 28 Can. Cr. Cas. 25, 10 A.L.R. 349, [1917] 1 W.W.R. 919.

Evidence.

When the evidence is as consistent with innocence as with guilt, there should not be a conviction.

The King v. Luttrell, 17 Can. Cr. Cas. 295.

II. Jurisdiction and duty of magistrate.

Jurisdiction of magistrate to try for offences quashed on certiorari, see Criminal Law, II G—79.

As to petit theft, see Appeal, I-1.

(§ II—20)—Presence of accused.

A magistrate has jurisdiction to proceed with the hearing of a charge punishable on summary conviction if the accused is in fact present, although he may have been brought there by irregular means, if the magistrate has jurisdiction over the person and offence. [The Queen v. Hughes, 25 Q.B.D. 249, and Ex parte Giberson, 4 Can. Cr. Cas. 537, 34 N.B.R. 538, applied; Re Paul, 20 Can. Cr. Cas. 161, 7 D.L.R. 25, disapproved.]

R. v. McDougall; Ex parte Goguen, 35 D.L.R. 269, 44 N.B.R. 369, 27 Can. Cr. Cas. 423.

Powers of magistrate—Law and facts.

The entering of a conviction by a magistrate when he has no legal power to do so and without the hearing of evidence is to be distinguished from the entering of a conviction after a hearing and because of a misinterpretation of the general law applicable to the case.

R. v. Richmond, 39 D.L.R. 117, 29 Can. Cr. Cas. 89, 12 A.L.R. 133, [1917] 2 W.W.R. 1200.

War Revenue Act — Essentials of offence.

A summary conviction, even upon a plea of guilty, must be set aside if the complaint does not set out the essential ingredient of the offence, e. g., under the Special War Revenue Act, 1915, that the accused sold the unstamped goods to a consumer, and not merely that the accused neglected to affix the stamps to certain goods as required by the Act.

Ex parte Richard, 30 D.L.R. 364, 26 Can. Cr. Cas. 166.

Trial—Certificate of dismissal.

Where on the trial of summary conviction proceedings the evidence produced is insufficient to prove the charge, the duty of the magistrate is to dismiss it and grant a certificate of the dismissal as provided by Cr. Code.

R. v. Chew Deb., 9 D.L.R. 266, 18 B.C.R. 23, 23 W.L.R. 308, 3 W.W.R. 854.

Territorial jurisdiction of magistrate—Proving locality of offence.

A summary conviction will be quashed where there was no evidence before the magistrate that the locality at which the offence was committed was within his territorial jurisdiction, the only reference to the place of the offence being in such general terms as "the landing" and "the coal company's offices."

R. v. Picard, 11 D.L.R. 423, 21 Can. Cr. Cas. 250, 3 W.W.R. 1007.

Summary trial — Jurisdiction without consent.

The absolute jurisdiction of a police magistrate in Saskatchewan, of a city having a population of over 2,500, is retained under Cr. Code, ss. 776, 777 as to the offences specified in s. 773 (including that of unlawful wounding), and the consent of the accused to summary trial is required by ss. 777, 778, only in those cases in which there is additional jurisdiction under s. 777. [R. v. Hayward, 6 Can. Cr. Cas. 399, 5 O.L.R. 65, applied.]

Re Worrell, 21 D.L.R. 522, 24 Can. Cr. Cas. 92, 8 S.L.R. 140, 8 W.W.R. 478, 30 W.L.R. 915, affirming 21 D.L.R. 519, 24 Can. Cr. Cas. 88.

Territorial jurisdiction of magistrate—Inconvenient place of trial.

Where, as in Alberta, justices of the peace are appointed with territorial jurisdiction extending over the entire province, an objection that the charge was not laid before the nearest justice will not be a ground for quashing the summary conviction unless there has been a gross abuse of authority in compelling the attendance of the accused at a far-distant and inconvenient place of

trial, notwithstanding the availability of a justice at a convenient place of trial, under circumstances amounting to a denial of the right of the accused to make his "full answer and defence" (Cr. Code, s. 715).

R. v. Tally, 21 D.L.R. 651, 23 Can. Cr. Cas. 449, 8 A.L.R. 453, 7 W.W.R. 1178, 30 W.L.R. 396.

LOCALITY OF OFFENCE—TERRITORIAL JURISDICTION.

Where the depositions already taken before the justice do not supply the defect which makes a summary conviction bad on its face, the justice cannot without the parties being before him and having an opportunity of being heard make up a substituted conviction or amend a defective conviction. [Chaney v. Payne, 1 Q.B. 712, applied.]

R. v. Aikens, 21 D.L.R. 633, 23 Can. Cr. Cas. 467, 48 N.S.R. 509.

DEFECTIVE INFORMATION — NONAPPEARANCE OF ACCUSED.

A fatal objection to an information in a summary proceeding cannot be cured by the testimony adduced where the defendant does not appear. [R. v. Hughes, 4 Q.B.D. 614; Turner v. Postmaster-General, 5 B. & S. 756, distinguished.]

Ex parte Monahan; R. v. Hubbard, 24 Can. Cr. Cas. 127, 42 N.B.R. 524.

INFORMANT OFFICER IN CHARGE OF ACCUSED.

Where the defendant has had an opportunity of entering upon the full defence of the charge brought against him of selling intoxicating liquor in contravention of law, the fact that the officer who laid the information and the officer to whose custody the accused was committed pending the determination of the charge was one and the same person does not go to the jurisdiction of the magistrate so as to invalidate the conviction under a statute under which certiorari is expressly taken away, ex. gr., the Canada Temperance Act.

Ex parte Richard; R. v. Steeves, 24 Can. Cr. Cas. 183, 42 N.B.R. 596.

OBSTRUCTING PEACE OFFICER—MODE OF TRIAL—RIGHT OF ACCUSED TO ELECT.

The offence of obstructing a peace officer in the execution of his duty may be prosecuted and punished before two justices or before any magistrate having the jurisdiction of two justices, under the procedure provided by Part XV. Cr. Code, without the consent of the accused to a summary trial, and such procedure is not controlled by the provisions of Part XVI. requiring such consent. That the procedure for the summary trial of the offence is controlled by Part XVI., and the accused cannot be so tried without having been first put to his election as provided by s. 778, notwithstanding s. 169.

The King v. Folkins; Ex parte McAdam, 27 D.L.R. 32, 43 N.B.R. 538, 25 Can. Cr. Cas. 365.

OBSTRUCTING OFFICIAL DUTY—ASSAULT ON CROWN LAND SURVEYOR.

On an information charging that the accused unlawfully and maliciously assaulted and threatened to beat one T., a Crown land surveyor, and prevented him from performing his official duty, the magistrate found the accused guilty as charged and adjudged that he pay the sum of $20 over and above the amount of the damage done, being $13 and the costs, and, in default of the payment of the said several sums and costs of conveying to gaol, he be imprisoned for two months. That, as the obstructing of T. in the discharge of his official duty was not an offence over which the magistrate had jurisdiction on summary conviction, the conviction must be quashed, and could not be amended under s. 1124, Cr. Code.

The King v. Dugas, 43 N.B.R. 443.

COMMITMENT FOR ASSAULT.

Justices of the peace have no jurisdiction under part XVI. to hear a charge of committing an assault occasioning actual bodily harm, contrary to s. 295, Cr. Code, inasmuch as the jurisdiction given to magistrates under s. 773 is a statutory one, and cannot be extended by implication.

R. v. Law, 9 W.W.R. 1075, 25 Can. Cr. Cas. 251.

APPEARANCE—REGULARITY OF SUMMONS.

In order to give a magistrate jurisdiction to proceed in default of appearance in a summary conviction matter, there must have been service of a "summons" in conformity with Part XV. Cr. Code; service at different times of a copy of the complaint and of a written notice of the time and place of hearing it is not sufficient although the notice was signed by both the magistrate and the complainant.

Lacasse v. Fortier, 30 Can. Cr. Cas. 87.

PRESENCE OF ACCUSED—IRREGULAR ARREST.

Summary conviction proceedings before a justice are not invalidated by the circumstance that the accused was arrested to be brought before the justice without a warrant in a case where there was no right of arrest without a warrant. [R. v. Hughes, 4 Q.B.D. 614, applied.]

R. v. Hanley, 30 Can. Cr. Cas. 63, 41 O.L.R. 177.

OPPORTUNITY FOR DEFENCE.

An accused person is not deprived of the opportunity of defence by the magistrate inadvertently assuming that the case was closed when the evidence for the prosecution was concluded and thereupon announcing the sentence, if before recording the conviction an opportunity to proceed with the defence was offered to counsel for the accused and he declined.

R. v. Cyr, 38 D.L.R. 601, 12 A.L.R. 320 at p. 325, 29 Can. Cr. Cas. 77, [1917] 3 W.W.R. 849, affirming 12 A.L.R. 320, [1917] 2 W.W.R. 1185.

EFFECT OF PENDING CHARGE.

A summary conviction will be quashed for want of jurisdiction if the magistrate, at the time he made the same, had pending before him another information against the

accused for a similar offence arising out of the same circumstances and partly tried, and did not dispose of the same before entering upon the hearing.

R. v. McManus, 30 Can. Cr. Cas. 122, [1918] 3 W.W.R. 3.

OPIUM AND DRUG ACT—CERTIORARI—PLEA OF GUILTY.

Although the Opium and Drug Act, 1-2 Geo. V. (Can.), c. 17, takes away the right to certiorari, proceedings by way of certiorari may be allowed to quash a summary conviction purporting to be made on a plea of guilty of "having opium in his possession without lawful or reasonable excuse" if the accused forthwith, after pleading guilty, and before a conviction was recorded, said to the magistrate that he did not know the contents of the package which he had just received at the time of his arrest. Such statement of the accused was, in effect, a statement of "sufficient cause why he should not be convicted" (Cr. Code, s. 721) and qualified his previous answer of "guilty," and thereafter the magistrate had no jurisdiction to proceed to conviction without taking evidence.

R. v. Richmond, 39 D.L.R. 117, 12 A.L.R. 133, 29 Can. Cr. Cas. 89, [1917] 2 W.W.R. 1200.

An appearance in a summary conviction matter waives all irregularities in the summons and even the want of a summons.

The King v. Mitchell, 19 Can. Cr. Cas. 113, 24 O.L.R. 324, 19 O.W.R. 588.

A summary conviction under a by-law which prohibits the use of "abusive, insulting and provoking language" upon a public street sufficiency designates the offence under the Summary Convictions Act, R.S.N.S. 1900, c. 161, if the conviction sets out the words used and declares their use to be contrary to such by-law, although the conviction does not in terms state that the words were "abusive, insulting and provoking."

The King v. Elderman, 19 Can. Cr. Cas. 445.

JURISDICTION OF JUVENILE COURT.

A Juvenile Court has jurisdiction to make a summary conviction for the offence of corrupting a child under Cr. Code, s. 220 A. (1918, Can. c. 16, s. 1.)

R. v. Ducker, 31 Can. Cr. Cas. 357, 45 O.L.R. 466.

POST OFFICE ACT—LIMITATIONS.

Cr. Code, s. 1142 applies to limit the period within which summary proceedings can be taken for the offence of using cancelled postage stamps in contravention of the Post Office Act, R.S.C. 1906, c. 66.

R. v. Gourlay, 26 Can. Cr. Cas. 23, 9 O.W.N. 372.

APPEARANCE—SUMMONS—SIGNATURE.

A summary conviction made on default of defendant's appearance to an alleged copy of summons served upon him may be set aside if it be shewn that the summons was not signed by the magistrate and that in consequence the defendant had not been legally cited to appear.

Lamontagne v. Lanctot, 25 Can. Cr. Cas. 449.

NO EVIDENCE OF OFFENCE—NO JURISDICTION TO CONVICT—PROHIBITION.

When there is no evidence of the commission of the offence charged appearing on the record of proceedings at the trial of a summary conviction matter under Part XV. Cr. Code, the magistrate exceeds his jurisdiction in pronouncing a conviction and a writ of prohibition may issue from a superior court to restrain the execution of the same.

McBrien v. Recorder's Court, 31 Can. Cr. Cas. 352.

MOTOR VEHICLES ACT—MAGISTRATE'S CONVICTION FOR UNLAWFULLY DRIVING MOTOR VEHICLE ON HIGHWAY FOR HIRE WITHOUT LICENSE—R.S.O. 1914 c. 207, ss. 4, 29, 34—MOTION TO QUASH CONVICTION—JURISDICTION OF MAGISTRATE—TRIAL BEFORE MAGISTRATE—NOTHING SAID OR DONE TO PREVENT DEFENDANT GIVING EVIDENCE — SUFFICIENCY OF EVIDENCE TO SUSTAIN CONVICTION—QUESTION FOR MAGISTRATE OR FOR APPELLATE TRIBUNAL—DEFENDANT MISLED BY BEING INFORMED THAT CHARGE LAID UNDER BY-LAW—ABSENCE OF BY-LAW.

R. v. McCord, 17 O.W.N. 143.

CONVICTION IN ABSENCE OF ACCUSED.

R. v. Broadfoot, 17 Can. Cr. Cas. 71.

APPLICATION FOR SUMMONS OR WARRANT—PRELIMINARY HEARING OF WITNESSES.

The King v. Neilson, 44 N.S.R. 488, 17 Can. Cr. Cas. 298.

SUMMONS TO ANSWER BEFORE A MAGISTRATE—BY CONSTABLE OR OTHER PEACE OFFICER—SUMMONS SERVED BY CONSTABLE WHERE HIMSELF THE INFORMANT AND PROSECUTOR.

Re Kennedy, 17 Can. Cr. Cas. 342.

(§ II—21)—MALICIOUS DAMAGE—CLAIM OF RIGHT.

The magistrate's jurisdiction to try a charge under s. 539 Cr. Code (for malicious damage generally) is ousted under s. 540 only if the accused proves that he did the act complained of under a fair and reasonable supposition of right, which is a question for the magistrate to determine even if it involves some investigation of title to lands. [R. v. Davy, 4 Can. Cr. Cas. 28, applied.]

Ex parte Murphy; R. v. Mullins, 38 D.L.R. 625, 29 Can. Cr. Cas. 1.

WITHDRAWAL OF IRREGULAR CHARGE.

If a statute provides that summary prosecutions for a certain offence shall be brought only in the name of certain officials, the trial upon a prosecution in contravention of that restriction would be a nullity: the accused in such case has not been placed in jeopardy so as to bar a second prosecution instituted by the proper official after the first prosecutor had con-

sented to the charge being withdrawn. [Davis v. Morton, [1913] 2 K.B. 479, applied.]

Ethier v. Minister of Inland Revenue, 32 D.L.R. 320, 27 Can. Cr. Cas. 12. [Followed in Minister of Inland Revenue v. Nairn, 35 D.L.R. 224, 28 Can. Cr. Cas. 12, 11 O.W.N. 422.]

SUBSTITUTIONAL SERVICE.

The court will quash a summary conviction as made without jurisdiction on being satisfied by affidavit that the defendant was out of the province from a date prior to the laying of the information until after the hearing and had not authorized the appearance of counsel who had applied on his behalf for an adjournment, although the summons had been served substitutionally on defendant's wife at his last place of abode (Cr. Code, s. 658). [Ex parte Donovan, 3 Can. Cr. Cas. 286, applied.]

R. v. Dimond, 25 Can. Cr. Cas. 317, 9 S.L.R. 106, 33 W.L.R. 803, 9 W.W.R. 1529.

UNDER SPECIAL STATUTE—TRIBUNALS SPECIFIED—EXCLUSION OF OTHER TRIBUNALS—MOTOR VEHICLES ACT (QUE.)—RECORDER EX OFFICIO A JUSTICE.

Prosecutions under the Motor Vehicles Act, Que., are competent only before the tribunals specified in R.S.Q. art. 1410, i.e., a judge of the circuit court, a police magistrate or a justice of the peace. Neither a recorder nor the recorder's court has jurisdiction in that respect, and although a recorder in the Province of Quebec is ex officio a justice of the peace, the proceedings under the special authority of the Motor Vehicles Act cannot be entertained by him in the capacity of recorder but only as a justice of the peace. While the Motor Vehicles Act makes applicable to prosecutions thereunder the procedure of Part XV. Cr. Code (summary convictions), that procedure applies only when the proceedings are before a tribunal specified in the Act. Jurisdiction does not thereby attach to other tribunals which under the Code have the powers of a justice as to offences under federal law.

Latendresse v. Piette, 31 Can. Cr. Cas. 248.

(§ II—22)—STATING PLACE OF OFFENCE IN INFORMATION.

An information under the Canada Temperance Act, R.S.C. 1906, c. 152, is bad as not disclosing an offence within the magistrate's territorial jurisdiction if it does not specify where the offence took place, although the place of the offence was stated in the summons served upon the defendant; a conviction made on such information in default of the appearance of the defendant thereto must be quashed.

Ex parte Monahan; R. v. Hubbard, 24 Can. Cr. Cas. 127, 42 N.B.R. 524.

(§ II—25)—SUMMONS — IRREGULARITY—WAIVER—APPEARANCE.

The defendant's appearance by counsel in answer to a summons in a summary proceeding under Part XV. Cr. Code is equivalent to his personal appearance, and the plea of not guilty entered by counsel for defendant in the latter's absence without objection to an alleged irregularity in the information and proceedings upon which the summons was founded, is a waiver of the irregularity and a submission to the jurisdiction of the justice. [Dixon v. Wells, 25 Q.B.D. 249; R. v. Thompson, [1909] 2 K.B. 614, applied.]

Ex parte Dolan; R. v. Kay, 26 Can. Cr. Cas. 171, 41 N.B.R. 95.

ASSAULT—JURISDICTION OF JUSTICES OF THE PEACE—EVIDENCE—FAILURE TO REDUCE TO WRITING.

R. v. Zyla, 17 W.L.R. 258.

SUMMARY CONVICTION UNDER PROVINCIAL STATUTE—PROSECUTIONS "GOVERNED" BY CRIMINAL CODE.

The King v. Hyndman, 17 Can. Cr. Cas. 469.

DISQUALIFICATION—TRIAL OF CHARGE BY MAGISTRATE WHO IS ALSO A MEMBER OF THE BOARD OF POLICE COMMISSIONERS—RESOLUTION OF COMMISSIONERS INSTRUCTING PROSECUTION OF THAT CLASS OF OFFENCES.

R. v. Suck Sin, 20 Man. L.R. 720, 18 Can. Cr. Cas. 266, 18 W.L.R. 141.

DISQUALIFICATION OF MAGISTRATE—BIAS—PENDING LITIGATION BETWEEN MAGISTRATE AND ACCUSED.

Ex parte Daigle, 18 Can. Cr. Cas. 211.

III. Procedure.

(§ III—30)—EXAMINATION OF INFORMANT—WAIVER.

The examination of the informant or his witnesses under oath before the issuance of the summons is not necessary to the validity of a conviction for common assault, particularly where the defendant waived it by appearing without objection. [The King v. Kay, 41 N.B.R. 95, followed.]

The King v. Shaw; Ex parte Kane, 27 D.L.R. 494, 26 Can. Cr. Cas. 156.

LEAVE TO WITHDRAW CASE.

On a summary trial, where all the evidence, offered by the prosecution has been heard and the case closed, the prosecutor cannot, upon objection taken that material proof is lacking, withdraw the charge and lay a new information charging the identical offence. [Ex parte Wyman, 5 Can. Cr. Cas. 58, disapproved; Bradshaw v. Vaughton, 30 L.J.C.P. 93, followed.]

R. v. Chew Deb, 9 D.L.R. 266, 18 B.C.R. 23, 23 W.L.R. 308, 3 W.W.R. 854.

A conviction will not be quashed on the ground that the magistrate did not comply with subs. (a) of s. 85 of the Liquor License Act of N.B. 1903 by asking accused as to his former conviction of a similar offence where counsel appearing for accused in the absence of the latter, was interrogated thereto, but made no answer. [Ex parte Groves, 24 N.B.R. 57, applied.]

R. v. Matheson; Ex parte Martin, 2 D.L.R. 835, 41 N.B.R. 187, 10 E.L.R. 585.

The omission of the magistrate on the trial of a summary conviction matter to swear the stenographer before taking the evidence, is a matter of substance and goes to the jurisdiction of the magistrate so as to invalidate a conviction. [R. v. L'Heureux, 14 Can. Cr. Cas. 100, followed.]

R. v. Johnson, 5 D.L.R. 523, 20 Can. Cr. Cas. 8, 22 Man. L.R. 426, 21 W.L.R. 900, 1 W.W.R. 1045.

The provisions of Cr. Code, s. 655 as to a preliminary hearing of the allegations of "the complainant and his witnesses" apply only to cases of indictable offences and not to cases punishable on summary conviction. [R. v. Neilson, 44 N.S.R. 488, followed.]

The King v. Sweeney, 1 D.L.R. 476; 19 Can Cr. Cas. 222; 45 N.S.R. 494.

A conviction for selling liquor without a license will be quashed where the magistrate before whom three informations were lodged charging sales to different persons, heard evidence at one time tending to prove sales in the three cases, some of which were not relevant to the case in which the accused was convicted.

R. v. Lapointe, 4 D.L.R. 210, 3 O.W.N. 1469, 20 Can. Cr. Cas. 98, 22 O.W.R. 601.

Where a statutory offence is made punishable upon summary conviction and a statutory method of compelling the attendance of the accused is provided, an omission of such statutory method and the illegal arrest of the accused as a means of bringing the accused before the magistrate will constitute a valid objection to a summary conviction obtained as a result of the illegal proceedings, where the irregular procedure was objected to by the accused. [Pearks v. Richardson, [1902] 1 K.B. 91, 71 L.J.K.B. 18, applied; and see contra, Re Paul, 7 D.L.R. 24.] Unless the accused who has been brought before a magistrate to answer a charge punishable on summary conviction objects before the magistrate to the illegal method whereby his attendance has been compelled, e. g. by an arrest without warrant where a warrant is essential, the objection is considered as waived.

Re Baptiste Paul, 7 D.L.R. 25, 20 Can. Cr. Cas. 161, 5 A.L.R. 442, 2 W.W.R. 927.

Whether the defendant was illegally arrested or not is not material to the jurisdiction of a magistate under the summary convictions clauses of the Cr. Code when the accused is brought before him to answer a charge as to which an information had been properly laid before such magistrate. [Reg. v. Hughes, 4 Q.B.D. 614, 48 L.J.M.C. 151, applied. See Re Paul 7 D.L.R. 25.]

Re Baptiste Paul, 7 D.L.R. 24, 20 Can. Cr. Cas. 159, 5 A.L.R. 440, 2 W.W.R. 892.

ARREST WITHOUT WARRANT—JURISDICTION OF MAGISTRATE.

In the absence of any statutory provision in the Liquor License Act, (Alta.), enabling a peace officer to arrest without warrant a person whom he finds committing an offence under it, such an arrest is illegal, and the magistrate before whom the accused is brought in custody without a warrant or summons after such illegal arrest has no jurisdiction to proceed with the trial in the face of defendant's objection then taken that he was not properly before the magistrate. [Re Paul, 20 Can. Cr. Cas. 161, 7 D.L.R. 25, and R. v. Davis, 20 Can. Cr. Cas. 293, 7 D.L.R. 608, followed.]

R. v. Pollard, 39 D.L.R. 111, 13 A.L.R. 157, 29 Can. Cr. Cas. 35, [1917] 3 W.W.R. 754.

TRIAL ON MERITS AFTER CONVICTION QUASHED—NEW SUMMONS.

When judgment is rendered by a justice of the peace imposing a fine upon a chauffeur for driving his automobile while he is intoxicated, and this judgment is quashed by the Superior Court on technical grounds, the complainant cannot continue the prosecution before a magistrate of the district on giving a mere notice to the accused or to his counsel, since the magistrate has no jurisdiction without the consent or acquiescence of the accused:—(a) if there has been no adjournment of the case for several months; (b) if there has been no new summons to the accused, a mere notice not being sufficient; (c) if there has been no proceedings to put him in default and authorizing a trial and the conviction thereon in his absence.

Rhéaume v. Cliche, 30 Can. Cr. Cas. 112, 24 Rev. Leg. 61.

IRREGULAR PLEA—STATEMENT OF ACCUSED IN ANSWER TO CHARGE.

The answer of the accused on a charge of frequenting a disorderly house contrary to s. 238 Cr. Code, para. (k) that he "was there if that made him guilty," is not equivalent to a plea of guilty. [See also the new s. 229 Cr. Code as amended 1913, making it an offence to be found in a disorderly house without lawful excuse.]

R. v. Swett, 19 D.L.R. 694, 23 Can. Cr. Cas. 272, 29 W.L.R. 887, 7 W.W.R. 608.

LIMITATION OF CHARGE AND EVIDENCE TO ONE SPECIFIC OFFENCE.

The necessities of justice as well as the provision contained in s. 710 Cr. Code require that a summary conviction must be for a single and certain charge; and where there is no need for giving evidence of other offences to prove intent, the charge and the evidence at any one trial should be confined to a single offence.

R. v. Roach, 19 D.L.R. 362, 6 O.W.N. 630, 23 Can. Cr. Cas. 28.

SUMMARY TRIAL—ELECTION TO TAKE—RIGHT TO RE-ELECT—CROWN CASE RESERVED.

It is no ground for quashing a conviction under the provisions of the Cr. Code for speedy trials that the accused was committed for trial without being given the option by the justice of the peace, who was also a stipendiary magistrate, of a summary trial, who in his capacity as a justice

of the peace, took the information, issued his warrant for the arrest of the accused, held an examination and committed him for trial on a charge that as a stipendiary magistrate he might have heard and determined in a summary way. A person who has been brought up for election as to the mode of his trial under the speedy trials sections of the Cr. Code, and has elected to take a speedy trial, cannot afterwards re-elect to be tried before a jury in the ordinary way. Questions of law only, are properly the subject of a Crown case reserved. Questions depending on the weight or sufficiency of the evidence should not be reserved.

The King v. Howe, 42 N.B.R. 378.

HEARING—OPPORTUNITY FOR DEFENCE.

Where the accused has appeared in person to defend the charge an opportunity must be given him to put in his own evidence and that of other witnesses, and he should be distinctly asked by the magistrate whether he desires to give evidence.

Re. v. Curry, 24 Can. Cr. Cas. 340, 8 O.W.N. 512.

WITHDRAWAL OF COMPLAINT.

The person who has laid the complaint in a summary proceeding for keeping a disorderly house and who thereafter declares under oath before the magistrate that she laid the charge without understanding it and under duress of detectives may be permitted to withdraw it and so terminate the proceedings.

R. v. Rousseau, 24 Can. Cr. Cas. 390.

TRIAL—APPEARANCE BY COUNSEL.

In a summary conviction matter, the accused may appear by counsel instead of personally, and the magistrate has jurisdiction to proceed without requiring the accused to be personally present. [R. v. Thompson, 100 L.T. 970; R. v. Montgomery, 102 L.T. 325, applied.]

R. v. Romer; R. v. Johnson; R. v. Farrell, 23 Can. Cr. Cas. 235.

SERVICE OF SUMMONS—BY DE FACTO OFFICER.

An affidavit of the service of a summons in a summary conviction matter must be taken before a justice of the peace (Cr. Code s. 658) in order to give the magistrate jurisdiction to proceed ex parte, and a conviction made in the absence of the defendant where the affidavit of the service of the summons was taken before a commissioner of the Supreme Court is bad and will be set aside on certiorari.

Service of a summons is good if made by a de facto constable, such as one continuing to act after the expiration of his term and before a new appointment had been made.

R. v. Pelley, 27 Can. Cr. Cas. 405.

MOTION TO QUASH — REMEDY BY APPEAL CERTIORARI—APPEAL—DEFAULT OF SECURITY—AFFIDAVITS.

A motion to quash a conviction of the defendants by a magistrate for trespass to land, in contravention of the Petty Trespass Act, was dismissed upon the ground that the defendant had an adequate remedy by appeal under s. 10 (1) of the Summary Convictions Act, R.S.O. 1914, c. 90; and, therefore, by virtue of subs. (3) of that section, and of s. 1122 Cr. Code, the right to certiorari was taken away. The defendants had in fact appealed from the conviction, but their appeal was quashed because security was not given; and, as it was their own fault that they did not, by perfecting their security, avail themselves of the right of appeal, they were not in a position to move to quash. Semble, that affidavits intended to cover and answer the objections to the conviction set out in the notice of motion to quash, were inadmissible.

R. v. Chappus, 38 O.L.R. 576, 28 Can. Cr. Cas. 157. [Affirmed in 39 O.L.R. 329, 28 Can. Cr. Cas. 411.]

Upon an application by the informant for process in a summary conviction matter calling upon the accused to answer the charge, the magistrate need not first hear other evidence than that of the informant in swearing to the information if that satisfies him that the process should issue without hearing other witnesses for the complainant under Cr. Code s. 655, as amended by 8 & 9 Edw. VII. c. 9. [Ex p. Archambault, 16 Can. Cr. Cas. 433, approved; R. v. Smith, 16 Can. Cr. Cas. 425, disapproved.]

The King v. Mitchell, 19 Can. Cr. Cas. 113, 24 O.L.R. 324, 19 O.W.R. 588.

PROVINCIAL AND FEDERAL LAWS COVERING SAME OFFENCE.

The plea of autrefois convict is not a bar to a second prosecution when the parties are not the same and when the law in virtue of which the proceedings were taken was in the first case a provincial law and in the second case a federal law.

Forgues v. Gauvin, 30 Can. Cr. Cas. 302.

PROCEDURE AT TRIAL—REFUSAL TO ADJOURN DENIAL OF RIGHT TO MAKE FULL ANSWER AND DEFENCE.

The refusal of an adjournment to the accused even after the taking of evidence for the prosecution will be a ground for quashing a summary conviction if it was a manifest denial of justice and prevented the accused from making his full answer and defence to the charge.

R. v. Dominion Drug Stores, 31 Can. Cr. Cas. 86, [1919] 2 W.W.R. 413, 14 A.L.R 384, affirming, on an equal division, 44 D. L. R. 382, 30 Can. Cr. Cas. 318.

ILLEGALITY OF ARREST — DEFECTIVE WARRANT.

Prosecutions under the Prohibition Act, (B.C.), are within the rule applicable generally to summary conviction proceedings that the justice has jurisdiction notwithstanding any irregularity in the arrest or summons if the accused is present at the hearing and this although he objects so soon as the defect comes to his knowledge,

and before the hearing is concluded. Neither the Prohibition Act, (B.C.), nor the Summary Convictions Act, (B.C.), establish any condition precedent that the accused should have been regularly brought before the justice. [Reg. v. Hughes, 4 Q.B.D. 614, applied; Dixon v. Wells, 25 Q.B.D. 249, distinguished; R. v. Pollard, 39 D.L.R. 111, 29 Can. Cr. Cas. 35, 13 A.L.R. 157, not followed.]

R. v. Marks, 31 Can. Cr. Cas. 257, 26 B.C.R. 73.

QUASHING—EVIDENCE — BY-LAW—SERVICE OF NOTICE.

On an application to quash a conviction by a police magistrate the judge may look at the depositions taken before the magistrate in order to see what evidence was before him. A conviction for infringing a municipal by-law will be quashed if it be shewn that neither the by-law nor a copy thereof was put in evidence at the hearing before the convicting magistrate. [Reg. v. Banks, 2 Terr. L.R. 81, followed.] Notice of motion to quash a conviction for infringing a by-law held to have been served in compliance with r. 2 of the Crown Practice Rules.

Re Lethbridge, Re Hanson, 29 Can. Cr. Cas. 43, [1917] 3 W.W.R. 465.

CRIMINAL LAW—POLICE MAGISTRATE'S CONVICTION FOR KIDNAPPING — PLEA OF "GUILTY"—ADMISSION OF CROWN AS TO NATURE OF OFFENCE—HASTY PROCEEDINGS—QUASHING CONVICTION—COSTS—PROTECTION OF MAGISTRATE.

R. v. Steckley, 7 O.W.N. 137.

(§ III—31)—SECOND OFFENCE—MENTION OF FIRST CONVICTION.

Infringment of a statutory direction that, on a trial for a second offence subjecting to an increased penalty, no mention shall be made of the prior conviction until after an adjudication of guilt for the alleged second offence, will invalidate the summary conviction; but the affidavits filed must satisfy the court that there was something more than the commencement by counsel of his address preliminary to tendering the evidence, which address was stopped by the magistrate until the latter had completed the writing of the adjudication.

Re Ellis, 24 Can. Cr. Cas. 345.

SUMMONS—UNSWORN INFORMATION.

The duty of the justice on being applied to for a summons in a summary proceeding is to satisfy himself that there is sufficient cause for his interference by summons; he may be satisfied with the information or complaint alone although not sworn, but, if not, he may take the evidence under oath of any witness in support of the information.

Ex parte Dolan; R. v. Kay, 26 Can. Cr. Cas. 171, 41 N.B.R. 95.

INLAND REVENUE ACT—STAMP ON CANADIAN LEAF TOBACCO TO BE AFFIXED BY THE RETAILER—8-9 GEO. V. C. 28, S. 328 (A).

In a prosecution based upon the regulations of the Inland Revenue of August 1, 1918, against a "retailer" of Canadian leaf tobacco it is essential to allege in the summons that the defendant is a retailer, cultivator or packer of tobacco, as the case may be.

Hardy v. Lachance, 30 Can. Cr. Cas. 288.

WRITTEN COMPLAINT.

Where a person is accused of an offence punishable on summary conviction by imprisonment, a complaint in writing should be made against him before he is called upon for his defence; a trial held on the defendant's arrest without warrant and without any information or complaint in writing, and without stating to the accused the nature and substance of the charge, is irregular, and the conviction thereon will be quashed on certiorari.

Nagazoa v. Niquet, 30 Can. Cr. Cas. 77, 24 Rev. de Jur. 339.

(§ III—33)—INDEFINITE ADJOURNMENT.

The indefinite suspension of proceedings in the trial under the summary convictions clauses (Part XV. Cr. Code), is prohibited as prejudicial to the accused in his defence; however, if the suspension is by agreement between the Crown and the accused to the effect that the trial should be delayed so long as the accused remains away from a particular place, such suspension constitutes rather an adjournment of which the accused cannot complain, since he himself determines its duration. [Donahue v. Recorder's Court, 18 Can. Cr. Cas. 182 distinguished.]

Bedard v. The King, 30 D.L.R. 326, 26 Can. Cr. Cas. 99, 22 Rev. Leg. 302.

POSTPONEMENT OF DECISION PENDING HEARING OF ANOTHER CHARGE.

In summary conviction matters the justices are not to mix up two or more criminal charges and convict or acquit in any one of them with any reference to the facts appearing in the others; but the justices may for reasons of justice arising out of the circumstances of the case and for its better determination, postpone their decision in one or more cases and before deciding them proceed with the trial of other similar charges against the same accused so long as their discretion in so postponing is honestly exercised and is not used directly or indirectly with a view of bringing in facts or evidence which have no ligitimate bearing upon their decision. [R. v. Fry (1898), 19 C.C. 135, applied.]

Ex parte Richard; R. v. Steeves, 24 Can. Cr. Cas. 183, 42 N.B.R. 596.

ADJOURNMENT—NOTICE.

Where the record of proceedings before the magistrate in a summary conviction matter does not shew any adjournment from the hearing to the date of conviction and sentence, nor does it appear that the accused was notified of the time when sentence would be pronounced, a summary conviction and sentence to imprisonment pronounced in his absence and subsequent

to the hearing will be set aside on certiorari.

Nagazoa v. Niquet, 30 Can. Cr. Cas. 77, 24 Rev. de Jur. 339.

ADJOURNMENT TO CONSIDER JUDGMENT—FIXING DATE FOR JUDGMENT—NOTIFICATION OF PARTIES.

R. v. Haith, 18 O.W.R. 509

ADJOURNMENT FOR JUDGMENT—AGREEMENT—JUDGMENT TO BE HANDED OUT WITHIN ONE WEEK.

The King v. McKenzie, 44 N.S.R. 474, 17 Can. Cr. Cas. 372.

ADJOURNMENT SINE DIE — RESIDENCE OF POLICE MAGISTRATE—DISQUALIFICATION.

The King v. McQuarrie; Ex parte Giberson, 40 N.B.R. 1, 18 Can. Cr. Cas. 355.

COMMENCEMENT OF TRIAL—ADJOURNMENT OF HEARING FOR MORE THAN EIGHT DAYS.

Donohue v. Recorder's Court of Quebec, 18 Can. Cr. Cas. 182, 12 Que. P.R. 267.

ADJOURNMENT OF PROCEEDINGS—JURISDICTION.

R. v. Allen; Ex parte Gorman, 10 E.L.R. 214.

(§ III—34)—DEPOSITIONS IN SHORTHAND—OATH OF COURT STENOGRAPHER.

The fact that the stenographer acting at the magistrate's direction, in taking the evidence in a summary conviction matter, makes affidavit that he was sworn to "transcribe" the evidence, while the statute requires that he be sworn to "report" the evidence is not conclusive in support of an objection that the trial was irregular in that respect; and the court on habeas corpus may affirm the conviction where the magistrate could not remember whether the stenographer was sworn or not, and it was not clear that the oath taken by the stenographer was not in substance to "report" the evidence, the stenographer disclaiming that he was sworn other than in the usual form and probably using the word "transcribe" as the equivalent of "report."

R. v. Book, 25 Can. Cr. Cas. 89, 25 Man. L.R. 480.

TRIAL BEFORE MAGISTRATE—CONVICTION—EVIDENCE TAKEN IN SHORTHAND.

R. v. Bond, 19 W.L.R. 348.

PREVIOUS CONVICTION — IDENTITY OF ACCUSED—PRESUMPTION.

The King v. Atkinson, 44 N.S.R. 521, 18 Can. Cr. Cas. 279, 9 E.L.R. 212.

JUSTICE'S CONVICTION FOR SECOND OFFENCE—ABSENCE OF WRITTEN EVIDENCE—ADMISSIONS OF ACCUSED IN OPEN COURT—COMMITMENT WITHOUT FORMAL CONVICTION.

R. v. Dagenais, 23 O.L.R. 667, 18 Can. Cr. Cas. 287, 19 O.W.R. 252.

COMPLAINANT'S DEFAULT IN APPEARANCE AT TRIAL—DISMISSAL — INFORMATION NOT "CONSIDERED" BY MAGISTRATE—FRESH INFORMATION AND SUMMONS.

Hall v. Pettingell, 18 Can. Cr. Cas. 196.

V. Penalties and costs.

(§ V—50) — ARBITRARY AND EXCESSIVE AMOUNT—STRIKING OUT.

A summary conviction under a liquor license law cannot be supported in so far as it awards as an arbitrary sum, $50, to the complainant for costs where no witnesses were brought from a distance, but the court, on a motion to quash, may amend the conviction by striking out the award of such costs.

R. v. Palmer, 22 D.L.R. 300, 24 Can. Cr. Cas. 20, 25 Man. L.R. 359.

IMPRISONMENT IN DEFAULT OF PAYING FINE—SPECIAL ACT.

The magistrate making a summary conviction for an infraction of the Dental Profession Act, R.S.S., c. 108, has power to order imprisonment forthwith in default of payment of the fine and costs, although s. 51 of that Act provides a special mode of levying a fine by distress. [R. v. Cantillon, 19 O.R. 197, and R. v. Skinner, 9 Can. Cr. Cas. 558, distinguished.]

R. v. Schilling, 21 D.L.R. 60, 23 Can. Cr. Cas. 380, 8 S.L.R. 70, 30 W.L.R. 463, 7 W.W.R. 1112.

Where a defendant fined on summary conviction under the Liquor License Act (Ont.) and ordered to be imprisoned in default delivers himself up at the place of imprisonment before the warrant is made out, and the magistrate is made aware of that fact, no expenses of conveying the defendant to gaol should be ordered as a condition of release nor included in the warrant, but the warrant, being subject to the Ontario Summary Convictions Act, may be amended by striking out such costs.

The King v. Mitchell, 19 Can. Cr. Cas. 113, 24 O.L.R. 324, 19 O.W.R. 588.

ILLEGAL COSTS.

Where Cr. Code s. 1124 is made applicable by provincial statute to summary convictions under provincial laws, the court having certiorari jurisdiction will not quash the entire conviction because of the inclusion of illegal costs, but will amend an otherwise valid conviction by striking out the part which relates to costs.

R. v. Gage, 27 Can. Cr. Cas. 330, 10 O.W.N. 364.

SENTENCE AND IMPRISONMENT—CONVICTION AND COMMITMENT—POWER TO ALTER—CHANGING TO "HARD LABOUR."

Where a prisoner was convicted of being a vagrant and sentenced to six months' imprisonment, and no provision was made for "hard labour" and thereafter the words "hard labour" were added in the absence of the accused, and as so changed the commitment was made out to conform to it, such change is invalid and the commitment will be set aside on habeas corpus proceedings.

The King v. Kirwin, 20 Can. Cr. Cas. 181.

The costs which may be awarded by a justice in summary conviction cases do not include attorney's fees. Neither are attor-

ney's fees included in an award of costs made in general terms by the judgment upon an appeal to the Court of King's Bench (Crown side), in such cases, but the court sitting in appeal may, under ss. 751, 752 Cr. Code, exercise its discretion to include an attorney's fee in an award of costs.

Garneau v. Gauthier, 18 Rev. de Jur. 172.

(§ V—51)—Enforcement of fine—Costs of commitment—Indian Act (Can.).

A summary conviction for illegally selling intoxicants to an Indian in contravention of the Indian Act (Can.) may, under Cr. Code, s. 739, properly adjudge costs of commitment and conveying to gaol in default of payment of the fine.

R. v. Verdi, 23 Can. Cr. Cas. 47.

(§ V—52)—Default in paying fine.

Where imprisonment is imposed in the first instance for a first offence against the Canada Temperance Act, it is limited to one month under s. 127 of that Act; but where a fine is imposed in the first instance, the imprisonment which may be directed in default of payment of the fine may be for any term not exceeding three months under Cr. Code s. 739. [R. v. Stafford, 1 Can. Cr. Cas. 239; R. v. Horton, 3 Can. Cr. Cas. 84, 34 N.S.R. 217; R. v. Blank, 10 Can. Cr. Cas. 358, 38 N.S.R. 337, followed.]

Ex parte Richard; R. v. Steeves, 24 Can. Cr. Cas. 183, 42 N.B.R. 596.

(§ V—53)—Increasing costs verbally awarded—Error in calculation.

A justice making a summary conviction and imposing a fine and costs to an amount then stated may, at least before making his minute of adjudication or the formal conviction, correct in the presence of defendant an error in the calculation of the costs, although the sum first mentioned is increased.

R. v. Dickey, 25 Can. Cr. Cas. 55, 9 W.W.R. 142, 32 W.L.R. 404.

Being drunk and disorderly—Conviction—Excessive penalty.

R. v. Lawson, 18 O.W.R. 162.

Hard labour—Memorandum of fine and imprisonment endorsed on information not stating hard labour—Onus of proof.

The King v. Gratton, 17 Can. Cr. Cas. 324.

VI. Record of conviction and proceedings.

(§ VI—60)—Stating nature of offence.

A summary conviction under a municipal by-law must state the nature of the offence and not merely recite that defendant violated a specified section of the by-law.

R. v. Hubley, 28 D.L.R. 376, 25 Can. Cr. Cas. 102, 49 N.S.R. 281.

Stating the offence—Sufficiency.

Though a woman cannot be convicted as a vagrant under s. 238 (i), Cr. Code, unless she has failed to give a proper account of herself on being asked to do so, when found wandering at night in the public streets, the absence from the conviction of the allegation that she was asked to do so is not fatal to its validity, where the offence is charged in the language of s. 723 (3). [Reg. v. Levecque, 30 U.C.Q.B. 509; Reg. v. Arscott, 9 O.R. 541; R. v. Harris, 13 Can. Cr. Cas. 393; R. v. Pepper, 15 Can. Cr. Cas. 314, dissented from; Cotterill v. Lempriere, 24 Q.B.D. 634; Smith v. Moody, [1903] 1 K.B. 56, applied.]

Re Effie Brady, 10 D.L.R. 423, 21 Can. Cr. Cas. 123, 5 A.L.R. 400, 23 W.L.R. 333, 3 W.W.R. 914.

Service of minute of order—Conviction not an "order."

The "minute of conviction" made by a justice of the peace for an offence under the Vagrancy Clauses, Cr. Code, ss. 238, 239, upon directing imprisonment for the offence is not a minute of an "order" of a justice so as to require service of a copy thereof under s. 731 before issuing a warrant of commitment. [Section 731 applies only to "orders" as distinguished from "summary convictions" made by justices although the procedure as to both is regulated by Part XV. of the Code.]

Re Effie Brady, 10 D.L.R. 423, 21 Can. Cr. Cas. 123, 5 A.L.R. 400, 23 W.L.R. 333, 3 W.W.R. 914.

Form—Date of offence—Defect in information—Waiver.

An objection that a summary conviction for common assault assigns no date to the offence is cured under Cr. Code, s. 1124, if the date appears on the depositions. An irregularity in not reswearing an information in a summary conviction matter when materially amended at the hearing is waived by proceeding with the trial without taking the objection. [R. v. Lewis, 6 Can. Cr. Cas. 499, approved.] If the depositions in a summary conviction matter establish such facts as warranted the justice in convicting of the offence indicated by the information, although not stated in the latter in correct form, Cr. Code, s. 724, applies to validate the conviction regardless of the defect in the information.

R. v. Tally, 21 D.L.R. 651, 23 Can. Cr. Cas. 449, 8 A.L.R. 453, 7 W.W.R. 1178, 30 W.L.R. 396.

Fine payable to magistrate—Formal conviction.

Where the statute under which the summary conviction is made directs that the fine shall be payable to the convicting magistrate, there is no necessity for a direction in the formal conviction that the fine should be paid to him.

R. v. Schilling, 21 D.L.R. 60, 23 Can. Cr. Cas. 380, 8 S.L.R. 70, 7 W.W.R. 1112, 30 W.L.R. 463.

Prosecution of a partnership under a licensing law—Medical Profession Act (Alta.)

A summary conviction for illegal practice of medicine without a license is not to be made against a partnership firm in the firm name, at least without shewing who

the individuals are who compose the firm. An adjudication of imprisonment in default of paying a fine must state who the parties are who are liable to such imprisonment.

Re "Roske & Messenger," 30 Can. Cr. Cas. 393, [1919] 1 W.W.R. 341.

A mistake by misdescription of the official capacity of the magistrate in the proceedings before the final adjudication whereby a "commissioner of police" having the authority of two justices of the peace was wrongly described in the preliminary proceedings as a "justice of the peace" will not invalidate a summary conviction made by him as a commissioner of police if he was correctly designated as such both in the memorandum of adjudication and in the formal conviction.

The King v. Fitzgerald, 19 Can. Cr. Cas 39, 19 W.L.R. 462, 1 W.W.R. 109.

IRREGULARITY IN CONVICTION.

Failure to state the offence in a conviction for contravening the provisions of the Liquor License Act (Que.) is not a mere irregularity which is cured by application of art. 1166 of the Act, but goes to the very essence of the conviction and nullifies it.

Déguire v. Lacroix, 14 Que. P.R. 316.

(§ VI—61)—WAIVING WRITTEN DEPOSITIONS.

The accused, represented by counsel at a justice's trial under Part XV., Cr. Code, tacitly waives the taking of the deposition in writing, if he takes part in the hearing by proceeding with the cross-examinations without objecting to the omission. [Denault v. Robida, 8 Can. Cr. Cas. 501, distinguished.]

Bedard v. The King, 30 D.L.R. 326, 26 Can. Cr. Cas. 99, 22 Rev. Leg. 302.

MAGISTRATE'S CLERK TAKING DOWN THE DEPOSITIONS.

The magistrate's clerk taking down the depositions of a witness in longhand need not be sworn under Cr. Code, s. 683, and if it be a trial of a summary matter under Part. XV., the depositions need not be signed by the witness and are properly authenticated by the signature of the magistrate.

R. v. McKinley, 28 Can. Cr. Cas. 294, [1917] 2 W.W.R. 1069.

SUSPENDED SENTENCE—IRREGULARITY.

The fact that the evidence for the prosecution was sufficient to warrant a summary conviction and that no evidence was given for the defence will not support a commitment where no formal conviction was ever drawn up and the minute of adjudication in which the accused was found guilty contained a suspension of sentence which had not been regularly superseded.

R. v. Knight, 27 Can. Cr. Cas. 111, 11 O.W.N. 190.

EVIDENCE—DEPOSITIONS—UNSWORN STENOGRAPHER.

The fact that the stenographer who took down the evidence at the trial before a magistrate under the Ontario Liquor License Act was not sworn in conformity with R.S. O. 1914, c. 215, s. 87 (2) will not affect the validity of the conviction, if the magistrate himself made full notes of the depositions and there was no evidence to prove that either these or the stenographer's extended notes were incorrect.

R. v. Bosak, 26 Can. Cr. Cas. 374, 10 O.W.N. 301.

AUTHENTICATION OF DEPOSITIONS.

The provision of Cr. Code, s. 682 (4), that the justice shall sign the depositions is directory only and not mandatory. [Ex parte Doherty, 3 Can. Cr. Cas. 310, 32 N. B.R. 479, followed.]

R. v. Dickey, 25 Can. Cr. Cas. 55, 32 W.L. R. 404, 9 W.W.R. 142.

(§ VI—65)—COMMON ASSAULT—PROTECTION FROM CIVIL PROCEEDINGS.

Section 734, Cr. Code, applies only to summary convictions, therefore it is only one who has been tried by a justice upon a charge of common assault—which is the only kind of assault punishable on summary conviction—who can claim protection from subsequent civil proceedings. One who has been tried summarily for one of the indictable offences specified in s. 773 (c) is entitled to immunity under s. 792 "from all further or other criminal proceedings for the same cause," but not from civil proceedings. [Nevills v. Ballard, 28 O.R. 588, followed.]

Green v. Henneghan, 43 D.L.R. 272, 14 A.L.R. 106, 30 Can. Cr. Cas. 256, [1918] 3 W.W.R. 658.

VII. Amendment.

(§ VII—70)—TIME.

A magistrate has the right to make out and return an amended conviction at any time up to the moment before the conviction is quashed, provided such amendment is according to the truth and supported by the facts of the case.

R. v. Bissette, 41 D.L.R. 52, 29 Can. Cr. Cas. 97, [1917] 3 W.W.R. 501.

A conviction will not be quashed because the information has been amended in substantial respects, if the amendment has been made before the taking of evidence and the defendant has not been prejudiced by surprise.

R. v. Van Fleet, 38 D.L.R. 592, 13 A.L.R. 320, 29 Can. Cr. Cas. 218, [1918] 1 W.W.R. 332.

Where there is no court of general or quarter sessions of the peace, or officer thereof, in a province, with whom a warrant and conviction may be filed by a stipendiary magistrate, under s. 793, Cr. Code, if filed with a city clerk, they are still under the control of the magistrate who issued them, and he may amend them at any time before the conviction is quashed. A reasonable time may intervene between the date of a conviction and the filing by a stipendiary magistrate of a warrant and conviction with the clerk of

the peace, as required by s. 793, Cr. Code, and where but a few days elapse, it will be presumed, unless the contrary is shewn, that during such time the warrant and conviction remain in the custody of the magistrate, and so long as they are in his possession he may make amendments thereto.

The King v. Sarah Smith, 19 Can. Cr. Cas. 253, 45 N.S.R. 517.

AMENDING COMMITMENT—CR. CODE, S. 1121.

A defective warrant of commitment following a summary conviction cannot be amended under Cr. Code, s. 1121, on a habeas corpus application if the conviction itself is also bad in law.

R. v. Peart, 23 Can. Cr. Cas. 259.

"STORING EXPLOSIVES" — "INFLAMMABLE GOODS."

A conviction "for storing inflammable goods" purporting to be made under s. 42 of the by-laws of the Harbour Commissioners of Vancouver which makes it an offence to store "explosive material" cannot be amended, the defect being fundamental and irremediable.

R. v. Little, 10 W.W.R. 893.

(§ VII—75)—ON APPEAL.

A stipendiary magistrate cannot amend a warrant or conviction after it is filed with the clerk of the peace, or other proper officer, under the provisions of s. 793, Cr. Code, to be kept among the records of the general or quarter sessions of the peace or of any court discharging the functions thereof. [Reg. v. Learmont, 23 N.S.R. 24; Ex parte Austin, 44 L.T. 102, distinguished.]

The King v. Sarah Smith, 19 Can. Cr. Cas. 253, 45 N.S.R. 517.

Where a summary conviction was made by a magistrate of several persons upon a charge of unlawfully playing or looking on in a common gaming-house, and the evidence returned on certiorari was sufficient for the conviction of all the defendants for unlawfully playing, the court will not quash the conviction for duplicity and uncertainty, but will amend the conviction under Cr. Code, s. 1124, by striking out the charge of looking on.

The King v. Toy Moon, 19 Can. Cr. Cas. 33, 19 W.L.R. 480, 1 W.W.R. 50.

(§ VII—80)—DEFECTS IN FORM.

The intention of s. 1124, Cr. Code, in giving the power to amend a summary conviction on a motion to quash is, that, when guilt appears upon the evidence which has been believed by the magistrate, the accused should not escape by defects in form occasioned either by the error or by the stupidity of the magistrate.

The King v. Demetrio, 1 D.L.R. 515, 3 O.W.N. 602, 20 O.W.R. 999.

An amendment may be made to a conviction under the Liquor License Act (Ont.) to state that the township was one in which there was, at the time, a by-law in force passed under s. 141 of such Act prohibiting the sale of liquors by retail therein, and so cure the failure to mention that fact in the conviction as originally made, where the record returned to the court by the convicting magistrates shewed that counsel for the accused at the trial admitted that such by-law was in force in that township.

R. v. O'Connor, 3 D.L.R. 23, 20 Can. Cr. Cas. 75, 3 O.W.N. 840, 21 O.W.R. 691.

TEMPERANCE ACT—PROCLAMATION—PLEA OF GUILTY.

It is not open to a defendant, against whom a summary conviction awarding imprisonment has been made on his plea of guilty, to set up on habeas corpus that the conviction which expressly charged a violation of the Canada Temperance Act was invalid for lack of allegation or proof that the proclamation necessary to bring the Act into force in the district had in fact been issued; proof of the proclamation was dispensed with by the plea of guilty. [As to mode of proof of proclamations generally, see Canada Evidence Act, R.S.C. 1906, c. 145, s. 21.]

O'Neil v. Carbonneau, 29 Can. Cr. Cas. 340, 54 Que. S.C. 417.

A magistrate, who still has control of a warrant and conviction may amend them after notice has been given of an application for a writ of certiorari and for the release of a person convicted under habeas corpus. [Ex p. Austin, 44 L.T. 102, and Reg. v. Learmont, 23 N.S.R. 24, distinguished.]

The King v. Sarah Smith, 19 Can. Cr. Cas. 253, 45 N.S.R. 517.

It is the duty of the court on certiorari to receive an amended conviction in substitution for the one first made if the amended conviction is supported by the evidence and other proceedings at the trial.

The King v. Fitzgerald, 19 Can. Cr. Cas. 39, 19 W.L.R. 462, 1 W.W.R. 109.

FORM—LOCALITY OF OFFENCE.

A place certain should be specified so as to identify the house in question upon a conviction for keeping a disorderly house; but a summary conviction which specifies merely that such keeping was within a named municipality may be amended in that respect in certiorari proceedings to conform to the evidence by virtue of Cr. Code, s. 1124.

The King v. Demetrio, 20 Can. Cr. Cas. 316.

ON MOTION TO QUASH—HABEAS CORPUS—CERTIORARI.

Section 1124, Cr. Code, permits the court itself to amend a summary conviction removed by certiorari proceedings as to certain defects, but the right of the magistrate to tender another conviction in substitution for the one attacked is one independent of s. 1124.

The King v. Fitzgerald, 19 Can. Cr. Cas. 39, 19 W.L.R. 462, 1 W.W.R. 109.

CRIMINAL LAW—POLICE MAGISTRATE—CONVICTION FOR "THREATENING"—EVIDENCE OF ASSAULT—IMPRISONMENT FOR EXCESSIVE TERM — HABEAS CORPUS — DISCHARGE—CONDITION — CRIMINAL CODE, s. 1120 (7 & 8 EDW. VII., c. 18, s. 14) —AMENDMENT—SECTION 1121 OF CODE — CERTIORARI — ATTORNEY-GENERAL —PROTECTION OF MAGISTRATE—COSTS.

R. v. Peart, 7 O.W.N. 126.

VIII. Duplicity and uncertainty.

(§ VIII—85)—DUPLICITY.

Two or more offences against the Alberta Liquor Act, 1916, can be included in one information only in the event of the time and place of each offence being stated (s. 42); an information for unlawfully selling on a date mentioned "and for some time previous thereto" does not state the time of both offences and a conviction in the terms of the information is bad for duplicity, although the evidence related wholly to an offence of the specific date. [R. v. Code, 13 Can. Cr. Cas. 372, 1 S.L.R. 299, followed.]

R. v. Aitken, 37 D.L.R. 530, 28 Can. Cr. Cas. 227, 11 A.L.R. 573, [1917] 2 W.W.R. 781.

Section 725, Cr. Code, 1906 (former s. 907, Cr. Code, 1892), applies to validate a summary conviction stating the offence to have been committed in one or other of the different modes specified in the statute whereby a single offence is declared, e.g., under the Inspection and Sale Act (Can.) the offering for sale, the exposing for sale or the having in possession for sale. [R. v. McDonald, 6 Can. Cr. Cas. 1, followed.] An information for an infraction of the Inspection and Sale Act, R.S.C. c. 85, charging that the accused did unlawfully "offer, expose or have in his possession for sale" ten barrels of apples packed in contravention of that statute, discloses an offence; and an objection by reason of setting forth the alternative methods by which the offence may have been committed must be taken before entering a plea of guilty, and cannot effectively be raised for the first time in certiorari proceedings in respect of a summary conviction similarly worded made upon such plea.

R. v. Brouse, 9 D.L.R. 458, 4 O.W.N. 640, 23 O.W.R. 790.

TAMPERING WITH WITNESS—ALLEGATIONS—PREJUDICE.

A summary conviction for attempting to tamper with a witness upon a prosecution for illegally keeping liquors for sale is not invalid because it does not recite what allegations the witness was asked to swear to falsely, if the conviction follows the words of the statute, and there was no prejudice to the accused as to what was the issue being tried.

R. v. Armstrong, 31 D.L.R. 82, 26 Can. Cr. Cas. 151, 36 O.L.R. 2.

UNCERTAINTY — CHARGE NOT DISCLOSING LEGAL OFFENCE—PLEA OF GUILTY.

A plea of guilty to a charge intended to be framed under s. 242a, Cr. Code (amendment of 1913), but not specifically referring to that section, will not support a summary conviction thereunder where the information upon which the plea was taken did not sufficiently disclose an offence, the form of same being that the defendant did "neglect his wife."

R. v. Chitnita, 16 D.L.R. 241, 27 W.L.R. 268, 22 Can. Cr. Cas. 344.

CR. CODE, ss. 710, 725.

A summary conviction for that the accused did "take, transport or deliver" intoxicating liquor into a prohibited area is not invalid because of the offence being stated to have been committed in different modes or being stated in the alternative. The effect of Cr. Code, s. 725, is to declare that the conviction is for one offence only (s. 710).

R. v. McManus, 31 Can. Cr. Cas. 180, [1919] 3 W.W.R. 190.

COMMITMENT—COST OF CONVEYANCE TO JAIL.

It is not in the summary conviction, but in the warrant of commitment thereunder that the law requires the amount of the expenses of conveying the convicted person to the common jail to be mentioned and fixed.

White v. Leet, 18 Can. Cr. Cas. 337, 12 Que. P.R. 339.

SUMMARY JUDGMENT.

See Judgment.

SUMMARY PROCEEDINGS.

(§ I—6)—ENFORCEMENT OF UNDERTAKING.

A motion to enforce an undertaking given by a defendant through his solicitor to submit to judgment upon a certain event or contingency is not properly enforceable upon a Chambers application, although it was given in respect of a Chambers motion; a summary application for its enforcement may be made to the court or an independent action may be brought for its enforcement.

Clarkson v. McNaught, 2 D.L.R. 55, 3 O.W.N. 741, 21 O.W.R. 350.

SUMMONS.

See Writ and Process; Summary Convictions.

SUNDAY.

Municipal powers as to regulation of Sunday, closing restaurants, see Municipal Corporations, II C—113; Constitutional Law, I F—135.

I. JUDICIAL PROCEEDINGS.
II. SPORT; AMUSEMENT.
III. LABOR AND BUSINESS.
  (A.) In general.
  (B.) Works of necessity and charity.
IV. CONTRACTS.
V. VIOLATING OF SUNDAY LAW AS A DEFENSE.

II. Sport; amusements.

(§ II—5) — THEATRICAL PERFORMANCE — LORD'S DAY ACT—ACCEPTING CONTRIBUTIONS BUT NOT CHARGING ADMISSION.

Where tickets of admission were not sold on Sunday to a moving picture show, nor an admission fee charged, nor any person requested to pay one, but a plate, near which an employee of the theatre was stationed, was placed near the entrance, and on which any person who desired to do so might place contributions, the performance was not one "at which any fee is charged directly or indirectly" in violation of s. 7 of the Lord's Day Act, R.S.C. 1906, c. 153.

R. v. Thompson; R. v. Hammond; R. v. Churchill; R. v. Aherns, 14 D.L.R. 175, 22 Can. Cr. Cas. 78, 7 A.L.R. 40, 25 W.L.R. 576, 5 W.W.R. 157.

SKATING RINK—FRANCHISE TO CLUB UNDER QUEBEC STATUTE.

As s. 16 of the Lord's Day Act (Can.), R.S.C. 1906, c. 153, preserves in any province the provisions of any Act or law already in force there, an athletic institution which has acquired the rights and franchises granted by statute of the Province of Quebec to an athletic club prior to the "Lord's Day Act" (Can.), including by implication the right to keep its skating rink open on Sunday, has the right to maintain and operate a public skating rink on Sunday if permitted to do so under municipal by-laws and ordinances.

R. v. "The Stadium," 18 D.L.R. 85, 23 Can. Cr. Cas. 84, 50 C.L.J. 626.

BASEBALL MATCH.

A baseball match held publicly on Sunday, and for which an entrance fee is charged, is not prohibited by R.S.Q. 1909 arts. 4466–7, nor does it come within the Dominion Sunday Observance Act, R.S.C. 1906, c. 153, s. 7.

Caldwell v. Shaughnessy, 51 Que. S.C. 146.

GAMBLING—PLAYING CARDS.

The unrepealed Lord's Day Act, C.S.U.C., c. 104, s. 3, in force in Ontario, makes it a criminal offence to be engaged in playing cards for money in a private place on a Sunday.

The King v. Quick, 17 Can. Cr. Cas. 61.

III. Labor and business.

A. IN GENERAL.

(§ III A—10)—SALE OF FRUITS AND TOBACCO—CUSTOM—PAROL EVIDENCE.

Section 4466, R.S.Q. 1909, preserves, subject to the restrictions therein mentioned, all such liberties as are recognized by the customs of the Province of Quebec as to Sunday trading, and on a prosecution in that province under the Lord's Day Act, R.S.C. 1906, c. 153, for selling by retail, fruits and tobacco on a Sunday at a place where there is no municipal by-law prohibiting such sales, it may be shewn by parol evidence in defence of the charge that such sales, of which there is no express prohibition in either federal or provincial Acts, are customary in the Province of Quebec and therefore lawful under the exception contained in the Federal Act of matters provided "in any provincial Act or law;" (R.S.C. 1906, c. 153, s. 5).

Dupuis v. Blouin, 26 D.L.R. 127, 24 Can. Cr. Cas. 441.

TRADESMEN SELLING WARES.

Whether by the operation of s. 5 of the Lord's Day Act, R.S.C., 1906, c. 153, or of the British Columbia Sunday Observance Act, R.S.B.C. 1911, c. 219, or of the Imperial Acts introduced prior to Confederation, it is unlawful in British Columbia for a tradesman to publicly sell his wares on Sunday.

R. v. Laity, 13 D.L.R. 532, 21 Can. Cr. Cas. 417, 18 B.C.R. 443, 25 W.L.R. 363, 5 W.W.R. 75.

CARRYING ON BUSINESS—HOTEL CIGAR STAND —LORD'S DAY ACT.

The sale of cigars in a hotel on Sunday otherwise than in connection with and as an incident to a meal is contrary to the provisions of the Lord's Day Act, R.S.C. 1906, c. 153; but an hotel steward taking no part in the running of the cigar stand is improperly convicted, under s. 5, of carrying on his "ordinary calling" in respect of Sunday sales there made, although he might be liable under s. 14 if he were the employer of the cigar stand attendant, and had authorized and directed that the stand should be open on Sunday.

R. v. Walsh and Crane, 22 Can. Cr. Cas. 144, 26 W.L.R. 394.

RESTAURANT—SALES OF ICE CREAM.

A restaurant-keeper duly licensed may legally sell ice cream on Sunday to be consumed in the restaurant and not sold to be taken away.

R. v. Brooker, 22 Can. Cr. Cas. 146.

FARMING OPERATIONS—WHETHER OFFENCE UNDER BOTH FEDERAL AND PROVINCIAL LAWS.

In a prosecution under the Lord's Day Act, R.S.C., 1906, c. 153, it is not essential for the prosecution to prove that the alleged Sunday labour is also an offence under some provincial Act or law. Semble, where there is no provincial law legalizing farm work on Sunday, a farmer is liable to conviction under the Federal Lord's Day Act for carrying on his ordinary avocation on Sunday in so far as his work is not shewn to be one of necessity or mercy within the exceptions of that Act. [The Queen v. Silvester, 33 L.J.M.C. 79, distinguished; R. v. Dimond, 23 B.C.R. 325, approved.]

R. v. Sam Bow, 31 Can. Cr. Cas. 269, [1919] 3 W.W.R. 315.

(§ III A—12)—SELLING REAL ESTATE.

An agreement for the sale of land made on Sunday in British Columbia is illegal, as contravening s. 5 of the Lord's Day

Act (Can.). [Lord's Day Act, R.S.C. 1906, c. 153, s. 5, applied.]

Simpson v. Proestler, 13 D.L.R. 191, 21 Can. Cr. Cas. 415, 25 W.L.R. 243, reversing in the result, 11 D.L.R. 145, 18 B.C.R. 68, 24 W.L.R. 303.

OPERATING RAILWAY—PROVINCIAL JURISDICTION, HOW LIMITED.

A prosecution under the Sunday observance laws of Ontario against a railway company chartered by the Dominion Parliament with powers of operation beyond the limits of the province cannot be maintained merely upon the ground that the company has not actually exercised such powers outside the province.

Kerley v. London & Lake Erie R. & Transportation Co., 13 D.L.R. 365, 28 O.L.R. 606, 15 Can. Ry. Cas. 337.

SUNDAY SALES—ONTARIO LAW.

R. v. Weatheral, 18 Can. Cr. Cas. 372.

LORD'S DAY ACT, C.S.U.C. c. 104, s. 1—SALE OF CIGARS AND CANDY ON SUNDAY—ANCILLARY BUSINESS—ARTICLES NOT TO BE CONSUMED ON PREMISES.

R. v. Wells, 24 O.L.R. 77, 18 Can. Cr. Cas. 377, 19 O.W.R. 452.

SALES OF FRUITS, CIGARS, ETC. BY RETAIL ON SUNDAY—STATUTORY PERMISSION TO CERTAIN CLASSES OF DEALERS.

Kennedy v. Couillard, 17 Can. Cr. Cas. 239.

SALE OF CIGARS AND SOFT DRINKS—QUEBEC LAW.

In the Province of Quebec sales on Sunday of fruit, sweets, cigars and nonintoxicating liquors to be consumed upon the premises are permissible, notwithstanding the Sunday Observance Act, R.S.Q. 1909, art. 4462 et seq., and the Lord's Day Act, R.S.C. 1906, c. 153, s. 16.

Spiliotopulos v. The King, 30 Can. Cr. Cas. 123, 27 Que. K.B. 79.

BAND PLAYING—MUSICIAN NOT AN "ARTIFICER, ETC." UNDER PROVISIONS OF C.S. U.C. CH. 104, SEC. 1.

R. v. Powell; R. v. Vitalle, 19 O.W.R. 459.

ENACTMENT AUTHORIZING MUNICIPALITIES TO REGULATE SALES ON SUNDAY.

Kokoliades v. Kennedy, 40 Que. S.C. 306, reversing 17 Can. Cr. Cas. 4.

B. WORKS OF NECESSITY AND CHARITY.

(§ III B—15)—SALE OF FRUIT BY STOREKEEPER.

The King v. Dimond, 31 D.L.R. 556, 27 Can. Cr. Cas. 28, 23 B.C.R. 325.

Where the substituted holiday provided for by the Lord's Day Act is being claimed, it is the duty of the employee to do the work and then demand the substituted holiday during the next six days. As to "cases of emergency in connection with transportation," as applied to an able-bodied seaman at cargo work on a ship, the word "emergency" must be given an elastic and varying meaning according to the circumstances, especially in the case of vessels engaged in the coasting trade in dangerous waters where conditions of wind, tide, and weather must be carefully considered beforehand and duly provided for by the master, so as to insure, as far as possible, the safety of the vessels and those on board.

Murray v. Coast Steamship Co., 8 D.L.R. 378, 17 B.C.R. 469, 22 W.L.R. 572, 3 W.W.R. 153.

PAPER MILL.

The operation of a paper mill is not a "work of necessity or mercy" permitted to be carried on continuously without closing down over Sunday,. under the Lord's Day Act, R.S.C. 1906, c. 153, s. 12.

R. v. Donnacona Paper Co., 35 D.L.R. 189, 28 Can. Cr. Cas. 13.

The employment of a limited number of men in work on Sunday in a combined pulp and paper mill is permissible as a "work of necessity" within s. 12 of the Lord's Day Act, R.S.C. 1906, c. 153, during that part of the season when the water is high and it is commercially necessary to keep the water power going in the pulp mill to manufacture the pulp supply for the paper mill during the remainder of the year, and where the resultant clogging of the liquid pulp on its way to the paper mill, in case of the latter being entirely shut down, would mean a serious injury to the product.

R. v. News Pulp & Paper Co. 28 Can. Cr. Cas. 77.

WRIT OF PROHIBITION—OBSERVANCE OF SUNDAY — WORK — NECESSITY — COMPLAINT — OMISSION TO DENY EXCEPTIONS — JURISDICTION — CR. CODE, SS. 717, 1125—R.S.Q. 1909, c. 153—C.C.P. ART. 1003.

A complaint for the infraction of the Sunday Observance Law, declaring that the accused has illegally carried on business on Sunday in the ordinary course of his work, and that, for gain, he has employed and caused certain persons to work on Sunday, is sufficiently particularized, and the plaintiff is not bound to deny in his complaint the exceptions which could constitute the defence of the accused. If such omission constituted an irregularity it would furnish ground for a writ of error or appeal, but it cannot take away the jurisdiction of the magistrate. The remedy by way of prohibition is only open to restrain the excess of jurisdiction when no other means of appeal exists.

Belgo Canadian Pulp & Paper Co. v. Court of Sessions of the Peace of Three Rivers, 56 Que. S.C. 164.

(§ III B—21) — SUNDAY NEWSPAPER—INCORPORATED COMPANY.

An incorporated company is within the term "person" under the Interpretation Act, C.S.U.C., as regards liability in Ontario under the Lord's Day Act, C.S.U.C., c. 104, for carrying on the business of a merchant on a Sunday by issuing and selling on that day for purposes of gain an edition of a newspaper the publishing of

which on other days was the company's ordinary business; it is not within the exception made by the statute as to works of necessity.

R. v. World Newspaper Co., 24 Can. Cr. Cas. 145.

IV. Contracts.

See also Contracts; Sale; Vendor and Purchaser.

(§ IV—25)—Contracts.

The fact that the initial payment on account of purchase money for lands was made on a Sunday and that the receipt therefor was also signed on Sunday will not nullify the formal contract of purchase made on the following day in furtherance of the negotiations of which such initial payment formed a part.

Bailey v. Dawson, 1 D.L.R. 487, 25 O.L.R. 387, 20 O.W.R. 908.

A contract executed on the Lord's Day giving an option for the purchase of land, is void under s. 3 of c. 91 of Con. Ords. N.W.T. 1898, as preserved by the Lord's Day Act, R.S.C. 1906, c. 153, s. 16, which declares void all contracts or agreements for the sale or purchase of real or personal property made on that day.

Fallis v. Dalthaser, 4 D.L.R. 705, 4 A.L.R. 361, 21 W.L.R. 171, 2 W.W.R. 132.

Live stock—Special contract limiting liability—Contravention of Lord's Day Act.

Rise v. C.P.R. Co., 3 A.L.R. 154.

V. Violation of Sunday law as a defence.

Professional services — Dentist — Work performed on Sunday — Lord's Day Act—Special plea necessary.

DesBrisay v. Morash, 8 E.L.R. 176.

SUPREME COURT OF CANADA.

See Appeal; Courts.

SURETYSHIP.

See Principal and Surety; Bonds; Guaranty; Bills and Notes.

SURGEONS.

See Physicians and Surgeons.

SURNAME.

See Trademark, II—8.

SURVEY.

Survey of subdivision — New survey — Errors.

Thordarson v. Akin, 21 Man. L.R. 157.

Removing land marks—Boundaries settled judicially.

Morissette v. St. Francois Xavier, 40 Que. S.C. 224, 18 Can. Cr. Cas. 291.

TAXATION.

See Taxes; Costs.

TAXES.

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Annotations.

Exemption from taxation: 11 D.L.R. 66.

Powers of taxation; competency of province: 9 D.L.R. 346.

Taxation of poles and wires: 24 D.L.R. 669.

I. Powers of taxation; what taxable.

Assessments for school purposes, see Schools.

Municipal assessments, see Municipal Corporations, II H.

A. Taxation districts.

(§ I A—5)—Surtax—Rural Municipality Act.

The surtax provided for by the amendment to the Rural Municipality Act contained in s. 4 of c. 31 (Sask.), 1912-13, does not belong to the municipality but to the Crown in the right of the province, notwithstanding that the Legislature has imposed upon the municipality the duty of levying and collecting the tax.

Snipe Lake v. Martin, 11 S.L.R. 73, [1918] 1 W.W.R. 841. [Reversed in 44 D.L.R. 442, 12 S.L.R. 46, [1919] 1 W.W.R. 251. [Affirmed by Privy Council, 48 D.L.R. 258, [1919] 3 W.W.R. 91, [1919] A.C. 1006.]

C. Equality; uniformity; discrimination; double taxation.

(§ I C—21)—Tax on land lots—Uniformity—Minimum rate.

Where a uniform rate of taxes is imposed upon each lot of land, the fact that the statute provides for a minimum rate, in the event the tax payable on any lot or portion of land amounts to less than the required rate, does not violate the rule of uniformity.

Bow Valley v. McLean, 24 D.L.R. 587, 9 W.W.R. 84, 32 W.L.R. 357. [Varied, 26 D.L.R. 716, 9 W.W.R. 1299, 33 W.L.R. 893.]

(§ I C—28) — Assessment — Valuation roll — Inequality — Intervention of court.

When the basis of valuation of a property on the roll is its real value, the fact that adjacent properties have been undervalued is not a ground for reducing it. The courts should not interfere when the question is only as to the amount of the valuation unless satisfied that it was made on a wrong principle.

Brassard v. Laprairie, 15 Que. P.R. 129.

Assessment Act, R.S.O. 1914, c. 195, s. 69 (16)—Value of lands for assessment purposes—Uniformity.

Re Lake Simcoe Hotel Co. and Barrie; Re Tuck and Barrie, 11 O.W.N. 16.

Special taxes—Mining operations—Land.

Mining operations are quite distinct from the means by which these operations are carried out; it is the use and purpose to which mining property is put which constitutes mining operations; therefore a tax on the immovable property of a mining company is not a tax upon the company's mining operations.

Thetford Mines v. Amalgamated Asbestos Co., 29 D.L.R. 517, [1916] 2 A.C. 588, 26 Que. K.B. 24, reversing 23 Que. K.B. 195.

Interpretation of "business of a manufacturer"—Leased premises in city —Assessment Act, R.S.O. 1914, c. 195, s. 10 (1), (b).

A company carrying on a manufacturing business, having its factory and head office in one place, and a show room and sales room in another, must be assessed as a "business assessment" for the latter premises under the provisions of the Assessment Act, R.S.O., 1914, c. 195, s. 10 (1), (d).

Re Studebaker Corp. and Windsor, 49 D.L.R. 326, 46 O.L.R. 78.

D. For what purpose or use.

(§ I D—40) — Rural Municipality Act (R.S.S., c. 87)—Direct taxation for raising revenue for municipal purposes—Powers of provincial legislature.

Section 323 (b) of the Rural Municipality Act (R.S.S., c. 87; see Amendments, 1912-13, c. 31, s. 4), imposes a direct tax for the purpose of raising a revenue for municipal purposes, and is therefore legislation within the powers of the provincial legislature. A tax imposed on the appellant company under s. 323 (b) of the Act is not an "exceptional tax" within the meaning of clause 11 of the deed of surrender between the appellant company and the Crown under the Rupert's Land Act, 1868.

Hudson's Bay Co. v. Bratt's Lake; Martin v. Snipe Lake, 48 D.L.R. 258, [1919] A. C. 1006, [1919] 3 W.W.R. 91, affirming 44 D.L.R. 445, and 44 D.L.R. 442, 12 S.L.R. 28 and 12 S.L.R. 46, [1919] 1 W.W.R. 242, and [1919] 1 W.W.R. 251.

Noxious Weeds Act—Property of non-resident—Destruction of woods—Notice—Seed Grain Act.

Land the property of a nonresident owner, but looked after for him by a resident, to whom the full charge and control has been entrusted cannot be considered "unoccupied" land within the meaning of the Noxious Weeds Act. Land producing wild hay of sufficient value to be sold cannot be considered "not under crop" within the meaning of s. 8 of the Noxious Weeds Act. [Fraser v. Pere Marquette, 18 O.L.R. 589, applied.] A notification of the destruction of woods under s. 8 of the Noxious Weeds Act must be given to the owner personally or shown to have been received by him. Compliance with the requirements of s. 13 of the Municipalities Seed Grain Act as to the prior passing of an authorizing by-law is necessary to create a charge upon the lands sown or intended to be sown.

Re Fertile Belt, 9 W.W.R. 103, 32 W.L.R. 267.

E. What taxable.

(§ I E—45)—International bridge.

That portion of an international bridge lying within the Province of Ontario is subject to taxation as real property under s. 2, subs. 7 (d) of c. 23 of the Assessment Act, 4 Edw. VII. (Ont.), R.S.O. 1914, c. 195, declaring that real property shall include "all buildings, or any part of any building, and all structures." [Belleville & Prince Edward Bridge Co. v. Ameliasburg, 15 O.L.R. 174; Niagara Falls Suspension Bridge Co. v. Gardner, 29 U.C.R. 194, followed.]

New York & Ottawa R. Co. v. Cornwall, 15 D.L.R. 433, 29 O.L.R. 522, 16 Can. Ry. Cas. 403.

Business assessment—Unlicensed hotel —"Business"—Assessment Act, R.S. O. 1914, c. 195, s. 10 (1) (j), (11).

Re Clark and Leamington, 33 D.L.R. 787, 38 O.L.R. 405.

Assessment—"Business of distiller"—Appeal.

Re Hiram Walker & Sons and Town of Walkerville, 38 D.L.R. 758, 40 O.L.R. 154.

Right-of-way—"Land."

A right-of-way appurtenant is not assessable as a separate interest in land, nor covered by an assessment of the dominant tenement; it is included in the "land" it-

self upon an assessment of the servient tenement.

Reach v. Crosland, 45 D.L.R. 140, 43 O. L.R. 635, 15 O.W.N. 85.

INFORMATION AND BELIEF—AFFIDAVIT OF —SOURCE OF INFORMATION—RIGHT TO CUT STANDING LUMBER—INTEREST IN LAND—ASSESSMENT.

The court will not refuse to consider an affidavit produced in answer to affidavits upon which a rule absolute for a certiorari to remove an assessment and a rule nisi to quash the same were granted, on the objection that it is based only on information and belief, if it states the source of the information. The standing lumber on a block of land on which a lumber company has reserved the right to cut for a period of five years is an interest in land and liable to be assessed as such.

The King v. The Assessors of Marysville, 46 N.B.R. 330.

TELEPHONE LINES.

The poles and wires of a telephone company, placed upon public streets, are not immovable property by nature or destination, and are not subject to taxation under the Towns Corporation Act, R.S.Q. 1888, or for school assessments.

Cookshire v. Canadian Telephone Co., 44 Que. S.C. 126.

(§ I E—47)—"LAND"—MINERALS—"ESTATE OR INTEREST"—"UNSUBDIVIDED."

Minerals are not "land" within the meaning of the Town Act (Alta.). A right to minerals is not an "estate or interest" in lands. In that expression the word "interest" should be construed as an interest in the whole land, not as applying to something which belongs to or is a part of the land. Farm lands in s. 294 of the Act means lands not in the town. The use of the word "unsubdivided" in s. 294 is an indication not merely that the maximum rate of taxation therein set out is applicable only to surface lands, but also indicates a consideration by the statute only of lands in their general sense and not of a part of the lands such as minerals.

Coleman v. Head Syndicate, 11 A.L.R. 314, [1917] 1 W.W.R. 1074.

REVENUE—SUPPLEMENTARY REVENUE ACT, 1907, 7 EDW. VII., c. 9, s. 20A—AMENDING ACT, 1 GEO. V., c. 17, s. 3—PAYMENT OF PROVINCIAL TAXES—OWNERS OF MINING LOCATIONS—SUMMONS TO DELINQUENT CO-OWNERS—FORM OF—SEVERAL PARCELS—INTERESTS OF PERSONS IN MINING LOCATIONS.

Re Mining Locations D. 199, 5 O.W.N. 756.

(§ I E—48)—PERSONAL PROPERTY.

Coal towers forming part of a coal plant, and depending on the power house for power, may be said to form part of the business premises of the owner thereof and are therefore liable to taxation under the provisions of the charter of the city of Montreal.

Nova Scotia Coal & Steel Co. v. Montreal, 3 D.L.R. 750.

(§ I E—48)—OWNER OF LAND—OCCUPANT —PURCHASER.

A purchaser of Crown lands entitled to possession thereof, the title remaining in the Crown until completion of payment, is assessable as the equitable owner and occupant of the land. [Southern Alta. Land Co. v. McLean, 29 D.L.R. 403, 53 Can. S.C.R. 151; Smith v. Vermilion Hills, 20 D.L.R. 114, 49 Can. S.C.R. 563, affirmed in 30 D.L.R. 83, [1916] 2 A.C. 569, followed.] G.T.P.R. Co. v. Calgary, 36 D.L.R. 538, 55 Can. S.C.R. 103, 21 Can. Ry. Cas. 200.

"OCCUPANTS OF LAND"—CROWN PURCHASERS.

A purchaser of Crown lands under the Irrigation Act (R.S.C. 1906, c. 61), entitled to possession thereof, with title reserved to the Crown until completion of the agreement is an "occupant of land" within the assessment provisions of s. 250 of the Rural Municipality Act (Alta.) 1911-12, c. 3, as amended 1913, 1st sess., c. 7, s. 30, and has an interest therein taxable under the statute.

Southern Alberta Land Co. v. McLean, 29 D.L.R. 403, 53 Can. S.C.R. 151, 10 W.W.R. 879, affirming 23 D.L.R. 88, 22 D.L.R. 102, 31 W.L.R. 725, 30 W.L.R. 540.

PURCHASER OF CROWN LANDS—"OCCUPANT."

Marcus v. Kilborn, 31 D.L.R. 237, [1917] 1 W.W.R. 177.

REAL ESTATE—BUILDINGS AND IMPROVEMENTS—POLES AND WIRES.

Under the Mun. Code (Que.) buildings and improvements, including poles and wires affixed to land, cannot be taxed as real estate apart from the land to which they are attached.

Montreal Light, Heat & Power Co. v. Chambly Basin, 24 D.L.R. 665.

GRAZING LEASES—CROWN GRANTEES B.N.A. ACT.

The taxation under the Rural Municipality Act (Alta.), of an occupant of lands under grazing leases or licenses from the Minister of the Interior, is not in contravention of s. 125 of the B.N.A. Act. [Vermilion Hills v. Smith, 30 D.L.R. 83, 20 D.L.R. 114, 49 Can. S.C.R. 563, followed.] A rural municipality incorporated under the Rural Municipality Act, 1911-12 (Alta.) c. 3, is empowered to recover, by suit, school taxes, educational taxes and hail insurance taxes.

Marquis v. Hardwick, 34 W.L.R. 852.

TELEGRAPH LINE—POLES—PRIVILEGE—MORTGAGE—ACTION IN DECLARATION OF MORTGAGE—DESCRIPTION OF IMMOVABLE—SCHOOL TAXES—C. C. ARTS. 379, 2026, 2042, 2084—8, REF. [1909], ARTS. 5696, 5699—5 GEO. V. [1915], c. 96, ART. 3.

A creditor who has a preferred claim on

an immovable has a right of action in declaration of his mortgage. The Superior Court is competent to try any action in declaration of a mortgage or assessment. According to the special Acts governing the school municipality of the city of Lachine, and the city of Lachine itself, they both have the right to tax the underground cables, pipes, poles, wires conducting cables, and apparatus employed in transmitting and receiving telegraphic messages, installed in the municipality, which are immovables by virtue of the Act and are affected with a mortgage in favour of said municipalities. These immovables are sufficiently described in the manner set out above. This mortgage is not subject to the Registry Act nor to arts. 2026, 2042 C.C. (Que.), relating to the description of the notice for legal mortgage and that required for a conventional mortgage.

School Municipality of Lachine v. G.N.W. Telegraph Co., 56 Que. S. C. 215.

(I E—50)—Provincial taxation powers —Crown lands—Interest of lessee.

Though under s. 125 of the British North America Act, 1867, the provinces have no constitutional power to tax Crown lands, that restriction does not prevent them from imposing a tax upon the interest of a tenant of such lands under grazing leases from the Dominion Government.

Smith v. Rur. Mun. of Vermilion Hills, 30 D.L.R. 83, affirming 20 D.L.R. 114, 49 Can. S.C. 563.

(§ I E—52)—Waterworks.

Pipes of a water company laid in the public streets are not "real estate" within the meaning of the law of public instruction, and are not liable to school taxes. [Bell Telephone Co. v. Ascot, 16 Que. S.C. 436, disapproved.]

School Municipality v. Montreal Water & Power Co., 4 D.L.R. 776, 41 Que. S.C. 500.

(§ I E — 53) — Business tax — Bank — "Person."

A bank is a "person" according to the Interpretation Act, R.S.O. 1914, c. 1, s. 9 (x), and after it has transferred its assets to another bank is a "person removed from the municipality" within the meaning of s. 95 (3) of the Assessment Act (R.S.O. 1914, c. 195, added by 7 Geo. V., c. 45 (9)).

Toronto v. Quebec Bank, 38 D.L.R. 708, 40 O.L.R. 544.

Company — Franchise — Amendment of charter.

The amendment by c. 33, 1916, of the charter of the defendant city held not to entitle it to impose a business tax upon the plaintiff company contrary to a contract made prior to the amendment whereby the city had agreed to limit the company's assessment to a fixed amount.

Hedley Shaw Milling Co. v. Medicine Hat [1918] 1 W.W.R. 754.

Assignment for creditors.

Goods subject to the charge imposed by the Calgary city charter (s. 25 (12), as amended by c. 26, 1915, and c. 32, 1916), in respect to the business tax remains subject thereto in the hands of an assignee for the benefit of the creditors of the person assessed, but there is nothing in the charter making a tax on land a charge against goods, and since, under s. 47 of the charter, goods are not liable for such tax unless when seized they are the property of the person assessed, they are not liable when seized after they have been assigned for the benefit of such person's creditor.

Re Tardy, [1918] 3 W.W.R. 137.

Criminal law—The Special War Revenue Act—Not stamping packages of playing cards.

Under s. 16a of The Special War Revenue Act, 1915, as amended by s. 3 of c. 46 of 1918, no duty is cast on manufacturers or importers to stamp packages of playing cards manufactured or imported before April 30, 1918, or upon wholesalers or retailers to stamp packages secured by them after July 1, 1918; therefore a conviction under said section against appellant was quashed, with costs against informant, because there was nothing in the evidence to indicate that the package in question was not manufactured or imported before April 30, 1918, or that it was not added to the stock of the appellant after July 1, 1918.

R. ex rel. Conklin v. Bruser, [1919] 2 W.W.R. 644.

(§ I E—55)—Business taxes.

A person who has a contract with the city of Montreal by which, on payment of an annual sum, he has the privilege of removing dead animals from the streets and private premises and conveying them beyond the city limits to an establishment of his own is not a carter or a contractor doing business in the city and cannot be taxed as such.

Lesage v. Montreal, 13 Que. P.R. 402.

Occupants of Dominion property for commercial or industrial purposes.

The law of a provincial legislature authorizing a municipality to impose a tax upon persons "who occupy, for commercial or industrial purposes," immovable property belonging to the Dominion Government is constitutional. This tax is personal and does not affect the immovable property. One who rents an immovable property in order to sub-let it for commercial or industrial purposes performs an act of commerce and occupies it himself, within the meaning of the law quoted above "for commercial or industrial purposes." A municipality having power to impose a tax as above described is not bound to pass a special by-law for the purpose; it can enter the tax in question in its general tax collectors' roll.

Fraser v. Montreal, 23 Que. K.B. 242.

(I E—65)—Building and loan associations — What constitutes—Carrying on business.

A company is a "loan company" within the meaning of the Corporations Taxation Act (Alta.) 1907, c. 19, s. 2, if the buying and selling of lands, partly on credit, is clearly within its power under its articles of association, but it will not be liable to taxation thereunder merely by reason of such power, there must be an actual exercise of it and not merely in an isolated instance but in the way of carrying on business.

Re Sherbrooke Land Co., 15 D.L.R. 902, 27 W.L.R. 244, 5 W.W.R. 1333, 7 A.L.R. 493.

(§ I E—69) — Corporation tax — Trust companies in Alberta.

In ascertaining the tax payable by a trust company under the Corporations Taxation Act, (Alta.) 1907, c. 19, where the company employs only a part of its funds in Alberta, the word "tax" in paragraph (i) of s. 3 (f) has reference to the tax as it would be ascertained under the primary and dominating provisions of the statute, with the result that the amount which, apart from paragraph (i) would prima facie be chargeable is to be moderated and reduced in the proportion that the company's investments in Alberta bear to its total investments.

Re General Administration Society, 16 D.L.R. 112, 27 W.L.R. 156, 6 W.W.R. 7, 8 A.L.R. 169.

(§ I E—70)—Street railway taxes.

A city by-law relating to the taxation of an electric street railway company, which provided that the company should keep and maintain within the city limits all of its engines, machinery, power houses and shops, will not prevent the company importing, for the operation of its plant, electricity generated at a point beyond the city limits.

Winnipeg Electric R. Co. v. Winnipeg, 4 D.L.R. 116, [1912] A.C. 355, 1 W.W.R. 964.

F. Exemptions.

(§ I F—75)—Local improvements.

Lands benefited by local improvements are not exempt from taxation for the benefit conferred because the debentures issued under the by-law authorizing the work were purchased by the municipality instead of by a stranger.

Hislop v. Stratford, 34 D.L.R. 31, 38 O.L.R. 470, affirming 11 O.W.N. 191.

"Buildings on mineral land."

Buildings used in connection with the working of a deposit of traprock are not "buildings on mineral land" within the exemption provisions of the Ontario Assessment Act (R.S.O. 1914, c. 195, s. 40 (4)).

Foster v. St. Joseph, 37 D.L.R. 283, 39 O.L.R. 525, affirming 39 O.L.R. 114.

Nonresident government employee — Sheriff.

For the purposes of taxation, a sheriff is not within the exemption of nonresident members of the executive government when employed within the city of Fredericton, in a government or county office, whose duties are necessarily performed therein, as provided by s. 3 (11) of the Assessment Act of the City of Fredericton (N.B.), 7 Edw. VII. c. 84, notwithstanding he retained a home with his family in a different town, where he spent a considerable portion of his time.

R. v. Assessors of Fredericton, Ex parte Howe, 11 D.L.R. 713, 12 E.L.R. 510, 41 N.B.R. 564.

Church property — Sites — Adjoining lands.

The effect of subs. 1 of s. 228 of the Municipal Act, R.S.B.C. 1911, c. 170, is that not only the land upon which the church buildings are actually situated, but also such adjoining property, within reasonable limits, as may be said to constitute a "site," is intended to be exempt from taxation. [See B.C. Stat. 1913, c. 47, s. 16, amending above subs. by striking out the words, "and the site thereof."]

Victoria v. Trustees of the Church of Our Lord, 25 D.L.R. 617, 22 B.C.R. 174, 9 W.W.R. 173, 32 W.L.R. 330.

Church buildings.

Buildings used exclusively as places of worship with grounds surrounding the same upon which no other buildings are erected, are within the meaning of subs. 12 of s. 3, N.B.S. 3 Geo. V. c. 21, and are not to be included in the tax valuation.

St. John v. Board of Valuators, 43 N.B.R. 369.

Judges.

A County Court Judge in Ontario is not exempt from municipal taxation under provincial legislation in respect of his salary or income as such judge.

Toronto v. Morson, 38 D.L.R. 224, 40 O.L.R. 227, affirming 11 O.W.N. 195. [See 28 D.L.R. 188, 37 O.L.R. 369.]

Municipal exemption — Contract — Renewal.

Article 943 Mun. Code, authorizing a local municipality to exempt from the payment of municipal taxes, for a period not exceeding 25 years, certain enterprise within its territory, applies only to trade, commerce, manufacture enterprises, and not to electric railways. A contract between a municipality and an individual, exempting an enterprise from taxation for the period of 20 years, with the stipulation that at the expiration of the 20 years the said exemption should be renewed for 10 additional years, must be construed in the sense that the municipality would be willing to renew that exemption for 10 years more, but that the

exemption must be renewed after 20 years and a new contract signed.

Montreal v. Montreal Tramways Co., 54 Que. S.C. 87.

RURAL SECTION TAKEN INTO CITY.

When the Legislature permits a municipality to take in large areas capable of containing a population of many times its present population, and including portions which cannot be required for any ordinary city purpose for years to come, it is not unreasonable to suppose that it did not intend that such portions, since they do not receive any of the city benefits, should bear the ordinary city burdens.

Strathcona v. Edmonton & Strathcona Land Syndicate, 3 A.L.R. 259.

"MINING OPERATIONS" — EXEMPTION FROM TAXES.

In a law giving to a mining town the right to impose a special tax on owners of lots operated or not, the amount to vary, according to the extent of the operation, but with the benefit of exemption of any other special tax as to their "mining operations," this latter expression applies exclusively to lots operated as mines, the shops and machinery used for the operation being included. Therefore, the owners of lots not operated, or which are used for other purposes, may not (although they have paid the special tax for their operations) claim the exemption.

Amalgamated Asbestos Corp. v. Thetford Mines, 23 Que. K.B. 195.

MUNICIPAL TAXES—SCHOOL TAXES.

School taxes are included in the term municipal taxes in any event where the burden of providing school revenue is upon the municipality. [C.P.R. v. Winnipeg, 30 Can. S.C.R. 558, applied.]

G.T.P.R. Co. v. Edmonton, [1918] 1 W.W.R. 943.

UNEARNED INCREMENT TAX ACT—PERIOD OF EXEMPTION.

The exemption given by subs. 3 of s. 3 of the Unearned Increment Tax Act, c. 10, 1913 (2nd sess.), is absolute, i.e., it is not limited to the first or any other transfer of the land, but entirely frees from the operation of the Act land of the character described in the sub-section during the continuance of the conditions giving rise to the exemption.

Re Witt, [1918] 1 W.W.R. 612.

LAND—"EXPLOITATION" — "SPECULATION."

The word "exploitation" in art. 943, Mun. Code (old), respecting exemptions from municipal taxes, is not synonomous with "speculation," and should be interpreted in connection with the words "industry and business" which precede it, according to the rule nonscitur a sociis—that is, in the sense of the transformation by labour of raw material into a new and marketable article. The acquisition of land to be divided into building lots, and sold as such piecemeal, is a "speculation" and not an "exploitation," and a municipal by-law exempting from taxes land held for speculation is absolutely void and the municipality may impose the usual taxes upon such immovables.

Cartierville v. Boulevards de L'ile Co., 51 Que. S.C. 170. [Appeal to Supreme Court of Canada quashed.]

(§ I F—80) — CORPORATIONS AND THEIR PROPERTY.

Under the Assessment Act, 4 Edw. VII. (Ont.), 1904, c. 23, s. 226, providing that the Act shall not affect the terms of any agreement made with a municipality, a railway company is exempt from the ordinary business tax under an agreement with the city exempting its property from all taxes other than school rates.

Re Sandwich, Windsor & Amherstburg R. Co. and Windsor, 3 D.L.R. 43, 3 O.W.N. 575, 21 O.W.R. 44.

"SPECIAL FRANCHISE"—ASSIGNEE.

A municipal tax exemption, except for school taxes, of the real and personal property of a company includes also its "special franchise," and inures to the benefit of an assignee, although the words "successors and assigns" were not used in the by-law creating the exemption, but were used in the agreement incorporated with the by-law, the municipality assenting to the assignment; it also extends to taxes imposed for liabilities subsequently incurred by the municipality. As to school taxes, the special franchise is assessable, under s. 123 of the Municipal Ordinance (Alta. 1913, 2nd sess., c. 36, s. 12), with reference to its value as a right apart from the visible assets.

Red Deer v. Western General Electric Co., 34 D.L.R. 406, 11 A.L.R. 363, [1917] 2 W.W.R. 450.

RAILWAY PROPERTIES—WHAT ARE—LAND.

Lands acquired by a railway company for railway purposes, contingent upon the approval of the plans by the Minister of Railways, are not, until definitely appropriated as part of the railway and taken from other uses, "properties and assets which form part or are used in connection with its railway," so as to be exempt from taxation under clause 13 (e), c. 3, B.C. statutes 1910.

Canadian Northern Pacific Ry. Co. v. New Westminster, 36 D.L.R. 505, [1917] A.C. 602, affirming 25 D.L.R. 28, 22 B.C.R. 247.

RAILWAYS—LOCAL ASSESSMENTS.

The exemption of railway property from all assessments and taxation of every nature and kind, as provided by s. 18 of the Railway Taxation Act, 1900, c. 57, is subject to the limitation of the amending Act, 1900, c. 58 (R.S.M. 1913, c. 193, s. 18), empowering municipal corporations to assess the real property of railway companies for local improvements, the exemption, however, extending to special survey charges made under the Special Survey Act (R.S.M. 1913, c. 182).

C.N.R. Co. v. Winnipeg, 36 D.L.R. 222, 54 Can. S.C.R. 589, [1917] 2 W.W.R. 100, affirming 27 D.L.R. 369, 26 Man. L.R. 292, 18 Can. Ry. Cas. 317, 34 W.L.R. 524, 10 W.W.R. 549.

EXEMPTION—RAILWAY PROPERTIES — WHAT ARE RAILWAY LANDS.

Lands acquired by the plaintiff railway company cannot be said to form part of the railway, nor can they be classed as lands used in connection with the operation of the railway, so as to be exempt from taxation under clause 13 (e) B.C. statutes 1910, until plans of these lands have been filed, or submitted for approval, by the Minister of Railways. [Canadian Northern Pacific R. Co. v. New Westminster, 36 D.L.R. 505, [1917] A.C. 602, followed. See also Canadian Northern Pacific R. Co. v. Vernon, following].

Canadian Northern Pacific R. Co. v. Kelowna, 44 D.L.R. 315, 25 B.C.R. 514, [1918] 3 W.W.R. 845.

RAILWAY PROPERTY—EXEMPTION FROM TAXATION—EVIDENCE AS TO USE AND OCCUPATION.

By an agreement between the Government of British Columbia and the Canadian Northern R. Co. exemption was granted to the railway company in the following terms: "The Pacific Company and its capital, stock, franchise, income, tolls and all properties and assets which form part of or are used in connection with the operation of its railway shall be exempt from all taxation," etc. Their Lordships held that the approval by the Minister of Railways of a plan of proposed line designated as company's "right-of-way" deposited under the provisions of the B.C. Railway Act, did not bring such right-of-way within the meaning of the exemption clause where there was nothing in the uses to which the lands were devoted or in the circumstances of their occupation to mark them in a physical sense as part of a railway constructed or in process of construction.

The reason for the remission of taxation was the benefit to the public from the railway, and did not arise when the public were neither getting the actual railway nor having it in process of construction for their benefit. [Canadian Northern Pacific R. Co. v. New Westminster, 36 D.L.R. 505, [1917] A.C. 602, applied.]

Armstrong v. C.N.P.R. Co.; Vernon v. C.N.P.R. Co., 48 D.L.R. 268, [1919] 3 W.W.R. 352, reversing 44 D.L.R. 319, 44 D.L.R. 317, 26 B.C.R. 222, [1919] 1 W.W.R. 114 at 125.

"TAXATION" DEFINED — SPECIAL SEWER RATES—SANCTION BY LEGISLATURE.

"A total exemption from taxation," granted by a city under statutory authority for a certain time upon the lands, buildings, plant and stock of a company operates to exempt the company from liability to contribute a share of the cost of sewers constructed by the city in streets upon which its land fronts; the essence of taxation is that it is in a limited sense imposed by superior authority without the taxpayer's consent and the presumption that the sewer construction charges so imposed constitute "taxation" is not rebutted by the circumstance that the rate is a capital and not a recurring charge and is fixed by reference to the linear frontage independently of the tax assessors, nor by a statutory direction that they may be enforced in like manner to a rate or tax. Les Ecclesiastiques de St. Sulpice v. Montreal, 16 Can. S.C.R. 399, 14 App. Cas. 660, applied.]

Halifax v. Nova Scotia Car Works, 18 D.L.R. 649, [1914] A.C. 992, affirming 11 D.L.R. 55, 47 Can. S.C.R. 406, 12 E.L.R. 282, which reversed 4 D.L.R. 241, 45 N.S.R. 552.

MUNICIPAL LAW — STATUTORY EXEMPTION OF MINING COMPANIES "FROM ANY OTHER TAX IN RESPECT OF THEIR MINING OPERATIONS"—3 EDW. VII., C. 48, S. 21.

Amalgamated Asbestos Corp. v. Thetford Mines, 20 Rev. de Jur. 386.

MANUFACTURING COMPANIES — ILLEGAL BY-LAW VALIDATED BY STATUTE—SCHOOL RATES.

A statute passed for the purpose of validating an illegal municipal by-law enacted contrary to the provisions of s. 366 of the Municipal Act (Ont.) 1887, exempting a manufacturing company from any kind of assessments beyond a fixed rate, merely confirms the by-law subject to the interpretation provided by s. 4 of the Public Schools Act (Ont.) 1892, existent at the time of the passage of the by-law, that "no municipal by-law exempting ratable property from taxation shall be construed to exempt such property from school rates of any kind whatsoever." [Pringle v. Stratford, 20 O.L.R. 246, followed.]

Ontario Power Co. v. Stamford, 27 D.L.R. 161, [1916] 1 A.C. 529, 114 L.T. 473, affirming 8 O.W.N. 241. [See also 20 D.L.R. 261, 50 Can. S.C.R. 168.]

An exception from "taxation and all other municipal rates" operates to exempt from school taxes. [Winnipeg v. C.P.R. Co., 30 Can. S.C.R. 558; Halifax v. Nova Scotia Car Works, 84 L.J.P.C. 17, followed.] Held, also, upon a consideration of the agreement, by-laws and statutes, that the plaintiff's property was exempt from assessment for high school purposes. Construction of statutes in pari materia, considered.

Moose Jaw Street R. Co. v. Moose Jaw, 33 W.L.R. 320.

FACTORY SITES.

A resolution of the municipal council which exempts from taxes land for a manufacturing lot (factory site) should be in-

terpreted as meaning that the lots should be occupied and used as such site.

Belgo-Canadian Pulp & Paper Co. v. Brown, 49 Que. S.C. 57.

IMPERATIVE STATUTE.

The requirements of a taxing statute are imperative in the absence of a contrary intendment, and the construction of its taxing provisions will be the same whether the method adopted for the recovery of the taxes is by distress, by sale of the land or in an action for debt. [Minto v. Morrice, 22 Man. L.R. 391, 4 D.L.R. 435, followed.]

Bifrost v. Houghton, [1917] 2 W.W.R. 905.

THE CORPORATIONS TAXATION ACT, R.S.M. — MUNICIPALITY — BUSINESS TAX ON EXPRESS COMPANY.

Dominion Express Co. v. Brandon, 20 Man. L.R. 304, 17 W.L.R. 71.

(§ I F—83) — CORPORATION HAVING TWO BUSINESSES—EXEMPTION AS TO ONE.

An agreement between a city and a railway company which also conducted an electric lighting plant exempting from certain taxes "the tracks, right-of-way, wires, rolling stock, and all superstructures and substructures and all the properties of the" railway company does not entitle the company to an exemption from taxes on its buildings, machinery, poles and wires used in connection with its lighting plant.

Re Sandwich, Windsor & Amherstburg R. Co. and Windsor, 3 D.L.R. 43, 3 O.W.N. 575, 21 O.W.R. 44.

BUILDING OWNED BUT NOT YET OCCUPIED BY IT—LAND ON WHICH BUILDING IS BEING ERECTED.

While in course of preparation for use as its headquarters, a building owned by a Young Men's Christian Association is sufficiently "occupied" by it, although not actually its headquarters, so as to bring it within s. 11 of the Act of its incorporation, 63 Vict. (Ont.) c. 140, exempting from taxation the building and land of the association while occupied for the purposes for which it was created. Land on which a building is being erected by a Young Men's Christian Association for its own use is "occupied by the association" within the meaning of s. 11 of c. 140 of 63 Vict., exempting from taxation the buildings and land of the association as long as occupied by it.

Ottawa Y.M.C.A. v. Ottawa, 15 D.L.R. 718, 29 O.L.R. 574, affirming 20 O.L.R. 567.

(§ I F—84)—RAILWAY PROPERTY—LIMITATION AS TO AREA.

The exemption privilege given to railways under s. 14, c. 40, R.S.S. 1909, providing that the railway and the land comprised in the right-of-way, station grounds, yards and terminals, and all buildings, structures and personal property used for the purposes of the operation of a railway shall be free and exempt from taxation, does not apply to arrears of taxes which were a charge on the land in question before it was purchased by the railway company, nor to assessments for local improvements made on the land. The exemption privilege given by s. 14, c. 40, R.S.S. 1909, to railway companies may be claimed by a railway company on land having a maximum area of one mile in length by 500 feet in width, which amount of land they are allowed to expropriate under s. 177 of the Railway Act, 1906 (Can.) for stations, depots, yards and other structures for the accommodation of traffic, even though the land in question is not actually used or immediately needed for railway purposes, and whether the land had been obtained by expropriation proceedings or by voluntary sale or otherwise; and to exempt a further area the railway must shew that the additional land is necessary for the purposes set out in said s. 177. A railway company is not entitled under the statute R.S.S. 1909, c. 40, to an exemption from taxation on land in excess of the area they are allowed to expropriate under subs. (a) of s. 177 of the Railway Act 1906 (Can.), giving them the right to take for right-of-way land 100 feet in width and under subs. (b) giving them the right to take for stations, yards and other structures for accommodation of traffic an area one mile in length by 500 feet in breadth, including the width of the right-of-way, unless they shew that the additional area is necessary for the purposes set out in subs. (b); such necessity will be presumed if the additional area was obtained by permission of the Railway Board as provided in s. 178 of the Act, but not otherwise.

Prince Albert v. C.N.R. Co., 10 D.L.R. 122, 23 W.L.R. 275, 6 S.L.R. 49, 3 W.W.R. 900, 15 Can. Ry. Cas. 87.

(§ I F—85)—COMMUTING AT FIXED GROSS SUM, HOW CONSTRUED—SCHOOLS.

The effect of a fixed assessment by a municipality commuting at a fixed gross sum covering a stated period of years "taxation of any nature or kind whatever" against the company's ratable property used for the corporate purposes of the company is to that extent to exempt from taxation the property to which it applies.

Re Ontario Power Co. and Stamford, 18 D.L.R. 64, 30 O.L.R. 378.

EXEMPTIONS — YOUNG MEN'S CHRISTIAN ASSOCIATION — PROVIDING MEALS AND LODGINGS FOR OTHER THAN OWN MEMBERS.

That members of other associations, and sometimes visiting friends and relatives of its own members, are furnished meals and lodgings by a Y.M.C.A., will not deprive it of the exemption of its building from taxation given it by its incorporating statute, 63 Vict. (Ont.) c. 140, s. 11.

Re Ottawa Y.M.C.A. and Ottawa, 15 D.L.R. 724, 29 O.L.R. 582, affirming 15 D.L.R. 718, 29 O.L.R. 574.

YOUNG MEN'S CHRISTIAN ASSOCIATION.

Section 11 of c. 140 of 63 Vict. (Ont.), incorporating the Y. M. C. A. of Ottawa, exempting from taxation its buildings and land so long as occupied and used for the purposes of the association, is not limited to property owned by the previously unincorporated association, but includes as well a building subsequently erected by the corporate body for its own occupancy.

Ottawa Y.M.C.A. v. Ottawa, 15 D.L.R. 718, 29 O.L.R. 574, affirming 20 O.L.R. 567.

COLLEGE—LOCAL IMPROVEMENTS.

Upper Canada College not being a school maintained in whole or in part by a legislative grant or school tax, and being a college or seminary of learning, would by the Local Improvement Act, R.S.O. 1914, c. 193, s. 47, be liable to assessment for local improvements, but s. 10 of the Upper Canada College Act, R.S.O. 1914, c. 280, exempts it from all assessments, including local improvements, and the latter Act being a local Act is not repealed by the public general Act, and so being exempt from taxation the college is not a necessary party to a petition for local improvements.

Upper Canada College v. Toronto, 32 D. L.R. 246, 37 O.L.R. 665. [Affirmed, 38 D.L.R. 523, 55 Can. S.C.R. 433. See also 13 O.W.N. 92, 119.]

PROPERTY OF EDUCATIONAL INSTITUTION—PERIOD.

When it is a question of determining whether or not a property belonging to a scholastic order is exempt from taxes as being intended for purposes of education it is not necessary to consider its position but what it is intended for. Thus it is immaterial to the question that the educational establishment is situated in one municipality and the recreation grounds of the pupils in another; the latter must be considered to be necessary for the education of the pupils in the development of their physical faculties. A town charter which allows a municipality to make an agreement with the owners of immoveables for "fixing the amount at which they will be taxed for a definite period," may make such arrangement for thirty years; art. 4559 R. S.Q., 1888, the Towns and Corporations Act, limiting the exemption from taxes that the town corporations can grant to 20 years does not deprive them of this power.

Maisonneuve v. College Ste. Marie, 24 Que. K.B. 563.

ORPHAN ASYLUM.

Re I.O.F. and Oakville, 25 D.L.R. 842, 34 O.L.R. 524.

PROPERTY DEVOTED TO EDUCATIONAL, CHARITABLE OR RELIGIOUS PURPOSES.

The Assessment Act, R.S.N.S., 1900, c. 73, s. 4, exempts from taxation "every church and place of worship and the land used in connection therewith, and every churchyard and burial ground." It was held, not to extend to and include lands and buildings not being churches or places of worship, such as glebe houses and lands, rectories, parsonages, etc., occupied and used by the pastors in actual charge of the churches, and not rented to third persons or used otherwise than as a means of aiding in the support of such pastors.

Catholic Corp. of Antigonish v. Richmond, 45 N.S.R. 320.

HORTICULTURAL SOCIETY—TAX SALE—SETTING ASIDE.

Lot 1, block 207, district lot 546, in the district of North Vancouver, which is owned by the plaintiff Society and used for its own purposes, was sold for taxes alleged to be in arrears for the years 1913 and 1914. The lot was less than five acres in area. In an action to set aside the tax sale on the ground that the taxes were improperly imposed:—Held, that the lands in question were exempt by law from the taxes so imposed and the sale should be set aside.

North Vancouver Horticultural Society, etc. v. North Vancouver, 24 B.C.R. 290.

EDUCATIONAL INSTITUTIONS—PUBLIC AND PRIVATE.

Under the City and Towns Act (R.S.Q. 1909, arts. 2733, 5729), all educational establishments are exempt from taxation; there can be no distinction made between public and private institutions.

Fraserville, v. Lebel, 50 Que. S. C. 299.

(§ I F—86)—INSTITUTIONS ENTITLED TO EXEMPTIONS.

Where a statute provides for exemption from taxation of buildings used as a seminary of learning maintained for religious or educational purposes only when the whole profits are applied to such purposes and when the buildings are actually used and occupied by such seminary, the letting of rooms to persons other than students of the seminary in one of the buildings belonging to and used by that seminary for its ordinary purposes does not render either the whole of the buildings and property of such seminary, or the whole of the building in which the rooms are let, liable to taxation if the whole income derived from the room rents is used for seminary purposes.

Re Sisters of Notre Dame and Ottawa, 1 D.L.R. 329, 3 O.W.N. 693, 21 O.W.R. 394.

(§ I F—88)—PROPERTY DEVOTED TO EDUCATIONAL CHARITABLE, OR RELIGIOUS PURPOSES—NATURE OF USE OF PROPERTY.

A ladies' boarding and day school the property of a religious body, is exempt from taxation under s. 1 (3) of the Ontario Assessment Act, 10 Edw. VII. c. 88, R.S.O. 1914, c. 195, where the profits therefrom are devoted to philanthropic, religious and educational purposes. The fact that a small portion of the property of a religious order, whose dominant purpose is charitable, is used as a boarding place for pupils attending a school conducted by the order, does not prevent the property being exempt from taxation as that of a charitable institution, under s. 5 (9) of the Ontario Assess-

ment Act, 4 Edw. VII. c. 23, amended by 10 Edw. VII. c. 88, R.S.O. 1914, c. 195. [Re Sisters of Notre Dame and Ottawa, 1 O.L.R. 329, 3 O.W.N. 693, distinguished.] That a portion of the income of a religious body, the purposes of which are the dissemination of secular and religious education, the care of the sick, and relief of the poor, is devoted to the maintenance and support of its members in a convent owned by it does not defeat the exemption of such property from taxation under s. 5 (9) of Ontario Assessment Act, 4 Edw. VII. c. 23, as amended by 10 Edw. VII. c. 88, R.S. O. 1914, c. 195, as that of a charitable institution.

Re Ottawa and Grey Nuns, 15 D.L.R. 725, 29 O.L.R. 568.

BOARD OF REVISION—JUDICIAL FUNCTIONS—ADMINISTRATIVE POWERS.

Sisters of Charity v. Vancouver, 44 Can. S.C.R. 29.

LANDS USED IN CONNECTION WITH CHURCHES, ETC.—GLEBE HOUSE AND RECTORY.

Catholic Episcopal Corp. v. Richmond, 9 E.L.R. 478.

MUTUAL FIRE INS. CO.—RESERVE FUND—INCOME ON.

Economical Mutual Fire Ins. Co. v. Berlin, 20 O.W.R. 349.

DISUSED CEMETERY—"BURYING GROUND."

Roman Catholic Episcopal Corp. v. Sault Ste. Marie, 24 O.L.R. 35, 19 O.W.R. 364.

(§ I F—90)—PUBLIC PROPERTY.

Interest of licensee from Crown.

Cruikshank v. Coulee, 7 D.L.R. 934, 2 W. W.R. 805.

CROWN — SPECIAL ASSESSMENT — WATER CHARGE—B.N.A. ACT—MUNICIPAL ACT.

A special tax or assessment imposed by a municipality for the use of water from its water supply is not within the exemption of the Crown from "taxation" within the meaning of s. 125 of the B.N.A. Act and art. 5729 of the Quebec Cities and Towns Act, 1909.

Minister of Justice for Canada v. Levis, 45 D.L.R. 180, [1919] A.C. 505, affirming 51 Que. S.C. 267, sub nom. Doherty v. City of Levis.

NONRESIDENT — GOVERNMENT SERVANT — RESIDENCE.

A nonresident carrying on business in the city is liable to assessment under the Fredericton Assessment Act, 1907; but is exempt therefrom if he be a government employee whose duties are necessarily performed in the city. Residing at a place for the purpose of doing such government work does not make one a "resident" for assessment purposes. [Ex parte Howe, 11 D.L.R. 713, 41 N.B.R. 564, applied.]

The King v. Fredericton Assessors; Ex parte Maxwell, 36 D.L.R. 685.

PUBLIC PARKS AND PLEASURE GROUNDS—MUNICIPALITY.

Land within one municipality granted by the Crown, under s. 175 of the Municipal Act, C.S.B.C. 1888, to another municipality upon trust to maintain and preserve the same as a public park or pleasure grounds, are not exempt from taxation by the municipality within which they are situate.

Saanich v. Victoria, 24 B.C.R. 121.

INDIAN LANDS.

Indian lands become taxable from the time they are sold by the Government, though it is only by mere location ticket or permission to occupy. An Indian, the same as any other person, can become owner of a lot of land which has formed part of a reserve when this reserve has been regularly surrendered to the Crown; but he does not benefit as to this immoveable by any privilege of exemption from taxes or of unseizability. By arts. 21, 101 of the Indian Act, a located Indian—having the benefit of the privilege of exemption from taxes and unseizability—is an Indian to whom land has been allotted by the tribe while the reserve existed (that is, before it was surrendered to the Crown), and who has continued to occupy it.

Doherty v. Giroux, 24 Que. K.B. 433. [Affirmed 30 D.L.R. 123, 53 Can. S.C.R. 172.]

PROPERTY OF THE CROWN IS EXEMPT FROM ALL TAXES—SECTION 125 OF THE B.N.A. ACT—CHARTER OF THE CITY OF MONTREAL.

Property of the Crown cannot be taxed, even if it be temporarily placed in civil hands; but that which belongs to the tenant (buildings, improvements, and like works), can be taxed like the property of any other citizen.

Att'y-Gen'l of Canada v. Baile & Montreal, 25 Rev. de Jur. 463.

RAILWAY AID — LAND SUBSIDY — CROWN LANDS—INTERESTS OF PRIVATE OWNER "FREE GRANT."

Calgary & Edmonton Land Co. v. Att'y-Gen'l. of Alberta, 45 Can. S.C.R. 170.

MUNICIPAL TAXATION — PLEBISCITE ORDINANCE—GOVERNMENT OF CITY VESTED IN COMMISSIONER FOR YUKON TERRITORY—ULTRA VIRES—MUNICIPAL INSTITUTIONS—ILLEGAL TAXATION.

Dugas v. Macfarlane, 18 W.L.R. 701.

DECLARATION AS TO RIGHT OF TAXATION—NO CONSEQUENTIAL RELIEF.

Viola School District v. Canada Saskatchewan Land Co., 3 S.L.R. 498.

VALUATION ROLL—ERROR IN DESCRIPTION OF PROPERTY.

Cowansville v. Noyes, 39 Que. S.C. 311.

APPEAL FROM ASSESSMENT OF REAL ESTATE—JURISDICTION OF ASSESSMENT APPEAL COURT TO INCREASE ASSESSMENT.

Leadbetter v. Port Hood, 9 E.L.R. 153.

UNPATENTED LAND—SALE OF LAND AFTER ISSUE OF PATENT FOR TAXES IMPOSED BEFORE ISSUE—DOMINION LANDS ACT.

Hannesdottir v. Bifrost, 17 W.L.R. 325. [Affirmed, 21 Man. L.R. 433, 19 W.L.R. 189 (Man.).]

II. Where taxable; situs.

See infra, V C.

(§ II—95)—Resident — Sheriff with home in town other than county seat.

For the purposes of taxation, a sheriff became a resident of the county town, where the law required him to reside, and where he kept an office and spent a portion of his time, having a room in the gaol building and boarding with the gaoler during the time he was in the town, and also paying taxes there for two years without objection, notwithstanding the sheriff's family remained in a different town, on property owned by him, and where he spent a considerable portion of his time.

R. v. Assessors of Fredericton; Ex parte Howe, 11 D.L.R. 713, 41 N.B.R. 564, 12 E.L.R. 510.

Where taxable—Government official.

The appellant, Att'y-Gen'l. for Nova Scotia, was at the time of his appointment resident and carrying on a law practice in Bridgetown. In October, 1911, he went to Halifax to reside and where the duties of his office required him to live. About the same time he disposed of his law business in B. and thereafter had no further interest in it. At the time of appeal brought he owned a dwelling-house in B. which his family contemplated visiting and occupying from time to time. Being assessed for income in B. for the year 1912. Held, that he was not liable to be so assessed for income under s. 15 of the Assessment Act, R.S.N.S. 1900, c. 73, as he did not "reside" in B. within the meaning of the Act. The Assessment Appeal Court cannot, under s. 35 of the Act, entertain an appeal on the ground of nonresidence by a person assessed. [Toronto R. Co. v. Toronto, [1904] A.C. 809, relied on.]

Re Assessment Act, O. T. Daniels and Bridgetown, 12 E.L.R. 157.

"Terrain"—"Lot"—Immovable property.

Westmount v. Montreal Light, Heat & Power Co., 44 Can. S.C.R. 364.

III. Assessment of property; enforcement.

A. In general; levy and apportionment.

Sufficiency of notice of assessment for local improvements, see Municipal Corporations, II H—265.

(§ III A—100)—Notice of assessment—School ordinance.

Although generally statutory provisions relating to the imposition of taxes are to be deemed imperative, proceedings for the imposition of the tax are to be presumed regular and valid until the contrary is shewn. A failure to give the owner notice of assessment under the School Ordinance (Alta.), is a fatal irregularity.

Clive (Olive) School District v. Northern Crown Bank, 34 D.L.R. 16, 12 A.L.R. 344, [1917] 2 W.W.R. 549.

Telephone company—"All branch and party lines."

Re Turnberry and North Huron Telephone Co., 4 O.W.N. 598.

(§ III A—105)—Owner and lessee—Seizure of crop—Power of municipal council.

Where the owner of certain land has leased and sublet other land, under a crop payment lease, and his share of the crop has been seized and the proceeds applied in payment of the taxes due on the leased property, the council of the municipality has power, under the Rural Municipality Act, R.S.S. 1909, c. 87, by agreement, to apply the proceeds of such seizure in payment of the lessee's taxes due on other land. Such power may be exercised by resolution.

Kaufman v. Baildon, 43 D.L.R. 487, 11 S.L.R. 481, [1918] 3 W.W.R. 611.

Lot or portion of land—Subdivision lots.

For the purpose of subss. 2 and 3 of s. 297 of the Rural Municipality Act (Alta.), as amended by ss. 23 and 24, of Acts 1913, c. 21, providing a mode of imposing, for municipal and school purposes, a tax on any "lot or portion of land," each tract of land assessed to one person should be treated as one parcel irrespective of whether different portions of the tract are separately assessed upon the roll.

Bow Valley v. McLean, 26 D.L.R. 716, 33 W.L.R. 893, 9 W.W.R. 1299, varying 24 D.L.R. 587, 32 W.L.R. 357, 9 W.W.R. 84.

Seizure for arrears—Goods and chattels of "occupant"—Thresher's outfit temporarily on premises—Wrongful seizure—Damages.

Le Bruyne v. Laurier, 25 D.L.R. 746, 8 S.L.R. 251, 9 W.W.R. 682, 33 W.L.R. 107.

B. Assessment; valuation.

Evidence of value, see Evidence, XI F—790.

(§ III B—110)—Validity — Inclusion of property not owned by ratepayer or not assessable.

An entire assessment on land, some of which did not belong to the ratepayer assessed, or was Crown land not subject to taxation, will be quashed where there is nothing in the assessment list to identify the nonassessable land from that which was assessable.

The King v. Grand Falls, 13 D.L.R. 266, 42 N.B.R. 122, 13 E.L.R. 240.

In order to shew that taxes are due, it must appear that the imperative requirements of the statute as to assessment have been complied with and that the rate of taxation has been fixed.

Sturgeon Falls v. Imperial Land Co., 7 D.L.R. 352, 31 O.L.R. 62, 23 O.W.R. 170.

Railway property—Ontario Assessment Act—Conclusiveness for four years what concluded by.

The provisions of s. 45 of the Assessment Act, 4 Edw. VII. (Ont.) c. 23, R.S.O.

1914, c. 195, declaring that the amount of an assessment of railway property under s. 44 of the Act, as finally made in the corrected rolls, shall stand for the following four years in respect of property included in the assessment, relates only to the amount of the assessment, and not to its regularity, or the jurisdiction to make it.

New York & Ottawa R. Co. v. Cornwall, 15 D.L.R. 433, 29 O.L.R. 522, 16 Can. Ry. Cas. 403. [Affirmed, 35 D.L.R. 468, [1917] A.C. 399, 20 Can. Ry. Cas. 435.]

MUNICIPAL ASSESSMENT — LAND — REDUCTION.

Pearce v. Calgary, 31 D.L.R. 548. [See also 23 D.L.R. 296, 31 W.L.R. 208, 9 W.W.R. 195.]

"LAND LIABLE TO ASSESSMENT"—BUILDINGS —ERROR.

Buildings are "land liable to assessment" under s. 2(b) of the Ontario Assessment Act (R.S.O. 1914, c. 195), apart from the land itself; a clerical omission to separately value the buildings on the assessment roll may be amended in the next assessment roll in a manner provided by s. 54 of the Act.

Reamsbottom v. Haileybury, 48 D.L.R. 353, 45 O.L.R. 345.

HUSBAND AND WIFE—ESTOPPEL.

A wife, not legally separated from her husband, having paid taxes for several years on property owned by her, with the knowledge that the property was assessed in her husband's name, is estopped from pleading that the property was improperly assessed. [The King v. Grand Falls, 13 D.L.R. 266, distinguished.]

Byrne v. Chatham, 33 D.L.R. 111, 44 N.B.R. 271.

NONRESIDENT.

The provisions of s. 20 of the Assessment Act (as to the insertion of the word nonresident in the owner column of the assessment roll) and of s. 23, as to notice from nonresident requiring entry of his name on the assessment roll) are imperative. [Berlin v. Grange, 1 U.C.E. & A. 279, applied.]

Bifrost v. Houghton, [1917] 2 W.W.R. 905.

BUILDING LOTS—FARM LAND.

A farm owned exclusively for agricultural purposes, in a town governed by the Cities and Towns Act, must be assessed according to the purposes for which it is used, and not as building lots, as long as the general interest of the town does not necessitate its being divided into building lots and offered for sale as such.

Gillen v. Quebec West, 51 Que. S.C. 122.

ELEVATORS—PERSONAL PROPERTY—THE VILLAGE ACT, S. 114.

Elevators resting by their own weight upon concrete foundations, not having become attached to the freehold, should be considered as personal property so as to be assessable for school purposes under s. 114 of The Village Act.

Alberta Pacific Grain Co., v. Strome, 6 W.W.R. 1560.

ON "PERSON" OR "LOT"—AUTHORITY OF BOARD.

In assessing a general rate for a rural municipality the proper principle to adopt as to a minimum tax is that such tax is applicable to the "person" and not to the "lot," but where a minimum tax is levied under the provisions of the Supplementary Revenue Act each lot is to be assessed. The authority of the local Government Board to deal with matters of assessment dates from Sept. 24, 1914, and accordingly where an assessment for that year has been completed and closed prior to that date, the Board has no authority to open up the assessment for that year although a portion of it has been made on an improper basis.

Parry v. Sherwood, 7 W.W.R. 1244.

MINIMUM TAX—"PERSON"—"LOT"—REVISION BY BOARD.

Notwithstanding anything in the Rural Municipality Act, the local Government Board may, where it appears desirable, revise and adjust assessments upon giving the proper notices. The minimum tax for municipal and school purposes is applicable to the "person" and not to the "lot." [Parry v. Sherwood, 7 W.W.R. 1244, applied.]

Wilson v. Sherwood, 9 W.W.R. 853.

(§ III B—112)—ASSESSMENT AND APPORTIONMENT OF RAILWAY PROPERTY.

The assessment of the real property of a steam railway company does not become fixed for the next following four years, under s. 45 of the Ontario Assessment Act, 1904, upon the mere formal receipt by the clerk of the municipality of the company's annual statement of such property, and the transmission to the company of a notice of the amount of the assessment thereof, such amount being the same as the amount of the previous year; the only assessment which remains so fixed is an actual assessment after inspection and valuation.

Re Steelton and C.P.R. Co., 3 D.L.R. 402, 3 O.W.N. 1199, 22 O.W.R. 94, 15 Can. Ry. Cas. 176.

RAILWAYS—"SUPERSTRUCTURE."

The "superstructure" of a railway, within the meaning of an assessment statute (Con. Ord. N.W.T. 1898, c. 71, s. 3), includes that which constitutes the line of railway, such as the ties, rails, bridges, culverts, platforms, etc., but not the buildings thereon. [Re C.P.R. and Macleod, 5 Terr. L.R. 192, followed.]

G.T.P.R. Co. v. Calgary, 36 D.L.R. 538, 55 Can. S.C.R. 103, 21 Can. Ry. Cas. 200.

RAILWAY SUBSIDY LANDS — INTEREST OF OWNER—VALIDATING STATUTE.

An agreement declaring one entitled to a moiety of railway subsidy lands for which no formal conveyance is executed, but the recitals as to the moiety being later adopted in a validating Act, confirming a repurchase of the lands by the Crown subject thereto, sufficiently vests an interest in the lands

which is liable to assessment and taxation under s. 47 of the Taxation Act, R.S.B.C. 1911, c. 222.

Re Heinze; Fleitmann v. The King, 26 D.L.R. 211, 52 Can. S.C.R. 15, affirming 20 B.C.R. 99.

ASSESSMENT OF RAILWAY PROPERTY—RAILWAY ASSESSMENT ORDINANCE, s. 3—SCHOOL ASSESSMENT ORDINANCE, s. 41, SUBS. 3—ILLEGAL ASSESSMENT.

The right-of-way, station grounds, and buildings of the plaintiffs, a railway company, within the school district of the defendants, were assessed by the defendants for the years 1912 and 1913 at $49,500 and $50,000 respectively. The buildings were worth, according to the evidence, $5,775, and the lands comprised 50.73 acres. Section 3 of the Ordinance respecting the assessment of railways, Rev. Ord. N. W. T. c. 71, provides that the roadway and superstructure shall not be assessed at a greater value than $1,000 per mile:—Held, that the curative effect of subs. 3 of s. 41 of the School Assessment Ordinance, Rev. Ord. N. W.T., c. 105, is not such as to extend the powers of a school board, but is limited to matters over which the board has statutory jurisdiction; and the defendants having in their assessment exceeded the limit prescribed by s. 3 of c. 71, the assessment was ultra vires and illegal. Held, also, that as the foundation of the jurisdiction to assess was nonexistent, the plaintiffs were not bound to appeal, but were entitled to question the assessment in an action. [Brantford v. Ontario Investment Co., 15 A.R. 605, 608b, approved and followed.]

C.N.R. Co. v. Cora Lynn District School Board, 28 W.L.R. 409.

"ROADWAY" OF RAILWAY COMPANY.

Section 1 of c. 71, Con. Ord., N.W.T. 1898, provides that the roadway and superstructure of the roadway of a railway company shall not be assessed at a greater value than $1,000 per mile. "Roadway" here means the right-of-way as indicated in the Railway Act, namely, a strip of land 100 ft. wide upon which is constructed the roadbed of the company, and does not include all its yards, buildings, tracks and sidings.

C.N.R. Co. and C.P.R. Co. v. Edmonton, 5 W.W.R. 1088.

(§ III B—113)—NAME IN WHOM ASSESSABLE—CONDITIONAL VENDORS.

The sale of pianos under a hiring agreement, whereby title to the property is retained until all instalments of the purchase price are paid, constitutes the seller the actual legal owner of the property though possession thereof is in the purchaser, and he is therefore subject to assessment under r. 4 of s. 15 of the Assessment Act, R.S.N.S. 1900, c. 73.

Glace Bay v. Smith, 27 D.L.R. 74, 50 N.S.R. 286.

LAND TRANSFERS—PERSONS LIABLE—VENDOR AND PURCHASER.

Elart v. Shafer, 28 D.L.R. 725, 34 W.L.R. 57.

PERSONS IN WHOSE NAME PROPERTY ASSESSABLE — "OWNERS" — "OCCUPANTS" — CORPORATION AND ITS OFFICERS.

Marcus v. Burns, 31 D.L.R. 237, [1917] 1 W.W.R. 176.

ASSESSMENT—IN WHOSE NAME—ESTATE OF DECEASED OWNER.

After the death of the owner of land it must be assessed for taxation in the name of the registered owner or occupant and not in that of the estate of the former.

Riesbech v. Creighton, 12 D.L.R. 363, 3 W.W.R. 785.

ASSESSMENT — IN WHOSE NAME — SUBSEQUENT PURCHASER—VALIDITY.

An assessment of land exempt from taxation in the name of one who was not the owner at the time the assessment was made, is void, notwithstanding he subsequently acquired title to the land with knowledge of such assessment.

The King v. Grand Falls, 13 D.L.R. 266, 42 N.B.R. 122, 13 E.L.R. 240.

PURCHASER IN POSSESSION.

A purchaser of land under suspensive conditions, who is given possession, may be properly placed on the valuation roll of a municipal corporation, especially when it is stipulated in the deed of sale that the occupant would pay all the taxes.

Maisonneuve v. Michaud, 52 Que. S.C. 161.

OCCUPANT—EXPROPRIATED LAND.

The occupant of land vested in His Majesty by the filing of a plan and description thereof under s. 8 of the Expropriation Act is liable to assessment for such property by virtue of the City Act, s. 386(3).

Westman v. Regina, 10 W.W.R. 505.

(§ III B—116)—DESCRIPTION OF LAND—VALIDITY—LOTS AND BLOCKS—"OCCUPANT"—"OWNER"—VENDOR AND PURCHASER.

Varson v. Vegreville, 28 D.L.R. 734, 34 W.L.R. 504, 10 W.W.R. 791.

DESCRIPTION OF PROPERTY.

The failure to note on an assessment roll, as imperatively required by s. 31 of the Municipal Assessment Act (Man.), the fact that land assessed was unpatented, will render the assessment invalid. [Haisley v. Somers, 13 O.R. 600, applied.] Provincial lands held by one under an agreement for purchase thereof from the Crown are "unpatented" lands within the meaning of s. 31, which requires the fact that where lands assessed for taxes are unpatented, the fact is to be noted on the assessment rolls.

Minto v. Morrice, 4 D.L.R. 435, 22 Man. L.R. 391, 21 W.L.R. 255 and 617, 2 W.W.R. 374.

Under the Assessment Act, 4 Edw. VII. (Ont.), c. 23, s. 22, whereby land "subdi-

visions" are to be assessed separately two or more lots or parcels on a plan should not be included in one assessment. Upon the separate assessment of a part of a lot in a land subdivision such part should be designated in the assessment roll by its boundaries or other definite description, so as to indicate what part is intended.

Sturgeon Falls v. Imperial Land Co., 7 D.L.R. 352, 23 O.W.R. 170, 31 O.L.R. 62.

DESCRIPTION—REMEDY.

An assessment roll when finally passed by a Court of Revision binds all parties concerned, notwithstanding any defects or errors therein, and such defects or errors are therefore not proper subjects for an action at law.

Hislop v. Stratford, 34 D.L.R. 31, 38 O.L.R. 470, affirming 11 O.W.N. 191.

DESCRIPTION OF LAND—EFFECT ON TAX SALE PURCHASER.

It is only for the purpose of a tax sale and the conveyance to the tax purchaser that a description of the land in the assessment thereof is required to be sufficient to identify the land and permit of the registration of a transfer; if the ratepayer is personally liable for the taxes on the land and he pays them under protest, it is not open to him to recover them on the ground that the identity of the land was not made clear in the description contained in the assessment roll.

Pearce v. Calgary, 23 D.L.R. 296, 9 W.W.R. 195, 31 W.L.R. 208. [See 9 W.W.R. 668, 31 D.L.R. 548.]

WATER POWER AND LANDS—DESCRIPTION—ASSESSMENT AT LUMP SUM.

When immovables are situated on both sides of a river and are acquired with the right to use the water of the river for a water power, but as a matter of fact no works were there to develop it, the following description contained in the valuation roll of the municipality for the purpose of taxation, to wit, "basin water power," is not indicative that the water power which does not exist is taxed, but is a mere description of the lands which are taxed; and this tax is not illegal on the ground that the lands and the water power being taxed for a lump sum, the tax was for a thing that did not exist.

Westbury v. Sherbrooke, 47 Que. S.C. 82.

(§ III B—119)—C. & E. TOWNSITE TRUSTEES—VALID ASSESSMENT AGAINST—TOWNSITES LIMITED ACQUIRING LANDS—NOTICES—VALIDITY OF ASSESSMENT—ASSESSMENT COMMITTEE—TAX ROLL—PREPARATION OF.

Trustees named by the company constructing the Calgary & Edmonton Ry. for the purpose of handling its townsites along the railway line, and who were commonly known as the "C. & E. Townsite" Trustees or "Townsite Trustees" were assessed for the land under the name of "Townsite Trustees" which was a valid assessment. In 1913 the defendants were incorporated and in 1915 became owners of the assessed land, there being nothing to shew that they did not hold it under the same trusts as their predecessors in title. An assessment for taxes for 1916 and 1917, in the name of "Townsite Trustees," the notice being sent to the firm which was manager of the lands both before and after the defendants became incorporated, held to be a valid assessment against the defendants. The Municipal Ordinance (Alta.) s. 123, providing for the appointment of an assessment committee by the council consisting of "the mayor or reeve, secretary-treasurer and assessor, or any two others with the assessor" does not mean that the mayor and secretary-treasurer must both be either included or excluded, but that the assessor is to be a member and some two other persons are to be associated with him. A bound book, the left-hand page containing the information required for the assessment roll, and the right, the additional information for the tax roll in accordance with the Town Act, is a sensible method of preparing the roll under the Municipal Ordinance, and free from substantial objection, the two pages constituting a tax roll.

Wetaskiwin v. C. & E. Townsites, 45 D.L.R. 482, 14 A.L.R. 307, [1919] 1 W.W.R. 515. [Affirmed, 51 D.L.R. 252, 59 Can. S.C.R. 578, [1920] 1 W.W.R. 438.]

NOTICE.

The omission of the word "limited" from the name of a company to whom a tax notice is mailed will not invalidate the notice where the notice conformed to the rolls in that respect and the officers of the company knew that the company was meant to be designated and they acted on that assumption.

McCutcheon Lumber Co. v. Minitonas, 2 D.L.R. 117, 20 W.L.R. 729, 2 W.W.R. 173. [Affirmed on different grounds (No. 2), 7 D.L.R. 664, 3 W.W.R. 275, 22 W.L.R. 500, 22 Man. L.R. 681.]

NOTICE OF ASSESSMENT—OMISSION—EFFECT ON SALE.

Under the Assessment Act, R.S.B.C. 1897, c. 179, as amended by the B.C. Taxation Act, 1911, c. 222, notice either actual or constructive as therein provided is an essential element of a valid assessment, and where the letters "N.R." were omitted on the assessment roll in respect of a person whom the assessor must have known to be nonresident, there is not the equivalent of service by reason of s. 61 and no valid assessment if notice were not in fact given.

Eaton v. Creighton, 16 D.L.R. 137, 5 W.W.R. 1212.

TAXATION — TOWN ACT — THREE CO-OWNERS OF PROPERTY — ASSESSMENT AND TAX NOTICES TO ONE ONLY — PROPERTY ASSESSED IN NAME OF "QUEEN'S HOTEL" —VALIDITY OF PROCEEDINGS.

Where there were three co-owners of a property called the "Queen's Hotel," its assessment under that name (with the

names of the three co-owners beside it on the roll) and the sending of the assessment and tax notices to the one of the co-owners, who lived at and managed the hotel, the others not living in town, which had been done for some years, was held not to invalidate proceedings for assessment and taxation and for distress and sale by the town for realizing taxes, which proceedings were attacked by one claiming under a chattel mortgage the property so distrained. In any case the defect or error in the transmission of the notice or receipt thereof is cured by s. 317 of the Town Act.

Hagman v. Merchants Bank, [1919] 1 W.W.R. 500, affirming 13 A.L.R. 293, which reversed [1918] 1 W.W.R. 257.

FAILURE TO GIVE NOTICE—CURATIVE STATUTE.

The curative provisions of the Town Act, c. 2, 1911-12, are not intended to condone a total neglect of the ordinary duties of a municipality in relation to assessments and the collection of taxes; s. 317 (which provides that "no defect, error or omission in the form or substance of the notice or statement required by ss. 301, 302 hereof, or in the service, transmission or receipt thereof, shall invalidate any subsequent proceedings of the recovery of taxes") involves or assumes the existence in some form or other of at least a notice and statement issued and directed to the taxable person.

Merchants Bank v. Guyler, [1918] 1 W.W.R. 257.

(§ III B—120)—TAX SALE ASSESSMENT—VALIDITY OF—MEETINGS OF COUNCIL AND COURT OF REVISION HELD OUTSIDE OF MUNICIPAL AREA — MUNICIPAL CLAUSES ACT — CONSENT INFERRED FROM ABSENCE OF OBJECTION—REQUIREMENTS OF BY-LAW NOT OBSERVED—NOTICE OF SALE—WAIVER.

Anderson v. South Vancouver, 16 B.C.R. 401, 409, 18 W.L.R. 373. [Reversed, 45 Can. S.C.R. 425.]

(§ III B—122) — ASSESSMENT OF HOTEL PROPERTIES—EFFECT OF LOCAL OPTION BY-LAW—REDUCTION IN VALUE—BUSINESS ASSESSMENT.

Re Rattenbury and Clinton; Re McCaughey and Clinton; Re Pike and Clinton, 12 D.L.R. 851, 4 O.W.N. 1607, 24 O.W.R. 910.

(§ III B—125) — ESTIMATING VALUE OF PROPERTY FOR — FUTURE PROSPECTS — PRESENT VALUE OF TO BE TAKEN INTO ACCOUNT—GROSS ONLY—VALUATION OF PROPERTY IN VICINITY.

Where prospects of future sales or future profitable exploitations of land are considered in estimating the value of such land for taxation purposes under s. 321 of the charter of the city of Edmonton (Alta.), it is the present value of such prospects only that are to be taken into account. The value at which lands in the immediate vicinity have been assessed is an important factor in determining the assessment value in question, but this does not apply where such lands have been grossly overvalued by the assessors. [Fraser v. Fraserville, 34 D.L.R. 211, [1917] A.C. 187, followed.]

Grierson v. Edmonton, 45 D.L.R. 70, 58 Can. S.C.R. 13, [1917] 2 W.W.R. 1138.

VALUATION—GRAIN ELEVATOR.

By s. 302 of the Town Act, R.S.S. 1909, as amended in 1915, a grain elevator is assessable at the actual value of the building, and unless it is used for commodities other than grain the business carried on therein is exempt from taxation; nor, by virtue of s. 292, is it subject to taxation when not in existence at the time of the completion of the assessment roll.

Saskatchewan Co-operative Elevator Co. v. Ogema, 36 D.L.R. 398, 10 S.L.R. 310, [1917] 3 W.W.R. 194.

"ACTUAL VALUE" OF LAND—SPECIAL ADAPTABILITY—WATER POWER.

In assessing land at its "actual value" within the meaning of s. 40 (1) of the Assessment Act, R.S.O. 1914, c. 195, it is proper to take into consideration its special adaptability, such as its use in developing a valuable water power, and whether its value as a town lot or as agricultural land was enhanced owing to its being so situated that it was capable of being used in developing the water power. [The valuation rule settled in expropriation cases applied]

Re Ontario & Minnesota Power Co. and Fort Frances, 28 D.L.R. 30, 35 O.L.R. 459.

VALUATION.

Although s. 3 of title 31 of the Strathcona charter, c. 34, 1907, provides that "land shall be assessed at its fair actual value," the fact that the word "value" is not to be given its ordinary meaning, but rather a special meaning for the purpose of assessment, is shewn by the provision therein that "in estimating the value, regard shall be had to its situation and the purpose for which it is used," or, if sold by the present owner, it could and would probably be used in the next succeeding twelve months."

Strathcona v. Edmonton & Strathcona Land Syndicate, 3 A.L.R. 259.

INCREMENT TAX—VALUE OF LAND.

The increased value of land under the Unearned Increment Tax Act (Alta. 1913, 2nd sess., c. 10) is to be computed as of the time of registering the transfer.

Bredin v. Canadian Northern Town Properties, 39 D.L.R. 20, 13 A.L.R. 225, [1918] 1 W.W.R. 542.

ACTUAL VALUE.

The Manitoba Assessment Act, R.S.M. (1913), c. 34, s. 29, does not authorize the assessment of property at more than its actual value.

Roman Catholic Arch. Corp. of St. Boniface v. Town of Transcona, 39 D.L.R. 148, 56 Can. S.C.R. 56, [1918] 1 W.W.R. 347.

"ACTUAL VALUE"—HOTEL PROPERTY—PROHIBITION ACT.

In assessing property the assessor should determine the "actual value thereof within the meaning of the Municipal Act, R.S.B.C. 1911, c. 170, as amended by s. 30, c. 46, 1915, by taking the viewpoint of a solvent owner not anxious to sell, but yet not holding for a fictitious or merely speculative rise in price, and by considering how such value is affected by existing conditions. [Re Charleson Assessment, 22 D.L.R. 249, 21 B.C.R. 281, at pp. 285 and 296, applied; Re Municipal Clauses Act and Dunsmuir, 8 B.C.R. 361, distinguished.] In assessing a hotel property the effect of the British Columbia Prohibition Act upon the former value thereof should, therefore, be taken into consideration.

Re Municipal Act; Gates' Case, [1918] 2 W.W.R. 930.

LAND — VALUATION OF BLOCKS — FRONTAGE — FAIR ACTUAL VALUE.

A block of land forming one parcel and held under one title may be assessed as one parcel although it is of a varying character which makes one portion much more valuable than other portions; the assessor will be assumed to have taken the varying values of the different frontages into consideration in fixing a lump sum or average rate for the entire block of land.

Pearce v. Calgary, 23 D.L.R. 206, 9 W.W.R. 195, 31 W.L.R. 208. [See 31 D.L.R. 548.]

DECLINED VALUES.

If the condition of land values in a city is abnormal in that there is practically no market because of the collapse of a real estate boom, the assessor must endeavour to fix the value for assessment purposes on a normal footing under a statute which directs that property shall be estimated at its actual cash value as it would be appraised in payment of a just debt from a solvent debtor.

Charleson v. Byrne, 22 D.L.R. 240, 21 B.C.R. 281, 8 W.W.R. 930, 31 W.L.R. 309.

VALUATION BELOW ACTUAL VALUE—VALIDITY.

A municipal valuation roll in which all properties as a whole are valued below their actual value is illegal and will be annulled by the court.

La Cie. d'Approvisionnement d'Eau v. Montmagny, 25 D.L.R. 292, 24 Que. K.B. 416.

ASSESSMENT BELOW ACTUAL VALUE — GOOD FAITH — UNIFORMITY.

A valuation roll is not a nullity for the reason merely that the valuators have assessed in it the taxable properties for a third of their actual value only if this low and insufficient valuation has been made impartially, in good faith, in a uniform manner and in proportion to the respective values of each of the properties situated in the municipality.

Rivard v. Wickham West, 47 Que. S.C. 441.

REVISION OF VALUATION ROLL—HOMOLOGATION.

Under our municipal laws, the preparation of the valuation roll by the valuators and its deposit with the secretary-treasurer is not a completion of the roll. It is completed and ready for homologation only when it has been revised by the council, or it is decided that no revision is necessary. The word "completion" of art. 4511, R.S.Q. 1909, must be construed in that sense. Therefore, the council may, at any time, after the expiry of the delays prescribed for the examination of the roll, on complaints or not, revise and homologate the valuation roll.

Whelan v. Aylmer, 48 Que. S.C. 204.

COMMON STANDARD.

In order to secure under the Rates and Taxes Act (N.B.), 3 Geo. V., c. 21, a common standard of valuation for general county purposes, the value of property as fixed by special Acts for assessment purposes is the value to be taken, and not its full value as provided by s. 4 of the Act.

St. John v. Board of Valuators, 43 N.B.R. 369.

VALUATION.

The want of the buyer, the site of the property, and the price paid for identical land in the neighbourhood are the best guides in valuing real estate.

Herbert v. Saint Michel, 18 Rev. de Jur. 228.

EDMONTON CHARTER — APPEAL FROM ASSESSMENT — WHETHER 1919 AMENDMENT APPLICABLE — "FAIR ACTUAL VALUE" — ASSESSOR'S VALUATION — INTERFERENCE BY COURT.

In an assessment appeal from the decision of the council to a judge under the Edmonton Charter where under the requirements of s. 344 the roll for the year 1919 was adopted by the council on June 23, 1919, it was held that amendments to the charter as to estimating value and as to variation on appeal assented to April 17, 1919, applied for the purposes of the appeals. The term "fair actual value" in s. 321 considered. Where the assessor has honestly applied all the factors entering into his problem on the footing of the law as set out in s. 321 and reaches an unbiased and reasoned conclusion which is relatively fair and equitable, the court should be slow to interfere unless he has flown in the face of an imperative requirement of the charter or has proceeded on a wrong principle of law.

Condell v. Edmonton, [1919] 3 W.W.R. 214.

MUNICIPAL LAW — VALUATION ROLL — NULLITY — AGREEMENT — MUN. CODE, 725, 742, 734, 743, 746a, 939, 940, 941, 1061.

When a valuation roll cannot fulfil the purpose for which it was made, namely to serve as a basis for the imposition of taxes, it is absolutely null, and no agreement can cover its nullity, but if it is only imper-

fectly made up, as, for example, if it contains a valuation uniformly either too high or too low, but sufficient for the assessment of taxes, the taxpayers can agree to it. Thus, when a valuation roll does not take into account the value of the buildings, and estimates a lot worth $3,000 at $300, and the interested party does not take advantage of his right to lodge a complaint before the local council, or of his power of appeal to the county council, and has not given any proof of injustice or wrong resulting to him from such valuation, in his action in nullity commenced 18 months after the homologation of the roll, such silence is an acquiescence in, and a ratification of, the list as homologated.

Dionne v. Grantham, 46 Que. S.C. 359.

(§ III B—132)—Structures and other property "on railway lands" — Exemption.

The words, "on railway lands," in R.S.O. 1914, c. 195, s. 47 (3) (the Assessment Act), exempting certain structures and other property "on railway lands" from municipal assessment, include all lands in the lawful use and occupation of a railway company, exclusively for railway purposes, or incidental thereto, without reference to the title under which they may be held.

Cornwall v. Ottawa & N.Y.R. Co., 35 D.L.R. 468, [1917] A.C. 399, 20 Can. Ry. Cas. 435, 117 L.T. 227, affirming 30 D.L.R. 664, 52 Can. S.C.R. 466. [See also 15 D.L.R. 433, 16 Can. Ry. Cas. 403, 29 O.L.R. 522.]

Railways — Local improvement charges.

The meaning and intention of the agreement between the Province of Manitoba (c. 39, 1 Edw. VII. 1901) and the C.N.R. Co. and the interpretation to be put on the legislation affecting it, is that the burden assumed by the plaintiff under the agreement is in lieu of all taxes, rates and assessments, including all charges for local or municipal purposes.

C.N.R. Co. v. Winnipeg, 9 W.W.R. 902.

(§ III B—133)—Express and telephone companies — Financial institutions.

Neither an express nor a telegraph company can be classed as a "bank, loan company or financial institution" within the meaning of s. 302 (2) of the Towns Act (Sask.), providing the mode of their assessment for taxation.

Canadian Northern Express Co. v. Rostbern; Canadian Northern Telegraph v. Rostbern, 23 D.L.R. 64, 8 S.L.R. 285, 8 W.W.R. 1181, 31 W.L.R. 868.

C. Tax officers.

(§ III C—134)—Board of assessors — Mode of assessment.

It is not necessary that the entire board of assessors unite in an inspection of property for the purpose of assessing it for taxation; it is sufficient if each member ascertains the values as he thinks them to be and reports the facts and his views to the other members of the board for final determination, and no member of such board is justified in refusing to act in a separate capacity for the purpose of inspecting the property when required to do so by the municipal authorities.

The King v. Halifax; Re Stevens, 25 D.L.R. 113, 49 N.S.R. 289.

D. Review; correction; equalization; appeal.

Appeals to Supreme Court of Canada from assessment matters, see Appeal, II A—35.

(§ III D—135)—Town Act (Alta.) — Assessment of land — Relief against — Decision of court not appealed against — Res judicata — Action to recover — Defences.

If a taxpayer does not pursue the remedy provided for relief against excessive taxation by the Town Act (1911-12, Alta. c. 2) by an appeal from the Court of Revision to the District Court Judge and from him to the Appellate Court, the decision of either of these courts not appealed from is res judicata, and such excessive taxation cannot be set up as a defence to an action by the municipality for the recovery of the tax. [Toronto R. Co. v. Toronto, [1904] A.C. 809; Canadian Oil Fields Co. v. Oil Springs, 13 O.L.R. 405, distinguished.]

Macleod v. Campbell, 44 D.L.R. 210, 57 Can. S.C.R. 517, [1918] 3 W.W.R. 769, reversing 41 D.L.R. 357, 13 A.L.R. 487, [1918] 2 W.W.R. 718.

Appeal — Railway and Municipal Board — District Court — Concurrent jurisdiction.

Even where there has been an appeal to the Ontario Railway and Municipal Board from the Court of Revision, it is the duty of a judge of the District Court to hear and determine an appeal to him from the Court of Revision. The right of appeal from the Court of Revision to the Ontario Railway and Municipal Board given to a person assessed for over $10,000 has not taken away the right to appeal to the District Court Judge.

Re Fort Frances Assessment, 11 D.L.R. 564, 27 O.L.R. 622.

Assessment — Appeals from — Extension of time.

Re Rush Lake Assessment and Fares, 30 D.L.R. 537, 9 S.L.R. 374. [See also Fares v. Rush Lake, 28 D.L.R. 539, 9 S.L.R. 915, 10 W.W.R. 13, 33 W.L.R. 978.]

Fixed assessments — Actual value.

Lands of industrial corporations, under "fixed assessments" granted by by-law of the municipality in which they are situate, are not assessable for equalization purposes for county rates, beyond the amount of the fixed assessments; except for school rates, the fixed assessment must be regarded, both for county and municipal taxation, as the actual value of the properties.

Re Stamford and Welland, 31 D.L.R. 206 37 O.L.R. 155.

REVISION—APPEAL.

If a municipality has no power to make an assessment, the party assessed may resist the illegal assessment by an action, but if it has power the only remedy is by appeal to the Court of Revision.

Coquitlam v. Langan, 33 D.L.R. 175, [1917] 2 W.W.R. 208.

CERTIORARI — AFFIDAVIT — "MERITS OF PROCEEDINGS."

Irregularities in notices of assessment, and in the service thereof are technical objections not within the meaning of the words "merits of the assessment" in s. 59 of the Assessment Act (R.S.N.S. c. 73), permitting a certiorari to remove the proceedings when such merits are at issue.

Re Davison Lumber Co., 33 D.L.R. 283, 50 N.S.R. 491.

MINERAL RIGHTS — APPEAL — ACADEMIC QUESTION.

On an appeal under the Assessment Amendment Act (Ont. 1916, c. 41, s. 6), raising a question as to the value of petroleum mineral rights, the court will not consider a question whether "other mineral rights" are assessable under s. 40 (8) of the Assessment Act, R.S.O. 1914, c. 195, if the question appears to be merely of an academic character.

Re Canada Co. and Colchester North, 33 D.L.R. 61, 38 O.L.R. 183.

REMEDY — APPEAL — INJUNCTION.

Injunction is not the proper remedy for an illegal assessment where there is a statutory right of appeal to the Court of Revision.

Foster v. St. Joseph, 37 D.L.R. 283, 39 O.L.R. 525, affirming 39 O.L.R. 114.

REVIEW — METHOD OF ONTARIO ASSESSMENT ACT.

Whether or not property is subject to taxation should ordinarily be determined in the manner provided by the Ontario Assessment Act, 4 Edw. VII. c. 23, amended by 10 Edw. VII. c. 88, R.S.O. 1914, c. 195, and not be an action for a declaratory judgment.

Ottawa Y.M.C.A. v. Ottawa, 15 D.L.R. 718, 29 O.L.R. 574.

ILLEGAL VALUATION ROLL — SETTING ASIDE — JURISDICTION OF SUPERIOR COURT.

The Cities and Towns Act (Que.), providing an appeal from an illegal valuation to the Circuit Court, does not exclude the jurisdiction of the Superior Court over actions to annul the whole of an illegal valuation roll.

La Cie. d'Approvisionnement d'Eau v. Montmagny, 25 D.L.R. 292, 24 Que. K.B. 416.

SPECIAL ASSESSMENT UNDER LOCAL IMPROVEMENT BY-LAW — DECISION OF COURT OF REVISION — APPEAL FROM TO COUNTY COURT JUDGE — TIME FOR — ASSESSMENT ACT, R.S.O. 1914, C. 195, S. 57, 72 — LOCAL IMPROVEMENT ACT, R. S.O. 1914, C. 193, S. 39 (2) — ASCERTAINING DATE OF DECISION — DAY ON WHICH PARTIES NOTIFIED THEREOF — OBJECTION TO RIGHT OF APPEAL — WAIVER.

Re Kemp and Toronto, 8 O.W.N. 32.

ASSESSMENT—POWER TO REVISE.

Sherwood v. Wilson, 39 D.L.R. 761, 55 Can. S.C.R. 617, affirming 31 D.L.R. 795; 30 D.L.R. 539.

"ACTUAL VALUE" — REVIEW ON APPEAL.

The "actual value" at which the assessors of the city of Montreal are bound to assess real properties must be the selling value, that is, the price which the owner might obtain for his property from a purchaser who, without being bound to pay, might want to acquire it. The assessors should only take count of the value of property at the moment of making the roll; they cannot take into consideration the expectation of public works, such as the opening of projected streets, the construction of sewers and other works of the same nature. The principle that a court of appeal should only intervene with much circumspection in the exercise of the functions of municipal assessors has application only in a case where the law gives to these officials a purely discretionary power, and not when they violate a principle or positive rule of law.

Lacroix v. Montreal, 54 Que. S.C. 130.

MUNICIPAL VALUATION.

Courts ought not to substitute their opinion for that of valuators and municipal councils, whose examination is requisite for the validity of the valuation rolls.

Fortin v. Contrecoeur, 24 Rev. de Jur. 537.

BUSINESS ASSESSMENT — COURT OF REVISION REDUCING ASSESSMENT — TAKING INTO CONSIDERATION MATTERS BEYOND ITS SCOPE—CONCESSION IN NATURE OF BONUS — DISCRIMINATION AGAINST OTHER BUSINESS.

The provisions of the City Act with regard to assessment of business should be construed and carried out as far as possible with uniformity and equality. Concessions should not be granted to one ratepayer to the prejudice of another, nor should one class of business be favoured at the expense of other businesses of a similar class. Appeal from a Court of Revision reducing assessment of a certain department store business allowed because in granting reduction the Court of Revision in effect was granting a concession in the nature of a bonus which was a discrimination against other business.

Weyburn Hardware & Furniture Co. v. Weyburn, [1919] 2 W.W.R. 42.

PROCEDURE — EXCEPTION — COMPETENCE OF COURTS — MUNICIPAL TAXES — CITIES AND TOWNS ACT—S. REF. [1909] ARTS. 5751, 5752, 5755 — MUN. CODE, ART. 724.

Actions for the recovery of municipal taxes are not of the competence of the Superior Court: only the courts designated by

the Cities and Towns Act and by the Mun. Code have jurisdiction to try them.

Quebec East v. Quebec, 56 Que. S.C. 543.

ANNULMENT OF VALUATION ROLL — PARTIES —OFFICERS.

A municipal valuation roll in which the ratable properties are, as a whole, valued below their actual value is illegal and null. In such a case the proper remedy is by an action to set aside the roll and not by an appeal to the Circuit Court. Every ratepayer, by separate title, has sufficient interest to institute the action. The municipal corporation is responsible for the acts of its municipal valuators, who are its officers, and there is no necessity for impleading the latter as parties in the cause.

Rivard v. Wickham-West, 25 Que., K.B. 32.

MUNICIPAL VALUATION.

A court should intervene with great discretion in the valuation of immovables made by a municipal valuator: it should only set aside his valuation where it has been made on a principle so erroneous that a competent and honest man could not have made it.

St. Denis v. Montreal, 49 Que. S.C. 55.

SECURITY—AMENDMENT.

An appeal to the Circuit Court from decisions of a municipal council, upon the examination or revision of the valuation roll as provided by pars. 4 & 5 of art. 1061 Mun. Code is intended to secure a review of this decision and not to cause the roll to be annulled. A petition accompanying the appeal which alleges grounds of nullity of the valuation roll and concludes by demanding that the roll "be quashed and set aside" constitutes a real petition for quashing which should be preceded by the security required by art. 352 Mun. Code. The security should be furnished at least ten days before the presentation of the petition to the court, failing which the petition will not be received. The court cannot go beyond this imperative provision of the law and permit the security to be filed after the expiration of the delay. Art. 1072 Mun. Code is intended to allow the amendment of municipality proceedings carried to the court by way of appeal but not the amendment of proceedings in the court sitting as a Court of Appeal or of cassation.

Bédard v. Sillery, 49 Que. S.C. 29.

APPEAL—WHAT REVIEWABLE.

An objection as to the rate of taxation cannot be dealt with in an appeal from the assessment, and, therefore, the right of such appeal can in no way affect the right to raise such an objection at the hearing of an action for the recovery of taxes. The right of appeal given by the Town Act to the Court of Revision does not preclude an objecting party from raising in another court the point that he is not the owner of anything that is assessable.

Coleman v. Head Syndicate, 11 A.L.R. 314, [1917] 1 W.W.R. 1074.

(§ III D—136)—ASSESSMENT.

An assessment of taxes by a city corporation is not invalid though the provisions of s. 281 of the City Act, R.S.S., 1909, c. 84, providing that before the notices are sent out the assessment roll must be checked over by a committee consisting of the assessor and two members of the council, were not complied with if the roll was finally passed by the council as provided in s. 298 of that Act, to the effect that the roll as finally passed by the council shall be valid and bind all parties concerned, notwithstanding any defect or error committed in or with regard to such roll. [See the amended s. 281 of the City Act, Sask. Stat. 1912, c. 26, s. 17.]

Prince Albert v. C.N.R. Co., 10 D.L.R. 121, 6 S.L.R. 49, 23 W.L.R. 275, 3 W.W.R. 900, 15 Can. Ry. Cas. 87.

The substitution, for the purpose of qualifying him as a voter, of the name of a landowner for that of a former owner of the same property upon the assessment roll upon his shewing to the officer charged with the custody of the roll his certificate of title, is not invalid merely on the ground that it was done prior to the decision of the Court of Revision upon the owner's application to that court to have his name placed upon the voters' list under the Mun. Ordinance, Con. Ord. 1898, c. 70, in force in Alberta, if, in fact, the court afterwards granted his application. Under a statute which permits any person otherwise duly qualified to vote whose name is not on the voter's list, to apply to have such list amended by the addition of his name, and which also declares qualified those persons who are named on the last revised assessment roll as occupants or owners of real estate of a stated amount held in their own right, the amendment of the voters' list on such application casts upon the officer in charge of the assessment roll the duty of amending the latter in the same way.

The King ex rel. Angus v. Knox, 1 D.L.R. 843, 19 W.L.R. 769, 1 W.W.R. 341, 4 A.L.R. 54.

Objection to the imposition of taxes by municipal assessors may be made at any time if the objects assessed are not taxable by law, as this would constitute an ultra vires assessment, radically null.

Nova Scotia Coal & Steel Co. v. Montreal, 3 D.L.R. 750.

ASSESSMENT OF PROPERTY TO ONE WHO SUBSEQUENTLY BECOMES OWNER.

An assessment of land in the name of one who subsequently became its owner cannot be corrected under s. 67 of 53 Vict. (N.B.) c. 67, since such section does not apply where the assessment to be corrected was made without jurisdiction.

The King v. Grand Falls, 13 D.L.R. 266, 42 N.B.R. 122, 13 E.L.R. 240.

EXCESSIVE ASSESSMENT—APPEAL FROM—REDUCTION.

On an appeal by a public utility company to the Ontario Railway and Municipal

Board against the company's assessment, if the appellants prove that the amount assessed for buildings was excessive the onus is not upon them to prove that the total was likewise excessive; a reduction of the total assessment should be made in respect of the excess in the building valuation unless the question of increase of the assessment under the other heads is before the Board on the evidence or upon an inspection of the property.

Re Ontario & Minnesota Power Co. and Fort Frances, 22 D.L.R. 878, 8 O.W.N. 216.

(§ III D—137)—Board of review or equalization—Court of Revision.

An assessent roll prepared in accordance with the provisions of the city charter, if not attacked before the board of assessors within the legal delays, is absolutely binding on all the ratepayers taxed and the legality thereof cannot be enquired into once it has been duly homologated.

Montreal v. Allard, 3 D.L.R. 438, 18 Rev. de Jur. 326.

Power to remit.

Neither the Court of Revision of a municipality nor the County Court Judge has jurisdiction under the assessment Act (R.S.O. 1914, c. 195, s. 118) to remit or reduce taxes which have been paid; the authority to remit is confined to taxes due.

Taylor v. Guelph, 39 D.L.R. 416, 41 O.L.R. 33.

Assessment Act (R.S.N.S. 1900, c. 73)—Objections to valuation—Statement under oath—Assessors — Appeal—Assessment Act Court—Taxing Act—Construction — No appeal to County Court—Procedure.

Nova Scotia Steel & Coal Co. v. Sydney Mines, 41 D.L.R. 744, 52 N.S.R. 335.

(§ III D—138)—Appeal—Appeal from assessment—Validity of—Excessive valuation—How value determined—Actual sales—Admissibility of evidence as to price received.

Burns v. Calgary; Ross v. Calgary, 7 D.L.R. 918, 4 A.L.R. 362, 21 W.L.R. 662, 2 W.W.R. 647.

Assessment—Appeal from.

The time for appealing against an assessment of property in a municipality in an unorganized district is one month after the time fixed for returning the assessment roll.

Re Fort Frances Assessment, **11 D.L.R.** 564, 27 O.L.R. 622.

Assessment of power plant—Review — Appeal.

The effect of the repeal of s. 52 of the Ontario Railway and Municipal Act of 1906 by Ont. Stat. 3 & 4 Geo. V. c. 37, on the re-enactment of that Act, May 6, 1913, was that as to a subsequent decision of the Court of Revision of a town in a territorial district assessing a power plant either the right of appeal directly to the Ontario and Municipal Board was taken away until the new Municipal Act, 1913, 3 & 4 Geo. V. c. 43 came into force on July 1, 1913, or the right of appeal, left as it existed before the Statute of 1906, was one to a Judge in Chambers, even if s. 13 of the Assessment Amendment Act of 1913 did not impliedly repeal the provisions as to appeal contained in the Act relating to territorial districts.

Re Ontario & Minnesota Power Co. & Fort Frances, 22 D.L.R. 701, 32 O.L.R. 235.

Appeal—Review of law.

On an appeal to the Appellate Division of the Supreme Court of Ontario from the Ontario Railway and Municipal Board, in respect of the assessment of the property of a public utility company, the question determined is one of law that the Board should, on the facts as found, fix the value of the property at a particular figure; the Appellate Division does not decide as a matter of fact that such is the value of the property, but to save any question as to the effect of the opinion of the Appellate Division, its certificate may contain a statement that in the opinion of the court it would have no effect as res judicata in any future assessment.

Re Ontario & Minnesota Power Co. & Fort Frances, 22 D.L.R. 881, 8 O.W.N. 303.

Assessment of exempt property—Church premises—Mode of revision.

It is not necessary to appeal to the Court of Revision from an assessment of church property, which is exempted by statute, in order to be relieved from liability for such taxes, and it is open to the defendant to refuse payment of the taxes sought to be imposed by such improper assessment. [Re Sisters of Charity Assessment, 15 B.C.R. 344, 44 Can. S.C.R. 29, distinguished.]

Victoria v. Trustees of the Church of Our Lord, 25 D.L.R. 617, 22 B.C.R. 174, 9 W.W.R. 173, 32 W.L.R. 330.

Appeals from Board of Revision—Questions of law.

An application to a judge under s. 349 Winnipeg Charter, 9 Edw. VII., c. 78, by a person affected by a decision of the Board of Valuation and Revision, should not be in the nature of an appeal upon questions of fact as well as law, but should be confined to obtaining his opinion upon questions of law only; otherwise he has no authority to deal with it.

Re Winnipeg Charter; Baird's Case; Re Orde (3 cases) 29 D.L.R. 464, 34 W.L.R. 930, 932.

Conclusiveness of assessment — "Rehearing."

Where an assessor has acted honestly and has arrived at a valuation of property without any mistake in principle or law the valuation will be given great weight by a Court of Appeal. An appeal from the decision of a Court of Revision under the Taxation Act is a rehearing and fresh evidence may be adduced.

Re Mackenzie, Mann & Co. Assessment, 22 B.C.R. 15.

APPEAL.

Clause 12 of s. 138 of the Municipal Ordinance, which provides that "the decision and judgment of the judge shall be final and conclusive in every case adjudicated upon, and can only be appealed from by a unanimous vote of the council," gives a right of appeal from a judgment reducing an assessment, if the council by a unanimous vote authorizes the appeal; and, in the absence of any provision in the statute as to the Court of Appeal or the machinery of appeal, it must be presumed that the appeal is to the same court and in the same manner as any other appeal from a District Judge.

Strathcona v. Edmonton & Strathcona Land Syndicate, 3 A.L.R. 259.

REVISION—NOTICE OF APPEAL.

Where a notice of appeal from assessment is given pursuant to the provisions of s. 279 of the Town Act, R.S.S. 1909, c. 85, on the ground that it is "too high," the Court of Revision has not power to raise the assessment appealed from in the absence of a notice that it was "too low." Section 290 of the Act does not apply to the notice of appeal given under s. 279.

Rogers Lumber Yards v. Estevan, 34 W.L.R. 402.

APPEAL TO COURT OF REVISION—STATUS OF ASSESSOR AS APPELLANT—JURISDICTION OF COURT OF REVISION—APPEAL TO COUNTY COURT JUDGE—REMEDY BY PROHIBITION—ASSESSMENT ACT, R.S.O. 1914, c. 195, s. 69 (1), (3), (5), (19), (21)—FURTHER APPEAL—ASSESSMENT AMENDMENT ACT, 6 GEO. V. c. 41, s. 6—STATED CASE.

Re Walkerville Assessment Appeals, 11 O.W.N. 25.

On the appeal to the Circuit Court from the decisions of the council at the time of annual revision, the court must establish the actual value of the contested real estate, at the time of the revision, not taking into consideration the value which may be given to it by future public works such as opening of a street.

Herbert v. Saint-Michel, 18 Rev. de Jur. 228.

SALE OF LAND FOR TAXES—ACTION TO SET ASIDE — NONRESIDENT OWNER — STATUTORY NOTICE OF ASSESSMENT—STATEMENT AND DEMAND OF TAXES—TRANSMISSION OF, TO OWNER'S ADDRESS. "IF KNOWN"—PROVISIONS OF ASSESSMENT ACT AS TO—UNREVOKED ADDRESS DISREGARDED—DUTY OF TREASURER UNDER S. 165.

Gast v. Moore, 4 O.W.N. 525.

SALARY OF COUNTY JUDGE—APPEAL FROM COURT OF REVISION TO COUNTY JUDGE—PROHIBITION—DISQUALIFICATION BY INTEREST—JURISDICTION OF JUDGE IN CHAMBERS—10 EDW. VII. c. 26, s. 16—APPOINTMENT UNDER THE ACT.

Re Chisholm and Berlin, 4 O.W.N. 431, 23 O.W.R. 571.

E. PERSONAL OBLIGATION; ACTION FOR COLLECTION.

As debt, see Garnishment, I C—15.

(§ III E—140)—ACTION FOR CANCELLATION — DISTRAINT—ASSESSMENT—ENFORCEMENT — ACTION TO RECOVER—MEANING OF "OCCUPANT" AND "SQUATTER"—R.S.S. 1909, c. 88, s. 2.

Spy Hill v. Bradshaw, 7 D.L.R. 941, 2 W.W.R. 399.

Where vacant lots are comprised between the homologated lines of a projected avenue, and destined therefor to fall into the civic domain, and an assessment roll prepared taxing these lots for the purpose of constructing a drain and the proprietor has not objected thereto in time, he cannot raise, by opposition to a seizure of these lots for overdue taxes, the illegality of such roll.

Montreal v. Allard, 3 D.L.R. 438, 18 Rev. de Jur. 326.

RURAL MUNICIPALITY—TAXES ASSESSED BY LOCAL IMPROVEMENT DISTRICT.

A rural municipality that succeeds a local improvement district, may, in the name of its council, recover unpaid land taxes assessed before the organization of the rural municipality by the local improvement district under the provisions of c. 36 (Sask.) 1906, and c. 88 R.S.S. 1909, as well as the Supplementary Revenue Act, c. 37, R.S.S. 1909.

Vermilion Hills v. Smith, 13 D.L.R. 182, 6 S.L.R. 366, 24 W.L.R. 903, 4 W.W.R. 1219.

ARREARS FOR MORE THAN SIX YEARS—RECOVERY—STATUTE OF LIMITATIONS.

The Statute of Limitations is no defence to an action to recover arrears of taxes which have been in arrears more than six years, the action being in respect of a liability created by statute the period of limitation is that applicable to an action upon a specialty. [Pipestone v. Hunter, 28 D.L.R. 776, 28 Man. L.R. 570; Cork & Brandon R. Co. v. Goode, 13 C.B. 826, 138 E.R. 1427, followed.]

McLean v. MacLeod, 49 D.L.R. 146, [1919] 3 W.W.R. 519.

AS DEBT—PENALTIES AND INTEREST—STATUTE OF LIMITATIONS—MUNICIPAL LEVY AGAINST PURCHASER OF CROWN LANDS.

Pipestone v. Hunter, 28 D.L.R. 776, 28 Man. L.R. 570, 33 W.L.R. 614, 9 W.W.R. 1152.

LOCAL ASSESSMENTS—AS DEBT—VALIDITY—"INSTALMENTS."

Rates levied on land under the Municipalities Local Improvement Act (B.C. 1913, c. 49) are recoverable as a debt, and may be counterclaimed in an action on an award for land taken under the Act; any defects in the by-law or assessments are cured by ss. 38, 44 (2), and cannot therefore be set up. The expressions "number of instal-

ments" in s. 30 (e) and "annual instalments" in s. 42 (2) mean one or more instalments.

Pelly v. Chilliwack, 30 D.L.R. 651, 23 B.C.R. 97, [1917] 1 W.W.R. 208.

SEIZURE AND DISTRESS — AMOUNT DUE — VALUE OF GOODS.

Seizure for more than the amount of taxes really due does not render a distress void. Where the value of the goods seized greatly exceeded the amount due, and at the sale the amount received was much below the assumed value of the goods, distress was held valid upon sufficient goods at the price realized to pay the amount due, and the defendant was held liable to pay the difference between the value of all the goods seized and the value which might properly have been seized. [Squire v. Mooney, 30 U.C.Q.B. 531, applied.]

Smart Hardware Co. v. Melfort, 32 D.L.R. 552, 10 S.L.R. 40, [1917] 1 W.W.R. 1184, varying 28 D.L.R. 513, 10 W.W.R. 638, 34 W.L.R. 475.

TERMINATION OF LIABILITY—FORFEITURE—SATISFACTION.

Lands forfeited under tax enforcement proceedings, under the Town Act (Alta.), are deemed to be taken in satisfaction of the taxes, and the personal liability of the taxpayer is thereby terminated.

Castor v. Fenton, 33 D.L.R. 719, 11 A.L.R. 320, [1917] 1 W.W.R. 1474.

FORFEITURE — SATISFACTION — REGISTRATION.

An adjudication of a forfeiture of land for nonpayment of taxes which was not registered nor advertised as required by the Towns Act, so that no title thereto has vested in the municipality, does not operate as a satisfaction of the taxes. [Castor v. Fenton, 33 D.L.R. 719, distinguished.]

Granum v. Lennox, 36 D.L.R. 299, 12 A.L.R. 531, [1917] 2 W.W.R. 1173.

CONFIRMATION OF RETURN—EFFECT.

The confirmation of a tax enforcement return by the District Court Judge under the Town Act (Sask.), vests the taxed land in the municipality subject to redemption, the municipality receiving the land for all taxes then overdue thereon, and assuming responsibility for all taxes against it subsequently to the taxes that have been confirmed; the municipality cannot afterwards seize other property for taxes included in the confirmation or overdue at that time.

Smart Hardware Co. v. Melfort, 32 D.L.R. 552, 10 S.L.R. 40, [1917] 1 W.W.R. 1184, varying 28 D.L.R. 513, 10 W.W.R. 638, 34 W.L.R. 475.

ACTION UNDER MUNICIPAL ACT—APPEAL—REVISION.

If an assessment of land is illegal the person assessed is not compelled to resort to the remedy of an appeal to the Courts of Revision, but may resist an action under the Municipal Act (B.C. 1914, c. 52, s. 275) to recover the taxes. A municipality has no power to assess lands situate in another municipality.

North Cowichan v. Hawthornthwaite, 42 D.L.R. 207, 24 B.C.R. 571, [1918] 3 W.W.R. 574.

SEIZURE FOR TAXES—"OCCUPANT"—NOTICE—"AT LEAST TEN DAYS"—DAMAGES.

Under s. 308 (1) of R.S.S. 1909, c. 87, authorizing seizure for arrears of taxes, the seizure of "the property of or in possession of any other occupant of the premises" can be made only when the property is found upon the land in respect of which the taxes are due, and such property is liable only for the taxes due upon that particular parcel of land. In an action for damages for a wrongful seizure of property for arrears of taxes the onus is on the defendant to show the legality of the seizure. [McCutcheon v. Minitonas, 2 D.L.R. 117, followed.] The plaintiff held not to have been an "occupant" within the meaning of s. 2 (10) of the Rural Municipality Act, R.S.S. 1909, c. 87, of a certain quarter-section of land, although his cattle were found thereon. The "at least ten days" public notice prescribed by s. 308 (2) of the Rural Municipality Act, of an intended sale of property for taxes means ten clear days. [Canadian Canning Co. v. Fagan, 12 B.C.R. 23, 3 W.L.R. 38, followed.] C. 5, 2 William & Mary (an Act for enabling the sale of goods distrained for rent in case the rent be not paid in a reasonable time) does not apply to the seizure of goods for arrears of taxes.

Purdy v. Langenburg [1918] 3 W.W.R. 161.

PRIMA FACIE EVIDENCE OF DEBT—DESCRIPTION—CERTIFICATE—SUFFICIENCY.

An entry on the assessment roll describing the property as "Tenant on Canadian Pacific Railway property" does not sufficiently set forth all the particulars required by ss. 12, 24 of the Municipal Assessment Act, R.S.M. 1913, c. 134, and a certified copy thereof cannot therefore constitute prima facie evidence of debt under s. 144. In the absence of evidence that the officers of "clerk" and "treasurer" were held by the same person, a certificate signed by the treasurer and not by the clerk, as required by s. 144, is likewise defective. [Jacker v. International Cable Co., 5 T.L.R. 13; Toronto v. Russell, [1908] A.C. 493; McCutcheon Lumber Co. v. Minitonas, 22 Man. L.R. 681; Blakey v. Smith, 20 O.L.R. 279; Wildman v. Tait, 32 O.R. 274, 2 O.L.R. 307; Carter v. Hunter, 13 O.L.R. 310, applied.]

Whitemouth v. Robinson, 26 Man. L.R. 139.

(§ III E—142)—FREE GRANT LAND—LIABILITY OF LOCATEE FOR TAX AGAINST PRIOR LOCATEE WHOSE RIGHTS HAD BEEN CANCELLED.

The goods of a locatee on land relocated by the Crown after the forfeiture or cancellation of a prior location under the Free Grants and Homesteads Act, R.S.O. 1897, c. 29, are not subject to seizure or distress for unpaid taxes assessed against the prior

locatee's interest, no attempt to collect having been made while he was in possession. Pattison v. Emo, 12 D.L.R. 309, 28 O.L.R. 228.

A tax valuation statute may apply to a pending action calling in question the validity of the tax assessment; and where it declares that the assessment was valid and binding notwithstanding any defect or irregularity in the proceedings taken, and that the validity thereof shall not be questioned in any action on account of any defect or irregularity in said proceedings, or on account of noncompliance with any statutory provisions, the statute must be construed as retroactive and as including cases as to which litigation was pending at the time it was passed. The word "taxes" in s. 129 of the Municipal Assessment Act, R.S.M. 1902, c. 117, giving a municipality the right to a distress of the goods and chattels of one neglecting "to pay taxes," includes taxes on personal property as well as those on real estate. The necessity for any demand for arrears of taxes is met by following the requirement of s. 129, which provides that if a person neglects to pay his taxes for thirty days after the mailing to such person or his agent of the notice required by s. 123 of such Act, the municipality shall have a right to a distress and sale of his goods. A loan made under by-laws passed for the purpose of enabling a municipality to borrow money and providing that it may "hypothecate" all arrears of taxes, does not pass all proprietary interest of the municipality to the lender so as to deprive it of its right to distrain for taxes in arrears. McCutcheon Lumber Co. v. Minitonas, 2 D.L.R. 117, 20 W.L.R. 729, 2 W.W.R. 173. [Affirmed on different grounds, 7 D.L.R. 664, 22 Man. L.R. 681, 3 W.W.R. 275, 22 W.L.R. 500.]

DISTRESS OF GOODS FOR—CONDITIONAL SALE —VENDEE'S INTEREST UNDER—VENDOR'S RIGHTS, HOW LIMITED—ONUS.

Under the Town Act, R.S.S. 1909, c. 85, the municipality has the right to distrain for tax arrears upon the interest of the person taxed in any goods to the possession of which he is entitled under a conditional sale contract, as well as upon goods which are his absolute property; so where goods seized for taxes against the person rightfully in possession are claimed by the conditional vendor, who fails on demand to produce to the municipality proofs of his title, he will be deprived of his costs of an action in which his title was established. John Deere Plow Co. v. Scott, 20 D.L.R. 543, 7 S.L.R. 276, 29 W.L.R. 542.

VALIDITY OF SEIZURE—WARRANT—SCHOOL RATES.

A warrant for the collection of school rates was issued without compliance with the provisions of the Assessment Act, R.S.N.S. 1900, c. 73, s. 82, subss. 1 and 2 (made applicable to the collection of school rates by the Education Act, R.S.N.S., c. 52, s. 97), the collector having failed to make the return and oath in writing required by the Act. Held, that the warrant was issued without jurisdiction and that therefore no justification for the seizure and sale of plaintiff's goods could be made under it; that the defendant trustees having received and retained the proceeds of the seizure and sale their objection that they did not convert the goods could not prevail. Sterling v. Cumberland School Trustees, 49 N.S.R. 125.

F. SALE; DEED; RIGHTS OF PURCHASERS.

Validity of use of public funds towards advertising tax sale, see Injunction, I J—84.

(§ III F—145)—PERSON ASSESSED MAY BUY —TITLE ACQUIRED.

The person assessed may himself buy in the property at a tax sale under the Assessment Act, R.S.O. 1914, c. 195, to perfect his prior defective title, and his tax deed will create a new commencement of title free from prior adverse possession. [Stewart v. Taggart, 22 U.C.C.P. 284, and Tomlinson v. Hill, 5 Gr. (Ont.) 231, applied.] Soper v. Windsor, 22 D.L.R. 478, 32 O.L.R. 352.

SALE.

In order that a sale of land for arrears of taxes may be openly and fairly conducted, within the meaning of s. 172 of the Assessment Act, 4 Edw. VII. (Ont.) c. 23, something more is required than easy-going, unenquiring honesty on the part of the official who sells. The sale must be conducted as an ordinary business transaction is, where property is sold by auction with a view to obtain its fair market value, and fairness is required on the part of the vendee, as well as of the vendor. [Donovan v. Hogan, 15 A.R. (Ont.) 432, followed.] Sutherland v. Sutherland, 4 D.L.R. 591, 3 O.W.N. 1368, 22 O.W.R. 296.

A forced sale by municipal bodies of a property on which there are arrears of municipal taxes is subject to the rules generally applicable to the contract of sale, and hence a sale super non domino and non possidente is absolutely null. Hull v. McConnell, 3 D.L.R. 37.

SALE—ENCUMBERED PROPERTY—RIGHT OF PURCHASE.

Notwithstanding a dedication of land for a highway may be ineffectual as against mortgagees, the latter's rights are divested and the dedication becomes effectual upon the land covered by the highway subsequently becoming vested in the municipality by title under a tax sale. Re Toronto Plan M. 138, 11 D.L.R. 424, 28 O.L.R. 41.

INDIAN LANDS—LIMITATION OF TIME FOR ATTACKING.

The limitation as to time, in the Indian Act, R.S.C. 1906, c. 81, s. 59, during which the original purchaser of Indian lands may claim assistance of the courts in having

a tax sale of his lands declared invalid, is applicable only to a case where the Superintendent-General has actively intervened between the tax purchaser and the original purchaser, by taking under consideration the tax deed, and approving it as a valid transfer by endorsement thereon; but there is no such limit of time in attacking an illegal tax sale and deed, if no action in respect of the tax deed by way of approval has been taken by the Superintendent-General.

Richards v. Collins, 9 D.L.R. 249, 27 O.L.R. 390, 22 O.W.R. 592, 23 O.W.R. 499.

LEGAL IMPOST OF TAXES ESSENTIAL—THREE YEARS ARREARS PRECEDING FURNISHING OF LIST.

The statutory protection afforded by s. 209, Assessment Act (Ont.), to the effect that where lands are sold for arrears of taxes, and the treasurer has given a deed for the same, that deed shall be to all intents and purposes valid and binding, if the same has not been questioned before some court of competent jurisdiction by some person interested, within two years from the time of sale, does not apply if there has been no legal impost of taxes, nor does it apply where the tax has not been in arrear for three years next preceding the furnishing of the list of lands liable to be sold under s. 152 of the Act or where no such list was furnished.

Richards v. Collins, 9 D.L.R. 249, 27 O.L.R. 390, 22 O.W.R. 592, 23 O.W.R. 499.

BURDEN AS TO REGULARITY.

In an action to recover property alleged to have been sold under an invalid tax sale, though the person in possession of the land has a certificate of title, if it appears that the defendant's certificate of title under the Land Registry Act (B.C.) was obtained by him as purchaser at a tax sale, the burden is on him to establish the regularity of the tax sale. [Kirk v. Kirkland, 7 B.C.R. 12, in appeal sub nom. Johnson v. Kirk, 30 Can. S.C.R. 344, followed.]

Beavis v. Langley, 9 D.L.R. 403, 18 B.C.R. 30, 23 W.L.R. 55.

RETURN—UNOCCUPIED LAND—SUFFICIENCY OF ADVERTISING—ADEQUACY OF PRICE—NOTICE TO REDEEM BY NONRESIDENT OWNER—FAILURE TO STATE ADDRESS—STATUTORY PERIOD FOR ATTACKING SALE.

Excelsior Mining Co. v. Lochead, 27 D.L.R. 762, 35 O.L.R. 154.

AUCTION—PURCHASER UNABLE TO PAY CASH.

Land was offered for sale by public auction, one of the terms being that the sale was to be for cash. A vendor ignorant of this term, duly advertised and announced at the sale, was the highest bidder, but was unable to pay cash:—Held, that there had been no sale of the lands.

Denis v. Morinville, [1917] 2 W.W.R. 323. [See also 34 D.L.R. 724.]

REFUSAL OF DEED—ACTION—PARTIES.

An action for refusal to give a tax sale deed should be brought against the collector and not against the municipality.

Stolle v. Mission, 24 B.C.R. 195, [1917] 1 W.W.R. 1388.

BY MUNICIPALITY—IMMOVABLES—INTERPRETATION OF TOWN CHARTER.

A provision in the charter of a town that when a ratepayer in arrears for taxes appears, by a return of insolvency, to have no chattels, the mayor can, with authority from the council, issue an order to the sheriff of the district to seize the immovables for which the taxes had been imposed, must be strictly interpreted and the formalities required observed on pain of nullity. A resolution of the council passed more than a year prior to the proces-verbal of insolvency is not sufficient to authorize the mayor to issue such order, and an opposition by the ratepayer to have it set aside will be maintained.

Saint-Jean v. Bouin, 44 Que. S.C. 469.

A sale of land for unpaid taxes under arts. 998 et seq., Mun. Code, can only be made for municipal and school rates. There is not included therein, under the definition thereof by art. 19, par. 22, Mun. Code, the cost of work done on a drain or bridge by a highway inspector. Therefore, a sale announced and made to realize an amount formed in part of such rate is void, and a sale to realize such amount is equally void when the statement required by art. 371 was not transmitted, in the preceding month of November, by the local secretary-treasurer to the secretary-treasurer of the county.

Bissonnette v. St. Joseph de Soulanges, 43 Que. S.C. 334.

TAX SALE — IRREGULARITY — SALE HELD OUTSIDE MUNICIPALITY — "ARREARS" — INVALIDITY OF CERTIFICATE.

All irregularities and defects in proceedings anterior to and at a bona fide de facto land tax sale, found to have been fairly and openly conducted by the officer named for that purpose (whether such irregularities are trivial or grave, and whether or not they are of a character which, but for the section referred to might have been held by the courts on a contest to be fatal to the validity of the sale), are cured by s. 3, c. 31 (B. C.) 1901. See R.S.B.C. 1911, c. 127, s. 36. Noncompliance with conditions precedent, such as the issue of proper certificate, the fact that taxes validly imposed have been in arrear for two years prior to the passing of the municipal by-law directing the sale, the existence of a proper assessment roll (as distinguished from an anticipatory roll, not formally adopted by the council), the election of a council or the appointment of an assessor prevents the curing of an irregular sale by the section referred to. Per Fitzpatrick, C.J., Idington and Anglin, J.J.

Temple v. North Vancouver, 6 W.W.R. 70.

(§ III F—146)—Deeds — Certificate — Sale — Redemption — Confirmation of sale — Time to redeem — N.W.T C.O. Alberta (1911), c. 109 — Lethbridge charter construction.

Re Lethbridge Charter, 7 D.L.R. 772, 2 W.W.R. 827.

Tax sale—Validity.

In Manitoba a tax sale is invalid for every purpose unless the property was at the time liable for all the taxes for which it was sold. [Review of legislation.]

C.N.R. Co. v. Springfield, 50 D.L.R. 37, [1920] 1 W.W.R. 18, reversing [1919] 1 W. W.R. 709.

The period of two years from the time of sale, on expiration of which a sale of land for arrears of taxes is validated by s. 173 of the Assessment Act, 4 Edw. VII. (Ont.) c. 23, runs from the time of making the tax deed, and not from the time of the auction sale of the land. [Donovan v. Hogan, 15 A.R. (Ont.) 432, followed.] After the expiration of two years from the time of a sale of land for arrears of taxes, s. 173 of the Assessment Act, 4 Edw. VII. (Ont.) c. 23, validates not only the deed but also the sale of the land, and it is not necessary to shew that the sale was openly and fairly conducted. [Hall v. Farquharson, 15 A.R. (Ont.) 457, distinguished.]

Sutherland v. Sutherland, 4 D.L.R. 591, 3 O.W.N. 1368, 22 O.W.R. 296.

Section 357 and subs. 10 of s. 2 of the Town Act, R.S.S., c. 85, that a judge of the District Court may confirm tax sales "unless the context otherwise requires" are controlled by R.S.S. 1909, c. 49, which requires such confirmation to be made by a Judge of the Supreme Court.

Nicholson v. Drew, 3 D.L.R. 748, 5 S.L.R. 379, 21 W.L.R. 189, 2 W.W.R. 295.

Notice of sale.

The abbreviated notice permitted by subs. 3 of s. 143 of the Assessment Act, 4 Edw. VII. (Ont.) c. 23, in the case of a sale of land for arrears of taxes must be published for 13 weeks. A single publication thereof is insufficient.

Sutherland v. Sutherland, 4 D.L.R. 591, 3 O.W.N. 1368, 22 O.W.R. 296.

Order confirming return — Registration —Effect.

A town is not obliged to obtain a judge's order confirming the return of unpaid taxes required by s. 349 of the Town Ordinance (R.S.S. 1909, c. 35, as amended by c. 28 of 1912-13), but may exercise a discretion; when the order has been obtained the town is bound to send it to the Registrar of Land Titles, and his duty is to register it against the lands therein mentioned; subject to the owner's right of redemption, the land thereupon becomes vested in the town in lieu of the right to collect the taxes; if not redeemed within the time limited, the land is held by the town free from all liens except those of the Crown or the town not merged; the lien of the town becomes merged after the town has procured a certificate of title to the land.

Smart Hardware Co. v. Melfort, 28 D.L.R. 513, 34 W.L.R. 475, 10 W.W.R. 638. [Varied in 32 D.L.R. 552, [1917] 1 W.W.R. 1184.]

Confirmation of sale — Land titles — Order — Invalidity.

Section 2 of c. 49, R.S.S. 1909 provides that no application for an order for confirmation shall be heard until all persons appearing by the records of the proper Land Titles Office to have any interest in the said land have received notice of such application; an order made in the face of this statutory prohibition is made without jurisdiction and is void. The questions involved, not having been determined in a regular procedure, the doctrine of res judicata has no application.

Wallbridge v. Steenson, 41 D.L.R. 330, 11 S.L.R. 224, [1918] 2 W.W.R. 801.

Illegal assessment — Confirmation — Setting aside.

The assessment under the Local Improvement Act, c. 11, 1907, of contiguous lots separately in each block is illegal. [Bow Valley v. McLean, 26 D.L.R. 716, followed.] Semble, the confirmation of a tax-enforcement return by a Judge of a District Court must be made by him as an adjudication of such court, or a judge thereof, and not as persona designata. The confirmation of tax-enforcement return set aside and the title issued thereon directed to be cancelled.

Sutherland v. Spruce Grove, [1918] 3 W. W.R. 152. [Varied in 43 D.L.R. 280.]

Municipal Act—Rights of purchaser—Land—Fixtures—Equitable waste.

Where land is sold under s. 250 of the Municipal Act, c. 52, 1914 (B.C.), for arrears of taxes, improvements thereon become the property of the purchaser, although improvements are not assessed. A purchaser at a tax sale under the Municipal Act obtains an inchoate right in, or title to, the property which may ripen into a complete title upon failure of the owner to redeem, and while the purchaser cannot now enter into possession during the redemption year, equity will apply to the person in possession the principles of equitable waste, so as to prevent him from acting in respect of the property to the injury of the tax sale purchaser, and therefore the purchaser may obtain an order restraining the owner from removing from, or disposing of, fixtures in a building on the land sold and for the return of those removed. [Vane v. Barnard, 2 Vern 738; Turner v. Wright, 2 De G. F. & J. 234, applied.]

New Westminster v. Kennedy, [1918] 1 W.W.R. 489.

Sale of land for arrears of taxes — Assessment Act, R.S.O. 1914, c. 195, s. 22 — Ownership of land — Illegal assessment — Duty of assessor — Inquiry — Knowledge of city coun-

CIL — NECESSITY FOR SUBSTANTIAL COMPLIANCE WITH STATUTORY PROVISIONS—SALE SET ASIDE.

Heighington v. Toronto, 15 O.W.N. 76.

TAX SALE — ARREARS OF TAXES ACT — RETURN — TIME — REGISTRATION—TITLE.

Re Land Titles Act (Sask.), [1918] 3 W.W.R. 343.

MUNICIPAL TAX SALES.

The city of Montreal has the right, under its charter, to announce anew the sale of an immovable for municipal taxes, according to C.C.P. art. 733, after an opposition has been decided subsequently to the date fixed for the sale in the first notice.

Montréal v. Tritt, 24 Rev. Leg. 167.

MUNICIPAL TAX SALES — COLLOCATION — OWNERSHIP.

One who purchases property sold for municipal taxes, which is not redeemed within the two years following, has a right to be collocated in the stead of the original owner, if the property is sold by the sheriff when in possession of such purchaser, even if he had only registered his title more than six months after the expiry of the two years.

Noel v. Roy, 24 Rev. Leg. 507.

MUNICIPAL TAX SALES — ACION TO SET ASIDE—PARTIES—PURCHASER.

Although s. 1019, old Mun. Code (Que.) reproduced in s. 751, new Code, declares that the action to set aside the sale of immovables sold for municipal taxes can only be taken against a municipal corporation whose officers are in default, the real owner of an immovable property sold "super non domino" has, nevertheless, the right to summon the purchaser, and to add petitory conclusions to his action to set the sale aside.

Gale v. Lacroix, 53 Que. S.C. 292.

TAXATION — TAX SALE — ARREARS OF TAXES ACT, SS. 37 AND 47 — APPLICATION FOR TITLE BY ASSIGNEE OF TAX PURCHASER — APPLICATION TOO LATE—FORFEITURE OF CLAIM.

The advertised date of sale of land for taxes was Oct. 18, 1915. The actual date of sale was Oct. 25, 1915. The application of the assignee of the tax purchaser for title was dated Oct. 15, 1918, and was received by the registrar on Oct. 22, 1918. Held that under ss. 37 and 47 of the Arrears of Taxes Act (c. 21, 1915), the application was received too late and the applicant forfeited all claim to the land and to the amount paid by her in connection with the purchase at tax sale and for subsequent taxes.

Re Land Titles Act, Lees' Case, [1919] 1 W.W.R. 401.

(§ III F—147)—SALE EXTINGUISHING RESTRICTIVE BUILDING COVENANT.

A restrictive building covenant contained in a deed to the land is extinguished upon a tax sale of the property, and will convey it to the tax purchaser free from any claim under the covenant. [Tomlinson v. Hill, 5 Gr. 231; Soper v. Windsor, 22 D.L.R. 478, followed; London County Council v. Allen, [1914] 3 K.B. 642; Re Nisbit, etc., [1905] 1 Ch. 391, [1906] 1 Ch. 386, applied.]

Re Hunt and Bell, 24 D.L.R. 590, 34 O.L.R. 256.

APPLICATION TO BE REGISTERED — EASEMENT — DUTY OF REGISTRAR — PURCHASER'S RIGHT CONTESTED — AUTHORITY OF REGISTRAR — ACTION AGAINST MUNICIPALITY — WHEN NECESSARY — EXTINGUISHMENT OF EASEMENT.

When a tax sale purchaser makes application to be registered as owner of the land set out in his tax sale certificate, the duty of the registrar is to cause to be served upon all persons who appear by the records of the land titles office to be interested in the lands sold, a notice requiring them within a specified time to contest the claim of the tax purchaser, or redeem the land. If the purchaser's right is contested on the ground that the sale was not openly and fairly conducted, the matter may be disposed of by the registrar. If, however, the ground is that the land is subject to an easement because such easement has not been properly assessed, it must be by action against the municipality. If no action is brought against the municipality the treasurer's return (see Arrears of Taxes Act, 1915, ch. 21, Sask.) is conclusive evidence to the registrar of the validity of the assessment and the sale of the land for taxes, and the easement is extinguished. [Reach v. Crosland, 45 D.L.R. 140, followed.]

Re Land Titles Act; Bank of B.N.A. v. London Sask. Investment Co., 46 D.L.R. 90, 12 S.L.R. 191, [1919] 2 W.W.R. 33, affirming [1919] 1 W.W.R. 507.

RIGHTS OF PURCHASER — TAX SALE — ACTION BY PURCHASER TO RECOVER POSSESSION OF LAND.

McPherson v. Ferguson, 4 O.W.N. 1564, 24 O.W.R. 871.

(§ III F—148)—SETTING ASIDE TAX DEED.

Where land is sold for arrears of taxes, and there is no local advertisement, except a bill posted at the court house, and a single insertion in two papers of the abbreviated advertisement authorized by subs. 3 of s. 143 of the Assessment Act, 4 Edw. VII. (Ont.) c. 23, and only three or four persons attend the sale, and only one bid was made which was of the exact amount of the arrears offered by the brother of the owner, who had been anxious, though not to the knowledge of the municipal officers, to get the land, the sale is not openly and fairly conducted within the meaning of s. 172 of the Act.

Sutherland v. Sutherland, 4 D.L.R. 591, 3 O.W.N. 1368, 22 O.W.R. 296.

IRREGULAR SALE — VALIDATING ACT — SETTING ASIDE TAX DEED.

Errikkila v. McGovern, 9 D.L.R. 873, 27 O.L.R. 498.

SETTING ASIDE — IRREGULARITIES — CURATIVE ACT.

A tax deed for land purchased by the City of Toronto for unpaid taxes of said city, is not open to attack on the grounds that the land was improperly assessed; that it was not sufficiently described as required by law; that proper notice of the assessment was not given or served; that no proper return was made by the collector; that no proper by-law was passed by the city council expressing a desire that the city should purchase the land for arrears of taxes, and authorizing the purchase, or that no notice of the city's intention to do so was given the landowner; since all such irregularities were cured by s. 8, of 3 Edw. VII. (Ont.) c. 86, validating all sales of Toronto land for taxes prior to and including the time when the land in question was sold to the city, irrespective of all prior errors and irregularities. [Toronto v. Russell, [1908] A.C. 493, followed.]

Cartwright v. Toronto, 13 D.L.R. 604, 29 O.L.R. 73. [Affirmed in 20 D.L.R. 189, 50 Can. S.C.R. 215.]

SUBSEQUENT TAXES PAID BY TAX PURCHASER — VACATING SALE.

Section 14 of the Taxation Act Amendment Act, 3 Geo. V. (B.C.) c. 71, is not retroactive so as to confer a lien in favour of the tax purchaser for taxes accruing after the tax sale and before the judgment setting it aside, all of which had taken place prior to the passing of the statute.

Smith v. Anderson, 14 D.L.R. 454, 18 B.C.R. 453, 25 W.L.R. 823, 5 W.W.R. 386.

SETTING ASIDE—DEED—ERRONEOUS ASSESSMENT.

A tax deed will be declared void when issued on a sale of land based on an assessment not in the name of the registered owner or occupant, but in the name of the estate of a deceased owner.

Riesbech v. Creighton, 12 D.L.R. 363, 3 W.W.R. 785.

OWNER'S RIGHT TO STATUTORY NOTICE.

Under statute 4 Edw. VII. c. 23, s. 165 (2), requiring a written notice, as prescribed by subs. 6, s. 46, to be sent to a nonresident owner of land, which has been sold for arrears of taxes, giving him thirty days' time in which to redeem his property, the notice must be sent to the last address lodged by the owner in the city treasurer's department; and the fact that the city treasurer had obtained outside information that letters addressed to the owner at the address on file in his office did not reach their destination, does not excuse sending the notice to the address given, in the absence of a direct revocation of the address filed by the owner himself, and it is immaterial whether he had in fact a different address in New York so long as the prescribed notice under subs. 6, s. 46, stood unrevoked.

Gast v. Moore, 9 D.L.R. 507, 27 O.L.R. 515.

SETTING ASIDE TAX SALE — IRREGULARITIES.

Burrows v. Campbell, 10 D.L.R. 812, 4 O.W.N. 747, affirming 6 D.L.R. 877, 23 O.W.R. 814, 24 O.W.R. 190.

PREMATURITY — CURATIVE ACT.

A conveyance purporting to be a tax sale deed delivered before the actual expiration of the statutory period of redemption (B. C. Assessment Act, 1888, c. 111, s. 92) is ineffectual, and is not validated by subsequent statute (1903, c. 53, ss. 125, 153, 156) intended to cure defects in proceedings preliminary to a valid tax sale deed.

Heron v. Lalonde, 31 D.L.R. 151, 53 Can. S.C.R. 503, 10 W.W.R. 1241, reversing 24 D.L.R. 851, 9 W.W.R. 440, which affirmed 22 D.L.R. 37, 32 W.L.R. 861, 8 W.W.R. 78.

TAX SALE — ACTION TO SET ASIDE SALE MADE FOR TWO YEARS' TAXES IN ARREAR — NO ARREARS FOR ONE YEAR — VALIDITY OF ASSESSMENT — IRREGULARITY — VALIDATING ENACTMENT — ASSESSMENT ACT, 4 EDW. VII. c. 23, s. 22, SUBS. (1) (D), s. 172—COSTS—SUCCESSFUL APPEAL.

Millar v. Patterson, 7 O.W.N. 714.

(§ III F—149)—STATUTORY CONFIRMATION VALIDATING IRREGULAR ASSESSMENT.

A tax deed issued on a sale under a void assessment of land in the name of the estate of its deceased owner is not validated by the Curative Act, Statutes of B.C., 1903-4, c. 53, s. 153.

Riesbech v. Creighton, 12 D.L.R. 363, 3 W.W.R. 785.

A tax deed issued on a sale under an assessment void by reason of the omission of the essential element of notice thereof, is not validated by the curative provisions of R.S.B.C. 1911, c. 222, s. 255. [Riesbech v. Creighton, 12 D.L.R. 363, followed.]

Eaton v. Creighton, 16 D.L.R. 137, 5 W.W.R. 1212.

CURATIVE ACT.

Failure of a municipal council to give notice before an adjourned tax sale under the Ontario Assessment Act, R.S.O. 1897, c. 224, s. 184, that the municipality intended to purchase the land for the arrears if no better bid were received, is cured by the statutes 3 Edw. VII. (Ont.) c. 86, s. 8, and 6 Edw. VII. (Ont.) c. 99, s. 8, and on the expiration of the time fixed for redemption after sale to the municipality as the highest bidder at the adjourned sale, all rights of the former owner are barred in its favour. [Toronto v. Russell, [1908] A.C. 493, applied; Cartwright v. Toronto, 13 D. L.R. 604, 29 O.L.R. 73, affirmed.]

Cartwright v. Toronto, 20 D.L.R. 189, 50 Can. S.C.R. 215.

APPLICATION TO CONFIRM — APPLICATION BY REGISTERED OWNER TO REDEEM.

Re Attrux, 3 S.L.R. 345, 15 W.L.R. 525.

PURCHASER AT TAX SALE — MOTION FOR ORDER DIRECTING ISSUE OF CERTIFICATE OF TITLE.

Re Clendenan, 18 O.W.R. 666.

DISTRESS FOR TAXES — SEIZURE OF GOODS ON PREMISES OF PERSON TAXED.

Foster v. Reno, 22 O.L.R. 413, 17 O.W.R. 707.

JOINDER OF LOTS.

Shefford v. Donais, 20 Que. K.B. 193, affirming 36 Que. S.C. 367.

G. REDEMPTION; NOTICE TO REDEEM.

(§ III G—150)—NOTICE TO REDEEM — ENFORCEMENT — SALE — RIGHT TO REDEEM — TIME FOR REDEMPTION — TENDER — LETHBRIDGE CITY CHARTER — TAX SALE CONFIRMATION ORDINANCE (1901), c. 12.

Re Turner and Carosella, 7 D.L.R. 818, 22 W.L.R. 19.

ESTOPPEL TO CONTEST PURCHASER'S TITLE.

The failure of a landowner to contest the claim of a tax purchaser or to redeem the time prescribed by s. 3 of the Land Registry Act, B.C. 1901, c. 31, after receipt of notice from the registrar of application by the purchaser to register his tax sale title, forever estops and bars the owner from setting up a claim on any ground to the land sold.

Temple v. North Vancouver, 13 D.L.R. 492, 18 B.C.R. 546, 25 W.L.R. 245, 350, 4 W.W.R. 1369. [Appeal to Can. Supreme Court dismissed, 6 W.W.R. 70.]

COSTS OF REDEMPTION.

Costs incurred and which were paid under protest to a municipality in order to redeem property from a wrongful sale for taxes claimed to be exempt may be recovered back. [Alloway v. Morris, 18 Man. L.R. 363, followed.]

C.N.R. v. Winnipeg, 27 D.L.R. 369, 26 Man. L.R. 292, 18 Can. Ry. Cas. 317, 34 W.L.R. 524, 10 W.W.R. 549. [Affirmed, 36 D.L.R. 222, 54 Can. S.C.R. 589, [1917] 2 W.W.R. 100.]

TAX SALE — RIGHT TO REDEEM — NOTICE — LIMITATION — LAND REGISTRY ACT.

Beavis v. Stewart, 20 D.L.R. 956, 7 W. W.R. 170, 20 B.C.R. 450.

H. WHO MUST PAY; CORPORATION TAXES.

(§ III H—151)—REDEMPTION — TIME — MUNICIPAL ACT.

Under the Municipal Act (B.C.) as amended in 1906, c. 32, s. 156 (R.S.B.C. 1911, c. 170, s. 299), the owner's right to redeem land, sold by a municipality for unpaid taxes, exists for one year from the date of sale, and not until the expiration of the statutory notice or until the purchaser has demanded his deed.

Milne v. South Vancouver, 36 D.L.R. 180, affirming 32 D.L.R. 184, 24 B.C.R. 255, [1917] 3 W.W.R. 28.

CERTIORARI — MUNICIPAL TAXES — PERSONAL TAX — CIVIC EMPLOYEE — RESIDENCE OUTSIDE OF MUNICIPALITY — QUEBEC CHARTER ARTS., 227, 230, 231 —40 VICT. (1877), c. 52—1 EDW. VII. 1901, c. 42.

It is only by way of exception, and within the strict limits of the authority conferred, that a city or a town can tax persons who do not reside within its limits. By arts. 227, 230, 231 of its charter, the city of Quebec can only exact the annual personal tax of $2 from male persons domiciled for six months in the city and from those who, living outside the city limits, are already obliged to pay another tax, by reason of carrying on in the city their trade profession or calling. Consequently, civic employees residing outside the city, but who go there each day to carry out the duties of their position, are not subject to the payment of a personal tax.

Myrand v. Desrivières, 56 Que. S.C. 99.

(§ III H—156)—BUSINESS TAX — SIMILARITY.

Section 18 of the Corporation Taxation Act (Sask.), prohibiting the imposition of any similar tax on any company or corporation paying the corporation tax, has no reference to an assessment of a company for a business tax.

Can. Northern Express Co. v. Rosthern; Can. Northern Telegraph Co. v. Rosthern, 23 D.L.R. 64, 8 S.L.R. 285, 8 W.W.R. 1181, 31 W.L.R. 868.

I. PAYMENT; TENDER; REMEDIES AS BETWEEN INDIVIDUALS.

Effect of taking cheque in payment, see Municipal Corporations, II G—210.

(§ III I—160)—ARREARS OF — PROMISSORY NOTE — LANDS NOT SPECIFIED — JUDGMENT — ELECTION — ASSESSMENT ACT, 1904 (ONT.).

By taking promissory notes for part of the tax arrears due by a company in respect of a number of separately assessed parcels of land without distinguishing the specific lands upon which the notes were to apply, and by taking judgment on such notes, the municipality must be taken to have elected to proceed under s. 90 (Assessment Act, 1904, Ont.), and treat the arrears on such lands for the years in respect of which the notes were accepted by municipal council as a debt and not realizable in any other way. [Bank of Africa v. Salisbury, [1892] A.C. 281, applied.]

Sturgeon Falls v. Imperial Land Co., 20 D.L.R. 718, 31 O.L.R. 62.

(§ III I—164)—EXCESSIVE ASSESSMENT OF ACREAGE—REVIEW—ACTION FOR RECOVERY BACK—RES JUDICATA.

Under the Assessment Act, Alta., a Court of Revision, and on appeal from that court the District Court Judge, has jurisdiction to entertain a complaint in respect of any or all of the matters which make up an assessment for taxation purposes, including the ascertainment of the acreage of the land to be taxed under any assessment; where uncontroverted evidence was given by the municipality on an assessment appeal as to such acreage and the assessment was fixed on that basis, such adjudication if not appealed from becomes res

judicata, and it is not open to the ratepayer by separate action to recover from the municipality the overpayment resulting from the area of the land being afterwards found to be less than the acreage upon which the assessment was fixed. [Toronto R. Co. v. Toronto, [1904] A.C. 809, distinguished.]

Pearce v. Calgary, 23 D.L.R. 296, 9 W.W.R. 195, 31 W.L.R. 208. [See 31 D.L.R. 548, 9 W.W.R. 668.]

INSTALMENT PAYMENTS.

A ratepayer who pays without demur an instalment due under an assessment roll cannot subsequently evade payment of the other instalments on the ground that the assessment is illegal, if the roll has become confirmed in default of statutory proceedings to vacate it or set it aside.

Montreal v. Allard, 3 D.L.R. 438, 18 Rev. de Jur. 326.

RECOVERING BACK—VOLUNTARY PAYMENT.

A taxpayer who voluntarily pays taxes without protest, in the absence of any attempt to collect by distress or threat of distress, cannot recover back the amount so paid.

New York & Ottawa R. Co. v. Cornwall, 15 D.L.R. 433, 29 O.L.R. 522.

PAYMENT UNDER PROTEST.

The owner of an immovable advertised for sale for unpaid taxes for work done on a drain or bridge by a highway inspector, for which lands cannot be lawfully sold, who deposits the required sum under protest to avoid the sale, has a right to recover it from the local corporation with the costs of establishing the nullity of the proceedings of which he complains.

Bissonnette v. St. Joseph de Soulanges, 43 Que. S.C. 334.

J. REMISSION OR ABATEMENT OF TAXES.

(§ III J—165)—PAYMENT UNDER MISTAKE OF FACT.

Payment of taxes under the mistaken belief that it is included in a mortgage is payment under compulsion, and upon discovery of the mistake the money paid can be recovered. [Kelly v. Solari, 9 M. & W. 54; Imperial Bank v. Bank of Hamilton, [1903] A.C. 49, followed; Trust Corp. v. Toronto, 30 O.R. 209, distinguished. See also O'Grady v. Toronto, 31 D.L.R. 632, 37 O.L.R. 139.]

Canadian Mortgage Assn. v. Regina, 33 D.L.R. 43, 10 S.L.R. 30, [1917] 1 W.W.R. 1130.

MISTAKE OF LAW.

Money voluntarily paid for taxes under a mistake of law cannot be recovered.

O'Grady v. Toronto, 31 D.L.R. 632, 37 O.L.R. 139.

RECOVERY BACK — OVER-ASSESSMENT — MODE OF OBJECTION.

Where a municipality has the right under statute to impose a tax, and the person assessed in respect thereof does not appeal against the quantum of the assessment, he cannot in an action to recover the taxes which he was compelled to pay be heard to say that he was over-assessed.

Can. Northern Express Co. v. Rosthern; Can. Northern Telegraph Co. v. Rosthern, 23 D.L.R. 64, 8 S.L.R. 285, 8 W.W.R. 1181, 31 W.L.R. 868.

BUSINESS ASSESSMENT—BUSINESS DISCONTINUED—REMISSION OF TAXES FOR PROPORTIONATE PART OF YEAR—ASSESSMENT ACT, R.S.O. 1914, c. 195, ss. 56, 118.

Re MacMillan and London, 10 O.W.N. 416.

IV. Lien.

Lien for taxes paid on another's land, see Liens, I—1.

Drainage assessments as lien on land, see Drains and Sewers, III—15.

As covenant running with land, see Landlord and Tenant, II B—10.

Effect of seizure for arrears as against mortgagee in possession, see Chattel Mortgage, II A—7.

Forfeiture of land, caveat, alien enemy, see Aliens, III—19.

(§ IV—175)—EXTINGUISHMENT.

A town has a lien upon land for the taxes assessed in respect thereof; this lien is not lost by reason of the fact that the land has become conditionally vested in the town by the operation of proceedings under a judge's order confirming a return of unpaid taxes thereon.

Smart Hardware Co. v. Melfort, 28 D.L.R. 513, 34 W.L.R. 475, 10 W.W.R. 638, [Varied in 32 D.L.R. 552, [1917] 1 W.W.R. 1184.]

LIQUIDATION OF COMPANY NOT AFFECTING LIEN—EXTENT OF PREFERENCE.

A preferential lien for taxes which the City of Halifax has upon personal property during the civic year for which the taxes are imposed under ss. 449, 450 of the Halifax charter, is not abrogated by the liquidation of the company liable for such taxes under a winding-up order made under the Winding-up Act (Can.); but such priority does not extend to the taxes for prior years as to which no effectual levy had been made.

Re Halifax and Kane, 23 D.L.R. 158, 49 N.S.R. 93.

ENFORCEABLE BY ACTION — ASSESSMENT ACT, 1904 (ONT.)—SPECIFIC ON EACH LOT.

The lien given for taxes under s. 89 of the Assessment Act, 1904 (Ont.), 4 Edw. VII. c. 23, is not a mere possessory lien, but one which may be enforced by action and decree for sale. [Mutrie v. Alexander, 23 O.L.R. 396, distinguished.] It is of the essence of the charge resulting from a tax assessment under the Assessment Act, 1904 (Ont.), and of the lien on the land under s. 89 of that Act, that it is specific upon each separate lot or block. [Blakey

v. Smith, 20 O.L.R. 279; Christie v. Johnston, 12 Gr. 534, followed.]

Sturgeon Falls v. Imperial Land Co., 20 D.L.R. 718, 31 O.L.R. 62, varying in part, 7 D.L.R. 352, 23 O.W.R. 170.]

ENFORCEMENT—PARTIES.

Athabasca v. Shaw, 37 D.L.R. 766, [1917] 3 W.W.R. 1001, affirming [1917] 3 W.W.R. 505.

LOCAL IMPROVEMENTS—PRIORITY.

Taxes under the Local Improvement Act have priority over mortgages and create a special lien on the land, which can be realized by action.

Local Improvement District v. North Saskatchewan Land Co., [1917] 2 W.W.R. 138.

ENFORCEMENT OF LIEN—SCHOOL TAXES.

The special lien for arrears of taxes declared by s. 15 of the School Assessment Ordinance, C.O., c. 105, is not enforceable by action. [Sturgeon Falls v. Imperial Land Co., 7 D.L.R. 352, 31 O.L.R. 62, distinguished; Athabasca v. Shaw, [1917] 3 W.W.R. 505, followed; L.I. District 453 v. North Saskatchewan Land Co., [1917] 2 W.W.R. 138, not followed.]

Richmond School District v. Garbutt, [1918] 2 W.W.R. 926.

CREDITORS — REPORT OF DISTRIBUTION — MUNICIPAL TAXES—PREFERRED CLAIM — PRESCRIPTION — RENUNCIATION OF PRESCRIPTION AS TO THIRD PARTIES—C.C. QUE. ARTS. 2011, 2187, 2229—R.S.Q. 1909, ART. 5728.

In the report of distribution on the price of an immovable, a municipal corporation cannot, with regard to third parties, rank for a greater number of years' arrears of taxes than are allowed by the period of prescription applicable to the case. Thus, the taxes of cities and towns being prescribed in 3 years, a corporation, with the concurrence of the mortgage creditors, cannot rank for more than 3 years arrears, notwithstanding the suspension of prescription on arrears much older than those which are pleaded against the debtor.

Fontaine v. Paradis, 56 Que. S.C. 336.

V. Succession of duties.

A. IN GENERAL.

As direct taxation within province, see Constitutional Law, I G—140.

(§ V A—180)—SUCCESSION DUTIES ACT, R.S.B.C. 1911, c. 217—PROPERTY BOTH INSIDE AND WITHOUT THE PROVINCE—SUCCESSION DUTIES PAYABLE.

Under the Succession Duties Act, R.S.B.C. 1911, c. 217, and amendments thereto, where a deceased has property both inside and without the province and the property inside would otherwise be exempt from taxation, then for bringing such inside property within the ambit of taxation the outside property may be looked to, but the taxation shall only be on the actual value of such inside property.

Re Succession Duty Act and Van Horne, 47 D.L.R. 529, [1919] 3 W.W.R. 76, affirming [1919] 1 W.W.R. 1101.

PROVINCIAL JURISDICTION.

So far as it relates to property within the province of Alberta, the Succession Duties Ordinance provides a scheme of direct taxation and is within the competence of the provincial Legislature.

Re Cust, 21 D.L.R. 366, 8 A.L.R. 308, reversing 18 D.L.R. 647, 7 W.W.R. 1286, 30 W.L.R. 671.

PROPERTY IN ONE PROVINCE—DOMICILE IN ANOTHER—SPECIALTY DEBTS.

A testator having his domicile in one province and having in his possession at the time of his death debts secured by mortgages of real estate, situate in another province, where the mortgagors have their domicile, such debts are specialty debts, and are liable to duty under the Succession Duty Act, C.S.N.B. 1903, c. 17.

Receiver-Gen'l of New Brunswick v. Rosborough, 24 D.L.R. 354, 48 N.B.R. 258.

RATE OF DUTY — MIXED ESTATE — MIXED FUND—WILL.

The will of Lord Strathcona held not to create, or disclose an intention to create, out of the real and personal estate a mixed fund to be applied in the payment of legacies, so as to bring it within the rule in Roberts v. Walker, 1 Russ. & M. 752. [The will in Allan v. Gott, L.R. 7 Ch. 439, distinguished.] The mere fact that executors are given wide discretionary powers in dealing with the whole estate to dispose of the real estate of the testator and in reinvesting the proceeds thereof does not ipso facto put the case on all fours with Allan v. Gott, supra. The contention of the Provincial Treasurer of Manitoba that, for the purpose of arriving at the amount of succession duties payable by the estate of Lord Strathcona, legacies to all beneficiaries should be deemed to be payable pro rata out of the whole estate, and the real estate in Manitoba should bear its pro rata share, not upheld, the court holding that the will did not create out of the real and personal estate a mixed fund for the payment of legacies.

Re Lord Strathcona's Estate, 28 Man. L.R. 579, [1918] 2 W.W.R. 499.

"FAIR MARKET VALUE."

For the purpose of fixing the "fair market value," within the meaning of the Succession Duties Act, c. 187, R.S.M. 1913, of certain vacant and unimproved property, part of which was subdivided, and for all of which there was no market, held, that the values given by the executors in the inventory filed by them should be accepted. Cameron, J.A., fixed the value with regard to the present value of the possibilities of subdivision and sale at some not unreasonably distant date, and, in the absence of a present market, taking as a test a hypothetical sale such as that referred to by Idington, J., in Pearce v. Calgary, 9 W.W.

R. 668, to some person willing to take advantage as an investment of the existing shrinkage in values.

Re Nairn Estate, [1918] 2 W.W.R. 278, 28 Man. L.R. 546.

NEW BRUNSWICK SUCCESSION DUTY ACT, 1896, S. 1—CONSTRUCTION—LOCALITY OF SIMPLE CONTRACT DEBTS—LEX LOCI AND ADMINISTRATION—LEX DOMICILII AND DISTRIBUTION.

The King v. Lovitt, [1912] A.C. 212, reversing 43 Can. S.C.R. 106; restoring 37 N.B.R. 558.

SUCCESSION DUTY ACT, R.S.O. 1914, C. 24, SS. 5, 9, 10, 11, 18—DUTY PAID ELSEWHERE ON PART OF ESTATE—DUTY CHARGEABLE AGAINST SPECIFIC LEGACIES, AND NOT AGAINST RESIDUE.

Re Munro, 12 O.W.N. 371.

CONSTITUTIONALITY — PROPERTY OUTSIDE THE PROVINCE — DIRECT TAX—B.N.A. ACT, R.S.Q. 1909, S. 1374.

The "Quebec Succession Duties Act," R. S.Q. 1909, s. 1374, is constitutional, being in accordance with the powers conferred on the Province of Quebec by the B.N.A. Act. This tax is imposed upon the transmission of property by succession, and not upon the property itself; and its payment is a condition precedent imposed on the seizing of the heir. Movable property being governed by the law of domicile of the owner, this Act authorizes the Province of Quebec to impose a direct tax upon movable property abroad. A direct tax is one which, in distinction to an indirect tax, is imposed upon a person, without the intervention of any agent or intermediary whatsoever. Without the assistance of the interpretative and declaratory statute of the Quebec legislature, which declares that this tax upon estates is direct, it could be held, under the previous law, that the tax is direct.

Burland v. The King, 46 Que. S.C. 430.

CONSTITUTIONALITY — PERSONS LIABLE — HEIRS—ASSIGNMENT.

When, as required by the statute relating to succession duties, one of the persons mentioned in art. 1380, R.S.Q. 1909, has deposited with the collector of revenue the declaration required by that article, and the collector has notified him of the amount that he should pay, such person does not become the debtor of the Government except in regard to such duties as may affect his share in the succession, but not for those duties which may affect the shares of other beneficiaries. Each of the beneficiaries in the succession is debtor for the duties charged upon his share therein without recourse against any person whomsoever. The old law relating to succession duties had not the effect of creating indirect taxes, and is not unconstitutional as ultra vires of the legislative powers of the provinces. Section 3 of the statute of 1914, 4 Geo. V., c. 11, which declares the statute not to apply to pending cases, does not exempt from its application any but those cases in which the unconstitutionality of the statute to which the interpretation is given has been specially pleaded. The assignment by an heir of his share in the succession, for consideration, constitutes an actual acceptance of the succession. The heir making the assignment cannot take exception to it in order to avoid the obligation on his part to make payment of the duties upon his share therein.

Olivier v. Jolin, 25 Que. K.B. 532. [Appeal quashed, 55 Can. S.C.R. 41.]

DECIDING VALUATION — THE SUCCESSION DUTY ORDINANCE, C. 5 OF 1903 (2ND SESS.) — EXECUTOR'S AFFIDAVIT OF VALUE—REVALUATION BY PROVINCIAL TREASURER—NO OBJECTION BY EXECUTOR — BOND SECURING PAYMENT OF DUTY—ACTION ON BOND—DEFENCE OF EXCESSIVE VALUATION — REVALUATION BY COURT.

The executor of an estate filed an affidavit of value with inventory pursuant to s. 6 of the Succession Duty Ordinance, c. 5 of 1903 (2nd Sess.), then in force. The provincial treasurer sent him a revised valuation of increased amount and fixing the succession duty. No objection was made and a bond (conditioned for payment of "any and all duty to which the estate may be found liable under the ordinance") was furnished as required. The executor subsequently requested extensions of time for payment. In an action by the provincial treasurer upon the bond the defence was that by mistake the assets were valued greatly in excess of their actual value and the liabilities were subsequently found to be much greater than as set out in the affidavit of valuation. Held, nothing that had taken place had finally decided the valuation; in cases other than under ss. 7, 8, 9, 10, providing for valuation by an appraiser and appeal to a judge from his decision, finality, other than by agreement, could only be arrived at by an action under ss. 11, 12; the question of values was open under s. 12; and the court fixed values independently of those stated by the executor in his affidavit under s. 6 or by the provincial treasurer.

R. v. Roach and London Guarantee & Accident Co., [1919] 3 W.W.R. 56.

(§ V A—181)—NATURE AND POWER TO IMPOSE.

The succession duty imposed upon all property in Ontario devolving upon death by the Ontario Succession Duty Act, 9 Edw. VII., c. 12, is the only inheritance tax in Ontario.

Re Gwynne, 5 D.L.R. 713, 3 O.W.N. 1428, 22 O.W.R. 405.

MOVABLE GOODS SITUATED IN A FOREIGN COUNTRY—ACT OF 1914—ITS CONSTITUTIONALITY—4 GEO. V., 1914, C. 10—C.C. QUE. ART. 6.

The Act called the Succession Duty Act relating to the imposition of direct taxes

on the transmission of certain property passing to a successor situated in a foreign country is intra vires of the powers of the legislative, and constitutional. This right to place direct taxes on goods which have only their legal situation in the province is exercised as much by virtue of the maxim mobilia sequuntur personam as by the provisions of art. 6, C.C. (Que.), directing that movable goods are governed by the law of the domicile of the owner. The actual transmission, of the property of a deceased person to his legatees in the province, of certificates of stock or shares in foreign companies, constitutes personal property situate in the Province of Quebec and upon which the legislature has the right to impose a direct tax. In the absence of a special provision to the contrary, the imposition of succession duty on personal property situated in a foreign country does not apply to heirs domiciled outside the province. The succession duty tax, as imposed by 4 Geo. V., [1914] c. 10, is a direct tax.

Barthe v. Sharples, 55 Que. S.C. 301.

(§ V A—183)—Rate of taxation—Aggregate value of estate.

The aggregate value of all the estate owned by the deceased at the time of his death is the basis on which the rate of taxation is to be computed and fixed under clause (a), s. 5, of the Succession Duty Act, and not the aggregate value of the property liable to succession duty.

Receiver-Gen'l of New Brunswick v. Rosborough, 24 D.L.R. 354, 48 N.B.R. 258.

(§ V A—184)—Contingent tax—Annuities.

A gift for life of the income from the residue of an estate does not create an annuity within the meaning of the Succession Duty Act (Ont.).

Bethune v. The King, 4 D.L.R. 229, 26 O.L.R. 117, 21 O.W.R. 559.

B. Exemptions; uniformity.

(§ V B—185)—Charitable bequest—Succession duty—Charitable purposes within the province — Succession Duty Act, N.B., 5 Geo. V. 1915, c. 27, s. 6.

In New Brunswick charitable bequests are liable to succession duty unless specifically bequeathed for charitable purposes within the Province. The rate of duty is 10 per cent and accrued interest at 5 per cent if not paid within 6 months after the testator's death.

Provincial Secretary-Treasurer of N.B. v. Robinson, 49 D.L.R. 361.

A legacy is exonerated from the payment of the succession duty established by the Ontario Succession Duty Act, 9 Edw. VII., c. 12, when it is expressly declared by the will to be "free of legacy duty" and the payment of the duty required falls upon the residuary estate.

Re Gwynne, 5 D.L.R. 713, 3 O.W.N. 1428, 22 O.W.R. 405.

Philanthropic institution — Church — "Person."

A legacy to a church or philanthropic institution is one to a "person" (by virtue of the Interpretation Act), and where less than $2,000 is, by virtue of s. 5 (2) (b), c. 45, 1905 (Man.), exempt from payment of succession duty.

Re Estate of Robert Muir, [1917] 2 W.W.R. 801.

C. Persons, property, transfers and interests subject to tax.

(§ V C—190)—Persons, property, transfers and interests subject to tax.

A succession duty established by the Ontario Succession Duty Act, 9 Edw. VII., c. 12, is a tax which is to be borne by the legatee unless the will contains some provision casting the burden upon the residuary estate. Under subs. 2 of s. 6 of the Ontario Succession Duty Act, 9 Edw. VII., c. 12, providing that no duty shall be leviable on property devised or bequeathed for religious, charitable or educational purposes to be carried out in Ontario by a corporation or a person resident in Ontario, it is essential in order that a legacy to a corporation organized in England may be free from any duty that the charitable purpose of the legacy should be carried out in Ontario and it is not sufficient for this purpose that the money might without breach of trust be expended within Ontario.

Re Gwynne, 5 D.L.R. 713, 3 O.W.N. 1428, 22 O.W.R. 405.

Situs of shares.

Shares of stock of a bank have their situs for the purpose of succession duties in the place where the bank has located their share registry office, and not where the bank has its head office; the share register is the document which determines the locality of the shares.

Smith v. Provincial Treasurer of Nova Scotia, 47 D.L.R. 108, 58 Can. S.C.R. 570, affirming 35 D.L.R 458, 51 N.S.R. 490.

Mortgages—Situs.

Mortgages under the Alberta Land Titles Act, to a person resident out of Alberta, on land situated therein are property situate within Alberta, and upon the death of the mortgagee are subject to duty under the Succession Duty Act (Alta.). The administrator could not recover the debts or have the benefit of his securities without claiming the protection and assistance of the Alberta law, and the case is within the test laid down in Wallace v. Attorney-General, L.R. 1 Ch. 1, 9, that such duty must be considered to be imposed only on those who claim title by virtue of the law of the taxing State. [Walsh v. The Queen, [1894] A.C. 144; Henty v. The Queen, [1896] A.C. 567; Payne v. The King, [1902] A.C. 552, followed; Commissioner of

Stamps v. Hope, [1891] A.C. 476, distinguished.]

Toronto General Trusts Corp. v. The King, 46 D.L.R. 318, [1919] A.C. 679, [1919] 2 W.W.R. 354, affirming 39 D.L.R. 380, 56 Can. S.C.R. 26, [1917] 3 W.W.R. 633, which affirmed 32 D.L.R. 524, 11 A.L.R. 138, [1917] 1 W.W.R. 823.

(§ V C—191)—SPECIALTY DEBTS—AGREEMENT FOR SALE OF LAND.

Agreements for sale of lands in Saskatchewan, in the possession of a party domiciled in Manitoba at the time of his death, by which he was to remain the owner of said lands until they were fully paid for, are specialty debts, and as such constitute property and are liable to succession duty there. [Marryat v. Marryat, 28 Beav. 224; Isaacson v. Harwood, 3 Ch. App. 224, applied.]

Standard Trusts Co. v. Treasurer of Manitoba, 23 D.L.R. 811, 51 Can. S.C.R. 428, 9 W.W.R. 1226, affirming 18 D.L.R. 144, 24 Man. L.R. 310, 6 W.W.R. 995, 28 W.L.R. 358.

(§ V C—193)—PARTNER'S SHARE IN LAND—SITUS—DOMICILE.

Succession duty is payable under the British Columbia Succession Duty Act (R.S.B.C. 1911, c. 217, s. 5) on the share of a deceased partner in lands situate in the province although the head office of the firm and the domicile of the deceased partner were outside the province. [The King v. Lovitt, [1912] A.C. 212, followed.]

Boyd v. Att'y-Gen'l for British Columbia, 36 D.L.R. 266, 54 Can. S.C.R. 532, [1917] 2 W.W.R. 242.

PARTNER'S SHARE IN LAND—NONRESIDENT FIRM.

Under s. 5 of the Succession Duty Act, R.S.B.C. 1911, c. 217, succession duty is payable in respect of the share of a deceased partner in partnership lands situate within the province, though the head office of the partnership and the domicile of the deceased were situate elsewhere. [The King v. Lovitt, [1912] A.C. 212; Re Estate of Scott McDonald, 9 B.C.R. 174, followed.]

Re Succession Duty Act and Boyd, 28 D.L.R. 193, 34 W.L.R. 811, 23 B.C.R. 77. [Affirmed, 36 D.L.R. 266, 54 Can. S.C.R. 193, [1917] 2 W.W.R. 242.]

PROPERTY OUT OF PROVINCE.

The maxim mobilia sequuntur personam being clearly excluded in the Manitoba Succession Duties Act, R.S.M. 1913, c. 187, the movable property of a deceased domiciled Manitoba citizen locally situate out of the province at the time of his death is subject to taxation under the Act. A covenant in an agreement under seal for the sale of land, to pay the purchase money, creates a specialty debt and the document being in the Province of Manitoba and the money payable there, though the land is situate in another province is deemed to be property subject to taxation under the Succession Duties Act, R.S.M. 1913, c. 187. [Commissioner of Stamps v. Hope, [1891] A.C. 476; Treasurer v. Pattin, 22 O.L.R. 184, followed.]

Re Muir Estate, 18 D.L.R. 144, 24 Man. L.R. 310, 50 C.L.J. 626, 28 W.L.R. 358, 6 W.W.R. 995.

SITUS OF PROPERTY—BONDS AND SHARES IN FOREIGN COUNTRY—DOMICILE.

Notwithstanding the change in the Quebec succession duty law, made by the Succession Duty Act of 1906, by adding a statutory definition of the word "property" (art. 1191c), stocks, bonds, and debentures having their situs outside of the province were not subject to succession duty, although the decedent was domiciled in the province, the operative clause being expressly limited to property "in the province," and this limitation not being removed by the statutory definition of the term "property" by which it was to include "movables wherever situate of persons having their domicile in the Province of Quebec."

Cotton v. The King; The King v. Cotton, 15 D.L.R. 283, [1914] A.C. 176, 13 E.L.R. 371, 26 W.L.R. 207, 5 W.W.R. 662, reversing on this point, 1 D.L.R. 398, 45 Can. S.C.R. 469, 10 E.L.R. 461.

SUCCESSION DUTY ACT (QUE.)—STATUTORY LIMITATION TO PROPERTY "IN THE PROVINCE."

The Succession Duties Act (Que.) as it stood in 1902, is to be construed as expressly limited to property in the Province of Quebec, and therefore did not include bonds, debentures, and corporate shares which had their situs elsewhere although the deceased owner was domiciled in the Province of Quebec.

Cotton v. The King; The King v. Cotton, 15 D.L.R. 283, [1914] A.C. 176, 13 E.L.R. 371, 26 W.L.R. 207, 5 W.W.R. 662, affirming on this point, 1 D.L.R. 398, 45 Can. S.C.R. 469, 10 E.L.R. 461.

DEBENTURE STOCK—SITUS—MONEY IN BANK IN OTHER PROVINCE.

Debenture stock is not a specialty debt, and where such stock is of a city in another province from that in which the testator had his domicile, and can only be transferred at the office of the treasurer of that city, it is not subject to succession duty in the province where the testator had his domicile.

Money on deposit in a bank situate in another province from that in which the testator had his domicile at the time of his death, is not liable to succession duty in the province where the testator was domiciled at the time of his death.

Receiver-Gen'l of New Brunswick v. Rosborough, 24 D.L.R. 354, 48 N.B.R. 258.

MORTGAGES ON LAND OUT OF PROVINCE—SPECIALTY DEBTS—DOMICILE OF TESTATOR—SUCCESSION DUTY ACT, R.S.O. 1914, c. 24.

Re Fisher, 7 O.W.N. 754.

(§ V C—204)—Succession Duty Act (R. S.S. 1909, c. 38)—Who must bear.

Under the Succession Duty Act (R.S.S. 1909, c. 38), the tenant for years should pay the duty upon the appraised value of the term and the remainderman upon the appraised value of the contingent fee simple going to him. The succession duty—particularly on a contingent interest in real estate—is not a testamentary expense.

Re Galbraith Estate, 48 D.L.R. 42, 12 S. L.R. 359, [1919] 2 W.W.R. 930, affirming [1919] 2 W.W.R. 193.

D. Assessment and collection.

(§ V D—205) — Arrears — Adjudication of—Notice—Copy—Mailing.

An adjudication as to arrears of taxes and confirmation of tax sales under s. 316 of the Rural Municipalities Act (Alta. 1911-12, c. 3), which bears no date on its face, has no date such as the Act contemplates and is not a foundation for the subsequent proceedings prescribed by the Act to enable the municipality to become the registered owner. Section 316 (c) of the Act requiring a copy of the adjudication to be mailed . . . is not complied with by mailing a notice of such adjudication. [Bow Valley v. McLean, 26 D.L.R. 716, distinguished.]

Sutherland v. Spruce Grove, 43 D.L.R. 280, varying, [1918] 3 W.W.R. 152.

Time—Crown's lien.

The phrase "unless otherwise provided for" in s. 20 of the Succession Duty Act, c. 217, R.S.B.C. 1911, refers to the succeeding phrase "shall be due and payable at the death of the deceased;" it, therefore, deals with the time of payment, not with the method thereof, and the lien given the Crown by said section is not confined to the period previous to the issue of letters probate.

Re Crawford Estate, 25 B.C.R. 178, [1918] 1 W.W.R. 267.

Effect of settlement—Crown not party.

The question as to the validity of a residuary devise in a will coming on before the court on originating notice, all parties were ordered to be represented by counsel except the Crown. The point was not determined, a settlement approved by the court being entered into. Subsequently the Crown claimed succession duties, at 10 per cent, on the whole estate, under R.S.M. 1913, c. 187, s. 6. Held, that the approval of the settlement was not in any sense or to any extent a judicial determination of the question originally submitted to the court, that the Crown was not bound by it in any event and that the duty was payable at the rate of 10 per cent.

Re Smith Estate, 34 W.L.R. 834.

Value of corporate shares.

In fixing the value of shares of stock of a company forming part of the estate of a deceased person so as to fix the amount to be paid under the Succession Duties Ordinance (Alta.), the value must be considered from the standpoint of dividend-earning power, together with the value of the real estate owned by the company, and the better method of ascertaining the value of such real estate is on the supposition that the company had gone into liquidation and was realizing on its entire assets. In the absence of mistake the executors cannot have the valuation placed upon assets in their affidavit reduced. [Re Marshall, 20 O.L.R. 116, followed.]

Re Estate of W. H. Clark, 34 W.L.R. 404.

Unsubdivided property under cultivation taxable on a basis of $150 an acre —5 Geo. V., 109, s. 28.

The corporation of defendant had no right to tax the property of the plaintiff which was under cultivation and not subdivided, on a valuation exceeding $150 an acre, even though the land had a real value of $600 an acre. Reimbursement ordered.

Bonneville v. St. Michel, 25 Rev. de Jur. 501.

(§ V D—207)—Collection of—"Surtax" provisions — Defences — Regularity of procedure not in question.

The fact that a municipality is using the taxes collected under the "surtax" provisions of the Rural Municipality Act (R.S. S., c. 87) and amendments (see stats. 1912-13, c. 31, s. 4), for municipal purposes is no defence to an action for recovery of such taxes if the regularity of the procedure for the levy and assessment is not called in question. The ultimate use or destination of such taxes is a matter to be settled between the province and the municipality after the collection has been made by the municipality. The provisions of the Act respecting the assessment and levy of municipal taxes are applied to the surtax in the same manner and to the same extent as if the surtax were part of the general municipal levy, and for this purpose the surtax roll is to be deemed to be and to be taken as a part of the assessment and tax roll of the municipality.

Hudson's Bay Co. v. Bratt's Lake; Martin v. Snipe Lake, 48 D.L.R. 258, [1919] A.C. 1006, [1919] 3 W.W.R. 91, affirming 44 D.L.R. 445, [1919] 1 W.W.R. 242, and 44 D.L.R. 442, [1919] 1 W.W.R. 25, 12 S.L.R. 28 and 12 S.L.R. 46.

VI. Income tax.

(§ VI—220)—Petition to reduce—Domicile.

A petition presented to the County Court for a reduction of taxes on the ground that the petitioner is a nonresident of the county is a sufficient compliance with s. 77 of 3 Geo. V., c. 21, N.B., to give the judge jurisdiction if the facts stated in the petition exclude the possibility of the petitioner being a resident or domiciled in such county.

Re McLean; Ex parte Assessors of Rothesay, 43 D.L.R. 316, 46 N.B.R. 74.

JOURNEYMEN MECHANICS.

Men who, after learning their respective trades, are employed in a steel mill as rollers, roll-turners or mechanics, without having superintendence over or charge of an entire department and the direction of the work therein, or power to hire and discharge the men under them, are "journeymen mechanics" within the meaning of r. 11 of s. 15, of the Assessment Act, R.S.N.S. 1900, c. 73, taxing the income of such in the town wherein they reside and not in another town where they work, notwithstanding the fact that, unlike other employees, they do not work all of the time with their hands, but, in the capacity of journeymen mechanics spend a considerable portion of the time overseeing the work of other employees.

Trenton v. Fraser, 14 D.L.R. 608, 47 N.S. R. 433, 13 E.L.R. 454.

FEDERAL OFFICERS—JUDGES—RECOVERY OF MUNICIPAL TAXES.

Toronto v. Morson, 28 D.L.R. 188, 37 O. L.R. 369. [See also 11 O.W.N. 195.]

INTEREST ON WAR BONDS—ASSESSMENT.

Interest received by a company on war bonds purchased from the Dominion Government constitutes "income" for purposes of taxation under the Ontario Assessment Act (R.S.O. 1914, c. 195, ss. 2, 11). In ascertaining the assessable amount, discounts for payments in cash, carrying charges, or loss on resale of the bonds cannot be considered by way of set-off.

Re Massey-Harris Co. and Toronto, 48 D. L.R. 321, 45 O.L.R. 353.

FUNDS IN HANDS OF TRUSTEES—RESIDENCE.

In come in the hands of a group of trustees not collectively residing within Ontario, for a beneficiary to be determined in the future, the testator himself never having lived in the province, cannot be regarded as income "derived" by a person resident in Ontario, or income "received" by an agent, trustee, etc., for a nonresident, and is not liable to taxation under the Ontario Assessment Act (R.S.O. 1914, c. 195, ss. 5, 10-13).

Re Gibson and Hamilton, 48 D.L.R. 428, 45 O.L.R. 458.

THE CITY ACT—INCOME FROM STOCKS AND BONDS ASSIGNED TO BANK TO SECURE INDEBTEDNESS FOR ADVANCE IN CONNECTION WITH BUSINESS.

Under the City Act the income from stocks and bonds assigned by the owner to the bank to secure an indebtedness for advances in connection with his business (the income from which business is not subject to taxation because of payment of business tax) is subject to income tax without deducting the interest charges paid the bank on said advances.

Jones v. North Battleford, [1919] 2 W. W.R. 44.

ACTION TO RECOVER AMOUNT OF TAXES BASED ON ASSESSMENT—SWORN STATEMENT OF PERSON ASSESSED ON APPEAL TO COURT OF REVISION—"TOTAL ASSESSABLE INCOME"—EFFECT OF JUDGMENT OF COURT OF REVISION—EVIDENCE OF PERSON ASSESSED.

Windsor v. Curry, 17 O.W.N. 54.

TELEPHONE COMPANY — VILLAGE MUNICIPALITY—ASSESSMENT ACT, R.S.O. 1914, c. 195, s. 14 (1)—AMENDMENT BY 5 GEO. V. c. 36—INCOME DERIVED FROM OUTSIDE STATIONS.

Re Bell Telephone Co. and Lancaster, 13 O.W.N. 17.

TOWN CORPORATION—TELEPHONE COMPANY—ASSESSMENT ACT, R.S.O. 1914, c. 195, s. 14—5 GEO. V. c. 36, s. 1—GROSS RECEIPTS FROM EQUIPMENT IN TOWN—RECEIPTS FROM LONG DISTANCE LINES—CENTRAL EXCHANGE SITUATED IN TOWN.

Re Temiskaming Telephone Co., and Cobalt, 13 O.W.N. 148.

NONRESIDENT — ADOPTION OF ASSESSMENT ROLL OF PREVIOUS YEAR—ASSESSMENT ACT, R.S.O. 1914, c. 195, ss. 12, 56—COLLECTOR'S ROLL — S. 99 OF ACT—OMISSION OF PARTICULARS—NULLITY—INACCURACIES IN ROLL, OATH, AND CERTIFICATE.

Berlin v. Anderson, 7 O.W.N. 790.

LIABILITY TO MUNICIPAL INCOME ASSESSMENT—SALARIES OF COUNTY COURT JUDGES—BRITISH NORTH AMERICA ACT—AUTHORITY OF DECIDED CASES.

Re County Court Judge's Income Assessment, 5 O.W.N. 657.

MINING COMPANY—TAXABLE INCOME—SET-OFF FOR LOSSES.

Re B.C. Copper Co., 16 B.C.R. 184, 17 W.L.R. 505.

TELEGRAPHS.

I. FRANCHISES; CONSTRUCTION AND OPERATION.

II. LIABILITY AS TO TRANSMISSION OF MESSAGES GENERALLY.

I. Franchises; construction and operation.

Jurisdiction as to, see Railway Board.

(§ I—1)—UNDERGROUND WIRES—JURISDICTION OF BOARD.

The Board has no jurisdiction under the Railway Act to direct that telegraph wires be put under ground with a view to effecting an aesthetic betterment or street improvement. [G.T.P.R.Co. v. Fort William Land Owners, Fort William Land Invest. Co., [1912] A.C. 224, at p. 225, 13 Can. Ry. Cas. 187, followed].

Woodstock v. G.N.W.T. Co., 19 Can. Ry. Cas. 429.

WIRES ALONG HIGHWAYS—UNDERGROUND—JURISDICTION OF BOARD—RAILWAY ACT.

Under s. 247 (g) of the Railway Act 1906, the Board only has jurisdiction to direct that wires be placed underground

and to abrogate the right of a public utility company to carry its wires along highways on poles. The Board cannot order that poles and wires be moved from one street to another or that wires be placed in cables or upon a designated line of poles. Such a company, however, has at all times the right to remove its pole line from a street and an order from the Board to place its wires underground does not prevent it from exercising such right.

Chatham v. G.N.W. Telegraph and Bell Telephone Cos., 21 Can. Ry. Cas. 183.

TELEGRAPH WIRES—UNDERGROUND CONSTRUCTION—URBAN DEVELOPMENT.

Where urban development has reached such a stage that the city's wires and poles are being placed underground, the Board will order telegraph companies to adopt underground construction for their wires at their own expense, or where the work is done by the municipality, and ducts may be rented from it, then upon such terms or rental as may be agreed upon between the parties.

Montreal v. C.P.R. and G.N.W. Telegraph Cos., 24 Can. Ry. Cas. 226.

(§ 1—6)—TELEGRAPH TOLLS—UNREMUNERATIVE BUSINESS—UNJUST DISCRIMINATION.

The Board refused to order telegraph companies to provide special tolls for press service similar to tolls provided by another telegraph company under special agreement when it appeared that the objecting companies had not sought the press business or provided the necessary facilities for it and that it would be unremunerative. The Board held that an increase from 25 to 50 cents per 100 words in telegraph tolls for "press specials" in the Maritime provinces, while the former rate of 25 cents was continued in Ontario and Quebec was prima facie an unjust discrimination against the Maritime provinces and in the absence of evidence of special circumstances justifying the difference in rate ordered the former rate to be restored.

Canadian Press v. G.N.W., et al. Telegraph Cos., 14 Can. Ry. Cas. 151.

RATES—REASONABLENESS.

In determining what are reasonable tolls for telegraph messages in Canada, the tolls charged for similar services in the United States may be taken into consideration, but these comparisons are merely informative, not conclusive. [Canadian Oil Cos. v. G.T.R., C.P.R. and C.N.R. Cos., 12 Can. Ry. Cas. 355; Manitoba Dairymen's Assn. v. Dominion and Can. Northern Express Cos., 14 Can. Ry. Cas. 142, followed.] The value of a telegraph service, as evidenced by the extent to which it receives public patronage, is not a safe criterion of the reasonableness of the tolls charged for it, though the public may be willing to pay these tolls rather than be deprived of it.

Re Telegraph Tolls, 20 Can. Ry. Cas. 1.

DISCRIMINATION.

The continuance, under statutory obligation, of a twenty-five cent telegraph toll within Ontario, Quebec, Nova Scotia and New Brunswick, while higher tolls are charged in other zones, is no evidence of undue discrimination or undue preference; nor does the anomaly created, by these uniform low tolls within a very large zone, justify the Railway Board in establishing the same tolls, or equally large zones, elsewhere.

The ultimate test of discrimination is to be found, not in a difference of tolls, but in the question whether as a result of this difference injury is caused to an individual or a locality. [Michigan Sugar Co. v. C.W. & L.E.R. Co., 11 Can. Ry. Cas. 253, Wegenast v. G.T.R. Co. (Brampton Commutation Rates Case), 8 Can. Ry. Cas. 42, affirmed; Toronto and Brampton v. G.T.R. and C.P.R. Cos. (Brampton Commutation Rates Case, No. 2), 11 Can Ry. Cas. 370, followed.]

Re Telegraph Tolls 20 Can. Ry. Cas. 1.

TARIFFS.

In a general enquiry into the tariff of tolls of telegraph companies the Board took into consideration, the value of the plant employed, the cost of construction and equipment of the telegraph lines, the facilities afforded them by railway companies, the proportion of railway to commercial business over lines owned or operated by railway companies, the relations generally between telegraph companies and railway companies, the distances covered, the volume of business done in the past, the prospect of future business, the probability of increased competition, the cost of operation and the gross and net returns and promulgated an amended table of reasonable maximum tolls upon the zone system based on a transcontinental toll $1. Though distance is not so directly nor so largely a factor in the cost of telegraph service as of railway transportation, it is by no means entirely negligible; it should be considered in fixing zone areas and tolls should be based on distance to a greater extent than they have been in the past.

Re Telegraph Tolls 20 Can. Ry. Cas. 1.

The division of a through toll as between companies is primarily an inter-company matter and does not directly concern the public; provided the total toll is reasonable.

Re Telegraph Tolls, 20 Can. Ry. Cas. 1.

TELEGRAPH TOLLS—DEVELOPMENT STAGE OF BUSINESS.

The Board has recognized that while in general telegraph tolls must be looked at from the standpoint of a general scheme, yet where business is in a development stage the isolation of the telegraph line and the particular facts of the particular section should be considered. [Telegraph Tolls, 20 Can. Ry. Cas. 1, followed.]

The Pas v. G.N.W. Telegraph Co., 22 Can. Ry. Cas. 402.

II. Liability as to transmission of messages generally.

(§ II—50)—LIMITATION OF LIABILITY.

A telegraph company may validly stipulate in a contract for transmission of a message that it will not be liable in case of failure to transmit by fault of its employees for more than the price paid for its transmission unless the message is repeated at the expense of the sender. Such an agreement contains nothing unlawful nor contrary to public order.

Tanguay v. G.N.W. Telegraph Co., 51 Que. S.C. 261.

(§ II—51)—MISDELIVERY OF MESSAGE—LIMITATION OF LIABILITY — PUBLIC POLICY.

A telegraph company which receives a message from England addressed to a person in Quebec is bound to deliver it as soon as received, and if by error it delivers it to another person it is liable in damages for the loss suffered by the person to whom it was addressed. Such company cannot by a clause for immunity relieve itself from liability, the obligation of the company to deliver telegraph messages being based upon a public law for the interest of the public.

Dominion Fish Co. v. G.N.W. Telegraph Co., 47 Que. S.C. 225. [See 25 Que. K.B. 230.]

TELEPHONES.

(§ I—2)—COMPULSORY SERVICE.

Notwithstanding the Ontario Telephone Act, 1910, there is no jurisdiction in the Ontario Railway and Municipal Board to make an order directing "connection, intercommunication, joint operation, reciprocal use and transmission of business," involving the expenditure of money upon capital account, by the subscribers to a telephone system, constructed and installed under the provisions of the Ontario Local Municipal Telephone Act, 1908.

Brussels v. McKillop Telephone System; Blyth v. McKillop, 2 D.L.R. 843, 21 O.W.R. 628, 26 O.L.R. 29.

ASSOCIATION — ELECTRIC LINE — SALE—ACCESSORIES — UNDIVIDED OWNERS — ACTION—ALLEGATION—C.C. QUE. ARTS. 1499, 1830—C.C.P. ARTS. 113, 123.

The following writing, "the undersigned desiring telephone service with another, and with Lachute, agree to contribute equally toward the necessary expense, which is estimated not to exceed $675 in total. This is void, unless at least 13 subscribers are obtained, in which case the expense is estimated to be $50 each," does not create a Society between the subscribers, but makes them undivided owners of an electric line. One of those who signed the above writing, after having connected his house with an electric wire, in the network built by the association, sold his property and all its accessories. Held, that this transaction, and the right of the seller in the public electric line, being real rights and not personal, had been transferred with the property and belonged to the purchaser. An undivided joint proprietor has no right on the undivided part of his joint proprietor and can do nothing which will injuriously affect such undivided part, so that if, in the above case, certain members of the association had the electric wires of the purchaser cut, they are liable for damages. Although the plaintiff had called his action a negatory action, when it is not a question of servitude, he has a right to damages, if these allegations, his conclusions, and his proof justifies them.

Laurin v. Cleland, 25 Rev. Leg. 321.

(§ I—3)—DOMINION AND PROVINCIAL COMPANIES — JURISDICTION—DISCRETION—UNJUST DISCRIMINATION—COMPETITIVE AND NONCOMPETITIVE—DUPLICATION—7 AND 8 EDW. VII. C. 61, PART 1, S. 1 (b).

Under para. b. of the interpretation clause, s. 1 of 7 & 8 Edw. VII. c. 61, part 1, a provincial company cannot invoke the jurisdiction of the Board to prohibit, on the ground of unjust discrimination, a Dominion company from, in the exercise of its discretion, making an agreement with one noncompetitive provincial company, and refusing it to another, which is alleged to be similarly situated, in order to prevent competition, or more correctly speaking duplication in telephone service.

Port Hope Telephone Co. v. Bell Telephone Co., 20 D.L.R. 778. 17 Can. Ry. Cas., 343.

TOLLS—EQUALIZATION—BASE AREA—LOCAL—SERVICES RENDERED — PUBLIC TELEPHONES—COIN-BOX OR ATTENDED—UNJUST DISCRIMINATION.

It is unjust discrimination for a public utility company, whose tolls should be equalized according to the services rendered, to charge double the toll at the attended station for local calls compared with the toll at the coin-box booth, both being public telephones. The Board ordered the respondent to equalize its tolls for local calls by fixing a toll for local messages on a "two-number basis" from public telephones inside the base toll area at five cents, and outside thereof at ten cents.

Lemieux v. Bell Telephone Co., 23 Can. Ry. Cas. 141.

UNJUST DISCRIMINATION — FREE MILEAGE ZONES—EXCESS MILEAGE.

There is no necessary connection between free exchange limits and civic limits; when untrammelled by arrangements already made by the company, it is a question of distance and of particular facts; and where the company had extended its flat toll applicable within the city, to certain territory outside, it was in the absence of circumstances to justify the discrimination ordered to extend the same toll to all territory within an equal distance from its main exchange. The existence of excess mileage does not

in itself constitute unjust discrimination, but where the conditions of telephone transmission up to the limit of the free area of an exchange are the same, it is unjust discrimination to treat the man living beyond this area and within the exchange territory in a different manner from the man living inside this area; that is to say, he should have the same free mileage allowed, and excess mileage should be charged only on the portion of the subscriber's line located beyond the boundary of the free mileage zone. [Winnipeg Jobbers & Shipper's Assn. v. C.P.R., C.N.R. and G.T.P.R. Cos., 8 Can. Ry. Cas. 175, at p. 182, followed.]

Montreal v. Bell Telephone Co. (Montreal Telephone Tolls Case), 15 Can. Ry. Cas. 118.

(§ I—4)—TOLLS—HOUSE OF A RELIGIOUS COMMUNITY—BUSINESS TOLL.

A telephone in the house of a religious community is properly charged the business toll. [Newman v. Bell Telephone Co., 17 Can. Ry. Cas. 271, followed.]

Notre Dame des Anges v. Bell Telephone Co., 20 D.L.R. 297, 17 Can. Ry. Cas. 277.

CONTRACTS — KNOWLEDGE OF CONDITION—CANCELLATION—LIQUIDATED DAMAGES.

The signer of a telephone contract is presumed to know all the conditions appearing therein, and is bound by a stipulation that in case of cancellation of the contract through the default of the subscriber the balance due for the unexpired term shall become payable as liquidated damages.

Bell Telephone Co. v. Zarbatany, 31 D. L.R. 641.

BUSINESS OR RESIDENCE TOLL—CLERGYMAN.

Under the provisions of s. 315 of the Railway Act, 1906, a clergyman is entitled to be charged the residence toll and not the business toll for the use of the telephone installed in his residence.

Desroches v. Bell Telephone Co., 26 D.L.R. 708, 18 Can. Ry. Cas. 322.

PRIVATE BRANCH EXCHANGE—RESIDENTIAL LINES—CONTRACT — TOLL—LISTING—SEPARATE.

Where the telephone service in connection with which publication by listing in the telephone directory is asked is not of the private branch exchange line, but of the separate residential ones, and entirely distinct from the contract covering the private branch exchange service, the service asked for is a distinct one, and is subject to the separate listing toll.

Irish v. Bell Telephone Co., 23 Can. Ry. Cas. 19.

TOLLS—MAXIMUM — FIXING—RESIDENCE—BUSINESS — SEMI-PUBLIC—INSTALLATION—SERVICE—AGREEMENT.

An agreement between a municipality and a telephone company fixing the maximum tolls to be charged for a residence or business telephone does not prevent the telephone company, subject to the provisions of the Railway Act, from filing its tariff of tolls with the Board covering the tolls to be charged for other forms of telephone service, such as semi public, and giving such service to the public.

Mace v. Bell Telephone Co., 23 Can. Ry. Cas. 137.

INCREASE IN RATES—REFUSAL TO PAY—REMOVAL OF PHONE—NOTICE—MUNICIPLE POWERS—NATURE OF RENTAL—BAILMENT—DURATION OF CONTRACT.

Edwards v. Edmonton, 25 D.L.R. 825, 8 W.W.R. 441.

LONG DISTANCE TOLLS—AGREEMENT.

Under an agreement between telephone systems imposing "another line" charge in addition to the long distance tolls of the Bell Co., "each party to receive its own charge and the party whose line the call originated shall collect and be responsible for such charge, provided, however, that the Bell Co. shall not be obliged to collect and be responsible for the Proprietor's charge if the Proprietor fails to collect a like charge on messages originating on the Proprietor's system." The obligation in respect of the "other line" charge is mutual, that is to say, if the Bell Co. is asked to collect the charge of the applicant company in respect of the message originating on the Bell Co's. line, the applicant company must similarly collect in respect of a message originating on its own line, and this obligation attaches to all calls.

Ernesttown Rural Telephone Co. v. Bell Telephone Co., 18 Can. Ry. Cas. 325.

TOLLS—BASE — INCREASE—PRIMARY TOLL AREA—PARTY LINE SERVICE — EXCESS MILEAGE—JUSTIFICATION—FREE MILEAGE ZONE—BUSINESS AND RESIDENTIAL.

Where it has been the custom to allow party line subscribers, so situated that they must pay excess mileage tolls, a reduction of one-fifth on the base toll, a discontinuance of this reduction is not justified on the ground that a change of tolls in the primary toll area ordered by the Board rendered obsolete party line service within that area. An order of the Board extending the primary toll area is not sufficient justification for an increase in mileage tolls to subscribers situated beyond that area. [Montreal v. Bell Telephone Co. (Montreal Telephone, Tolls Case), 15 Can. Ry. Cas. 118, followed.]

A telephone in the residence of a market gardener and fruit raiser, who has no office telephone, is properly charged the business toll irrespective of the amount of user. [Bayly v. Bell Telephone Co., 11 Can. Ry. Cas. 190, followed.]

Newman v. Bell Telephone Co., 17 Can. Ry. Cas. 271.

TOLLS—BUSINESS — SPECIAL—JUSTIFICATION—CONTRACTS—EXISTING.

A telephone company is justified in charging a business toll for a telephone used by a doctor at his residence. The Board approved the discontinuance of a special toll intermediate between the residence and business toll subject to the completion of

existing contracts. [Bayly v. Bell Telephone Co., 11 Can. Ry. Cas. 190 followed.] Medico-Chirurgical Society v. Bell Telephone Co., 16 Can. Ry. Cas. 267.

JURISDICTION OF BOARD—SERVICE—DIFFERENT EXCHANGES.

Under 7 & 8 Edw. VII. c. 61 s. 5, the board has no jurisdiction to deal with the rearrangement of the respondent's telephone service between different exchanges, the matter being one of internal management of its own business.

Tinkess v. Bell Telephone Co., 20 Can. Ry. Cas. 249.

SWITCHING—SUBSCRIBERS.

The Board is not given any power under 7 & 8 Edw. VII. c. 61, to direct that local telephone service shall be given to an applicant who is not a subscriber of a company subject to its jurisdiction and therefore has no jurisdiction over the switching connected therewith.

Bell Telephone Co. v. Falkirk Telephone Co., 20 Can. Ry. Cas. 256.

PROPER BASIS FOR FIXING TOLLS — IDLE PLANT—CONTRIBUTION OF TERRITORY AFFECTED TO COMPANY'S REVENUE.

Preparation for future needs and readiness to serve are requisites of proper management of a public utility corporation, and it is proper to consider these elements in fixing tolls, when determining whether the value of idle plant shall be included in the amount on which fair return should be allowed.

A company being in an admittedly satisfactory position financially must in order to justify an increase of tolls in specified territory, shew that the exchanges operating in the territory affected had not contributed their proper proportion to the general revenues and reserves of the company, and failing such proof application for leave to increase was refused.

Montreal v. Bell Telephone Co., 15 Can. Ry. Cas. 118.

TOLLS—REASONABLENESS—ONUS ON PARTY ATTACKING.

The burden being on the party attacking the existing toll to make out an affirmative case, an attack upon the reasonableness per se of existing tolls failed where it appeared that the return earned under them was apparently about 8.28 % on the book value of the plant.

Montreal v. Bell Telephone Co., 15 Can. Ry. Cas. 118.

PROPER BASIS—DEPRECIATION—LONG DISTANCE REVENUE.

With regard to depreciation, the percentage or composite life basis as compared with the setting aside of an arbitrary annual amount per instrument has both the sanction of business experience and the approval of regulative tribunals, and either the straight line or the sinking fund method may be used.

It is unfair in fixing tolls to attribute to the city territory as revenue the total long distance business of the company originated and terminated in the city regardless of such additional costs.

Montreal v. Bell Telephone 15 Can. Ry. Cas. 118.

(§ I—5)—INSTALLATION BY REASON OF ORDER OF RAILWAY COMMISSIONERS.

Where a grade separation has been ordered and a city street is lowered in the public interest, so as to go under the railway line by subway, a telephone company having overhead wires on the street is not entitled to compensation from the railway for the expense of moving and relocating the telephone line.

Bell Telephone Co. v. C.P.R. Co. and G. T.R. Co., 5 D.L.R. 297, 14 Can. Ry. Cas. 14.

(§ I—7)—GOVERNMENT REGULATIONS.

The construction and installation of a telephone system under the provisions of the Ontario "Local Municipal Telephone Act, 1908" by an association of individual subscribers, even when operated under a certain name, does not constitute them a corporate body or legal entity, and their telephone system and equipment used in connection therewith become vested in the municipality in trust for the benefit of the subscribers. While the Ontario Railway and Municipal Board may "review, rescind, change, alter or vary any rule, regulation, order or decision" made by it, it should not make an order having the effect of interfering with an agreement entered into between two telephone systems or companies to which the approval of the board had already been given, except on a properly framed application for the purpose, and upon due notice to the parties interested to appear and state their objections; the board has no power or jurisdiction to alter or vary such approved agreement except upon an application of which due notice has been given to the interested parties.

Brussels v. McKillop Telephone System; Blyth v. McKillop, 2 D.L.R. 843, 21 O.W.R. 628, 26 O.L.R. 29.

TOLLS—LONG DISTANCE CONNECTION—COMPENSATION—RAILWAY ACT, 7 & 8 EDW. VII. c. 61, s. 4 (5).

The Board, under 7 & 8 Edw. VII. c. 61, s. 4 (5), fixed the terms of compensation upon which an independent local telephone company should have leave to establish a connection with the respondent for long distance service as follows: An annual charge for (1) companies having not exceeding 250 subscribers, $100; (2) companies having exceeding 250 subscribers and not exceeding 600 subscribers, $200; (3) companies having exceeding 600 subscribers, $300; and a special charge of 10 cents each way in addition to the long distance charge of the respondent, of which charge the latter shall receive 7 cents and the applicant 3 cents.

Independent Telephone Co. v. Bell Telephone Co., 17 Can. Ry. Cas. 266.

SERVICE — EVIDENCE — CIRCUMSTANCES AND CONDITIONS—NEW EXCHANGE—VOLUME OF BUSINESS—JUSTIFICATION.

Where it appeared that certain changes with regard to the territory in question had taken place since the previous hearing, including an increase in population from 6,300 to 7,500, an increase in the number of telephones from 273 to 439, the establishment of special deliveries by the post-office and an increase in the number of places of business, the Board found that the evidence was not sufficient to warrant it in coming to any other conclusion than that previously reached that to be entitled to the city toll, the circumstances and conditions of the telephone business in the territory in question should be such as to warrant the establishment of a new exchange, and that the telephone business in the territory in question was not yet sufficiently large to warrant the Board in ordering this to be done. [Toronto v. Bell Telephone Co. (North Toronto Telephone Tolls Case), 15 Can. Ry. Cas. 142, re-heard and affirmed.]

Toronto v. Bell Telephone Co., 17 Can. Ry. Cas. 263.

EQUIPMENT — JURISDICTION OF RAILWAY BOARD.

It is not the function of the Board to order that specified apparatus should be continued or discontinued unless the efficiency of the service is involved.

Montreal v. Bell Telephone Co., 15 Can. Ry. Cas. 118.

FRANCHISE FROM TOWN—REFUSAL TO SUPPLY SERVICE AS AGREED—FORFEITURE—ACTION BY MUNICIPALITY—INDIVIDUAL RIGHTS OF INHABITANTS.

Red Deer v. Western General Electric Co., 3 A.L.R. 145, 14 W.L.R. 657.

JURISDICTION—LINES ON HIGHWAYS—CONDITIONS — COMPENSATION — RAILWAY ACT, SS. 247, 248.

The Board has no jurisdiction under ss. 247, 248 of the Railway Act, 1906, to make the payment of rent as compensation, a term of an order approving the location and construction of telephone lines upon, along, across or under a public highway, or to impose any condition, for which a municipality may contend in bargaining with a telephone company, a term or condition of such order. [Windsor v. Bell Telephone Co., 22 Can. Ry. Cas. 416; Bell Telephone Co. v. Ottawa and Carleton, 22 Can. Ry. Cas. 421, followed.]

Bell Telephone Co. v. London, 24 Can. Ry. Cas. 102.

JURISDICTION—STATIONS—RAILWAY ACT.

The Board has no jurisdiction under s. 245 of the Railway Act, 1906, to compel a railway company to continue the maintenance of telephonic connection and communication between its stations and the telephone system already installed, of the applicants. The Board has no jurisdiction under ss. 284, 317 to prevent the removal (at the instance of the municipalities within whose limits railway stations are situate) of telephones installed at such stations. The "facilities clause," s. 284, refers to physical transportation and physical accommodation on the railway. Telephonic communication with a railway station to be acquainted with the movement of the passenger or freight trains is not a facility which railway companies are required to furnish to the public under s. 284.

Province of Manitoba v. C.P.R. Co., 21 Can. Ry. Cas. 445.

TOLLS — CONNECTIONS — LONG DISTANCE — —LOCAL.

The Board has jurisdiction to order connection and fix tolls for long distance business but it has none in the case of connection for local business. [Bell Telephone Co. v. Falkirk Telephone Co., 20 Can. Ry. Cas. 256, followed.] In the case connecting telephone companies it is the duty of both companies to collect the full amount for long distance tolls, and the company should not absorb its share of the through long distance toll. [Ernesttown Rural Telephone Co. v. Bell Telephone Co., 18 Can. Ry. Cas. 325, followed.]

Joliette Telephone Co. v. Bell Telephone Co., 21 Can. Ry. Cas. 443.

CONDITIONS — COMPENSATION — RAILWAY ACT.

The Board is given no jurisdiction under sec. 47 of the Railway Act, 1906, to make the payment of compensation a term of an order approving the location and construction of a telephone line upon a public highway or to impose any condition for which a municipality may contend in bargaining with a telephone company as a term or condition of such order. G.T.P. Ry. Co. v. Fort William Landowners and Fort William Land Investment Co., et al., [1912] A.C. 224, at p. 229, 13 Can. Ry. Cas. 187, followed.] It is not the function of the Board to decide upon the validity of Dominion or provincial legislation. Under its charter, 43 Vict., c. 47, s. 3, and the interpretation clause of the Railway Act, s. 2 (11), the Bell Telephone Co. has power to carry its lines along a bridge on which there is a public right of travelling. [Auger and D'Auteuil Lumber Co. v. G.T.R. and C.P.R. Cos., 19 Can. Ry. Cas. 401, followed.]

Bell Telephone Co. v. Ottawa and Carleton, 22 Can. Ry. Cas. 421.

JURISDICTION.

In approving the route on a highway of the Bell Telephone Co. the jurisdiction of the Board is confined to fixing such terms, condition or limitations as refer to the lines, wires or poles within the municipality. The Board has no jurisdiction to require, as a condition, the payment of any money or the granting of free telephones to the municipality.

Windsor v. Bell Telephone Co., 22 Can. Ry. Cas. 416.

JURISDICTION OF RAILWAY BOARD—SERVICE.

2 & 3 Edw. VII., c. 41, s. 2, limits the Board's jurisdiction to direct the installa-

tion of a telephone service but gives the Board no power in regard to facilities such as it has in the case of railway companies. [Tinkess v. Bell Telephone Co., 20 Can. Ry. Cas. 249, followed.]

North Lancaster Exchange v. Bell Tel. Co., 21 Can. Ry. Cas. 220.

RIGHT OF TELEPHONE COMPANY TO PLACE POLES ON BRIDGE—ABSENCE OF ACTUAL DAMAGE—BOARD OF RAILWAY COMMISSIONERS.

Haldimand v. Bell Telephone Co., 19 O.W.R. 335, 2 O.W.N. 1154.

RURAL, PROVINCIAL AND DOMINION TELEPHONE COMPANIES—LONG DISTANCE CONNECTION—TERMS AND CONDITIONS.

Rural Telephone Cos. v. Bell Telephone Co., 12 Can. Ry. Cas. 319.

INTERCHANGE EQUIPMENT.

Byron Telephone Co. v. Bell Telephone Co., 11 Can. Ry. Cas. 433.

EXCLUSIVE CONTRACT—APPROVAL—PUBLIC INTEREST.

People's Telephone Co. v. Bell and Canadian Telephone Co's., 12 Can. Ry. Cas. 19.

TEMPERANCE ACT.

See Intoxicating Liquors.

TENANTS.

See Landlord and Tenant.

Annotation.

Law of obligation of tenants to repair: 52 D.L.R. 1.

TENANTS IN COMMON.

See Cotenancy.

TENDER.

Sufficiency of plea of tender, see Pleading, III D-328.

Annotation.

Requisites and sufficiency of tender: 1 D.L.R. 666.

(§ I—1)—TO WHOM MADE.

When a tender has to be deposited into court it is immaterial that such deposit be made at the time of the issue of the writ or at the time of the return thereof into court, as no prejudice results therefrom to the defendant.

Malo v. Roy, 3 D.L.R. 431, 18 Rev. de Jur. 462.

(§ I—2)—SUFFICIENCY OF, GENERALLY.

Where the buyer, by letter, advises the seller of his refusal to accept merchandise bought, informing him, at the same time, that, unless the vendor sends shipping instructions, the car will be forwarded to him, and the vendor replies "we positively will refuse delivery if you should decided to return them," the buyer is not obliged to cart the goods to the railway station to make a formal tender; it is sufficient if, in his plea, he renews his declaration that the goods are at the vendor's disposal.

Lachute Shuttle Co. v. Frothingham, 8 D.L.R. 417, 22 Que. K.B. 1.

Where a lease, not under seal, contains a clause giving to the lessee an option to purchase the premises for a certain sum of which part is to be paid in cash, and the remainder secured by mortgage, and a letter is written within the time prescribed, notifying the lessor of the exercise of the option by the lessee, but no tender is made of the cash payment, an action for specific performance will fail, because of the absence of any tender, and the plaintiff cannot reply upon a tender made on the day following the issue of the writ.

Miller v. Allen, 7 D.L.R. 438, 4 O.W.N. 346.

Payment into court by a mutual life insurance association of the amount claimed to be due on a certificate of membership, is insufficient as a tender if the costs of the action already begun for recovery of the amount were not offered therewith.

Cousins v. Moore, 6 D.L.R. 35, 42 Que. S.C. 156.

Where a purchaser under an agreement of sale of lands refused to comply with an express provision for payment of a substantial down payment on the purchase price of lands of speculative value of which he does not receive possession, and after a long interval without taking any action until the property had greatly increased in value offers such down payment to the vendor, the latter will not be compelled to accept the same for the reason that it would, in effect, be constituting a fresh contract.

Cushing v. Knight, 6 D.L.R. 820, 46 Can. S.C.R. 555, 2 W.W.R. 704.

SUFFICIENCY — CONDITIONS — PLEADING — REPLEVIN.

A tender is not necessarily conditional because the lien note of which the amount is due is asked in return, if its return is not made a condition precedent to the receiving of the sum; an offer of a sum exceeding the amount actually due on a lien note, which is refused because other items in the nature of expenses are also claimed, constitutes a sufficient tender, and may be successfully set up in an action for the replevy of animals seized under the lien note. [Richardson v. Jackson, 8 M. & W. 297; Norway v. Ashburner, 3 Moore (N.S.) 245, followed.]

Hart v. Brown, 27 D.L.R. 450, 9 S.L.R. 201, 34 W.L.R. 225, 10 W.W.R. 244.

COUPLING WITH CONDITION, EFFECT OF.

A tender of an overdue instalment on the purchase-price of land under the "crop payment" plan is vitiated if coupled with an unreasonable condition.

Dornian v. Crapper, 17 D.L.R. 121, 6 W.W.R. 551, 27 W.L.R. 599, 7 S.L.R. 229.

SUFFICIENCY—TIME OF MAKING.

Payment on the day after the expiration of a tenancy is a sufficient compliance with an option contained in a lease giving the tenant the privilege of purchasing demised

premises by making payment at the end of his term.

Ontario Asphalt Block Co. v. Montreuil, 12 D.L.R. 223, 24 O.W.R. 838, 29 O.L.R. 534. [Varied in 15 D.L.R. 703, 5 O.W.N. 289.]

PAYMENT INTO COURT.

A defendant sued in a civil matter in a magistrate's court in Nova Scotia cannot effectually pay a lesser sum to the magistrate as a payment into court under R.S.N.S. 1900, c. 160, to answer the plaintiff's demand, and thereby avoid payment of further costs of suit if his contention as to the amount is sustained, unless he has first made a tender of the amount to the plaintiff and proves the tender at the trial.

White v. McDougall, 14 D.L.R. 718, 13 E.L.R. 465, 47 N.S.R. 423.

INSURANCE—TENDER OF PREMIUM—NOTICE —REGISTERED LETTER.

Notice of cancellation of a policy of insurance may be given by registered letter addressed to the insured as required by condition 15 of the Ontario Insurance Act (R.S.O. 1914, c. 183, s. 4) and a sufficient tender to comply with condition 11 is made if the money for the unearned premium is enclosed with the notice so properly addressed and registered. The notice, however, is effective only from the time it is actually received by the insured.

London & Lancashire Fire Ins. Co. v. Veltre, 42 D.L.R. 79, 56 Can. S.C.R. 588, affirming 39 D.L.R. 221, 40 O.L.R. 619.

PLAINTIFF BY CONDUCT DISPENSING WITH NECESSITY OF FORMAL TENDER.

To constitute a legal tender, actual production of the money is necessary unless the tenderee expressly or by implication dispenses with it. If defendant goes to plaintiff with money sufficient for, and with the purpose of, making to plaintiff, and so informs plaintiff, who tells defendant he will not take it, this relieves defendant of the necessity of a formal tender.

Choma v. Chunelik, [1919] 1 W.W.R. 948.

(§ I—4)—NECESSITY OF KEEPING GOOD.

Where the plaintiff sued for unliquidated damages, and defendants pleaded tender before action, and paid into court a sum of money which the plaintiff accepted and obtained payment out upon an ex parte order it was held, that the tender was of no value inasmuch as it was accompanied by a statement that it was to be accepted in full satisfaction, and that the defence of tender was improper, and, further, that the plaintiff's conduct having been oppressive throughout the transaction, and having made an unfounded charge of fraud, he should be deprived of his costs.

Wainwright v. Farmer, 16 B.C.R. 468, 17 W.L.R. 670.

(§ I—6)—EFFECT.

Where a vendor of land gives notice of cancellation of the agreement of sale on the ground of default in payment of an instalment of the purchase price, and the purchaser subsequently tenders the arrears, the vendor does not, by offering to reinstate the agreement upon an addition being made to the purchase price, treat the agreement as being still on foot, so as to entitle the purchaser to specific performance upon payment of the arrears.

Chadwick v. Stuckey, 6 D.L.R. 250, 5 A.L.R. 145, 21 W.L.R. 788, 2 W.W.R. 671.

The tender, at an election of company directors, of a cheque of arrears in payment of a call, does not remove the disqualification imposed by s. 12, c. 53, 52 Vict. (Man.) on a shareholder, so as to permit him to vote at such election.

Colonial Ass'ce Co. v. Smith, 4 D.L.R. 814, 21 W.L.R. 815, 22 Man. L.R. 441, 2 W.W.R. 699.

(§ I—7)—RELIEF FROM MAKING.

The payment or tender of the amount agreed to be paid down on a lease is dispensed with where the lessor informed the lessee that he did not intend to carry out the contract.

Dulmage v. Lepard, 3 D.L.R. 542, 3 O.W.N. 986.

A declaration of the vendor upon inquiry by the vendee in a contract for the sale of land, as to the amount remaining unpaid thereon, that the agreement had been cancelled and terminated for nonpayment, relieves the vendee of the necessity of making a valid tender of the amount due before commencing suit for specific performance of the contract, or a return of the money paid thereon.

Brown v. Roberts, 2 D.L.R. 523, 17 B.C.R. 16, 1 W.W.R. 987.

(§ I—12)—CHEQUE ON BANK.

To constitute a valid tender of money there must, in the absence of some act or condition which amounts to a waiver, be something more than a mere readiness and willingness to pay even though expressed; there must be an actual production of the money and not merely of a cheque therefor.

Archdekin v. McDonald, 1 D.L.R. 664, 20 W.L.R. 595, 1 W.W.R. 1014.

A tender by means of an accepted cheque is not illegal and cannot be attacked subsequently as illegal when no objection to the form of such tender was made at the time, the tender having been declined on totally different grounds (e.g., the expiry of delays).

Malo v. Roy, 3 D.L.R. 431, 18 Rev. de Jur. 462.

BY CHEQUE—PAYMENT INTO COURT.

A cheque, though not legal tender, is a sufficient tender of payment for goods sold if not objected to on that account; upon a claim for the delivery of the goods, the amount tendered need not be paid into court or be so pleaded.

Wexelman v. Dale, 35 D.L.R. 557, 10 S.L.R. 289, [1917] 3 W.W.R. 235.

NOTICE—OFFER TO REDEEM—EVIDENCE.

B.C. Land & Investment Agency v. Ishitaka, 45 Can. S.C.R. 302.

TESTAMENTARY CAPACITY.

See Wills.

THEATRES.

LIABILITY—TRAINED WILD ANIMAL KEPT FOR EXHIBITION.

The managers of a theatre are not liable for injuries resulting from the bite of a trained monkey owned by one of the performers, over whom the management had no control except while he was in the theatre, where the injuries were sustained while the animal was insecurely chained in a yard of adjoining premises of another person, although the yard was occasionally used by people engaged at the theatre without any direct sanction of the theatre managers or objection by the person who owned the yard, and even though the theatre managers had knowledge that the animal had been tied in the yard on the day preceding the accident.

Connor v. Princess Theatre, 10 D.L.R. 143, 27 O.L.R. 466.

THEATRE ACT—CLEAR AISLES AND PASSAGEWAYS—CONVICTION.

Clause 39 of the regulations made under the Theatres Act (Alta.) requiring free and unobstructed passageways and forbidding that the public be allowed to stand in any aisle or approach thereto or at any place where it would hinder the entrance or egress of the public from the theatre, is not intended to prevent persons who have bought tickets at a moving picture theatre holding a continuous performance from standing in the lobby between the box-office and the auditorium entrance while waiting for seating space in the theatre, if there is a separated space kept clear for exit from the theatre. Clause 39 is ineffective to support a conviction thereunder because it fails to state who shall be responsible that its terms shall be observed and whether the owner, the occupant, or other person connected with a moving picture theatre, shall be responsible for seeing that the halls and passageways are kept unobstructed.

R. v. Hazza, 28 D.L.R. 373, 25 Can. Cr. Cas. 306, 34 W.L.R. 97, 10 W.W.R. 117.

PROSECUTION FOR OPERATING WITHOUT MOVING PICTURE LICENSE.

The intention of 3 Geo. V. (Que.) c. 36 (R.S.Q. 1301d), is to impose a provincial license fee on moving picture halls but not on theatres proper, and where the place in question has the appointments of a theatre and holds a municipal license as such, and at each public performance a number of performers or actors appear, it is not subject to the provincial tax merely by reason of the display of moving pictures to make up nearly half of each performance.

Boisseau v. People's Amusement Co., Boisseau v. Scala Amusement Co., 22 Can. Cr. Cas. 31.

THEATRES AND CINEMATOGRAPHS ACT—REGULATIONS AS TO PLACING ADVERTISING MATTER IN FRONT OF A THEATRE—"IN THE NATURE OF POSTERS"—CONVICTION FOR BREACH OF REGULATION—CONSTRUCTION OF REGULATION.

R. v. Minhinnick, 13 O.W.N. 440.

UNLAWFUL EXHIBITION—MENS REA.

An accused person may be convicted of having allowed an object to be exhibited, although in fact he did not know that it was being exhibited, if he might have suspected, on account of exhibitions there in the past, that something indecent might be exhibited and if acting as a mandatory of the managers of the exhibition, and having such reason for suspicion, he did not take any advance precaution against what might happen.

R. v. Morisset, 26 Que. K.B. 481.

MOTION PICTURE—"KNOWINGLY" ADMITTING CHILDREN UNDER 15 YEARS—UNACCOMPANIED BY ADULT—DECEPTION OF MAN IN TICKET BOX—1 GEO. V. c. 73, s. 10 (ONT.).

R. v. Bruce Paton, 20 O.W.R. 533.

THEFT.

Of motor car, see Automobiles, III C-31.

Summary conviction for petit theft, see Appeal, I A-1.

A railway conductor who does not account to the railway company for a cash fare he received from a passenger, and who denies the receipt thereof, may, under such facts, be convicted of theft under s. 355 Cr. Code where he omitted to issue a duplex ticket or to account for the money in the usual course.

R. v. Martin, 4 D.L.R. 650, 19 Can. Cr. Cas. 376, 4 A.L.R. 329, 21 W.L.R. 658, 2 W.W.R. 602.

ESSENTIAL OF OWNERSHIP—DESCRIPTION OF PERSON.

Upon a charge of larceny it is essential to prove ownership in some person other than the accused, and that person if unknown by name must be individualized by circumstantial description.

R. v. Jennings, 29 D.L.R. 604, 26 Can. Cr. Cas. 270, 11 A.L.R. 290, 34 W.L.R. 1058, 10 W.W.R. 1049.

Where an indictment for theft charges the defendant with stealing a cow the property of a person definitely named therein, a ruling by the Trial Judge that the question of ownership of the cow is immaterial to the crime, is erroneous, and a conviction based upon such ruling will be quashed.

R. v. Carswell, 29 D.L.R. 589, 26 Can. Cr. Cas. 288, 10 A.L.R. 76, 34 W.L.R. 1042, 10 W.W.R. 1027.

MORTGAGE—DEATH OF MORTGAGOR—SALE OF CROPS BY WIDOW.

A widow who continues to live on land owned and mortgaged by her husband be-

fore his death, where letters of administration have not been applied for or granted, is a trespasser; her position is not affected by the Devolution of Estates Act, and crops grown by her on the said land do not belong to the estate of the deceased and are not distrainable under either the attornment or the license clause of the mortgage.

The King v. Tschetter, 39 D.L.R. 688, 11 S.L.R. 116, 29 Can. Cr. Cas. 179, [1918] 1 W.W.R. 934.

WHAT SUBJECT OF.

One who induced a servant to steal for him a barrel of whisky owned by his master is guilty of an attempt to steal, where the servant, who informed his master of the plan, delivered a barrel of water instead of whisky to the defendant, as the master directed him to do. Where the defendant, with intent to steal a barrel of whisky, induced the servant of the owner to consent to bring it to him, there cannot be a conviction for the theft of a barrel of liquid, where the master, upon being informed by his servant of such plan, directed the latter to deliver to the defendant a barrel of water instead, which was done, as the owner of the whisky deliberately substituted a different article for that which the defendant intended to steal.

R. v. Montgomery, 19 Can. Cr. Cas. 233.

WHAT SUBJECT OF—WATER FROM WATER WORKS—FRAUDULENT TAKING.

Water conveyed in pipes may be the subject of larceny at common law, and where it was deliberately taken from the pipes through which an adjoining property owner got his water supply from the city municipality at a flat rate, after the refusal of permission from such owner and without any permisson from the city, the person wrongfully appropriating the water is properly convicted on a charge alleging the theft thereof from the city. [Ferens v. O'Brien, 11 Q.B.D. 21, 52 L.J.M.C. 70, and R. v. White, 1 Dears. C.C. 203, 22 L.J.M.C. 123, applied.]

R. v. Hutton, 24 Can. Cr. Cas. 212, 19 W.L.R. 907.

OF GROWING TREES OR SHRUBS—PROCEDURE—PROOF OF DAMAGE.

Where it is sought to make a summary conviction under Cr. Code, s. 374, for stealing growing trees or shrubs of less value than $25, the value should appear in the information, it being essential to the jurisdiction of the justice that the amount of the damage be at least 25 cents; the inclusion, as part of the penalty, of the sum of one dollar for the damage or injury done does not establish the justice's jurisdiction to make a conviction where no value was proved before him; nor could the conviction be supported as for the indictable offence of theft under $10 triable under Cr. Code, s. 773, by a magistrate having summary trials jurisdiction under s. 771, as there was no proof that the value of the property stolen did not exceed $10 nor did the record shew that the accused, who had pleaded "not guilty," was put to his election of mode of trial under s. 778, as would be necessary for the indictable offence of theft of the wood after cutting the trees into firewood.

Ex parte Legere; R. v. Dugas, 24 Can. Cr. Cas. 377, 43 N.B.R. 357.

GOODS UNDER SEIZURE BY SHERIFF—BOND TAKEN FROM DEBTOR.

A sheriff who has seized under a writ of execution for debt a number of hogs in possession of the execution debtor, and who at the latter's request takes a bond from the debtor and his surety for the purpose of continuing the seizure without the expense of leaving a man in possession, has a special property or interest in the hogs sufficient to make the selling of the same by the accused while under such bond a theft thereof under Cr. Code ss. 347, 386; the seizure was valid as against those who had notice of it, and the accused could not justify by setting up the alleged title of another and the latter's authorization to sell on his behalf. [Dodd v. Vail, 9 D.L.R. 534, 6 S.L.R. 22, affirmed in 10 D.L.R. 694, 23 W.L.R. 903, applied.]

R. v. Hrycziuk, 25 D.L.R. 490, 24 Can. Cr. Cas. 283, 8 S.L.R. 350, 8 W.W.R. 1169, 31 W.L.R. 786.

(§ I—3)—MORTGAGE — BAILEE — SALE OF GOODS.

A mortgagor who gives an undertaking to hold goods seized under a mortgagee's warrant of distress, as agent and bailee, but who subsequently sells the goods and gives no account of the proceeds, cannot be convicted of theft under s. 355, Cr. Code.

R. v. Kimbrough, 41 D.L.R. 40, 13 A.L.R. 412, 30 Can. Cr. Cas. 56, [1918] 2 W.W.R. 892.

CRIMINAL LAW—THEFT OF MONEYS AND SECURITIES—CR. CODE, S. 355—ACCOUNTING—ABSENCE OF FRAUDULENT INTENT.

To support a conviction for theft under s. 355, Cr. Code, it is necessary to make out: (a) a failure to account or pay; or (b) fraudulent conversion; or (c) fraudulent omission to account: where an account has been given, it must be found that prior defaults in giving an account were the result of fraudulent intent. Where the accused had accounted, and there was no evidence to support a finding of fraudulent intent, it was held, that there was no evidence upon which the defendant could be properly convicted.

R. v. Loftus, 46 O.L.R. 45.

(§ I—5)—EMBEZZLEMENT—PROCEEDS HELD "UNDER DIRECTION."

C. Code s. 357 declaring the offence of theft by misappropriating proceeds held "under direction" has reference to cases other than those for theft or embezzlement by a clerk or servant.

R. v. McDonald, 28 D.L.R. 377, 25 Can. Cr. Cas. 106, 49 N.S.R. 245.

UNDER POST OFFICE ACT.

Cr. Code, s. 400 originated with the Post Office Act, while the preceding s. 399, originated in the Larceny Act, and in reconciling the language of these two sections which in their ordinary meaning might seem to apply different punishments for the same offence, the words "hereby declared to be an indictable offence" contained in s. 400, must be limited at least to stolen property as to which the offence has been declared to be theft by some specific reference in the Code apart from the general declaration of s. 399, if indeed it may not be further limited to such chattels, parcels or other things, the stealing whereof was specially punishable under the Post Office Act. [Note the language of Code s. 6 as to the meaning of expressions where the subject-matter is dealt with in another statute, and compare ss. 364, 365, 366 taken from the Post Office Act.]

R. v. Nimchonok, 26 D.L.R. 38, 25 Can. Cr. Cas. 6, 25 Man. L.R. 766.

RECEIVING STOLEN GOODS — ALLEGING THE THEFT.

A magistrate's conviction under Cr. Code s. 399 should show not only that the accused received the goods knowing them to have been stolen, but should contain an allegation as to the goods having theretofore been stolen, it being possible that prior to the goods reaching the accused they may have lost the character of stolen goods and yet be known to him to have been stolen.

R. v. Watchman, 20 D.L.R. 201, 7 W.W.R. 880, 30 W.L.R. 534, 23 Can. Cr. Cas. 362, 7 S.L.R. 201.

(§ I—7)—BY BANK OFFICER.

It is no objection to a warrant for the extradition to a foreign state of a bank officer on a charge of embezzlement of money from the bank, who caused a note endorsed by him to be marked "paid" and to be surrendered upon a part payment of the amount due thereon charging the balance to the bank's interest and discount account, which act was undoubtedly embezzlement under the law of the state of which extradition was demanded, that by subs. (b) of s. 359 Cr. Code, such method of getting a note from a bank was theft and not embezzlement. [R. v. Stone, 17 Can. Cr. Cas. 377, applied.]

Re O'Neill, 5 D.L.R. 646, 19 Can. Cr. Cas. 410, 17 B.C.R. 123, 2 W.W.R. 368.

LOSS OF GARMENT FROM SCHOOL CLOAK ROOM —NEGLIGENCE—BOARD OF EDUCATION— LIABILITY.

Boards of Education are not responsible for loss or injury of school children's clothing except where it is shewn that they have been negligent in not exercising reasonable care.

Stevenson v. Toronto Board of Education, 49 D.L.R. 673, 46 O.L.R. 146.

OBTAINING MONEY FROM IMBECILE—KNOWLEDGE OF IMBECILITY.

If a person gets another to give him money to which he has no right or claim, knowing the giver to be an imbecile and that consequently the latter could have no will to give the money to him, he is properly convicted of theft.

R. v. Wallace, 24 D.L.R. 825, 8 A.L.R. 472, 24 Can. Cr. Cas. 95.

(§ I—8)—SALE OF CROP BY TENANT IN FRAUD OF LANDLORD.

Where the terms of an agricultural tenancy are such that the landlord is to receive an aliquot part of the crop as his rent, e.g., a one-third share to be taken to a grain elevator by the tenant and stored on account of the landlord and in the landlord's name as owner thereof, the landlord does not become the owner of any specific portion of the crop until it is divided, notwithstanding the provision in Manitoba statutes 1915, c. 13, s. 2, giving the landlord in such case certain preferential civil rights in regard thereto. The tenant who sells the entire crop in fraud of his landlord is not subject to indictment on a charge of stealing the number of bushels of wheat which would have constituted the landlord's share had a division actually been made; but, quære, whether Cr. Code, s. 352 would not apply to the statutory right declared by the Manitoba statute upon an indictment for theft of the undivided one-third share.

R. v. Hassall, 34 D.L.R. 370, 27 Can. Cr. Cas. 322, [1917] 2 W.W.R. 48.

REPOSSESSING GOODS UNDER HIRE-PURCHASE CONTRACT—DEMAND—MISDIRECTION.

It is a question to be passed upon by the jury upon a charge of theft in repossessing a sewing machine under a hire purchase contract in default of payment, whether the accused, acting under the instructions of the conditional vendor, took possession under colour of right and in the honest belief that the contract so authorized, where he repossessed the machine in the absence of the conditional vendee, and without a demand for its return in terms of the contract, although the contract stipulated for entry and repossession without resort to legal process in case of default of payment, and of failure to deliver back the machine upon demand; and it is a substantial wrong entitling the accused to a reversal of the conviction or a new trial (Cr. Code, s. 1019), if the Trial Judge in such case practically withdrew that question from the jury by an instruction that if no demand had been made for the machine itself, as distinguished from the arrears of the hire-purchase price, the prisoner ought to be found guilty.

R. v. Comeau, 27 D.L.R. 692; 25 Can. Cr. Cas. 165, 43 N.B.R. 177.

(§ I—9)—FROM RAILWAY PARLOR CAR — CRIMINAL CODE S. 460.

A compartment of a railway parlor car used for storing supplies is not a "warehouse" within Cr. Code s. 460. Theft from

a railway car is punishable under s. 384, but not under s. 460.

R. v. Levy & Gray, 31 Can. Cr. Cas. 19.

(§ I—10)—Criminal breach of trust—Intent.

On a charge of criminal breach of trust (Cr. Code s. 360), an intent to defraud must be shewn and if there is no evidence of that intent before the magistrate holding the preliminary enquiry he exceeds his jurisdiction in ordering a committal for trial.

R. v. Morency, 30 Can. Cr. Cas. 395.

(§ I—11)—With breaking and entering.

The offence of breaking into a countinghouse and stealing money therefrom as declared by the English statute 7-8 Geo. IV. c. 29, s. 15, was a part of the criminal law of British Columbia prior to its admission into Confederation, and remains in force under Cr. Code s. 11, subject to the change made by the Code as to the nature of the punishment. [See Cr. Code, s. 460.]

Re Dean, 9 D.L.R. 364, 48 Can. S.C.R. 235, 20 Can. Cr. Cas. 374, 49 C.L.J. 234, 3 W.W.R. 1037.

(§ I—12)—Recent possession—Evidence.

On a charge of theft the presumption arising from recent possession of the stolen goods may be applied against the accused in conjunction with direct evidence.

R. v. McClain, 23 D.L.R. 312, 23 Can. Cr. Cas. 488, 8 A.L.R. 73, 7 W.W.R. 1134, 30 W.L.R. 388.

(§ I—15)—Embezzlement—Various defalcations as one continuous act.

A conviction for theft of an entire sum, although it may have been taken in numerous small amounts at different times during the deficiency period, may be supported without proving the taking of each or any of such several amounts and the case treated as one continuous act of theft although there were a number of distinct takings, if a deficiency had occurred equal to the amount by which the accused had falsified an entry in his employer's books at or about the date at which he is charged with having embezzled the sum, if the evidence adduced also warrants the inference that the money stolen had reached his hands and had been misappropriated by him.

Minchin v. The King, 18 D.L.R. 340, affirming R. v. Minchin, 22 Can. Cr. Cas. 254, 15 D.L.R. 792, 7 A.L.R. 148, 23 Can. Cr. Cas. 414, 6 W.W.R. 800.

Illegal possession of gold or silver ores—Presumptions.

A person found in possession of silver ore under reasonable suspicion of such possession being illegal, within the meaning of Cr. Code ss. 424, 424A, has thrown upon him the onus of satisfactorily accounting at the trial for such possession when charged under s. 424A, and it is not necessary that before arrest or before the prosecution was begun he should have been asked by a police officer to explain his possession of the ore.

R. v. Karp, 30 Can. Cr. Cas. 115, 41 O.L.R. 540.

Receiving—Aiding and abetting.

It is only the receiving done in the commission of the principal offence of theft that cannot be treated as a separate offence of unlawfully receiving and a count charging the latter is not bad for duplicity because of its setting out matter which, if true, would constitute the accused an aider and abettor in the principal offence. [Reg. v. Hodge, 2 Can. Cr. Cas. 350, 12 Man. L.R. 319, followed.]

R. v. Kelly, 27 Can. Cr. Cas. 94, 10 W.W.R. 1345. [Affirmed in [1917] 1 W.W.R. 46; 34 D.L.R. 311, 54 Can. S.C.R. 220, [1917] 1 W.W.R. 463.

(§ I—20)—Abstracting electricity—Directing compensation to owner.

Where no claim for compensation under Cr. Code s. 1048 was made by the electric company from which the accused is found guilty of theft in fraudulently abstracting electricity (s. 351), the conviction is irregular in directing that part of the fine be paid to the electric company.

R. v. Sperdakes, 24 Can. Cr. Cas. 210, 40 N.B.R. 428.

Private possession of letters by post office employee—Cr. code, ss. 347, 359, 364.

The mere fact of finding in the coat pocket of a post office employee letters containing money, addressed to another person, may or may not be evidence of theft, according to circumstances.

Richard v. The King, 31 Can. Cr. Cas. 64.

(§ I—25)—Value of goods—Penalty.

An information or charge for stealing goods in process of manufacture should specify the value of the goods, so that the accused may know whether the prosecution seek to apply the added penalty provided by Cr. Code, s. 387, in case the value is over $200.

R. v. Leclerc, 31 D.L.R. 615, 26 Can. Cr. Cas. 242.

(§ I—26)—Unlawful use of another's motor car.

The marginal note "theft of motor car" appended to s. 285B Cr. Code (amendment of 9-10 Edw. VII., c. 11), cannot enlarge the effect of the provision which it creates, of taking a motor car with intent to operate it without the consent of the owner is not theft but a minor offence.

Hirshman v. Beal, 32 D.L.R. 680, 28 Can. Cr. Cas. 319, 38 O.L.R. 40.

(§ I—40)—On high seas—Procedure.

Proceedings for the trial of a foreign subject charged with theft on a British ship, committed on the high seas, should not be taken under s. 591, Cr. Code but under s. 686 of the Merchants Shipping Act, 1894 (Imp.); the consent of the Governor-General is not required before in-

stituting proceedings. [The King v. Heckman, 5 Can. Cr. Cas. 242, followed.]

The King v. Neilson, 40 D.L.R. 120, 30 Can. Cr. Cas. 1, 52 N.S.R. 42.

THEFT — CONDUCTOR OF RAILWAY TRAIN— ACCEPTANCE OF BRIBE FROM PASSENGER —FAILURE TO COLLECT FARE—FAILURE TO PAY OVER MONEY RECEIVED.

R. v. Thompson, 19 W.L.R. 676, 21 Can. Cr. Cas. 80, 4 A.L.R. 67.

MISAPPROPRIATION OF CHATTEL RECEIVED FOR DELIVERY IN SPECIE—NO EMPLOYMENT COVERING THE SERVICE.

The King v. Shyffer, 17 Can. Cr. Cas. 191, 15 W.L.R. 323.

THIRD PARTY PROCEDURE.

See Parties.

EXCEPTION TO FORM—DESCRIPTION OF PARTIES—INSOLVENCY—AFFIDAVIT.

In a tierce-opposition, where both plaintiff and defendant have already been described and designated in the action, it is not necessary to designate them anew. The plaintiff cannot, in contesting a tierce-opposition, set up irregularities in the service, made on the defendant; the latter alone can take advantage of the irregularities. A creditor of an insolvent has a right to attack by tierce-opposition or otherwise the declaration of the curator that he has illegally recognized the insolvent as debtor of a third party whose claim the third party opposing contests. After the tierce-opposition has been received by a judge, the sufficiency of the affidavit supporting it cannot be attacked by exception to the form. The nullity of the judgment delivered in the main action and of the judgment rendered on the seizure under execution can be demanded even by a tierce-opposition. The want of interest in a tiers-opposant, based on the fact that should he succeed he could recover nothing, as a privileged creditor would absorb all the assets of the defendant, cannot be the subject of an exception to the form.

Touzin v. Peladeau, 18 Que. P.R. 279.

THREATS.

THREATENING LETTER—INTENT TO EXTORT AMBIGUOUS LANGUAGE — EXPLANATORY EVIDENCE IN DEFENCE.

On a charge of sending a threatening letter with intent to extort money, the accused may be heard in explanation of what he understood to be the meaning of the words he had used in the letter, where the expression is ambiguous in view of the surrounding circumstances disclosed by the testimony. The accused charged with having sent a letter demanding money with menaces by threatening the addressee with prosecution for an alleged infraction of the law (Cr. Code, ss. 451–453), is not entitled to shew, upon the preliminary inquiry, that the addressee was in fact guilty as charged in the letter, such not being material to the existence of the offence; but the complainant may be cross-examined as to its truth to shake his credit as a witness. [R. v. Johnson, 14 U.C.Q.B. 569, distinguished; R. v. Cracknell, 10 Cox C.C. 408, applied.]

R. v. Odell, 22 Can. Cr. Cas. 39.

THRESHERS' LIEN.

See Lien, I—2.

TIMBER.

See Contracts, VI A—410.

Breach of contract, forfeiture, see Sale, III A—50.

Decay, accident, see Master and Servant, II A—110.

(§ I—1)—DEED OF, AS LICENSE.

One who makes application for a license to cut timber from a timber limit before it has been surveyed, is not required, in his application, to describe with mathematical accuracy the land he proposes to take up.

Lauresen v. McKinnon, 4 D.L.R. 718, 20 W.L.R. 384, 18 B.C.R. 682.

LICENSES TO CUT—RENEWAL—COMPLIANCE WITH REGULATIONS.

The departmental regulation declaring that holders of licenses to cut timber on Indian lands shall be entitled to renewal if they have complied with existing regulations does not confer a right of perpetual renewal, as such would be inconsistent with the limitation of licenses to twelve months under the Indian Act, R.S.C. 1906, c. 81.

Booth v. The King, 21 D.L.R. 558, 51 Can. S.C.R. 20, affirming 10 D.L.R. 371, 14 Can. Ex. 115.

AGREEMENT TO SELL "CULLINGS"—SALE OF GOODS — SUBSEQUENT SALE OF LAND— TERMINATION OF FIRST AGREEMENT.

An oral agreement to sell the "cullings" of his land is a sale of goods within the meaning of the Sale of Goods Act (N.S. 1910, c. 1); it does not give the purchaser an interest in the land although the trees do not become "goods" until severed from the soil. The purchaser has a legal right as against the vendor to enter upon the land for the purpose of cutting and carrying away the timber, but on a sale of the land to another the uncut timber passes under the deed; the prior contract cannot be enforced to the detriment of the purchaser of the land, and becomes impossible of performance.

Hingley v. Lynds, 44 D.L.R. 743, 52 N.S.R. 422.

CONTRACT—PURCHASE AND SALE OF TIMBER LIMITS—EXECUTED CONTRACT—MISREPSENTATIONS NOT AMOUNTING TO FRAUD BREACH OF WARRANTY—JUDGMENT IN FORMER ACTION BETWEEN THE SAME PARTIES—RES JUDICATA — ESTOPPEL — EVIDENCE—CREDIBILITY OF WITNESSES —ACCEPTANCE OF TESTIMONY OF THOSE WHO REMEMBER AGAINST THOSE WHO DO NOT—FINDINGS OF TRIAL JUDGE—APPEAL.

Vaughan-Rhys v. Clarry, 5 O.W.N. 929.

The existence of a commercial partnership cannot be proved by oral testimony. Rights acquired by grantees or purchasers of timber limits publicly sold at auction pursuant to the provisions of arts. 1623 et seq. R.S.Q. 1909, are immovable rights and cannot, therefore, be the object of a commercial contract. Oral evidence is not admissable to prove that a typewritten document, unsigned, emanates from a party against whom it is set up as a commencement of proof in writing.

Guerin v. Davis, 42 Que. S.C. 81.

(§ I—3)—Rights of purchaser—Liability of railway company for destruction.

On a licensee under a timber license from the Department of the Interior making a sale of the logs to another who did the lumbering, the logs when cut became the personal property of the buyer, and he has the right to maintain an action against a railway company through whose negligence the same were destroyed while still on the limits, although such buyer had no assignment of the Government license. [Booth v. McIntyre, 31 U.C.C.P. 183, distinguished.]

Dutton v. C.N.R. Co., 23 D.L.R. 43, 31 W.L.R. 367. [Affirmed, except as to damages, 30 D.L.R. 250, 26 Man. L.R. 493, 21 Can. Ry. Cas. 294, 34 W.L.R. 881, 10 W.W.R. 1006.]

(§ I—4)—Conditions precedent to right to cut.

Servitude is the right to the surface of the real estate which still subsists as to trees planted and existing at the time of execution of the deed. By the terms of this reservation the defendant, being in place and stead of the vendor, his father, may exercise the right to cut timber whenever he thinks fit, in conformity with the reservation, and consequently, the plaintiff, as representing his father, the vendee of the property, is ill founded in his demand to have a limit prescribed for exercising the right of the defendant. By the terms of the reservation, the defendant has only the right to the timber planted and existing on the date of the deed of sale, consequently, after the proof by which it was established that the defendant took and carried away new timber, which grew after that date, he will be adjudged to pay its value to the plaintiff.

Cournoyer v. Cournoyer, 18 Rev. de Jur. 196.

(§ I—6)—When title to passes.

A vendor who, under the provisions of a contract of sale of timber rights, was vested with the title to all property of the vendee found upon the land upon the vendor's re-entry for the vendee's default, cannot recover the value of property sold by the vendee before such re-entry from the person to whom the vendee turned over the proceeds of such sales, where the sales were made without fraud to bona fide purchasers.

Klock v. Molsons Bank, 3 D.L.R. 521, 44 Que. S.C. 193.

(§ I—7)—Forfeiture by nonremoval.

Where a sublicensee of rights to cut standing timber is notified by the first holder that the latter claims the timber as having reverted to him and that the license from himself has expired, when in fact a reasonable time has not elapsed for cutting the timber, and no time limit is specified in the license agreement, the sublicensee is not entitled to treat such notification as an interference preventing him from performing his own contract with the intermediate licensee. Where a license agreement for cutting standing timber contains no time limit, it will be presumed that the cutting must be completed within a reasonable time.

Dempster v. Russell, 2 D.L.R. 14, 3 O.W.N. 719, 21 O.W.R. 449.

(§ I—9)—Contract for sale of shares in lumber company with warranty of quantity of timber on lands of company—Meaning of "timber."

Swift v. David, 8 D.L.R. 739, 2 W.W.R. 709, affirming 16 B.C.R. 275, 18 W.L.R. 360.

Sale of timber—Mode of estimating—Rights of owners of dams.

A sale of timber to be manufactured by a contractor according to a contract (to which reference is made, a copy having been annexed) for the felling of 50,000 trees, but described in the words "the logs which the contractor shall cut," means those that will be in fact cut, and not the whole quantity of the contract. The owner of a dam in a river cannot claim from those using it anything more than the tolls fixed by an order-in-council, according to 7,300, R.S.Q. 1909.

Gilmour v. Hughson, 23 Que. K.B. 122.

(§ I—10)—Expropriation—Public lands—Provincial grants—Right-of-way—Timber license—Compensation.

Malone v. The King, 49 D.L.R. 685, affirming 42 D.L.R. 520, 18 Can. Ex. 1.

Crown timber licensee—Right of licensee to sue for damages—Fires.

An action for damage by fire to timber growing on lands held under license from the Crown can be maintained by the plaintiff as licensee.

West v. Corbett, 15 Can. Ry. Cas. 195, 41 N.B.R. 420.

License to cut timber—Property—Cutting of timber—Tender—Admission R.S.Q. s. 1270.

In an action by the holder of a licence to cut timber, for $839 as the value of timber cut, an offer of $664 is an admission of the plaintiff's right to sue for the claim. A license to cut timber is a conditional sale allowing the holder to use the land as if he were the real owner.

Union Bag v. Ritchie, 23 Que. K.B. 385.

FRAUDULENT PROCUREMENT OF TIMBER LICENSES—ACTION.

Wilson v. McClure, 16 B.C.R. 82, 15 W.L.R. 377.

(§ I—12)—CROWN TIMBER ACT (ONT.)—ASSIGNABILITY NOTWITHSTANDING WRIT OF EXECUTION.

An execution against a debtor levied under the execution Act of Ontario, 9 Edw. VII., c. 47, does not interfere with the power of the debtor to assign or transfer his rights under a timber license obtained under the Crown Timber Act, R.S.O. 1897, c. 32, subject to the security of the execution creditor not being impaired.

McPherson v. Temiskaming Lumber Co., 9 D.L.R. 726, [1913] A.C. 145, 23 O.W.R. 458, reversing 3 O.W.N. 36, 20 O.W.R. 13.

RESERVATION IN CROWN GRANT—TRESPASS AND CONVERSION — ACCEPTANCE OF AMENDS BY CROWN.

A grantee of a mining location under a Crown patent made subject to the reservation to the Crown of standing pine trees, but with certain privileges of cutting for use in mining and other operations on the land under the Mines Act (Ont.), cannot recover in trover or detinue for pine timber cut by a trespasser if the Crown holding the right of property in the timber has accepted payment from the trespasser, or from the persons under contract with whom the cutting was done by him, of timber dues in respect thereof and has consented to the appropriation of the timber by him or them to their own purposes as owners of same.

Eastern Construction Co. v. National Trust Co.; National Trust Co. v. Miller, 15 D.L.R. 755, [1914] A.C. 197, 110 L.T. 321, 25 O.W.R. 756, reversing National Trust Co. v. Miller, 3 D.L.R. 69, 46 Can. S.C.R. 45, 22 O.W.R. 485.

LICENSE—RESERVATION—SURFACE RIGHT—POSSESSORY ACTION.

A perpetual right to cut timber growing upon land constitutes a surface right, or a real right, which may be the basis of a possessory action. The reservation by a vendor of "the property forever of all the pine and fir which may at any time in the future be found upon the said lot of land . . . fit for the market," passes the ownership thereto even to that portion which may be lying on the ground or rooted up by the wind, provided that it is marketable.

Le Blanc v. Price, 26 Que. K.B. 29.

TIMBER—ASSIGNMENT OF LOCATEE'S RIGHTS—ACTION TO SET ASIDE—EVIDENCE—FINDINGS OF FACT.

Moore v. Midanick, 11 O.W.N. 241.

(§ I—14)—SALE OF TIMBER—CONTRACT—CONDITION PRECEDENT—ARBITRATION.

David v. Swift, 44 Can. S.C.R. 179.

TIMBER LICENSE—REAL ESTATE OR PERSONALTY—SALE—PAYMENT IN JOINT STOCK SHARES—VENDOR'S LIEN.

Laidlaw v. Vaughan-Rhys, 44 Can. S.C.R. 458.

CONTRACT BY WIFE TO PROCURE NECESSARIES—SALE OF STANDING TIMBER.

Awalt v. Smith, 44 N.S.R. 471.

SALE OF LOGS—MEASUREMENT AND CULLS.

Martin v. Beck Mfg. Co., 17 O.W.R. 291. [Affirmed, 18 O.W.R. 95, 2 O.W.N. 680.]

TIMBER SOLD BY COMPANY BEFORE ASSIGNMENT—LUMBER SOLD BY ASSIGNEE—TRUST—LIEN.

Bell v. Robertson, 17 W.L.R. 412.

AGREEMENT FOR SALE OF STANDING TIMBER—LICENSE TO ENTER AND CUT—EXTENSION BY PAROL OF PERIOD FOR CUTTING.

Drew v. Armstrong, 9 E.L.R. 491.

CROWN TIMBER DUES—SALE OF CUT OF TIMBER BY OCCUPANT OF LOT.

Deschamps v. Giroux, 39 Que. S.C. 454.

SALE OF STANDING TIMBER—BONA FIDES—PART PERFORMANCE—RIGHTS OF VENDOR'S CREDITORS — ABANDONMENT — WAIVER—INJUNCTION—DAMAGES.

Royal Bank v. Jackson, 10 O.W.N. 448.

TIME.

For taking appeal, see Appeal.

As essence of contract, see Contracts; Vendor and Purchaser; Specific Performance.

For filing mechanics' liens, see Mechanics' Liens.

For commencing actions, see Limitation of Actions.

(§ I—3)—MEANING OF "DAYS"—EXPIRATION OF OPTION.

An option to exercise a right within ten days will expire, in the absence of some custom, usage or express agreement to the contrary, at midnight of the last day, and not at the end of ten consecutive periods of 24 hours each from the hour at which the option was given. [Dictum of the court disagreeing in this respect with the court below, Beer v. Lea, 7 D.L.R. 434; Startup v. Macdonald, 6 Man. & G. 593, 134 Eng. R. 1029, followed; Cornfoot v. Royal Exchange Assurance Co., [1903] 2 K.B. 363, [1904] 1 K.B. 40, distinguished.]

Beer v. Lea, 14 D.L.R. 236, 29 O.L.R. 255.

(§ I—6)—MONTH—"THIRTY DAYS."

A cancellation notice purporting to give the vendee of land but thirty days in which to pay an instalment of the purchase price, is inoperative and of no effect with respect to the cancellation of the agreement of sale, where the default and cancellation clause of the agreement requires that one month's notice be given; and this defect is not cured by the fact that the default and cancellation clause as incorporated in the agreement is set out in full in the recitals which were at the beginning of the notice.

[Le Neveu v. McQuarrie, 21 Man. L.R. 399, followed.]

Fox v. Reid, 11 D.L.R. 735, 23 Man. L.R. 152, 23 W.L.R. 963, 4 W.W.R. 200.

In the County Court Act, R.S.N.S. 1900, c. 156, s. 57, prescribing that a notice requiring issues to be tried by a jury must be given "at least 15 days before the first day of the sittings," the words "at least" must be given the same construction as the words "clear days" and that a notice given on Oct. 23 for the sittings beginning on Nov. 7 is insufficient.

Chambers Electric L. & P. Co. v. Crowe, 5 D.L.R. 545, 46 N.S.R. 141.

COMPUTATION.

In an action in ejectment accompanied by an attachment for rent, the service of the declaration within three days of the service of the writ has for effect the summoning of the defendant to answer the demand as if such service had been made at the time of the service of the writ.

Smith v. Shapiro, 14 Que. P.R. 160.

"FROM THIS DATE" IN NOTICE SERVED.

A written demand for payment within 30 days "from this date" is to be construed as a demand for payment within that period computed from the date which the notice itself bears where the same is formally dated and not from the day of service of the demand.

Brown v. Roberts, 2 D.L.R. 523, 17 B.C. R. 16, 1 W.W.R. 987.

(§ I—10) — EXTENSION OF — STATUTORY POWER—SUBSEQUENT EXTENSIONS.

Where power to extend time for any purpose is conferred by a statute which does not provide that it may be done from time to time, such power can be exercised but once. [Power v. Griffin, 33 Can. S.C.R. 39, followed.]

Re Gimli Election, Rejeski v. Taylor, 13 D.L.R. 121, 23 Man. L.R. 678, 25 W.L.R. 205, 4 W.W.R. 1283. [Reversed, 14 D.L.R. 414, 23 Man. L.R. 678, 25 W.L.R. 677, 5 W.W.R. 363.]

EXTENSION OF—TO REVIEW TAXATION OF SHERIFF'S COSTS.

As the granting of an extension of time under Sask. r. 704 for reviewing the taxation of a sheriff's bill of costs rests in the discretion of the court, special circumstances justifying the extension need not be shewn; although every case is not to be treated in a spirit of plenary indulgence, but to be dealt with on its merits when reasonable ground for indulgence is shewn. [Baker v. Faber, [1908] W.N. 86 (C.A.); and Rumbold v. London County Council, 100 L.T. 259, followed; Crapper v. C.P.R. Co., 11 D.L.R. 486, and Re A Taxation, 11 D.L.R. 191, distinguished.]

Eggerson v. Smith, 14 D.L.R. 747, 6 S.L. R. 150, 26 W.L.R. 198, 5 W.W.R. 579.

TOLLS AND TOLL ROADS.

See Carriers; Telegraphs; Telephones; Railway Board.

(§ I—9)—POWERS OF TOLL ROAD COMPANY —EXEMPTED VEHICLES—AUTOMOBILES AND TRUCKS.

Toll roads are public roads where anybody has the right to pass, provided tolls authorized by law are paid, but a toll road company can demand a toll only on vehicles and animals mentioned in the Acts governing it, and the enumeration of those carriages and animals in art. 6386, R.S.Q. 1909, not including automobile trucks and automobiles, and a by-law of a toll company imposing a toll on vehicles exempted by the Acts is ultra vires and void.

By-Town & Aylmer Union Co. v. Blackburn, 24 D.L.R. 747, 24 Que. K.B. 118.

(§ I—15)—FOR USE OF IMPROVEMENTS IN STREAM.

In the absence of the authority to exact tolls and in the absence of a contract express or implied on behalf of the users of improvements on a highway to pay tolls, the person erecting improvements has no right to exact tolls from the users thereof whether the highway be on water or on land.

Rainy Lake River Boom Corp. v. Rainy River Lumber Co., 6 D.L.R. 401, 22 O.W.R. 952, 27 O.L.R. 131.

FOR USE OF IMPROVEMENTS IN STREAM—DAMS—LEVY, HOW LIMITED.

The owner of a dam on a river can only claim for the use of it, such tolls as are fixed by an order of the Lieut.-Governor-in-council, under 54 Vict. c. 25, s. 1 (Que.) now art. 7300, R.S.Q. 1909.

Bank of Ottawa v. East Templeton Lumbering Co., 44 Que. S.C. 295.

(§ I—16)—DEFECTS IN—LIABILITY FOR.

Trustees of toll roads are liable for damages from accidents caused by the bad condition of the roads of which they have the maintenance. They cannot relieve themselves from such liability on the ground of difficulties caused by exceptional climatic conditions at the time of the accident, or of abuse committed by many of the persons using the road which they have done nothing to prevent. These matters are not of the nature of force majeure or fortuitous event, and afford no defence to the remedy exercised by the person suffering the damage.

Collier v. Trustees of Toll Roads of North River, 43 Que. S.C. 215.

TURNPIKE ROADS—SURRENDER OF PART OF A ROAD TO A CITY FOR MAINTENANCE—RIGHT TO LEVY TOLLS FOR THE REMAINDER—EVASION OF TOLLS.

Hope v. Montreal Turnpike Trust, 20 Que. K.B. 139.

TORRENS SYSTEM.

See Land Titles.

TORTS.

Measure of damages for, see Damages.

Injunction against tortius acts, see Injunction.

For various acts of Negligence, see Negligence; Nuisance; Railways; Street Railways; Carriers; Master and Servant; Municipal Corporations; Highways; Waters; Crown.

(§ I—1)—NEGLIGENCE—DEATH CAUSED BY FUMIGATING A BUILDING—RULE OF CONTRIBUTION BY BLAMABLE PARTIES.

The liability attaching for the death of a person in the basement of a block caused by fumes of dangerous gas during the fumigation of other parts of the building by the fumigating contractor, under contract with the owner, attaches to the contractor for having generated the dangerous gas and for having failed to confine it to the rooms he was fumigating; against the defendant owner for having, through the order for the work given by his son on his behalf, brought a dangerous substance upon a portion of the premises, and for having failed to confine it; and against the owner's son for having directly ordered the work to be done; the rule applies that in actions of tort all parties concerned are treated as principals. [Fletcher v. Rylands, L.R. 3 H.L. 330; Wing v. London General, [1909] 2 K.B. 652; Dalton v. Angus, 6 App. Cas. 740; and Dominion Natural Gas v. Collins, [1909] A.C. 640, applied.]

Skubiniuk v. Hartman, 20 D.L.R. 323, 28 W.L.R. 518, 6 W.W.R. 1133.

NEGLIGENCE — LOSS OF CHATTELS BY BAILEE'S GROSS CARELESSNESS—AGISTER—DETINUE.

An action in detinue, for damages sustained by an owner of cattle lies against an agister in whose care the cattle were left if they are lost through his gross carelessness. [Reeve v. Palmer, 5 C.B. (N.S.) 84, followed.]

Harvey v. Farnell, 11 D.L.R. 740, 6 S. L.R. 161, 24 W.L.R. 44, 4 W.W.R. 488.

TOWAGE.

See Shipping; Salvage.

Annotation.

Duty of a tug to its tow: 49 D.L.R. 172.

Duties and liabilities of tug owner: 4 D. L.R. 13.

(§ I—1)—DUTY AND LIABILITY OF TUG AS TO TOW.

The owner of a tug not engaged in the towage business, who, by a friendly arrangement with a person from whom he had requested the loan of certain implement for use in his business undertakes to move a boom for the latter, does not thereby enter into an ordinary contract of towage by which he is bound to use a tug of sufficient strength and equipment safely to do the work and to face unfavourable weather conditions, and he is not liable for the loss of the boom through the breaking of the tow line in a gale, when using to the best advantage the equipment he had.

Wattsburg Lumber Co. v. Cook Lumber Co., 4 D.L.R. 8, 17 B.C.R. 410, 20 W.L.R. 833, 2 W.W.R. 248, reversing 16 B.C.R. 154, 17 W.L.R. 129.

LIEN FOR — MORTGAGE — PRIORITIES — LEX LOCI—PLACE OF CONTRACT — ACCEPTANCE BY TELEPHONE.

Under British and Canadian law a claim for ordinary towage does not give a maritime lien upon the ship towed nor one superior or prior to a mortgage existing upon it at the time the claim arose. Where a contract is proposed and accepted over the telephone, the place where the acceptance take place constitutes the place where the contract is made. Acceptance over the telephone is of the same effect as if the person accepting had done so by posting a letter, or by sending off a telegram from that place. The contract having been accepted in Canada was governed by Canadian law.

Carow Towing Co. v. The "Ed. McWilliams," 46 D.L.R. 506, 18 Can. Ex. 470.

LOSS OF TOW—RESPONSIBILITY—PRIVITY OF OWNER—LIMITATION OF LIABILITY—SECTIONS 921, 922, CANADA SHIPPING ACT, R.S.C. c. 113.

In an action seeking a declaration of limitation of liability for negligence in the performance of a towing contract, the owner of the tugs in question established that his vessels had been inspected according to law and their machinery and equipment were in good condition at the time of the towage. It was, however, proved by defendants that a key-pin had fallen from the steering gear of one of the tugs and that there was some want of reasonable promptitude, foresight and seamanship on the part of the master and crew. Held, that the dropping out of the key-pin from the steering gear was quite unforeseen and was not due to any neglect or want of supervision on the part of the plaintiff or their superintendent, and the accident having been due to the fault and negligence of the crews on board the tugs constituting the tow and having been caused without plaintiff's actual fault or privity, the plaintiff was entitled to an order limiting its liability.

Sincennes-McNaughton Line v. McCormick, 47 D.L.R. 483, 19 Can. Ex. 35.

NEGLIGENCE—DEFECTIVE STEERING GEAR—INEVITABLE ACCIDENT.

A steering wheel in a tug, rendered inoperative by a defect in the steering gear, will not relieve the owners of the tug from liability for damage to a tow, resulting from the grounding of the tow when released by the master of the tug, on the ground of inevitable accident; the accident could have been avoided by passing the tow to another tug which was there to assist.

McCormick v. Sincennes-McNaughton Line; Union Lumber Co. v. Sincennes-Mc-

Naughton Line, 45 D.L.R. 392, 18 Can. Ex. 357.

RESPONSIBILITY OF TUG—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.

The tug "Senator Jansen," with a scow in tow, lashed diagonally to her port bow, was floating down Fraser River with the tide and while going through a drawbridge (85 feet in width) the scow struck a projecting boom stick, tearing off a stern plank. Scow and cargo were lost. The "Senator Jansen" was properly navigated. Held—that the master of the "Senator Jansen," being thoroughly familiar with the situation, and the set of the tides and currents, and knowing that these would inevitably bring his port side against the bridge, creating a dangerous, if not a necessarily fatal situation, was guilty of negligence in not lashing the tow to the starboard side and thus avoiding the possibility of accident. Where, even if the scow in such a case had been wholly sound, the direct consequences of the accident could not have been avoided, the fact of the scow being unseaworthy will not constitute contributory negligence on her part, and will not relieve the tug of any responsibility—for damage due to her own negligence.

Patterson v. The "Senator Jansen," 49 D.L.R. 166, 19 Can. Ex. 105, [1919] 3 W.W.R. 458.

(§ 1—5)—SUFFICIENCY OF PERFORMANCE—DIVISIBILITY OF CONTRACT—MARITIME LIEN.

A towage agreement providing for payment per diem is a divisible contract as to each day's services performed; but there can be no recovery under the contract in the event of a prolongation of the voyage through the plaintiff's unjustifiable delay. A bond taken as security is not evidence that the towage was performed on the credit of the master and not of the ship. There is no maritime lien for the towage, only a statutory lien, in the form of a right to seize the tow in satisfaction of the claim.

Neville Canneries v. The "Santa Maria," 36 D.L.R. 619, 16 Can. Ex. 481.

NEGLIGENCE—STORMY WEATHER.

In all contracts of towage there is an implied obligation that competent skill and best endeavours shall be used in doing the work, and the act of the master of a tug in venturing out in stormy and dangerous weather is negligence which will render the owners of the towing craft liable for the consequence of the wrongful act. [Smith v. St. Lawrence Tow & Boat Co., L.R. 5 P.C. 308, applied.]

Nemo v. Canadian Fishing Co., 26 D.L.R. 714, 22 B.C.R. 455, 10 W.W.R. 97.

COLLISION—ARTICLES 18 TO 28—NAVIGATION IN NARROW CHANNEL—TUG WITH SCOW V. STEAMSHIP.

S.S. Charmer v. S.S. Bermuda, 15 B.C.R. 506.

TOWNS.

See Municipal Corporations.

County or township bridge, see Bridges.

Formation, effect on franchises, see Municipal Corporations, II F—165.

INCORPORATION OF—ERECTION OF VILLAGE—NOMINATION OF SPECIAL SUPERINTENDENT.

The nomination of a special superintendent, upon a petition of the ratepayers, for the erection of the territory into a village is the only way given to a county council to render justice and avoid arbitrary action, and the rejection of the petition by the council, without naming a superintendent, is illegal and an arbitrary act. The law does not require that the petition be accompanied by a certificate of the secretary-treasurer to the effect that it has been signed by two-thirds of the municipal electors. This fact can be proved otherwise, and after hearing both parties before the council. The expression "the council names," in art. 52, Mun. Code, comprehends an absolute and not an optional obligation and is equivalent to the expression "the council will name" or "the council must name."

Roberge v. Levis, 46 Que. S.C. 272.

FORMATION OF VILLAGE—PETITION—MODE OF ATTACKING PROCEEDINGS.

In placing their signatures to a petition asking for the erection of a territory into a village the electors owning land and dwelling in this territory thereby agree to the cognizance of the petition taken by the County Council. It is not allowable for them to withdraw their signatures when they have been voluntarily given. Any interested party who wishes to attack the proceedings of the Council upon such petition should not bring his action to quash these proceedings until the special superintendent appointed by the Council has made his report and the Council has acted upon it.

Rioux v. Témiscouata, 47 Que. S.C. 481.

TRADEMARK.

I. IN GENERAL; RIGHT TO.
II. WHAT MAY BE.
III. TRANSFER OF.
IV. INFRINGEMENT.
V. DEFENSES.
VI. REGISTRATION.

Annotations.

Trade-name; user by another in a non-competitive line: 2 D.L.R. 380.

Descriptive and distinctive words, secondary meaning, expunction or variation of registered trade-mark: 27 D.L.R. 471.

"Passing off," abandonment of trade-mark, 31 D.L.R. 602.

Registrability of surname as trademark: 35 D.L.R. 519.

Distinction between trademark and trade-name and the rights growing out thereof: 37 D.L.R. 234.

I. In general; right to.

See also Trade-name; Copyright; Patents.

(§ I—1)—Right of employee or trade union to adopt.

A label adopted by a trade union does not answer the description of an ordinary trade-mark, as it does not distinguish the goods of one person from those of another, and a member of the union has not a vendable interest in such label, but only a right to use it so long as he remains a member of the union.

Rickart v. Britton Mfg. Co., 4 D.L.R. 366, 22 O.W.R. 81.

Application for—Description and drawing.

In applying for a trade-mark under the Trade-Mark Act (Can.) the applicant must describe in writing what he claims as his mark. A drawing must also be filed. But the claim in the written application cannot be extended by reason of something appearing in the drawing which has not been claimed.

Mickelson Shapiro Co. v. Mickelson Drug & Chemical, 15 Can. Ex. 276.

(§ I—2)—General or particular—Class of goods.

There is no general right to a trade-mark or trade-name apart from its particular application, and other persons may legally use the identical name or mark in connection with a different class of goods or of business. [Eno v. Dunn (1890), 15 App. Cas. 252; Australian Wine Importers' Case, 41 Ch. D. 278; Eastman v. Griffiths, 15 R.P.C. 105; Collins v. Ames, 18 Fed. Rep. 561, distinguished.] The right to a trade-mark or trade-name is merely a prior right to use such mark or name in connection with the particular goods or business to which it is applied and which it has come to indicate; but the right extends to other goods or business of the same general class as that in which it has been applied.

Lambert Pharmacal Co. v. Palmer, 2 D.L.R. 358, 21 Que. K.B. 451.

(§ I—3)—General or specific mark.

A "general" trade-mark, under the Trade Mark and Design Act, R.S.C. 1906, c. 71, is one used in connection with the various articles in which the proprietor deals in his trade, and would cover all of the classes of merchandise in which the applicant deals, while a "specific" trade-mark is limited to one class of merchandise. The registration of the word "Albaloid" as a general trade-mark is properly refused by the Minister of Agriculture where there is already on the register a general trade-mark of a word so similar thereto as "Albolene."

Re Noelle, 14 D.L.R. 385, 49 C.L.J. 753, 13 E.L.R. 366.

(§ I—5)—Use of trade label.

The equitable relief granted to prevent unfair competition may reach far enough to afford redress to an unincorporated body from the unfair use and imitation of its union trade label by another union.

Rickart v. Britton Mfg. Co., 4 D.L.R. 366, 3 O.W.N. 1272, 22 O.W.R. 81.

As to baggage delivery—Infringement—Injunction.

A railway company is entitled to the exclusive use of the trade name they adopt in carrying on a baggage transfer business, and any infringement thereupon by a third party subsequently attempting to carry on a similar business under a similar trade-name will be restrained by injunction.

G.T.R. Co. v. James, 29 D.L.R. 352, 10 A.L.R. 109, 21 Can. Ry. Cas. 429, 34 W.L.R. 1007, 10 W.W.R. 1075 at 1081, affirming 10 W.W.R. 1075. [See 22 D.L.R. 915, 31 W.L.R. 716.]

II. What may be.

(§ II—8)—Surname.

A person who selects the name of a celebrated personage and fastens it upon his trade products must be held to take it with its disadvantages as well as its attractions; the word "Lister," however, has not so far become a mere word of description not susceptible of being appropriated as a trade-mark by long user. The putting on the market of an article known as "listerated tooth powder" is not an infringement of a trade-mark duly registered covering a medicinal substance sold to physicians and chemists under the name of "Listerine" as the two articles are not similar and are not sold to the same class of people or clientèle, more especially when the people who buy or use "Listerine" but it because of its good repute and not because the plaintiff is the manufacturer or compounder of it.

Lambert Pharmacal Co. v. Palmer, 2 D.L.R. 358, 21 Que. K.B. 451.

Geographical name—Secondary meaning.

Where a geographical name has become identified with manufactured goods of a certain class manufactured by a particular manufacturer and has in that respect acquired a secondary meaning, it may be registered as a specific trade-name to such goods under the Trade Marks Act, R.S.C. 1906, c. 71

Canada Foundry Co. v. Bucyrus Co., 10 D.L.R. 513, 47 Can. S.C.R. 484, 49 C.L.J. 195, affirming 8 D.L.R. 920, 14 Can. Ex. 35.

Surname.

A surname, when uncommon and distinctive from long user, is registrable as a trademark under the Canada Trade Mark and Design Act (R.S.C. 1906, c. 71).

Re Horlick's Malted Milk Co., 35 D.L.R. 516.

Surname—Secondary meaning.

A surname which has acquired a secondary meaning as a trademark cannot be used

as a trademark by another person without the latter clearly distinguishing his goods.

Palmer v. Palmer-McLellan Shoe-Pack Co., 37 D.L.R. 201, 45 N.B.R. 8 at 34.

(§ II—9)—DESCRIPTIVE WORD.

The word "Fruitatives," considered as the essential feature of a specific trademark applied to the sale of a laxative medicine and used on two sides of a four part label with the words "or Fruit Liver Tablets" printed thereunder, is not a mere descriptive word, and a carton four part label is not invalid as a trade-mark under the Trade Marks Act, R.S.C. 1906, because of the combination of that word with other features of colour and design in the registered trade-mark.

Fruitatives v. La Compagnie Pharmaceutique de la Croix Rouge, 8 D.L.R. 917, 14 Can. Ex. 30.

No merely descriptive name should be interdicted as descriptive unless in circumstances involving fraud on the part of the user. [Cellular Clothing Co. v. Maxton, [1899] A.C. 326, applied.] The claim of any person who seeks to adopt and use exclusively as his own a merely descriptive term will not be favoured by the court, for if a person employing a word or term of well-known meaning and in ordinary use to describe his goods were entitled to appropriate it and prevent others from using it he would acquire a right of more value than either a patent or a registered trademark.

Dominion Flour Mills Co. v. Morris, 2 D.L.R. 830, 21 O.W.R. 540, 25 O.L.R. 561.

DESCRIPTIVE WORD—VARIATION.

Where a particular name (e. g.) Bucyrus) has been applied to a specific line of goods manufactured by a company for so long a time that the designation so given by the company, although originally a mere geographical name, had acquired a secondary meaning as identifying such goods, although not registered as a trade-mark, a registration in opposition thereto of such name with the prefix of the word "Canadian" (e. g. Canadian Bucyrus) is not permissible under the Trade Marks Act, R.S.C. 1906, c. 71, and will be cancelled upon petition.

Canada Foundry Co. v. Bucyrus Co., 10 D.L.R. 513, 47 Can. S.C.R. 484, 49 C.L.J. 195, affirming 8 D.L.R. 920, 14 Can. Ex. 35.

DESCRIPTIVE WORDS—SECONDARY MEANING —EXPUNGING.

"Sure-Crop" or "Shur-Crop," as applied to fertilizers, are ordinary words descriptive of the quality of the article, incapable of acquiring a secondary meaning and not registrable as a valid trade-mark, and should be expunged from the register.

Bowker Fertilizer Co. v. Gunns, 27 D.L.R. 469, 16 Can. Ex. 520.

TRADE-MARK — IMITATION — DESCRIPTION — VIGNETTE—C.C. QUE ART. 1053, R.S. C. 1906, c. 71, ss 19, 20, 35.

In trade-marks, a generic name and the words which show the meaning of the thing cannot be the subject of a trade-mark; these are the vignettes which constitute it. The object of a trade-mark is to protect merchandise from imitation, in order to give use to an action for damages, the imitation should be such that, regarding it in a general manner, without inspecting it particularly, one would take it for the original which he wishes to obtain. The words and formulas printed on a trademark and giving directions for using the thing cannot be monopolized or lawfully included in the trade-mark, no more than the signs used to form the words, nor the whole general effect of their disposition, except they have a character so extraordinary, exceptional, and bizarre that they strike a person with their originality.

Fyon v. Bilodeau, 56 Que. S.C. 151.

WORD "SELF-REDUCING" AS APPLIED TO CORSETS—DESCRIPTIVE NAME.

The word "self-reducing" as applied to the manufacture and sale of women's corsets is descriptive and does not constitute a good trade-mark.

Kops v. Dominion Corset Co., 15 Can. Ex. 18.

III. Transfer of.

(§ III—10)—ASSIGNABILITY.

A trade-mark cannot be assigned in gross. [Gegg v. Bassett, 3 O.L.R. 263, approved.]

Re Vulcan Trade-mark, 22 D.L.R. 214, 15 Can. Ex. 265. [Affirmed in 24 D.L.R. 621, 51 Can. S.C.R. 411.]

Where there was no specific assignment of the trade-mark to the company which could be used for registry under the Trade-Mark Act. Where the words used in a general assignment are amply comprehensive to pass the trade mark, the defendant is bound to execute a specific assignment.

Tilley v. de Forest, 4 N.B. Eq. 343.

IV. Infringement.

(§ IV—15)—In ascertaining whether there has been a violation of a person's right in such mark the court will be guided by all the circumstances of the trade and market and of the uses of the mark as well as any meaning or idea which may have been publicly attached to the word mark itself before its adoption as a mark.

Lambert Pharmacal Co. v. Palmer, 2 D. L.R. 358, 21 Que. K.B. 451.

JURISDICTION OF EXCHEQUER COURT TO RESTRAIN.

The Exchequer Court of Canada has jurisdiction to restrain any infringement of a trade-mark, but has no jurisdiction to entertain an action seeking damages for passing off goods of the defendant as those manufactured and sold by the plaintiff. Trademark for gopher poison, registered in Canadian Trade-mark Register No. 79, folio 19,498, ordered to be expunged.

Mickelson Shapiro Co. v. Michelson Drug & Chemical, 15 Can. Ex. 276.

(§ IV—16)—Discontinuance of use.

An intention to abandon as to Canada a trade-mark used by a foreign firm in a world-wide business is not to be inferred from a lapse of ten years between shipments made to Canada prior to an application in Canada to register the mark.

Re Vulcan Trade-mark, 22 D.L.R. 214, 15 Can. Ex. 265. [Affirmed in 24 D.L.R. 621, 51 Can. S.C.R. 411.]

(§ IV—17)—Name of phrase—"Passing off."

Upon a claim to prevent the passing off of the goods of one manufacturer for those of another based upon the use by both of the same unregistered mark or brand, e. g. "Gold Medal," an alleged secondary meaning said to have been acquired in respect of the words of the brand for a particular class of goods, e.g. flour, must be supported by evidence that no other manufacturer in the country was making similar goods with the same mark or brand and the claim will not be supported even as to a single city or district by shewing that a customer at that place asking for that brand of goods would have been supplied with goods of the plaintiff's manufacture before the alleged interference and passing off complained of, if in fact the same mark was being used in other parts of the country by the defendants without any intention of passing off and with equal claim with the plaintiff to an independent right of user.

Dominion Flour Mills Co. v. Morris, 2 D.L.R. 830, 21 O.W.R. 540, 25 O.L.R. 561.

Passing off—Similar name and designs—Power of receiver to transfer use of signature to purchasers of defunct company.

The inventor of a preparation for destroying gophers and similar pests which has been successful with the result that the use of his name on the packages of the preparation sold has become a valuable asset to him is entitled to an injunction restraining the purchasers—from the receiver—of the assets of a company with which the inventor was associated from using his facsimile signature on the packages sold by the new company, the name being used as an artifice by which intending purchasers were induced to buy the goods on the strength of the well-known signature, the preparation being, in fact, different. The receiver had no power to transfer the right to use the signature, and the purchasers of the assets of the defunct company had no right to use such inventor's signature for any purpose without his consent. [See Mickelson Shapiro Co. v. Mickelson Drug & Chemical Co., 15 Can. Ex. 276; Mickelson Shapiro Co. v. Mickelson Drug Co., 23 D.L.R. 451; Mickelson v. Mickelson, 28 D. L.R. 307, for history of litigation in this case.]

Mickelson v. Kill-Em-Quick Co., 46 D. L.R. 622, [1919] 2 W.W.R. 210, affirming [1918] 1 W.W.R. 781.

Infringement—Name registered as general trade-mark.

Where a particular word has been registered as a general trade-mark, as distinguished from a specific trade-mark, under the Trade Mark and Design Act, R.S.C. 1906, c. 71, it cannot afterwards be registered as a general trade-mark by another, although carrying on a different line of trade; the second applicant for the same word or for another word so similar as would likely deceive the public, is limited to an application for a specific trade-mark, the Department not being called on to distinguish between the lines of trade of applicants for general trade-marks.

Re Noelle, 14 D.L.R. 385, 49 C.L.J. 753, 13 E.L.R. 366.

Trade-name—"Passing off"—Evidence—Inference.

The purchaser of the good will of a business has in general the right to continue to use the trade name, and the subsequent incorporation of a company by the assignor, under a similar name, which is clearly calculated to "pass off" his goods as the goods of the plaintiff, by the use of similar packages and designs is an infringement which will be restrained by injunction. A trade-mark is only one badge of identification; it may be equally wrong to imitate a trade-name or the get-up of goods, so as to "pass-off" the goods as another's. [Reddaway v. Banham, [1896] A. C. 204; Cellular Clothing Co. v. Maxton, [1899] A.C. 326; Valentine v. Valentine, 17 R.P.C. 673; Kingston v. Kingston, [1912] 1 Ch. 575; Spalding v. Gamage, 32 R.P.C. 273, applied.] The question whether the use of particular words or badges as a trade-mark is calculated to "pass off" goods or is merely honestly descriptive, is, in substance, one of fact; and it is not necessary to prove intent to deceive, but "passing off" may be inferred from conduct. [For other litigation of case see 23 D.L.R. 451, and 15 Can. Ex. 275.]

Mickelson v. Mickelson, 28 D.L.R. 307, 34 W.L.R. 155, 10 W.W.R. 261.

(§ IV—18)—Name of expansion bolts—Firm initials—Distinctiveness.

The word "Cebcol" used as a trade-mark on expansion bolts representing the initials of the name of its company, while phonetically alike, is unconfusingly distinctive from the trade-mark "Sebco," packed in dissimilar cartons, and constitutes no infringement as ground for injunction.

Ogden v. Can. Expansion Bolt Co., 22 D.L.R. 813, 33 O.L.R. 589.

(§ IV—20)—Criminal proceedings.

Section 655, Cr. Code, does not make it obligatory upon the magistrate to hear witnesses before issuing a warrant or summons for an infraction of s. 490, as to the unlawful use of beverage trade-marks and trade names, if, after having issued a

search warrant, the return of the constable shews that a large quantity of bottles, bearing the trade-mark of an opposition company, had been seized in defendant's possession with his own label added. Some offences requires a criminal intent mens rea, but that rule does not apply to all criminal offences and in particular does not apply to the offence under s. 490 of unlawfully using a beverage trade-mark on bottles.

The King v. Coulombe, 6 D.L.R. 99, 20 Can. Cr. Cas. 31.

FALSELY APPLYING—ADVERTISEMENT.

Offering for sale at his store by means of a newspaper advertisement under a description embodying a registered trade-mark covering goods of a particular class may constitute the offence of falsely applying the trade-mark where the accused had no goods which could properly be described in the manner advertised, and fraudulently used the advertisement to attract buyers for other goods of the same kind.

R. v. Gross and Miller, 31 Can. Cr. Cas. 35, 28 Que. K.B. 54.

CRIME OF TRADING IN BOTTLES CARRYING NAME OF OWNER.

Section 490, Cr. Code, which prohibits trading, without the consent of the owner, in bottles which have upon them the trade-mark or name of another person, is wide enough to cover such trading in bottles to which the name of the owner is affixed by means of a paper label.

R. v. Wittman, [1917] 3 W.W.R. 438, 25 B.C.R. 108.

(§ IV—21)—INFRINGEMENT—IMITATION OF LABEL OR DESIGN.

To establish an infringement of a trade-mark, as basis for injunction, it is not essential to shew that the defendant has used a mark in all respects corresponding with that which another person has acquired an exclusive right to use, provided the resemblance is such as to be likely to make ordinary purchasers suppose that they are buying the article sold by the party to whom the right to use the trade-mark belongs and that they have been thereby misled and deceived. [Barsalou v. Darling, 9 Can. S.C.R. 681, and Wotherspoon v. Currie, L.R. 5 H.L. 508, applied.]

Canadian Rubber Co. v. Columbus Rubber Co., 14 D.L.R. 455, 14 Can. Ex. 286.

PASSING OFF—INJUNCTION.

A trade-mark may exist independently of registration, and where there has been no abandonment of it by laches or acquiescence, and it has not become publici juris, its infringement by way of "passing off" will be enjoined.

United States Playing Card Co. v. Hurst, 31 D.L.R. 596, 37 O.L.R. 85.

INFRINGEMENT — DESIGN — INTENT TO DECEIVE—PASSING OFF—DAMAGES.

The word "Bicycle" may be made a valid trade-mark for a certain class of playing cards, and the sale by another manufacturer of a class of playing cards known as the "Bicycle series," the word "Bicycle" being in large letters in one line and the word "Series" being in smaller letters on the next lines is an infringement of such trade-mark. Where in the opinion of the Trial Judge intention to pass off was abundantly proved, and all means necessary to facilitate passing off were provided, and enough was shown to establish a reasonable probability of deception, his judgment enjoining infringement by passing off will be upheld although there is no proof of actual passing off.

United States Playing Card Co. v. Hurst, 47 D.L.R. 359, 58 Can. S.C.R. 603, reversing 34 D.L.R. 745, 39 O.L.R. 249, varying 31 D.L.R. 596, 37 O.L.R. 85.

INFRINGEMENT — USING CONTAINERS — LABELS—OBLITERATION.

There is no infringement of the Trade Mark and Design Act (R.S.C., c. 71, s. 19) if a tank, not itself protected by patent but used to store a patented product, is refilled by another manufacturer who obliterates the trade-mark on the tank by pasting a label over it shewing that the tank has been refilled.

Prest-o-Lite v. People's Gas Supply Co., 38 D.L.R. 379, 55 Can. S.C.R. 440, affirming 16 Can. Ex. 386.

FORMULA — FACSIMILE — INJUNCTION — DAMAGES.

The fact that the formula of a substance which has been sold under the facsimile signature of the maker is transferred to another manufacturer who acquires the right to sell it does not entitle the latter to use the signature where the right to use it has not been expressly transferred to him; and the person entitled to the use of the name may obtain an injunction restraining its use by the other, and also restraining the use by such other of a false statement that the substance sold by the latter is made from the original formula, even though the first maker no longer sells the substance directly to the public but manufactures it for a selling company of which he is a member. [Warwick Tyre Co. v. New Motor & General Rubber Co., [1910] 1 Ch. 248, followed.] Under such circumstances, however, he is entitled to nominal damages only.

Mickelson v. Kill-Em-Quick Co., [1918] 1 W.W.R. 781.

IMITATION OF LABEL.

A party who has acquired the right to make use of a certain name in connection with the sale of an article manufactured by him is entitled to recover against another who uses the same name upon his goods in a way calculated to deceive the public and represent his goods as the goods of the other, but where no actual damages are claimed or proved the recovery must be confined to nominal damages and costs.

Pearman v. Gray, 45 N.S.R. 489.

INDUSTRIAL DESIGN—REGISTRATION—WANT OF NOVELTY—PASSING OFF—IMITATION—RIGHT OF ACTION AGAINST SELLER—TRADE-MARK AND DESIGN ACT, R.S.C. 1906, c. 71, PART II., ss. 31, 35, 36, 45.

Canadian Heating & Ventilating Co. v. Eaton and Guelph Stove Co., 10 O.W.N. 439, 11 O.W.N. 176.

(§ IV—24)—USE CALCULATED TO DECEIVE.

A trade-mark should distinguish the trader's goods and the essential of an infringement (where the essential particulars are not bodily appropriated) is that the use of the mark upon the defendant's goods is calculated to lead purchasers to buy them when asking for the plaintiff's goods; failing such proof an action for infringement should be dismissed.

Lambert Pharmacal Co. v. Palmer, 2 D. L.R. 358, 21 Que. K.B. 451.

VI. Registration.

See Ante, II.

(§ VI—30)—REGISTRATION.

For a registered specific trade-mark the Trade Mark and Design Act gives the right of exclusive use of it only to designate a "class of merchandise of a particular description," and the scope of such title cannot be extended by construction, for all doubts are to be resolved in the direction of freedom and not of the exclusive right. [Apollinaris Co. v. Hersfeldt, 4 R.P.C. 478, distinguished.]

Lambert Pharamacal Co. v. Palmer, 2 D. L.R. 358, 21 Que. K.B. 451.

OWNERSHIP.

The applicant for registration in Canada of a trade-mark must be the proprietor of same.

Re Vulcan Trade-mark, 22 D.L.R. 214, 15 Can. Ex. 265. [Affirmed in 24 D.L.R. 621, 51 Can. S.C.R. 411.]

WHEN TITLE ACCRUES—RECTIFICATION.

Registration of a trade-mark under the Trade Mark and Design Act (Can.), confers no title to the mark, but is a prerequisite to the right to bring an action under the Act; and rectification of a registered general trade-mark may be ordered by the Exchequer Court so as to exclude a conflicting specific mark in prior use by another firm and sought to be registered by the latter firm where the general mark was not applied by its owners to the line of goods covered by the specific mark until the dispute arose as to its use on such goods.

Re Vulcan Trade-mark, 22 D.L.R. 214, 15 Can. Ex. 265. [Affirmed in 24 D.L.R. 621, 51 Can. S.C.R. 411.]

SPECIFIC TRADE-MARK—REGISTRATION—RESEMBLANCE TO EXISTING MARK—MANUFACTURED ARTICLES DISSIMILAR.

In an application for the registration of a specific trade-mark, where the resemblance to an existing registered trade-mark is not sufficient to cause deception, registration should be granted.

American Sheet & Tin Plate Co. v. Pittsburgh Perfect Fence Co., 44 D.L.R. 731, 18 Can. Ex. 254.

(§ VI—31)—CONFLICTING CLAIM ON REGISTER—PRIOR GENERAL TRADE-MARK OF SIMILAR WORD.

There is no power under the Trade Mark and Design Act (Can.) enabling the Minister of Agriculture, or his Deputy, to take evidence and adjudicate on the facts and thereupon to determine whether a trade-mark should be registered notwithstanding the prior registration of a similar mark; but such may be done by the Exchequer Court on the hearing of a petition for an order to register.

Re Noelle, 14 D.L.R. 385, 49 C.L.J. 753, 13 E.L.R. 366.

(§ VI—32)—EXPUNGING FROM REGISTRY—DISUSE.

Auto Sales Gum & Chocolate Co. v. Faultless Chemical Co., 14 D.L.R. 917, 14 Can. Ex. 302.

TRADE-MARK — INFRINGEMENT — PASSING-OFF — WANT OF REGISTRATION — FRAUD OR DECEPTION.

Anheuser Busch Brewing Ass'n v. Edmonton Brewing & Malting Co., 3 A.L.R. 371, 16 W.L.R. 547.

THE WORD "STANDARD."

The word "standard" cannot properly be registered as a trade-mark under the Trade Mark and Design Act, 1879 (Can.).

Standard Ideal Co. v. Standard Sanitary Mfg. Co., [1911] A.C. 78, 27 T.L.R. 63, reversing Standard Ideal Co. v. Standard Sanitary Co., 20 Que. K.B. 109, affirming 37 Que. S.C. 33.

AIDING CONTINUANCE OF MINERS' STRIKE—AGENT OF TRADE UNION SUPPLYING FOOD AND CLOTHING TO STRIKERS—EMPLOYEE NOT DISMISSED—PRIVILEGE OF RETURNING TO WORK.

The King v. Neilson, 44 N.S.R. 488, 17 Can. Cr. Cas. 298.

WORDS OF THE SAME DERIVATION APPLIED TO DIFFERENT SPECIAL PRODUCTS.

Lambert Pharmacal Co. v. Palmer, 39 Que. S.C. 64.

TRADE NAME.

Surname as, see Trade-mark, II—8.
Companies, I D—15.

Annotations.

Unfair competition; using another's trade-mark or trade name; noncompetitive lines of trade: 2 D.L.R. 380.

Passing off: 31 D.L.R. 602.

Distinction between trade-mark and trade name, and the rights growing out thereof: 37 D.L.R. 234.

Name of patented article as trade-mark: 49 D.L.R. 19.

(§ I—2)—"THE CLEANERS"—CLOTHES CLEANING ESTABLISHMENT.

An exclusive right to the use of the words "The Cleaners," which are merely descriptive of a well-known business, cannot be ac-

quired by one engaged in the business of clothes cleaning, unless it appears that the words have ceased to have their primary meaning as descriptive of a business, and have acquired a secondary meaning specially descriptive of the claimant.

Matthews v. Omansky, 14 D.L.R. 168, 25 W.L.R. 603, 5 W.W.R. 382, 24 Man. L.R. 85.

"VALET"—DESCRIPTIVE TERM.

One who carries on the business of cleaning, pressing and repairing clothing cannot acquire any proprietary right to the exclusive use of the word "valet" in connection therewith, since the word is merely descriptive of the kind of business that is carried on; but where the plaintiff carried on that class of business under the trade name of "My Valet" he is entitled to require that a person afterwards starting business in competition with him and also using the word "valet" in his trade name (e. g. "My New Valet") will do so in such a way and with such other distinctive words as will shew that he is not leading the public to believe that in dealing with him they are dealing with the prior established business.

"My Valet" v. Winters, 13 D.L.R. 583, 29 O.L.R. 1, affirming 9 D.L.R. 306, 27 O. L.R. 286.

"RUBBERSET" — DESCRIPTIVE WORD — MONOPOLY—EXPIRY OF PATENT—ACQUISITION OF SECONDARY MEANING.

The word "Rubberset" being clearly a descriptive word, invented to express the exact article produced by a patented process, a monopoly in its use cannot be asserted after the patents covering it have run out. In view of the short time since the expiry of the patents the word could lose its primary and descriptive character and acquire a dominating secondary meaning as describing the product of the appellant's factory.

Rubberset Co. v. Boeckh, 49 D.L.R. 13, 46 O.L.R. 11.

"REAL CAKE CONES"—"IDEAL CAKE CONES" —SECONDARY MEANING — EVIDENCE — — DECEPTION — PASSING OFF — INJUNCTION.

D'Nelly v. Union Cone Co., 17 O.W.N. 66.

(§ I—4) — TRADE NAME — RIGHT TO USE PARTNERSHIP NAME — SIMILARITY TO FIRM NAME OF PLAINTIFFS — PASSING-OFF — ACTION FOR INJUNCTION — EVIDENCE.

Cox v. Rennie, 6 O.W.N. 293, 474.

(§ I—9) — PROTECTION OF — UNFAIR COMPETITION — USE OF DESCRIPTIVE NAME.

Where the term "The Cleaners" was adopted as a trade name by a cleaner of clothing, with the first word in small letters and the last more prominently displayed in the form of an inverted crescent, the subsequent use of the words "Fort Rouge Cleaners" by a business rival will be restrained, where the first two words were used in smaller type and the last so arranged as to appear more prominently in a form similar to that adopted by the plaintiff, if the similarity has created confusion between the two establishments, so as to mislead a number of the plaintiff's customers.

Matthews v. Omansky, 14 D.L.R. 168, 24 Man. L.R. 85, 25 W.L.R. 603, 5 W.W.R. 382.

PROTECTION OF — UNFAIR COMPETITION — RIVAL HOLDING OUT—PURELY DESCRIPTIVE NAME.

"My Valet" v. Winters, 13 D.L.R. 583, 29 O.L.R. 1, affirming 9 D.L.R. 306.

PROTECTION—UNFAIR COMPETITION.

Where a trade name has not by long user acquired a secondary meaning so as to be merely descriptive of a general class of goods, the company using a name for its product may be granted an injunction against another company which attempts to use for goods of the same class a hyphenated trade name, of which the first component part is the name theretofore used by the plaintiff company, where such user works an injury to the plaintiff by confusing the two businesses with the public, and would tend to give the defendant company the benefit of plaintiff company's prior advertising of the distinctive name applied to their goods. [Kingston Miller & Co. v. Kingston, [1912] 1 Ch. 575, 29 R.P.C. 289; Lloyd's v. Lloyd's (Southampton), 29 R. P.C. 433, 28 T.L.R. 338, applied; and see Lloyd's Bank v. Lloyd Investment Trust Co., 29 R.P.C. 545, 28 Times L.R. 379.]

Gramm Motor Truck Co. v. Fisher Motor Co., 17 D.L.R. 745, 30 O.L.R. 1.

INFRINGEMENT—UNFAIR COMPETITION.

Where the defendant company had selected a corporate name resembling the plaintiff's corporate name, embarked in a trade the same as that of the plaintiff company previously established in the same city, and in so doing conspicuously advertised in connection therewith a trade word (e. g., "progress"), which, although it may not, constitute a valid trade-mark, was publicly known to have been used by the plaintiff company as descriptive of its goods, and where the defendant's action is found to be injurious to the plaintiff company by leading the public erroneously to suppose that the goods sold by defendant company are of the plaintiff's make, an injunction will lie to restrain the further use of such trade word, although the defendants had added thereto the word "proclaimed" in substitution for the word "brand" which followed it in the plaintiff's advertising.

Vineberg v. Vineberg, 16 D.L.R. 195, 23 Que. K.B. 256.

CUT RATE SHOE STORE — INFRINGEMENT — COMMON TERM.

A firm name of "Cut Rate Store," as applied to a retail shoe business, is a mere descriptive term of common use, which will not be enjoined by the court against a

person subsequently using that term to a similar business adjacently located.

Douglas v. Locke, 24 D.L.R. 238, 9 W. W.R. 42, 32 W.L.R. 254.

PASSING OFF—INTENT.

Representing products to be "just as good as another's," "practically the same except one ingredient," or "better than" the other's, does not constitute a "passing off."

Wodehouse Invigorator v. Ideal Stock & Poultry Food Co., 35 D.L.R. 721, 39 O.L.R. 302, varying 11 O.W.N. 296.

DECEPTION—USE OF SIMILAR NAME AND LABEL—SALE OF GOODS—LIKELIHOOD OF PURCHASERS BEING DECEIVED—EVIDENCE—SUSPICIOUS CIRCUMSTANCES—ACTION TO RESTRAIN USE OF NAME AND LABEL—DISMISSAL—COSTS.

Canadian H. W. Gossard Co. v. Dominion Corset Co., 14 O.W.N. 164. [Affirmed, 15 O. W.N. 103.]

TRADE SECRETS.

See Partnership, VI—27.

TRADE PUBLICATIONS—PIRACY—EVIDENCE—INJUNCTION — DAMAGES — CONTRACT — EMPLOYEE — MISCONDUCT — REMUNERATION FOR SERVICES — REFERENCE.

Canada Bonded Attorney & Legal Directory v. Leonard, 42 D.L.R. 342, 42 O.L.R. 141.

TRADE UNIONS.

INJUNCTION — ACTS OF INTIMIDATION BY STRIKING EMPLOYEES — SUING REPRESENTATIVES OF TRADE UNION.

Cumberland Coal & R. Co. v. McDougall, 44 N.S.R. 535, 9 E.L.R. 204.

RETIREMENT OF SUBORDINATE BODY FROM GRAND COUNCIL—RESTRAINING DISTRIBUTION OF FUNDS.

Equity Lodge, Provincial Workmen's Assn. v. McDonald, 8 E.L.R. 421.

TRADING STAMPS.

(§ I—10)—CONTESTS.

A voting ticket given by a trader to each purchaser of goods to enable the latter to become a contestant for prizes to be distributed in a voting contest or to aid another contestant by voting for him or by transferring the ticket to him, is a "trading stamp" within Cr. Code, ss. 335 (u) and 505.

R. v. Pollock, 28 D.L.R. 545, 26 Can. Cr. Cas. 24, 36 O.L.R. 7.

TRADING WITH ENEMY.

See Aliens.

Annotation.

Status of alien enemies during war: 23 D.L.R. 375, 22 D.L.R. 865.

TRAIN SERVICE.

See Carriers; Railways.

TRANSFER OF ACTIONS FOR APPEAL.

See Appeal III.

TRANSIENT TRADERS.

See Pedlars.

TRANSPORTATION.

See Railways; Carriers; Shipping; Railway Board.

TREASON.

Annotation.

Sedition; Treason: 51 D.L.R. 35.

INDICTMENT—NAME OF ENEMY.

An indictment for treason under s. 74, subs. (i), Cr. Code must be so framed as to afford notice to the accused in terms which he cannot mistake of the acts with which he is charged and which the Crown intends to establish by evidence. An indictment under that section should be quashed where it fails to state the name of the public enemy the accused is charged with assisting, and does not in sufficient terms state any definite overt act of treason.

The King v. Gabor Fehr, 29 D.L.R. 111, 26 Can. Cr. Cas. 245.

ASSISTING ENEMY DURING WAR—TRAP EVIDENCE.

Assisting an enemy alien to leave Canada to join the enemy's forces is treason under Cr. Code, s. 74, subs. (i); a mere attempt so to assist is not treason, but is indictable under ss. 72 and 570, where an intention to assist the enemy is manifested by any overt act. [By the Code Amendment, 1915, assisting alien enemies "to leave Canada" is made an offence if the circumstances do not exclude the possibility that assistance to the enemy is an intended object and if the assisting does not amount to treason. This is new, s. 75A of the Code.]

A conviction for an attempt to assist a public enemy with which His Majesty is at war by agreeing to ferry four enemy aliens over the Niagara River to the United States, whence they might proceed to join the enemy's forces, is not sustainable where there was no incitement by the accused and the enemy aliens had no intention of leaving Canada and no knowledge that the purpose of their being brought to the accused was that they should be ferried across the river, the fact being that they were being used in the make-up of a police trap to get evidence against the accused because of a suspicion that he had committed similar offences; the aliens could not be said to have been "assisted" without a desire or willingness on their part to be assisted, and the sham plot having been terminated by the arrest of the accused after he took the consideration money paid in advance by another person who had solicited the accused in furtherance of the plot arranged by the authorities and the transportation not having begun, there was no evidence of an attempt. [R. v. Linneker, [1906] 2 K.B. 99, applied]

R. v. Snyder, 25 D.L.R. 1, 24 Can. Cr. Cas. 101, 34 O.L.R. 318.

ASSISTING PUBLIC ENEMY—OVERT ACT.

The overt act of assisting another to aid a public enemy is in itself a treasonable act; the Cr. Code does not contemplate such an offence as an attempt to commit treason.

R. v. Bleiler, 35 D.L.R. 274, 28 Can. Cr. Cas. 9, 10 A.L.R. 520, 11 A.L.R. 150, [1917] 1 W.W.R. 1459.

STATING THE OVERT ACT IN THE INDICTMENT —SUFFICIENCY—CR. CODE, SS. 74, 75, 75A, 847.

It is not essential that the overt acts charged in an indictment of treason should in themselves amount to treason apart from the criminal intent with which they are alleged to have been committed.

Re Schaefer, 31 Can. Cr. Cas. 22. [See 45 D.L.R. 492, 58 Can. S.C.R. 43.]

INDICTMENT—INGREDIENTS—OVERT ACTS — INTENT—CR. CODE, ARTS. 74, 847, 852, 5 GEO. V. 1915, C. 12.

A motion in arrest of judgment is not a demurrer which should be presented before plea filed: It can be made at any time before judgment, if the indictment contains no offence. An indictment for treason which avers that the accused did commit treason by assisting subjects of the Austro-Hungarian Monarchy to leave the Dominion of Canada and proceed to Austria-Hungary, between which monarchy and sovereign thereof and our said Lord, the King, war was then, and is yet, prosecuted and carried on, as he, the said Israel Schaffer, then and there well knew, for purpose in such way of aiding, comforting and assisting the said public enemy so at war with His Majesty, and "maliciously, unlawfully and traitorously providing and assisting each and all of them with money of the said Austro-Hungarian Monarchy to be used in furtherance of their said purpose," and also set forth the details of the offence, contains all the elements and overt acts of treason and is sufficiently libelled. The statute 5 Geo. V., 1915, c. 12 (amendment to Cr. Code, s. 75a) did not create a special offence, it only imposed a new penalty. In an indictment for treason, the overt acts set out must not necessarily be acts of commission which by themselves would constitute treason. Although, in general, the criminal law takes no account of pure intent, it is not so in the case of treason. In the contemplation of law, the intent is the treason, as there are no accessories nor attempt recognized, all is principle.

The King v. Schaeffer, 28 Que. K.B. 35, 31 Can. Cr. Cas. 22.

TREATIES.

See International Law, I—3.

THE ASHBURTON TREATY.

A charter granted by the legislature of the State of Minnesota empowering a boom company to construct works in the Rainy river and granting permission to collect tolls from the users of the said works is ultra vires and null and void, as being contradictory to the provisions of the Ashburton Treaty, and this, notwithstanding that the boom company had secured a permit for the extension of their operations from the War Department of the United States Government.

Rainy Lake River Boom Corp. v. Rainy River Lumber Co., 6 D.L.R. 401, 22 O.W.R. 952, 27 O.L.R. 131.

TRESPASS.

I. CIVIL.
- A. What constitutes.
- B. Who may maintain the action.
- C. Remedy; Defenses; Recovery.

II. CRIMINAL.

Liability for injury to trespassers, see Negligence; Crown.

Liability of cestui que trust, see Trusts, III A—60.

Trespass to land, measure of damages, see Damages, II A—5.

Jurisdiction as to action, see Courts, II A—150.

Third party procedure, see Parties, III —120.

Annotations.

Obligation of owner or occupier of land to licenses and trespassers: 1 D.L.R. 240.

Unpatented land; effect of priority of possessory acts under colour of title: 1 D.L.R. 28.

I. Civil.

A. CONSTITUTES.

(§ I A—5)—WHAT CONSTITUTES.

The reckless running of a bicycle on a street resulting in collision with and injury to a foot-passenger crossing the street, may constitute trespass to the person of the injured party.

Woolman v. Cummer, 8 D.L.R. 835, 23 O.W.R. 504, 4 O.W.N. 371.

WHAT CONSTITUTES — OVERLAPPING OF BOUNDARIES — GRANTS FROM THE CROWN.

Hirtle v. Boehner, 18 D.L.R. 794, 50 Can. S.C.R. 264, reversing 6 D.L.R. 548, and restoring the trial judgment 9 E.L.R. 258.

The buyer of a quantity of logs which were the proceeds of timber cut and removed by the seller in acts of trespass and encroachment upon the property of an adjoining owner, is not liable in damages for the acts of trespass, in addition to and apart from his liability for the value of the logs in conversion, unless he knew of the trespass.

Phillips v. Conger Lumber Co., 5 D.L.R. 188, 3 O.W.N. 1436, 22 O.W.R. 436.

A railway company cannot, in an action for a trespass in laying sidetracks on the plaintiff's land, justify on the ground that its predecessor in title, without right, took a strip of land 12 feet wide from that owned by the plaintiff, for part of its right-of-way, which was not, at such place, of the width

allowed by statute, and that therefore it became entitled to claim the full 99 feet allowed by statute for a right-of-way, which would include the land on which the side-tracks were laid, since the court cannot presume that the company, by taking possession of the 12 foot strip, also took possession of the entire 99 feet which it was entitled to expropriate for a right-of-way.

Carr v. C.P.R. Co., 5 D.L.R. 208, 14 Can. Ry. Cas. 40, 41 N.B.R. 225. [Affirmed, 15 D.L.R. 295, 48 Can. S.C.R. 514, 13 E.L.R. 559.]

ESTATE OF PURCHASER CANCELLED BY RESCISSION—SUBSEQUENT OCCUPATION.

Where a purchaser has entered into possession of lands under a contract of sale and such contract is terminated by a final order of the court canceling the same and forfeiting the purchase money paid on account thereof pursuant to its terms, the estate at will of the purchaser is determined by the rescission of the contract, and he and his assigns will be liable in trespass for the subsequent occupation, and for removing the crop after the final order.

Stewart v. Schrader, 21 D.L.R. 764, 8 S.L.R. 172, 8 W.W.R. 761.

The fact that part of patented land is covered with navigable water gives no right to third persons to hunt and fish thereon. A claim of title, to oust the jurisdiction of the magistrate in a case of trespass, must be a claim of title in the party charged, and not a mere allegation of a jus tertii or of a defect in the complainant's title. [Cornwall v. Sanders, 3 B. & S. 206, followed.]

R. v. Harran, 3 D.L.R. 753, 3 O.W.N. 1107, 21 O.W.R. 951, 20 Can. Cr. Cas. 72.

DAMAGES—RIGHT TO POSSESSION—LANDLORD AND TENANT.

Richards v. Carnegie, 1 D.L.R. 902, 3 O. W.N. 686.

The fact that the person injured was walking on the tracks itself and not alongside will not constitute him a trespasser if his walking on the track was incidental to a reasonable attempt on his part to cross the railway at a crossing regularly used by the public without objection or warning on the part of the railway company.

G.T.R. Co. v. McSween, 2 D.L.R. 874.

One who cuts and removes timber from the timber limits of another with knowledge of the latter's rights, is answerable for a wilful and deliberate trespass.

Laursen v. McKinnon, 4 D.L.R. 718, 18 B.C.R. 682, 20 W.L.R. 384.

RAILWAYS—TAKING GRAVEL—CONSENT OF OWNER.

Isitt v. G.T.P.R. Co., 49 D.L.R. 687.

CIVIL ACTION FOR ASSAULT AND BATTERY—INTENTION—REMOVAL OF DOOR OF HOUSE—TRESPASS.

Lewis v. McInnes; Lewis v. Dominion Lumber & Fuel Co., 17 W.L.R. 309.

The plaintiff's fences enclosed part of the highway abutting on his land. The defendant tore down the fences, although his right of passage along the highway was not really interfered with:—Held, that the plaintiff was in possession, and could maintain trespass; and the defendant, as a private individual, had no right to abate the nuisance caused by the obstruction of the highway. Injunction and damages awarded.

Waddell v. Richardson, 17 B.C.R. 19.

TITLE TO LAND—DISPUTE AS TO OWNERSHIP OF SMALL STRIP—DEED—DESCRIPTION—EVIDENCE—ONUS—FINDING OF TRIAL JUDGE—REVERSAL ON APPEAL—CLAIM FOR POSSESSION—DAMAGES—COSTS—SCALE OF—ACTION BROUGHT IN SUPREME COURT—JURISDICTION OF COUNTY COURTS.

Baker v. Ryckman, 17 O.W.N. 196.

RIGHT OF FORCIBLE ENTRY.

An owner having a right of entry on property does not make himself liable to damages for trespass by making a forcible entry and evicting an accupier wrongfully in possession even though he thereby renders himself liable to indictment under 5 Rich. II. stat. 1, c. 8. Quære, whether in case of a forcible entry, resulting in damage to goods an action lies for such damages.

Allan v. Kirk, [1917] 2 W.W.R. 527.

SALE OF HOUSE—AGREEMENT OF PURCHASER TO REMOVE FROM LAND—SIMILAR AGREEMENT BETWEEN PURCHASER AND OCCUPANT OF HOUSE—FORFEITURE ON DEFAULT—NONENFORCEMENT OF—OWNERSHIP OF HOUSE—EVIDENCE—APPEAL—NEW TRIAL.

Genereux v. Kitchen, 13 O.W.N. 299.

WHAT CONSTITUTES—ENCROACHMENT ON HIGHWAY.

An agreement between a municipal corporation and a resident ratepayer that the question whether a hedge belonging to the latter and bordering on a highway, encroaches thereon and is a danger to the public, shall be submitted to a committee empowered to decide what shall be done, with a clause that the ratepayer shall pay a penalty of $100 if he refuses to carry out the decision of the committee, being lawful and binding, gives the corporation power to perform the work decided on by the committee on the ratepayer's refusal, and the corporation is not answerable to the ratepayer for a trespass committed in cutting the hedge in carrying out the recommendations of the committee.

McGowan v. Stanstead, 43 Que. S.C. 490.

B. WHO MAY MAINTAIN THE ACTION.

(§ I B—10)—Neither an applicant to purchase Crown lands nor his assignees has any legal or equitable interest therein which will amount to an answer to an action of trespass by a person having actual possession thereof with the concurrence of the Crown.

Brown v. Motherlode, 2 D.L.R. 277, 17 B.C.R. 248, 20 W.L.R. 778, 2 W.W.R. 157.

A lessee of land from the Crown under a mining lease, who was, under R.S.O. 1897, c. 36, s. 40, entitled to such trees, other than pine, as are required for building, fencing, or for any other purposes necessary for the working of the mine, or the clearing of the land, may maintain an action of trespass against one who cut and removed timber therefrom.

Phillips v. Conger Lumber Co., 5 D.L.R. 188, 3 O.W.N. 1436, 22 O.W.R. 436.

A title by possession to woodland may be based upon occupation under colour of title and acts of constructive possession such as the building of a lumberman's sluice and operating as a lumberman over the lands, although not enclosed by fences, to support an action against a trespasser.

Swinehammer v. Hart, 5 D.L.R. 106, 46 N.S.R. 194, 11 E.L.R. 260.

The acceptance by the Crown of a survey of land made by an applicant for a timber limit license and the noting on the official map that such land belongs to the applicant, and the issuance to him of such license, creates a right in the land which he may defend against trespassers.

Laursen v. McKinnon, 4 D.L.R. 718, 18 B.C.R. 682, 20 W.L.R. 384.

The patentee of mining lands in Ontario under the Mines Act (R.S.O. 1897, c. 36; see now 8 Edw. VII. c. 21, s. 112), has such an interest in the pine timber, as well as in the other timber thereon, as entitles him to maintain an action of trespass against anyone wrongfully cutting and removing such timber. [Casselman v. Hersey, 32 U.C.R. 333, followed.]

National Trust Co. v. Miller; Schmidt v. Miller, 3 D.L.R. 69, 46 Can. S.C.R. 45, 22 O.W.R. 485.

RIGHTS OF LANDLORD OR TENANT.

A lessee in possession is the proper person to maintain an action for trespass, and the landlord has no right to maintain such action where the injury is of a temporary character, and there is no permanent injury to the property.

Crawford v. Clowes, 24 D.L.R. 214, 48 N.B.R. 199.

TAKING GRAVEL FROM BEACH—ACTION BY POSSESSORY HOLDER—PARTITIONED COTENANCY.

A cotenancy which had been divided by the cotenants into their respective severalties, and held exclusively by one of them for a period sufficient to give him a possessory title under the Statute of Limitations (R.S.N.S., c. 167, ss. 10, 14 and 15), will entitle the latter, or his successor in title, to maintain an action of trespass for the taking of gravel from the unfenced beach adjoining his lands.

McDougall v. McDougall, 23 D.L.R. 28, 49 N.S.R. 101.

ACTION BY PURCHASER IN NAME OF VENDOR—DESCRIPTION—ADVERSE POSSESSION.

Plaintiff purchased land from the defendant H.C., paying a small portion of the purchase money down and agreeing to pay the balance on or before a later date specified. The deed in the meantime was handed to a third party to be delivered to plaintiff on payment of the balance due. Plaintiff failed to pay on the date fixed but paid on a later date and was given her deed. In the meantime, between the date fixed for payment of the balance of the purchase money and the date of delivery of the deed, the defendant, W. C., entered upon the land and cut and removed trees:—Held, that an action would be maintainable in the name of the vendor, who had remained in actual possession, and that as he refused to be made a plaintiff he was properly joined as a party defendant; that the entry upon the land before action and after delivery of the deed was in this case sufficient to enable plaintiff to maintain trespass; that the parties to such an action as this must either be bound by the descriptions in their title deeds or show an occupation under the statute of limitations varying the description.

Gibson v. Clinkworth, 51 N.S.R. 341.

In trespass the burden of locating the land is clearly upon plaintiff, and not having done so he must fail. While the report and plans of a Crown land surveyor leading to a grant cannot be used to contradict the terms of the grant they can be used for the purpose of ascertaining where the surveyor started and where he established his marks. Where a course is described as running from a fixed monument "north along the rear line of its 16, 17 and 18, 180 rods" the dimensions 180 rods conclusively determines the distance to be run and not the reference to "lot 18."

Millett v. Bezanson, 45 N.S.R. 152, 9 E.L.R. 16.

The occasional use of a strip of beach and land adjacent thereto (the property of the Crown) for the purpose of drying nets, etc., will be regarded as having occurred in the exercise of public right and will not confer any special right or interest in the locus. Such acts are not sufficient to enable the persons exercising them to maintain trespass against a person in possession claiming under colour of title.

Carr v. Ferguson, 45 N.S.R. 132, 9 E.L.R. 218.

WHO MAY MAINTAIN THE ACTION.

The possession of land animo domini which entitles the possessor, in case of interference, to an action for damages or for possession must result from acts which can leave no doubt as to the claim that he makes to the land. Therefore, acts permitted by a riparian owner, such as the cutting of grass and making of fences on the shore of the River St. Lawrence, between high and low tide, and the pasturing

of his animals, do not establish a useful possession.

Pelletier v. Roy, 44 Que. S.C. 141.

C. REMEDY; DEFENSES; RECOVERY.

(§ I C—15)—ENCROACHMENT — REMEDY—DAMAGES IN WILFUL TRESPASS—SCOPE OF.

On fixing the damages for a wilful trespass in mining operations no allowance will be made to the defendant for the working cost of dredging. [Lamb v. Kincaid, 38 Can. S.C.R. 516, followed.]

Yukon Gold Co. v. Boyle Concessions, 19 D.L.R. 336. [Affirmed 27 D.L.R. 672, 23 B.C.R. 103, 34 W.L.R. 436, 10 W.W.R. 585; 50 D.L.R. 742.]

TRESPASS TO LAND—CUTTING TIMBER —EVIDENCE — DAMAGES — COSTS —REFERENCE — STATUS OF EXTRA-PROVINCIAL COMPANY AS PLAINTIFF — TITLE TO LAND.

Rainy Lake Mining & Development Co. v. Lockhart, 12 O.W.N. 406.

TRESPASS TO LAND — TITLE — DAMAGES — LOSS OF TIMBER—QUANTUM.

Bausch v. Williams, 7 O.W.N. 404.

(§ I C—16)—REMEDY—LAND—RIGHT OF WAY—INJUNCTION—DAMAGES.

Mulholland v. Barlow, 5 O.W.N. 654.

(§ I C—17)—DEFENCES.

It is not a defence to an action for trespass upon land held by the plaintiff under a mining lease from the Crown, to shew that not enough mining work had been done thereon by the plaintiff to comply with the requirements of the Mining Act, since that was a matter exclusively between the lessee and the Crown.

Phillips v. Conger Lumber Co., 5 D.L.R. 188, 3 O.W.N. 1436, 22 O.W.R. 436.

A city cannot, as a defence to an action of trespass for laying a sidewalk that encroached upon lots owned by the plaintiff, shew that, as the result of a mistake in surveying the block in which the lots were located, the plan thereof, as filed in the land titles office, and to which the plaintiff's certificate of title referred, was incorrect, and that, therefore, he did not own the locus in quo. [Smith v. Millions, 16 A.R. (Ont.) 140, applied.]

Smith v. Saskatoon, 4 D.L.R. 521, 21 W.L.R. 868, 2 W.W.R. 756, 5 S.L.R. 218.

DEFENCES—WARRANT OF POSSESSION.

In an action against a railway company for a trespass, a warrant of possession for the locus in quo, issued under s. 217 of the Railway Act, 1906, will be a good defence, although some of the statutory requirements pertaining to the issue of the warrant were not complied with, as the regularity of the warrant can be inquired into only in the proceeding in which it was issued.

Sanders v. Edmonton, Dunvegan & B.C.R. Co., 14 D.L.R. 89, 6 A.L.R. 459, 25 W.L.R. 540, 5 W.W.R. 172.

DEFENCE—DISPUTING AUTHORITY OF LANDLORD'S AGENT TO EXECUTE PLAINTIFF'S LEASE—LESSEE'S RIGHT—TRESPASSER.

One whose lease from a company was subject to cancellation by a subsequent sale or lease of the demised premises, cannot, in an action of trespass against him by a subsequent lessee in possession, question the authority of the lessor's agent to execute the last lease. The right of one in peaceable possession to crop land, although his lease is for grazing purposes only, cannot be questioned by a trespasser.

West v. Mayland, 12 D.L.R. 3, 23 Man. L.R. 488, 24 W.L.R. 573, 4 W.W.R. 851.

REMEDY.

Mulholland v. Barlow, 16 D.L.R. 862, 6 O.W.N. 72.

CONSENT TO DO THE ACTS COMPLAINED OF—EVIDENCE—PERJURY.

Wellington Collieries v. Pacific Coast Coal Mines, 48 D.L.R. 703, [1919] 3 W.W.R. 463.

(§ I C—18)—CUTTING TIMBER — MEASURE OF DAMAGES.

In an action for trespass upon plaintiff's land and for wrongfully cutting timber therefrom, defendants, having been allowed by order of court to remove the timber cut, subject to plaintiff's right to damages, must answer for its then value—not as standing timber, but as it then was in the log.

Field v. Richards, 11 D.L.R. 120, 4 O.W.N. 1301, 24 O.W.R. 606. [Affirmed, 13 D.L.R. 943, 5 O.W.N. 57, 24 O.W.R. 987.]

RIGHT OF EQUITABLE OWNER.

Under the Judicature Act (N.S.), recovery for trespass to land may be had upon an equitable title where there is an appropriate prayer for such relief.

Miller v. Halifax Power Co., 24 D.L.R. 29, 48 N.S.R. 370.

WILD LAND—CONSTRUCTIVE POSSESSION UNDER COLOUR OF TITLE.

Borden v. Jackson, 45 N.S.R. 81.

CONSTRUCTION OF ROAD ON PLAINTIFF'S LAND—NO PROCEEDINGS FOR EXPROPRIATION.

Fodey v. South Qu'Appelle, 3 S.L.R. 412.

JOINT TORT FEASORS — LIABILITY FOR DAMAGES NOT NECESSARILY THE SAME IN AMOUNT.

Stewart v. Teskee, 20 Man. L.R. 167, 15 W.L.R. 604.

SEIZURE OF SHIP UNDER FI. FA. — SHIP WRONGFULLY BROUGHT BY EXECUTION CREDITOR INTO SHERIFF'S BAILIWICK.

Houghton v. May, 23 O.L.R. 252, affirming 22 O.L.R. 434.

BUILDING BY-LAW—DANGEROUS CONSTRUCTIONS — ABATEMENT OF NUISANCE — CONDITION PRECEDENT — NOTICE — DEMOLITION OF STRUCTURE.

Riopelle v. Montreal, 44 Can. S.C.R. 579.

DAMAGES—WATER PERCOLATING INTO PLAINTIFF'S CELLAR — EVIDENCE CONTRADICTORY—UNDERTAKING TO REPAIR WALL.
Pinder v. Sanderson, 2 O.W.N. 726, 18 O.W.R. 240.

TRESPASS TO LAND—BOUNDARY LINE—ADMISSION BY DEFENDANT.
McIntyre v. White, 10 E.L.R. 248.

TRESPASS—CUTTING TIMBER—LIABILITY — VALUE OF TIMBER CUT—DAMAGES FOR DEPRECIATION OF PROPERTY.
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I. Conduct and disposal.

A. IN GENERAL.

(§ I A—1)—ACTION FOR DAMAGES—DAMAGES INCIDENT TO INJURY — ASSESSMENT OF—NEW EVIDENCE.

In an action for damages for injuries received, all the damages incident to the injury must be recovered at the trial, new evidence will not be admitted to shew that by medical examination after the trial, permanent injuries were sustained for which compensation should be given.

Ryan v. C.P.R. Co., 46 D.L.R. 397, [1919] 2 W.W.R. 368.

ALIMONY — SETTLEMENT — REPUDIATION—STATUTE OF LIMITATIONS—EVIDENCE—FINDINGS OF TRIAL JUDGE — HUSBAND AND WIFE.
Jordan v. Jordan, 17 D.L.R. 840, 6 O.W.N. 543.

NOTICE OF TRIAL—TIME AND PLACE—RULES 237, 238—PREMATURITY OF ORDER.
Willow Heights Rural Telephone Co. v. Rourke, 37 D.L.R. 798, 10 S.L.R. 362, [1917] 3 W.W.R. 657.

NOTICE OF TRIAL.

In any cause or matter in which there has been no proceeding for one year from the last proceeding had, the party who desires to proceed shall give a month's notice to the other party of his intentions to proceed. A summons on which no order has been made shall not, but notice of trial although countermanded shall be deemed a proceeding within this rule (English Rules, Ord. 64, r. 13).

McDougall v. Groat, 10 W.W.R. 375.

Where a case is fixed for proof and hearing by the judge for a special day in the presence of the parties and at demand of one of them, it is not necessary to give notice to the other party.

Krauss v. Michaud, 26 Que. K.B. 504. [Appeal quashed 52 D.L.R. 681, 59 Can. S.C.R. 654.]

JURY NOTICE—PLACE OF TRIAL.
Helsdon v. Bennett, 11 O.W.N. 162.

NOTICE OF TRIAL—TIME FOR SERVICE—HOLIDAY.
Whittaker v. Toronto R. Co. and Dominion Transport Co., 11 O.W.N. 74.

CHANGE IN ORDER OF CAUSES—DISCRETION.

Parties to a judicial proceeding are strictly entitled to benefit by the delays fixed by law, but it is not the same in regard to those which result from encumbering the roll. The court can change the order of the causes inscribed, and direct, at its discretion, that one of them be heard before it reaches its place on the roll.

Picard v. Robillard, 49 Que. S.C. 235.

ADJOURNMENT—NOTICE OF TRIAL—SITTINGS JUDGMENT—IRREGULARITY.

Where an action comes on for trial at a sittings, and the trial is at that sittings

peremptorily adjourned till a later sittings, a new notice of trial for the later sittings is necessary: r. 252. A countermand of a notice of trial is not regular. [Friendly v. Carter, 9 P.R. (Ont.) 41, approved.] Where the trial had been adjourned to the June sittings, and the plaintiffs (by mistake) gave notice of trial for the October sittings, and the action was entered for trial at the October sittings, but the plaintiffs, without formally countermanding their notice for the later sittings—and without any motion being made by either party—gave notice of trial for the June sittings, and caused the entry for trial to be correspondingly changed:—Held, that the defendant had accepted the plaintiff's notice of trial for the October sittings, and, without an order setting it aside, the plaintiffs were bound by it; and a judgment for the plaintiffs pronounced at the June sittings, the defendant not appearing, was set aside.

Malden Public School Board v. Sellers, 42 O.L.R. 14.

NOTICE OF TRIAL — REGULARITY—RR. 173 (1), 248—COMPUTATION OF PERIOD OF 10 DAYS—PRACTICE.

Mayfair Investments v. Somers, 15 O.W.N. 95.

CONVENIENCE OF TRIAL OF TWO ACTIONS AT SAME SITTINGS—REMOVAL OF COUNTY COURT ACTION INTO SUPREME COURT OF ONTARIO — COUNTY COURTS ACT, S. 29 —TERMS—SECURITY FOR COSTS—DIRECTIONS AS TO TRIAL.

Huff v. Burton, 14 O.W.N. 181.

POSTPONEMENT—DISMISSAL.

Broom v. Toronto, 25 O.W.R. 314.

(§ I A—2)—SUMMARY CONVICTIONS—TRYING SEVERAL CHARGES AT ONE TIME.

Where the assaults charged separately against two persons took place as part of one and the same occurrence, and the evidence would have been identical in each case, it is not a ground for quashing the summary conviction in either case that the two cases were tried together, particularly where no exception was taken at the trial. [R. v. Lapointe, 4 D.L.R. 210, 20 Can. Cr. Cas. 98, and R. v. Fry, 19 Cox C.C. 135, 62 J.P. 457, applied.]

R. v. Tally, 21 D.L.R. 651, 23 Can. Cr. Cas. 449, 8 A.L.R. 453, 7 W.W.R. 1178, 30 W.L.R. 396.

SEPARATION OF JURORS—SUCCESSFUL PARTY DISCUSSING CASE BEFORE TWO JURORS—EFFECT ON VERDICT.

A verdict should not be allowed to stand where the course of justice has been or may possibly have been interfered with by any improper conduct on the part of the successful party (e. g., discussing the case with one of the opposing witnesses in the presence of two of the jurors during an adjournment of the hearing), and this irrespective of his motives and although he was not guilty of intentional wrong-doing. [Campbell v. Jackson, 29 C.L.J. 69, applied.]

Kellum v. Roberts, 19 D.L.R. 152, 31 O.L.R. 159.

(§ I A—4)—WHEN TRIAL BEGINS.

The actual procedure of trying the defendant commences with the preferring of the bill of indictment.

The King v. Montminy, 3 D.L.R. 483, 20 Can. Cr. Cas. 63.

OFFICIAL STENOGRAPHER.

By analogy to the powers of superior courts on the trials of indictments, the depositions taken on the trial before a magistrate of the indictable offences specified in Cr. Code s. 773 may be taken in shorthand by a stenographer under the direction of the magistrate.

The King v. Bond, 19 Can. Cr. Cas. 96, 19 W.L.R. 348.

B. ELECTION BETWEEN COUNTS.

(§ I B—5)—FIAT OF ATTORNEY-GENERAL—REFUSAL OF—COMMENCEMENT OF ACTION—RIGHT TO PROCEED.

The Hydro Electric Power Commission (the second defendant in the action) was established by 6 & 7 Edw. VII. c. 19 (Ont.), now embodied in R.S.O. 1914. This commission is a government department, and s. 23 of the original Act (now s. 16) provides as follows: "Without the consent of the Attorney-General no action shall be brought against the Commission or against any member thereof for anything done or omitted in the exercise of his office." The sole question in issue on the appeal so far as the Hydro Electric Power Commission was concerned was whether this provision is intra vires the Ontario legislature. Their Lordships thought it undesirable to express any final opinion upon the construction of the section and its effect upon the action until the precise nature of the plaintiff's claim had been formulated. In their Lordships' opinion the appellants' contentions as to the section raised points of importance which ought not to be dealt with in a summary way, and which demanded serious consideration in the ordinary course of law. Their Lordships, therefore, held that the action must proceed as against the Hydro Electric Commission, but without prejudice to the commission to raise this point as a defence when the pleadings have disclosed the exact nature of the plaintiffs' claim and the facts so far as necessary have been ascertained. As to the motion to set aside the writ as against the Attorney-General of Ontario, and that any claim against the Crown should be brought forward by petition of right, the argument advanced on behalf of the Attorney-General for Ontario failed to satisfy their Lordships that it was so clear that no declaration could be made against the Attorney-General under the circumstances as to make it right that the action should be summarily stopped as against him. All that their Lordships de-

cided was that the plaintiffs' claim ought not to be disposed of in a summary application.

Electrical Development Co. v. Att'y-Gen'l of Ontario, 47 D.L.R. 10, [1919] A.C. 687, reversing 34 D.L.R. 92.

(§ I B—6)—Adjournment of trial—Discharge of jury—Discretion of Trial Judge.

The discharge of the jury and the adjournment of the trial are matters solely within the jurisdiction of the Trial Judge and his discretion is not open to review on appeal.

The King v. Bordenink, 45 D.L.R. 470, 12 S.L.R. 126, [1919] 1 W.W.R. 968.

(§ I B—7)—Separate trial of counts—Indictment.

Where evidence is tendered in support of one count of an indictment which while admissible thereon is not admissible in proof of another count of the same indictment, the defendant's remedy is to apply under Cr. Code, s. 857 to have each count tried separately if he fears that, notwithstanding the direction which would properly be given by the judge to the jury to disregard such evidence in considering the second count, the jury would unconsciously be influenced thereby to the prejudice of the accused.

R. v. Strong, 26 D.L.R. 122, 24 Can. Cr. Cas. 430, 43 N.B.R. 190.

C. Reception of evidence.

(§ I C—10)—Reception of evidence.

Where, in an action for calls on company shares, the question is not raised by defendants' pleading that a statutory meeting was not held and that consequently the statutory limitation under the Ontario Companies Act for avoiding the allotment of shares had not begun, evidence upon such an issue, which would open up an entirely new case as to which no question had been raised previous to the trial, is properly rejected, particularly where no application was made to amend the pleadings.

Boeckh v. Gowganda Queen Mines, 8 D.L.R. 782, 46 Can. S.C.R. 645, 23 O.W.R. 313, affirming 24 O.L.R. 293.

Leave granted to the plaintiff by the Trial Judge to produce a written contract for sale of goods not set up in the pleadings and, therefore, inadmissible without an amendment of the pleading, is irregular, notwithstanding that such leave is given subject to the defendant's right to amend his plea.

Lemay v. Lefebvre, 4 D.L.R. 833, 41 Que. S.C. 541.

Where a witness is cross-examined by reference to his disposition taken on discovery, it is not permissible to conduct the proceedings in such a way as to give to the jury a false impression of the evidence given by the witness on discovery, and where that is attempted, the Trial Judge, in his discretion, may allow the whole of the discovery evidence to be read, or permit such other steps to be taken as may be necessary to remove the false impression.

King Lumber Co. v. C.P.R. Co., 7 D.L.R. 733, 14 Can. Ry. Cas. 313, 17 B.C.R. 502, 22 W.L.R. 553, 3 W.W.R. 442.

Crown witnesses at preliminary inquiry.

If the Crown does not intend to call at the trial a witness whom it called on the preliminary inquiry, such witness should be made available to the defence unless his evidence is unquestionably immaterial.

R. v. McClain, 23 D.L.R. 312, 23 Can. Cr. Cas. 488, 8 A.L.R. 73, 7 W.W.R. 1134, 30 W.L.R. 388.

Discretion—Recalling witness on collateral issue as to credit.

The judge trying a criminal case without a jury has a discretion to refuse to recall one of the accused who had given evidence on his own behalf for the purpose of giving further evidence tendered merely to confirm the credibility of one of his own witnesses as to a circumstance brought out on the latter's cross-examination which was not relevant to any fact in issue.

R. v. Prentice, 20 D.L.R. 791, 23 Can. Cr. Cas. 436, 7 A.L.R. 479, 29 W.L.R. 665, 7 W.W.R. 271.

Reception of evidence—Inadmissibility—Surveyor's notes—Mistrial.

Where the Trial Judge bases his finding upon inadmissible evidence, this constitutes a mistrial, and on a boundary line dispute where the hearsay of witnesses as to the survey made to establish the line is received in support of the finding of the court instead of the primary and best evidence thereof being required, such is ground for a new trial.

Anticknap v. Scott, 16 D.L.R. 20, 19 B.C.R. 81, 26 W.L.R. 952.

(§ I C—12)—Reception of evidence on counterclaim—Order of proof.

On the trial of an action in replevin for possession of an automobile and a counterclaim for the cost of repairs, the circumstances that the plaintiff in giving testimony on the claim incidentally gave some evidence as to the counterclaim does not disentitle the plaintiff, after the evidence on the part of the defendant in proof of the counterclaim is put in, to give testimony in answer thereto; and the Trial Judge's refusal to permit such further evidence is error constituting ground for a new trial on the counterclaim.

Hartney v. Boulton, 16 D.L.R. 521, 7 S.L.R. 97, 6 W.W.R. 260, 27 W.L.R. 613.

Reopening—Surprise.

An application by the plaintiff in an action, after trial and before judgment, to reopen the case and introduce further evidence, will be refused where no surprise is shewn, it appearing that his attention was sufficiently drawn to the point involved by

the pleadings, evidence and argument before the case was closed.

Brown v. "Alliance No. 2," 16 D.L.R. 413, 19 B.C.R. 529, 27 W.L.R. 704.

D. STATEMENTS AND ARGUMENTS OF COUNSEL.

(§ I D—15) — ASSESSMENT OF DAMAGES ONLY—RIGHT TO APPEAL BY COUNSEL—JUDGMENT PRO CONFESSO.

Atlas Elevator Co. v. Manitoba Commission Co., 11 D.L.R. 860, 4 W.W.R. 255.

MURDER TRIAL — REFERENCE TO POSSIBLE COMMUTATION OF SENTENCE.

It is not error entitling the accused to a new trial that the Crown counsel in addressing the jury in a murder case stated, as was the law, that the Crown through the Department of Justice might reduce a sentence of death, if the accused were convicted, by substituting a term of imprisonment, where such statement was elicited by a reference made by counsel for the accused in his address to the jury to the disgrace which would fall on the family of the accused were he convicted, and where the Trial Judge afterwards instructed the jury that they should pay no attention to what the punishment should be.

R. v. Anderson, 16 D.L.R. 203, 22 Can. Cr. Cas. 455, 7 A.L.R. 102, 50 C.L.J. 438, 5 W.W.R. 1052.

LIMITING SCOPE OF ENQUIRY—FAILURE TO OBJECT.

That the personal bank account of a person accused of embezzlement is put in evidence against him and counsel for the accused limits his examination of witnesses to an explanation of a single item of that account, does not preclude the Trial Judge from considering in his directions to the jury any inferences apart from such single item which may properly be drawn from what appears in the bank account, although counsel for the Crown had not during the examination by prisoner's counsel demanded an explanation of other items. [Browne v. Dunn, 6 R. 67, distinguished.]

R. v. Minchin, 15 D.L.R. 792, 22 Can. Cr. Cas. 254, 7 A.L.R. 148, 26 W.L.R. 633, 5 W.W.R. 1028. [Affirmed, 18 D.L.R. 340, 6 W.W.R. 800.]

ADVERSE COMMENT TO JURY ON JUDGE'S RULING ON ADMISSIBILITY OF EVIDENCE.

It is error for which a new trial will be granted that the Crown counsel in his address to the jury told them that certain material evidence for the defence which the Trial Judge had ruled to be admissible should not have been allowed, as the effect of counsel's statement may have been to induce the jurors to disregard such testimony.

R. v. Webb, 16 D.L.R. 317, 24 Man. L.R. 437, 22 Can. Cr. Cas. 424, 27 W.L.R. 313, 6 W.W.R. 358.

INFLAMMATORY LANGUAGE.

The mischievous practice of employing inflammatory language in addressing juries is an abuse of privilege of counsel, and if persisted in, a contempt of court.

Dale v. Toronto R. Co., 24 D.L.R. 413, 34 O.L.R. 104.

IMPROPER LANGUAGE ADDRESSED BY COUNSEL TO JURY—INFLAMMATORY TENDENCY—POSSIBLE PREJUDICE—OBJECTION MADE AT TRIAL—COURSE OPEN TO TRIAL JUDGE—VERDICT OF JURY SET ASIDE AND NEW TRIAL ORDERED.

Pender v. Hamilton Street R. Co., 12 O.W.N. 262.

(§ I D—16)—RIGHT TO OPEN AND CLOSE.

The party who obtains a preliminary hearing of a point of law has the right to begin, and, for the purposes of the argument, he is taken to admit all the facts in the opposition pleading, and the court will take the whole record into consideration and give judgment to the party who, on the whole, appears entitled to it.

Imperial Life Ass'ce Co. v. Audett, 5 D.L.R. 355, 4 A.L.R. 204, 20 W.L.R. 372, 1 W.W.R. 819.

(§ I D—17) — CRIMINAL CASE — COUNSEL FOR DEFENCE—STATING OR READING THE LAW TO THE JURY.

The right of the prisoner's counsel at the close of the testimony on a criminal trial is to "sum up the evidence" (Cr. Code, s. 944), and it is in the judge's discretion whether counsel will be permitted in his address to the jury to read to them extracts from legal text-books or law reports, even though the extract sought to be used may be of an English judicial opinion of accepted authority.

R. v. Cook, 18 D.L.R. 706, 23 Can. Cr. Cas. 50, '48 N.S.R. 150.

(§ I D—20) — CRIMINAL PROSECUTION — ALLEGED CONFESSION—OPENING CASE.

Counsel for the Crown in a criminal prosecution may not, in opening the case to the jury, disclose the facts relied upon as constituting a confession by the accused until the court has decided that the evidence is admissible.

R. v. Willis, 9 D.L.R. 646, 23 Man. L.R. 77, 23 W.L.R. 702, 4 W.W.R. 761.

DUTY OF CROWN PROSECUTOR ON OPENING CASE.

It is the duty of the Crown Prosecutor, on a trial for murder, in his opening, to state generally to the jury everything pertaining to which he intends to offer evidence, and if he does not do so, the prisoner may, when evidence is offered that has not been referred to in such opening statement, complain of being taken by surprise. In his opening statement to the jury, the Crown Prosecutor, on a trial for murder, may state that he intends to offer evidence of a confession by the prisoner of the crime charged against him.

Trepanier v. The King, 19 Can. Cr. Cas. 290, 18 Rev. de Jur. 177.

(§ I D—21)—Conduct of criminal trial—Matters not in evidence—Cross-examination of accused.

Where questions are put to the accused by the Crown counsel in cross-examination when the accused becomes a witness on his own behalf and such questions overstep the bounds allowable in cross-examination as making suggestions not warranted by the evidence and from which the jury might draw inferences prejudicial to the accused, the validity of the conviction will not be affected thereby if the Trial Judge has instructed the jury to disregard those questions and any inferences suggested by them.

R. v. Hurd, 10 D.L.R. 475, 21 Can. Cr. Cas. 98, 6 A.L.R. 112, 23 W.L.R. 812, 4 W.W.R. 185.

Counsel — Address to jury — Introduction of matter not in evidence—Duty of judge in instructing jury.

If counsel in addressing the jury introduces matter which is not in evidence, the Trial Judge is under an obligation where his attention is called to these statements to instruct the jury that they are not to be influenced by these statements. Where the instruction of the judge is not sufficient under the circumstances, and the court is satisfied that the jury were influenced by such statements a new trial will be granted.

Ryan v. C.P.R. Co., 46 D.L.R. 397, [1919] 2 W.W.R. 368.

Commenting on defendant's failure to testify.

Where there is a clear contravention of s. 4 of the Canada Evidence Act by a comment by the prosecuting counsel in his address to the jury on defendant's failure to take the witness stand in his own behalf, the jury may be discharged and the sheriff directed to summon a new jury for the retrial of the indictment.

R. v. Beaulieu, 24 Can. Cr. Cas. 65.

(§ I D—22)—On failure of prisoner's wife to testify.

A new trial will be ordered in a prosecution for incest if the Crown counsel in his address to the jury commented on the failure of the prisoner's wife to testify, and such comment may have affected the verdict.

R. v. Lindsay, 30 D.L.R. 417, 26 Can. Cr. Cas. 163, 36 O.L.R. 171.

Criminal case—Same Crown Prosecutor before grand jury and at trial of indictment found.

It is not an objection to the trial of an indictment that the Crown Prosecutor was present in the grand jury room during the deliberations of the grand jury upon the bill and also conducted the trial of the indictment found.

Gagnon v. The King, 24 Can. Cr. Cas. 51.

(§ I D—23)—Reference to payment into court.

Rule 22, order 22, of the Supreme Court Rules of British Columbia applies to actions for libel, and, therefore, in such an action no reference can be made before the jury to the fact that money has been paid into court.

Dickinson v. "The World," 5 D.L.R. 148, 17 B.C.R. 401, 21 W.L.R. 529, 2 W.W.R. 553.

F. Objections and exceptions.

(§ I F—30)—Objections and exceptions.

Where counsel for the prisoner objects, at the time, to evidence of a confession or admission by the accused being received on the ground that no proper foundation had been laid for such evidence, whereupon the Crown adduces evidence to disprove any threat or inducement and the prisoner's counsel cross-examines thereon but does not renew the objection when the examination is thereafter proceeded with, there is a waiver of further objection on that ground.

The King v. Hoo Sam, 1 D.L.R. 569, 5 S.L.R. 180, 19 Can. Cr. Cas. 259, 20 W.L.R. 571, 1 W.W.R. 1049.

Preliminary exceptions—Delay in filing—Judge's discretion—Que. C.P. 164.

The filing of preliminary exceptions are absolutely restricted by C.C.P. to the three days fixed by art. 164. The court cannot extend the time.

Lavallee v. Goold, 16 Que. P.R. 196.

G. Answering inquiry by jury; reading testimony to.

(§ I G—35)—Criminal case—Message to judge from jury room.

Where the jury are deliberating in a criminal case and the Trial Judge has taken up the trial of another case, the fact that the foreman of the jury sent a note to the judge asking for a certain letter which had been mentioned in the evidence, but which had not been filed as an exhibit, and that the judge directed the clerk of assize to inform the foreman that the letter itself was not in possession of the court, is not a ground of objection against the verdict. [Wilmont's Case, 10 Cr. App. R. 173, distinguished.]

R. v. Batterman, 24 Can. Cr. Cas. 351, 34 O.L.R. 225, 8 O.W.N. 554.

H. Remarks of court.

(§ I H—39)—Comment on failure of accused to rebut testimony.

A direction to the jury on a criminal trial that the accused had failed to account for a particular occurrence, as to which, by reason of the testimony adduced against him, the onus was cast upon him to answer, is not a comment upon the failure of the accused to testify, and does not contravene s. 4 of the Canada Evidence Act, R.S.C. 1906, c. 145. [R. v. Aho, 8 Can. Cr. Cas. 453, 11 B.C.R. 114, applied.]

R. v. May, 21 D.L.R. 728, 23 Can. Cr. Cas. 469, 21 B.C.R. 23, 7 W.W.R. 1261, 30 W.L.R. 488.

JURY—IRRELEVANT EVIDENCE—MISLEADING OBSERVATIONS — GENERAL VERDICT — PREJUDICE—NEW TRIAL.

Laird v. Taxicabs, 17 D.L.R. 847, 6 O.W.N. 505.

JUDGE EXPRESSING OWN OPINION.

The Trial Judge, in summoning up in a criminal case, may express his own opinion upon the facts, and this will not be a ground for a new trial if he made it clear to the jury that they were the judges of the facts and were to exercise their own judgment without being bound to accept his view.

R. v. Moke, 38 D.L.R. 441, 12 A.L.R. 18, 28 Can. Cr. Cas. 296, [1917] 3 W.W.R. 575.

ADMISSIONS OF COUNSEL—EVIDENCE.

Meunier v. C.N.R. Co., 3 A.L.R. 345, 17 W.L.R. 539.

POSTPONEMENT—JURISDICTION OF MASTER IN CHAMBERS, AND COUNTY COURT JUDGE.

[Wendover v. Nicholson, 5 O.W.R. 645, distinguished.]

Youldon v. London Guarantee Co., 19 O.W.R. 291, 2 O.W.N. 1135.

POSTPONEMENT OF—DEFENDANT ABSENT ON IMPORTANT BUSINESS—CONDITIONS.

Neville v. Eaton and International Heating Co., 19 O.W.R. 746, 2 O.W.N. 1432.

II. Submitting case to jury.

Intent as question of fact for jury, see Sedition, I—5.

Whether agreement champertous as question of fact, see Assignment, I—17.

Compensation as question, see Arbitration, III—17.

A. IN GENERAL.

(§ II A—40)—CRIMINAL CASE—INSTRUCTIONS TO JURY—SLIGHTING OF PRISONER'S DEFENCE IN SUMMING UP.

It is a serious flaw in a criminal case if the directions to the jury are not as carefully put in regard to the prisoner's case as is the case of the prosecution. [R. v. Walton, 1 Cr. App. R. 227, approved.]

R. v. Graves, 9 D.L.R. 30, 46 N.S.R. 305, 20 Can. Cr. Cas. 384, 12 E.L.R. 1.

REFUSING TRIAL BY JURY—DISCRETION—APPEAL.

A Court of Appeal will not interfere with an order of a judge, refusing a trial with a jury, where he has exercised his discretion after proper consideration of the case and has not proceeded upon any wrong principle.

Cristall v. McKernan, 40 D.L.R. 82, 13 A.L.R. 317, [1918] 2 W.W.R. 519.

CONTRACT — BREACH — DAMAGES — FUNCTIONS OF COURT AND JURY.

It is the duty of the court not the jury to determine the meaning of a contract. And when failure on the part of one party to fulfil its obligations has been established, the only question for the jury to deal with is the assessment of damages.

Gerrity v. Bragg, 50 D.L.R. 284.

QUESTIONS OF LAW OR FACT.

Where, at a trial of a civil action with a jury, the Trial Judge, under s. 112 of the Judicature Act, R.S.O. 1897, c. 51, submits questions to the jury to be answered, he may, if he sees fit, also submit a question inviting a general verdict (e.g., "do you find for the plaintiff or defendant") in addition to the answers to the questions submitted, and where the answers to the specific questions harmonize with the answer to the general question, a judgment entered in accordance with such findings is regular, provided the charge to the jury has been made sufficiently comprehensive to enable the jury to render a general verdict. [Furlong v. Carroll, 7 A.R. (Ont.) 145, applied, and Reid v. Barnes, 25 O.R. 223, distinguished, by court below.]

Boeckh v. Gowganda Queen Mines, 8 D.L.R. 782, 46 Can. S.C.R. 645, 23 O.W.R. 313, affirming 24 O.L.R. 293.

B. SUFFICIENCY OF EVIDENCE TO GO TO JURY.

(§ II B—45)—NEGLIGENCE.

Under the Quebec practice it is sufficient to put to the jury the question whether there was negligence and in what it consisted, and it is not necessary to detail specific faults.

Temple v. Montreal Tramways, 23 D.L.R. 587, 47 Que. S.C. 121.

NEGLIGENCE.

Absence of evidence from which a jury can reasonably find that there was negligence on the part of the defendant which caused the accident justifies the Trial Judge in withdrawing the case from the jury and dismissing the action.

Steele v. Cape Breton Electric Co., 39 D.L.R. 609, 52 N.S.R. 61.

Evidence making a prima facie case for the Crown in a criminal prosecution, if unanswered, and believed by the jury, is sufficient to support a conviction of the person accused.

Girvin v. The King, 20 W.L.R. 130, affirming 18 W.L.R. 482.

(§ II B—46)—NEGLIGENCE—VERDICT—NO ERROR IN LAW — APPEAL — FAMILIES COMPENSATIONS ACT (B.C.).

If in an action under the Families Compensation Act, R.S.B.C. 1911, c. 82, the finding of the jury is that there was negligence, and if upon the facts there was sufficient evidence to admit of the question being passed upon by it, the verdict will not be disturbed unless some error in law has taken place.

Richmond v. Evans, 48 D.L.R. 209, [1919] 3 W.W.R. 339, affirming 43 D.L.R. 214.

NEGLIGENCE—PERSONAL INJURIES.

Where the court or jury look at the locus of an accident, or the machine which is said to have caused one, it is simply

to enable the trial tribunal the better to follow the evidence, and the verdict is still to be given upon the evidence.

Corea v. McClary Mfg. Co., 3 D.L.R. 323, 3 O.W.N. 1071, 21 O.W.R. 909.

INJURIES CAUSING DEATH—DAMAGES—NEGLIGENCE OF EMPLOYER—SUFFICIENCY OF EVIDENCE TO GO TO JURY.

In an action claiming damages for the death of an employee caused by the negligence of the employer, if there is evidence on which negligence can be inferred, such evidence should be submitted to the jury. It is for the jury to say whether in fact negligence should or should not be inferred. Held, that the evidence was properly submitted to the jury, and that there was sufficient evidence to warrant the jury in finding negligence on the part of the defendants which caused the accident.

E.D. & B.C.R. Co. v. McPherson, 49 D.L.R. 254, [1919] 3 W.W.R. 471.

C. QUESTIONS OF LAW AND FACT.

(§ II C—50)—Where at the trial a question which is in truth a question of law is, as a precautionary measure, submitted by the judge as one of the questions of fact to the jury and the jury makes its finding thereon, the Trial Judge may, upon a motion for judgment upon the verdict, ignore that portion of the jury's findings and assume control of the question as one of law alone.

Johnston v. Clark, 7 D.L.R. 361, 4 O.W.N. 202, 23 O.W.R. 196.

QUESTIONS OF FACT—ADMISSIONS—NOTICE OF.

Where notice to admit facts is given under Order 32, r. 4, it is the duty of the party receiving the notice to admit the facts, or give reasons why it is not necessary to admit them.

Murchie v. Mail Publishing Co., 42 N.B.R. 56.

(§ II C—55)—MIXED QUESTIONS OF LAW AND FACT.

In a jury trial mixed question of law and of facts is for the jury under the direction of the presiding judge on the law part.

Security Life Ins. Co. v. Power, 24 Que. K.B. 181.

POWER OF COURT AND JURY—EVIDENCE SUPPORTING FINDING OF JURY.

It is not possible for the Supreme Court to reject a sworn statement of a plaintiff, not wholly incredible and accepted by a jury and to infer from surrounding facts and circumstances that he must have known that of which he specifically denied knowledge.

Ogle v. B.C. Electric R. Co., 6 W.W.R. 683.

(§ II C—85) — QUESTIONS OF FACT — WHETHER MEDICAL PRACTITIONER A MUNICIPAL EMPLOYEE.

The question as to whether a medical practitioner is an employee of a municipality is a question of fact and may properly be submitted to a jury for answer.

Boilard v. Montreal, 9 D.L.R. 152, 43 Que. S.C. 171.

QUESTION FOR JURY—EMPLOYEE'S KNOWLEDGE OF RISK.

The extent of the knowledge of an employee of the risk he runs in his employment is a proper subject for the consideration of the jury.

Valci v. Small, 11 D.L.R. 433, 24 O.W.R. 529.

CREDIBILITY OF WITNESSES.

The question involved in an action to set aside a voluntary conveyance is one of fact, and, therefore, much depends in such an action upon the impression made upon the mind of the Trial Judge by the parties when in the witness box. [Fleming v. Edwards, 23 A.R. (Ont.) 718, distinguished.]

Ottawa Wine Vaults Co. v. McGuire, 8 D.L.R. 229, 4 O.W.N. 318. [Affirmed in 13 D.L.R. 81, 43 Can. S.C.R. 44.]

(§ II C—91)—MALICIOUS PROSECUTION — PROBABLE CAUSE.

The question of reasonable and probable cause is one of law for the court, but in order to decide that question the court may properly ask the jury to decide the fact whether the defendant made reasonably careful inquiry. [Abrath v. North East R. Co., 11 App. Cas. 247, followed.]

Rudyk v. Shandro, 24 D.L.R. 330, 9 A.L.R. 87, 8 W.W.R. 880, affirming 18 D.L.R. 641, 7 W.W.R. 415.

FUNCTIONS OF JUDGE AND JURY—ACTION FOR MALICIOUS PROSECUTION—QUESTIONS OF REASONABLE AND PROBABLE CAUSE.

Connors v. Reid, 20 O.W.R. 291.

(§ II C—103)—QUESTION OF ACCORD AND SATISFACTION—SUBMISSION TO JURY.

In an action for damages for injuries sustained through the alleged negligence of defendants where the defence sets up an agreement releasing them from liability, it is a question of fact whether such agreement does or does not amount to an accord and satisfaction, and it can be tried by the jury at the same time as the other issues.

Trawford v. B.C. Elec. R. Co., 9 D.L.R. 817, 18 B.C.R. 132, 15 Can. Ry. Cas. 39, 23 W.L.R. 175, 4 W.W.R. 150.

(§ II C—105)—LIBEL AND SLANDER.

Special questions relevant and necessary to the complete determination of a matter can be submitted to the jury at the instance of the parties thereto, under the provisions of ss. 22, 23 of the Judicature Act, 9 Edw. VII. (N.B.), 1909, c. 5, only where the Trial Judge shall, in his discretion, instead of having a general verdict returned, have himself submitted similar questions to the jury, for the purpose of entering a verdict on their answers thereto.

Sonier v. Breau, 3 D.L.R. 184, 41 N.B.R. 177, 10 E.L.R. 391.

It is a question of fact for the court whether, in an action for libel, a certain communication is privileged. Whether an

alleged libellous article is to such an extent excessive that it might be held by the jury to be in excess of the privilege is a question for the Trial Court.

Winnipeg Steel Granary & Culvert Co. v. Canada Ingot Iron Culvert Co., 7 D.L.R. 707, 22 Man. L.R. 576, 22 W.L.R. 387, 3 W.W.R. 356.

A count in a claim for slander which charges a person with misfeasance in office should not be submitted to the jury where the truth of the allegation is shewn.

Holland v. Hall, 3 D.L.R. 722, 22 O.W.R. 209.

LIBEL—SUFFICIENCY OF RETRACTION—QUESTION FOR JURY.

The question whether a subsequent publication was a full and fair retraction of a libellous publication involving a criminal charge within the meaning of s. 8 of the Libel and Slander Act, 9 Edw. VII. c. 4, R.S.O. 1914, c. 71, is for the jury.

Lumsden v. Spectator Printing Co., 14 D.L.R. 470, 29 O.L.R. 293.

(§ II C—110)—NEGLIGENCE—ASSUMPTION OF RISK.

In an action for negligence, where the evidence for the plaintiff is equally consistent with the existence or nonexistence of negligence, it is not competent for the judge to leave the case to the jury.

Loffmark v. Adams, 7 D.L.R. 696, 17 B.C.R. 440, 22 W.L.R. 547, 3 W.W.R. 269.

Negligence is a mixed question of law and fact, and is therefore a proper subject to be determined by a jury under the court's instructions; their findings, if in accordance with the pleadings and evidence, are final, and cannot be disturbed.

Villani v. Montreal, 29 D.L.R. 321, 49 Que. S.C. 469.

CARE AND PRUDENCE.

Honest belief that no danger exists does not negative negligence the real question is, would a reasonably careful and prudent man, under the circumstances, arrive at that conclusion; that is for the jury to decide.

Huck v. C.P.R. Co., 29 D.L.R. 571, 9 S.L.R. 288, 34 W.L.R. 1177, 10 W.W.R. 1342.

The question of negligence is a mixed question of law and fact; it is for the judge to explain the law to the jury, from which they may draw their conclusion as to the question of liability, which will be binding upon the court. [Montreal Light v. Regan, 40 Can. S.C.R. 580, 590; Tobin v. Murison, 5 Moore P.C. 110, followed.]

Montreal v. Gamache, 25 D.L.R. 303, 24 Que. K.B. 312.

(§ II C—111)—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY WHEN — WITHDRAWN UNDER WHAT TEST.

Contributory negligence is prima facie a question for the jury, and only where it is very clear that no jury could reasonably find otherwise should a case be withdrawn from the jury on the ground that contributory negligence has been established.

Daynes v. B.C. Elec. R. Co., 19 D.L.R. 266, 49 Can. S.C.R. 518, 18 Can. Ry. Cas. 146, reversing 7 D.L.R. 767, 17 B.C.R. 498.

(§ II C—130)—NEGLIGENT DRIVING—SPEED.

In an action for damages for an injury to the plaintiff caused by the defendant's servant in the course of his employment negligently and through want of proper care and skill in driving a horse and carriage running into and injuring the plaintiff, a witness for the plaintiff having stated that just before the accident happened the horse was trotting, was asked, "Could you say how many miles an hour?" answered (subject to objection), "The horse was going so fast that I don't think he could have been pulled up immediately";—Held, that the answer was properly received. It is the duty of the Trial Judge to determine whether any facts have been established from which negligence may be reasonably inferred, and for the jury to find whether from the facts so established negligence ought to be inferred.

Porter v. O'Connell, 43 N.B.R. 458.

(§ II C—137)—LACK OF CARE IN RUNNING CAR — CAR STATIONARY DISCHARGING PASSENGERS.

The negligence of the defendant company was sufficiently shewn so as to prevent the withdrawal of such question from the jury, where the evidence disclosed that sufficient caution was not observed in running a street car towards a car standing on a parallel track discharging passengers at a street crossing where they were regularly discharged and received, and where, to the knowledge of the company, it was the habit or custom of passengers to cross a parallel track in order to reach another street, and that the car struck and injured the plaintiff, who had just alighted from the stationary car, and without noticing the car approaching from the opposite direction passed around the rear of the standing car and stepped upon the parallel track.

Cooper v. London Street R. Co., 9 D.L.R. 368, 4 O.W.N. 623, 15 Can. Ry. Cas. 24, 23 O.W.R. 767, affirming 5 D.L.R. 198, 14 Can. Ry. Cas. 91, 22 O.W.R. 87.

QUESTIONS OF LAW—WORKMEN'S COMPENSATION ACT—WHO HAS CHARGE OR CONTROL OF MACHINERY—WHAT IS A "MACHINE."

The interpretation of the words "in charge or control" of a machine, as used in the Ontario Workmen's Compensation Act, R.S.O. 1897, c. 160, is for the Trial Judge, although what the workmen alleged to have been in control did and how he did it are questions of fact for the jury where there are conflicting facts of circumstances. It is for the Trial Judge, upon the evidence, to define what is meant by the word "machine" as used in the Ontario Workmen's Compensation Act, R.S.O. 1897, c. 160, R.S.O. 1914, c. 146.

Dunlop v. Canada Foundry Co., 12 D.L.R. 791, 28 O.L.R. 140, affirming 2 D.L.R. 887, 4 O.W.N. 791.

(§ II C—146)—Negligence of railway—Questions for jury.

Stone v. C.P.R. Co., 13 D.L.R. 93, 15 Can. Ry. Cas. 408, reversing 4 D.L.R. 789, 14 Can. Ry. Cas. 61, 26 O.L.R. 121, 21 O.W.R. 785.

In an action for negligence against a railway company the Trial Judge should confine all questions of ultimate negligence to the time from which the defendants or their servants could have anticipated the danger.

McEachen v. G.T.R. Co., 2 D.L.R. 588, 3 O.W.N. 628, 21 O.W.R. 187.

In an action for personal injuries to the conductor of a construction train resulting from a wing of a gravel spreading machine operated by air pressure, coming down upon him, caused by the engineer in charge of the machine unintentionally starting it by striking his knee against the handle of a valve used to set it in motion while attempting to get closer to the air gauge, a statement by a witness that the engineer must have been climbing up the machine, together with the evidence that the valve was from two and a half to three feet above the spot where the engineer was standing, would justify a suggestion in the Trial Judge's charge that the engineer might have touched the valve with his knee while climbing up the machine to get a nearer view of the gauge.

Tobin v. C.P.R. Co., 2 D.L.R. 173, 5 S.L.R. 381, 20 W.L.R. 676, 1 W.W.R. 1252.

(§ II C—148) — Volens — Contributory negligence.

The question as to whether an engineer employed by a railway company received his injuries through his own negligence or whether he voluntarily assumed the risk is one of fact for the jury. [McPhee v. Esquimalt, etc., R. Co., 16 D.L.R. 756, 49 Can. S.C.R. 43; Canada Foundry Co. v. Mitchell, 35 Can. S.C.R. 452, followed.]

McPhee v. Esquimalt & Nanaimo R. Co., 23 D.L.R. 561, 22 B.C.R. 67, 8 W.W.R. 1319, 32 W.L.R. 125.

Questions of law and fact—Employer's liability—Assumption of risk.

In a servant's action against his master for damages for negligence where a defence of voluntary assumption of risk was duly presented at the trial and evidence submitted to support it, the plaintiff is not entitled to judgment on findings of the jury in which no answer was given to a question submitted on that issue, although there was a finding of negligence in failing to provide a guard and a further finding that there was no contributory negligence by the plaintiff.

McPhee v. Esquimalt and Nanaimo R. Co., 16 D.L.R. 756, 49 Can. S.C.R. 43, 5 W.W.R. 926, 27 W.L.R. 444, reversing 18 B.C.R. 450. [See also 23 D.L.R. 561, 22 B.C.R. 67, 8 W.W.R. 1319, 32 W.L.R. 125.]

(§ II C—157)—Injury to employee—Negligence—Elevator accident.

That a workman employed in building construction and conveying building material upon an uncaged elevator was crowded so close to the edge of an overloaded and uncaged elevator that his heel projected and was caught and injured in contact with the end of a bolt sunk in the wall of the elevator shaft, presents a prima facie case to go to the jury, and cannot properly be withdrawn from their consideration, where the jury might properly find upon the evidence that the proximate cause of the accident was the employer's failure to have the elevator caged for such work, or his negligence in leaving the bolts projecting in a dangerous way in the shaft, and where the jury would not necessarily have to attribute the injury to the negligence of the fellow servant in charge of the elevator in permitting the overloading.

Charles v. Norton Griffiths Co., 15 D.L.R. 177, 18 B.C.R. 179.

(§ II C—164)—Physicians.

An action for malpractice against a surgeon or physician should be tried without a jury.

Gerbracht v. Bingham, 7 D.L.R. 259, 4 O.W.N. 117, 23 O.W.R. 82.

(§ II C—168)—Insurance matters.

A motion to strike out a jury notice should be granted by a Judge in Chambers, under Con. rr. 1322, in an action on a policy of life insurance where the issues to be tried are, whether the action is barred, the insufficiency of the proof of death of the insured, the nonpayment of premiums, and the violation by the insured of the rules of the company.

Bissett v. Knights of the Maccabees, 3 D.L.R. 714, 3 O.W.N. 1280, 22 O.W.R. 89.

D. Taking case from jury.

(§ II D—170)—Two equally possible views on the facts.

If the facts which are admitted are capable of two equally possible views, which reasonable people may take, and one of them is more consistent with the case for one party than for the other, it is the duty of the judge to let the jury decide between such conflicting views. [Davey v. London & S.W.R. Co., 12 Q.B.D. 70, applied.]

Ramsay v. Toronto R. Co., 17 D.L.R. 220, 30 O.L.R. 127, 17 Can. Ry. Cas. 6.

Conflicting evidence — Statutory presumption of negligence — Rebuttal.

An action for injuries received by a collision with an automobile cannot be taken from the jury where the circumstances create a statutory presumption under s. 7 of 8 Edw. VII. (Ont.) c. 53, R.S.O. 1914, c. 207, that loss or damage was sustained by the negligence or improper conduct of the owner or driver of an automobile on a highway, although evidence adduced in re-

buttal of such presumption may preponderate.

Maitland v. Mackenzie, 13 D.L.R. 129, 28 O.L.R. 506.

VOLENS.

In the case of volens a very slight amount of evidence will prevent the court from withdrawing the question from the jury.

McPhee v. Esquimalt & Nanaimo R. Co., 23 D.L.R. 561, 22 B.C.R. 67, 8 W.W.R. 1319, 32 W.L.R. 125.

TRIAL BY JURY—CHARGE OF THE JUDGE — NEGLIGENCE C.C. (QUE)., ARTS. 1053. 1054.

In a trial before a jury for damages resulting from an accident, the presiding judge is not justified in withdrawing the case from the jury when there is some evidence of negligence against the defendant, even if such evidence is only presumptive. When a jury renders a verdict of specific liability against the defendant, the latter cannot, in the Court of Review, object to a part of the judge's charge, to the effect that the accident having taken place by the bursting of an engine, the property and the keeping in good order of which appertained to the defendants, the jury could come to a conclusion against him without finding liability against him if the defendant did not shew that it was impossible for him to avoid the accident as the verdict was not given under art. 1054, C.C. (Que.), but under art. 1053, C.C. (Que.). It is for the jury, and not the judge, to draw conclusions from the fact that exhibits which could have helped the jury were not produced before them.

Irwin v. G.T.R. Co., 47 Que. S.C. 32.

(§ II D—175)—NONSUIT—WHEN TO BE REFUSED.

The Trial Judge should not nonsuit the plaintiff or withdraw the case from the jury where there is material evidence as to the actual facts, but such evidence is conflicting, even although the evidence may be very strong on one side and weak on the other; or where the material primary facts are undisputed, but two different inferences may be reasonably drawn by different minds from those facts; or whenever some ground exists on which a jury may reasonably find a verdict either way.

Cochran v. Lloyd, 11 D.L.R. 721, 42 N.B. R. 112, 13 E.L.R. 92.

(§ II D—180)—WHETHER CAUSE OF ACT MIGHT HAVE BEEN FOUND—REVERSIBLE ERROR.

Where, from all the evidence submitted, the jury might reasonably have found the existence of the contract for the breach of which damages were claimed, it is error for the judge to take the case from the jury and to direct judgment for the defendant.

Starratt v. Dominion Atlantic R. Co., 11 D.L.R. 607, 47 N.S.R. 280, 12 E.L.R. 545.

(§ II D—186)—NEGLIGENCE — PERSONAL INJURIES.

Where there is no reasonable evidence upon the whole case whether adduced by the plaintiff or the defendant upon which the jury could find in the plaintiff's favour in an action of negligence, the case should be withdrawn from them and the action dismissed; it is not necessary to go through the form of directing the jury to find a verdict for the defendant and of having such verdict recorded.

Cooper v. London Street R. Co., 9 D.L.R. 368, 4 O.W.N. 623, 15 Can. Ry. Cas. 24, 23 O.W.R. 767.

E. SPECIAL INTERROGATORIES.

(§ II E—195)—GENERAL VERDICT—EFFECT.

Under s. 112 of the Ontario Judicature Act a general verdict will be disregarded where special questions are submitted to and answered by the jury.

Caldwell v. Cockshutt Plow Co., 18 D.L.R. 722, 30 O.L.R. 244.

(§ II E—196)—PRELIMINARY QUESTIONS TO JURY—BASIS FOR DETERMINING POINT OF LAW—MALICIOUS PROSECUTION.

Morrison v. Wilson, 16 D.L.R. 852, 28 W.L.R. 202, reversing 14 D.L.R. 815, 26 W.L.R. 317.

ABANDONMENT OF PLEA AT TRIAL—CHARGE TO JURY.

Slater v. Watts, 16 B.C.R. 36.

FAILURE TO SUBMIT QUESTIONS—GENERAL VERDICT.

Held, that there was no misdirection or nondirection, under the circumstances disclosed, in not submitting questions to the jury and in taking a general verdict.

Guthrie v. Huntting Lumber Co., 15 B. C. R. 471.

III. Instructions.

A. IN GENERAL; FORM; TIME.

(§ III A—200)—TAKING DOWN IN SHORTHAND.

It is not obligatory in other than capital offences that the judge's charge to the jury should be taken down in shorthand.

Rivet v. The King, 27 D.L.R. 695, 25 Can. Cr. Cas. 235, 24 Que. K.B. 559.

DIRECTION OF JUDGE—ERROR OF LAW.

In a trial by jury, the direction of the judge can only be attacked for error of law, and not for error of fact, when the judge leaves to the jury every liberty to estimate the facts.

Perron v. Drouin, 46 Que. S.C. 336.

C. ON WHAT MATTERS NECESSARY OR PROPER.

(§ III C—213)—JURY TRIAL—INDEMNITY — INCOME—CAPITALIZATION — JUDGE'S DIRECTION—C.C.P. 502.

The sum of $7,000 awarded by a jury is not excessive in a case of loss caused by a diminution of working power by 50 per cent upon an annual salary of $1,100, with an expectation of life of 33 years. It is not an error on the part of the judge in directing the jury to tell it that in estimating the damages for an accident it ought not to

take account of the payment of a sick benefit from a co-operative benefit society.

C.P.R. Co. v. Maxwell, 23 Que. K.B. 414.

(§ III C—216)—As to negligence—Personal injuries.

Where the answers of a jury to questions put to them are indefinite and inconclusive, it is a wise practice for the Trial Judge to send the jury back, for the purpose of making their meaning plain.

Dart v. Toronto R. Co., 8 D.L.R. 121, 4 O.W.N. 315, 23 O.W.R. 380.

(§ III C—217)—Criminal law—Murder — Homicide — Direction of judge — Mixed jury — Using one language only — Affidavit — Custom — Evidence of accused.

It is not error on the part of the judge presiding over a Criminal Court, in a case of murder, where the jury is composed half of jurors respectively speaking French and English, to sum up the case in the English language alone, if all the jurors understand the latter language, if all the pleadings are in English and no objection has been taken by the defendant at the time of the trial, and when the accused has not suffered any prejudice. The judge presiding at a trial by jury is only bound to sum up the facts in the case where it is necessary under the circumstances. In a criminal appeal, the court should not take any account of an affidavit, obtained and sworn to after the trial by a juryman. When in a trial for murder, there is nothing in the evidence which could justify a verdict of homicide, it is not a mistake of law on the part of the presiding judge to say in summoning up the facts, that the case is not one in which the jury can bring in a verdict of homicide; that the verdict must be that of murder or not guilty. A custom established in this country authorizes the presiding judge in a criminal case to draw the attention of the jury to the frequency of crimes in the district, resulting from the general belief that criminals often obtain a verdict in their favour. There is no false direction on the part of the judge, unless his words have made the jury believe, or have the nature of convincing them, that certain questions submitted to them were excluded by the law from their competence, or that they could lead them to make a mistake in the law. When the accused freely offers his evidence, the judge has a right to remark to the jury that in no part of his evidence has he denied the important facts proved against him, and that he has not declared that he was not guilty.

R. v. Veuillette, 28 Que. K.B. 364.

D. On evidence and facts.

(§ III D—220)—Jury—Judge's charge to—Discussion of facts—Opinion of Judge—Discretion of jury.

The Trial Judge may properly discuss the facts in his charge to the jury in order to assist them, and, in doing so, it is not error for him to express a definite opinion upon the evidence so long as the jury are left quite aware of their own discretion and authority to make an independent finding.

Tario v. West Canadian Collieries, 20 D.L.R. 761, 29 W.L.R. 167.

Judge's opinion upon.

A judge, in his charge to a jury, may express his opinion on questions of fact, providing he does not lead the jury to believe that they are being given a direction which it is their duty to follow.

Montreal Tramways Co. v. Séguin, 28 D.L.R. 494, 52 Can. S.C.R. 644.

(§ III D—228)—Comment on failure of prisoner's wife to testify for defence—New trial.

It is a ground for granting a new trial on a conviction for murder that the Trial Judge commented on the failure of the prisoner's wife to testify for the defence, although the judge before verdict withdrew the comment. [R. v. Corby, 1 Can. Cr. Cas. 457; R. v. Coleman, 2 Can. Cr. Cas. 523; R. v. Hill, 7 Can. Cr. Cas. 38, 33 N.S. R. 253, followed.]

The King v. Romano, 21 D.L.R. 195, 24 Can. Cr. Cas. 30, 24 Que. K.B. 40.

(§ III D—229)—Reading charge to jury—Minor inaccuracies.

In determining whether the instruction to the jury was a proper one or not, the Appellate Court is to look at the charge as a whole; a new trial will not be granted, even in a capital case, because of minor inaccuracies in the charge if the inaccuracies cannot have misled the jury and the defence was fairly put before them.

R. v. Hogue, 39 D.L.R. 99, 28 Can. Cr. Cas. 419, 39 O.L.R. 427.

Murder — Reasonable doubt.

The evidence to convict on a charge of murder must be such as to convince the jury beyond all reasonable doubt that the accused is guilty; but a juror is not to create materials of doubt by resorting to trivial suppositions and remote conjecture as to possible states of fact different from that established by the evidence.

R. v. Krafchenko, 17 D.L.R. 244, 24 Man. L.R. 652, 28 W.L.R. 76, 6 W.W.R. 836, 22 Can. Cr. Cas. 277. [Applied in R. v. Schurman, 19 D.L.R. 800, 7 S.L.R. 269, 23 Can. Cr. Cas. 365, 30 W.L.R. 56, 7 W.W.R. 680.]

E. Correctness of instruction.

(§ III E—235) — Presiding judge summing up—Comment.

In his charge to the jury, the presiding judge at the trial has the right to sum up the evidence and comment upon the facts and connect them with the proper principles of law.

Temple v. Montreal Tramways Co., 23 D.L.R. 587, 47 Que. S.C. 121.

(§ III E—236)—Correctness of — Damages — Personal injuries.

In a negligence case against a railway company by a fireman in its employment, for permanent personal injury impairing his earning capacity, the judge should charge the jury to consider, on the quantum of damages, the general opportunities in life still open to the plaintiff, and there is misdirection where the charge limits those opportunities to the plaintiff's particular calling or even the class of callings within his general industrial field, for instance, railroading.

Pickering v. G.T.P.R. Co., 14 D.L.R. 584, 23 Man. L.R. 723, 26 W.L.R. 77, 5 W.W.R. 666.

(§ III E—237)—Negligence — Death—Damages — Evidence — Death of judge.

It is error in law for a judge, in an action by a husband and his children for the accidental death of his wife and their mother, to advise the jury that they could not take into consideration the funeral expenses incurred by them. The loss of a wife and mother is to the husband and children a pecuniary loss, which a jury is bound to admit according to evidence adduced before them. Where the judge comments upon a fact as proved, when it is not, thereby influencing improperly the mind of the jury, it is ground for a new trial. If the judge died before signing his charge to the jury, the Court of Review may, under art. 1208 C.C.P., order the charge to form part of the record.

Montreal Tramways v. Rothschild, 27 Que. K.B. 350.

(§ III E—240)—Responsibility—Demand for judicial transfer — Damages — Trial by jury—Direction of judge—C.C. art. 1053—C.C.P. arts. 498, 499, 502, 591, 900.

A demand for judicial transfer of goods is in its nature injurious. In an action for damages founded on an illegal demand for judicial transfer, and which is submitted to a jury, it is not a fatal omission on the part of the presiding judge not to inform the jury that a demand for judicial transfer can be lawfully contested. The direction of the judge is not erroneous if he addresses the jury in an action such as that above described, in the following words: "To cease payment on the part of a merchant is as much as to say that he is not paying generally, that he has many obligations in suspense, that he is not meeting his obligations in proportion as they become due," and later on: "An unpaid note does not say that the debtor is insolvent, nor that he has ceased to make his payments."

Bélanger v. Jacobs, 56 Que. S.C. 149.

(§ III E—246)—Malicious prosecution.

Whether there was reasonable and probable cause for the arrest of the plaintiff must be decided, in an action for malicious prosecution, by the Trial Judge, while the question of malice is to be determined by the jury.

Wood v. Newby, 5 D.L.R. 486, 4 A.L.R. 333, 21 W.L.R. 438, 2 W.W.R. 409.

(§ III E—248)—As to libellous words.

In an action for libel the Trial Judge may tell the jury that in his opinion the words or article complained of are libellous, provided he makes it clear to them that they are free to determine for themselves the issue of libel or no libel upon the evidence, entirely apart from his interpretation.

Knott v. Telegram Printing Co., 39 D.L.R. 762, 55 Can. S.C.R. 631, [1917] 3 W.W.R. 335, affirming 32 D.L.R. 409, 27 Man. L.R. 336, [1917] 1 W.W.R. 974.

Libel or slander.

The fact that the Trial Judge in an action claiming damages for maliciously writing and publishing a libellous letter did not define malice to the jury and then proceed in the light of such definition to submit the facts to them, did not make the charge misleading or afford ground for a new trial, it appearing from the summoning up as a whole that the judge fairly covered the definition and submitted the evidence for the consideration of the jury and that nothing was said in or omitted from the charge that would or ought to be considered as misleading.

Bligh v. Warren, 46 N.S.R. 440.

(§ III E—250)—As to negligence.

Wherever a plaintiff seeking damages from a jury for injuries alleged to have been caused by negligence relies on more than one negligent act or omission, the Trial Judge should impress upon the jury that any alleged negligence not found will be taken to be negatived and that any negligence found, in order to avail the plaintiff, must also be found to have been a cause of the injury sustained.

Pruett v. G.T.R. Co., [1917] 2 W.W.R. 662.

In an action for damages for negligence, s. 55 of the Supreme Court Act, R.S.B.C., 1911, c. 58, is not complied with a charge to the jury which states merely abstract principles of law; the jury must be told how that law should be applied to the facts as the jury finds them. [Alaska Packers Assn. v. Spencer, 35 Can. S.C.R. 562, followed.]

Jackson v. B.C. Electric R. Co., 38 D.L.R. 145, 24 B.C.R. 484, [1917] 3 W.W.R. 1046.

As to what constitutes negligence.

In an action for damages for an injury caused by alleged negligence, the verdict will not be set aside on the ground that the Trial Judge failed to instruct the jury as to what would, and what would not, constitute negligence, if counsel on the trial neglected to ask the judge to so instruct them.

Robinson v. Haley, 42 N.B.R. 657.

CAUSE OF ACCIDENTS—EXHIBITS.

When a jury renders a verdict of specific liability against the defendant, the latter cannot, before the Court of Review, object to a part of the judge's charge, to the effect that the accident having taken place by the bursting of an engine, the property and the keeping in good order of which appertained to the defendants, the jury could come to a conclusion against him without finding liability against him if the defendant did not shew that it was impossible for him to avoid the accident; as the verdict was not given under art. 1054, C.C. (Que.), but under art. 1053. It is for the jury, and not the judge, to draw conclusions from the fact that exhibits which could have helped the jury were not produced before them.

Irwin v. G.T.R., 47 Que. S.C. 32.

(§ III E—253)—STREET RAILWAYS GENERALLY.

Where, in a jury trial of an action for negligence against a street railway company and a municipal corporation, the plaintiff desists from his action as against one of two defendants jointly sued in damages and the Trial Judge thereupon modifies the assignment of facts to be submitted to the jury, no prejudice is suffered by the remaining defendant if the assignment of facts as modified allows the jury to find the accident was due either to the negligence of the plaintiff, or to that of the defendant or to that of neither of them.

Montreal Street R. Co. v. Conant, 7 D.L.R. 261, 14 Can. Ry. Cas. 305, 22 Que. K.B. 212, 19 Rev. Leg. 71.

COLLISION—PRESUMPTION OF NEGLIGENCE.

It is sound law for a judge to instruct a jury that allowing two cars owned by the same company to collide is a presumption of negligence or fault equivalent to proof, and they could so find if the company does not shew that it is in no way responsible.

Kazaransky v. Montreal Tramways Co., 48 Que. S.C. 76.

(§ III E—260)—IN CRIMINAL CASES.

It is not misdirection for the Trial Judge charging the jury to speak of an admission against his interest, made by the accused as a "confession" and to use the word "confession" synonymously for a statement against interest.

The King v. Hoo Sam, 1 D.L.R. 569, 19 Can. Cr. Cas. 259, 5 S.L.R. 180, 20 W.L.R. 571, 1 W.W.R. 1049.

INSTRUCTION AS TO CORROBORATION OF ACCOMPLICE.

It is the duty of the Trial Judge to inform the jury in a criminal case, in which the evidence of an accomplice is given on behalf of the prosecution, that it is inadvisable to convict on such evidence unless corroborated.

R. v. Bechtel, 9 D.L.R. 552, 21 Can. Cr. Cas. 40, 24 W.L.R. 470.

INSTRUCTION AS TO EXCULPATORY ADMISSIONS.

In instructing the jury on a criminal trial the judge may properly direct the jury that it is for them to credit or not the exculpatory part of the story given by the accused in an implicating admission made to a fellow prisoner in the gaol, if the jury consider it not to be plausible and that it is open to them at the same time to credit other portions of the admissions if they see fit.

R. v. Farduto, 10 D.L.R. 669, 19 Rev. Leg. 165.

HOMICIDE—INSTRUCTION TO JURY—PRISONER'S LETTER REQUESTING FALSE ANSWER TO INQUIRY—EXPLAINING POSSESSION OF MONEY.

On the trial of a murder charge, the construction of a letter written by the accused and placed in evidence is for the judge, and not for the jury, and where the letter itself is a request to make false statements in aid of his defence, the Trial Judge may tell the jury that they should take into consideration the prisoner's action in endeavouring to manufacture evidence to mislead the court by concocting the scheme as disclosed in his letter, to account for the money found on him.

R. v. Haynes, 22 D.L.R. 227, 23 Can. Cr. Cas. 101, 48 N.S.R. 133.

INSTRUCTION IN CRIMINAL CASE.

The jury are entitled to have the assistance of the presiding judge in directing them in a criminal case and to have the case put to them in such a way as to ensure their due appreciatiaon of the value of the evidence, but this does not necessarily require that he should emphasize and elaborate the various discrepancies set up by the defence in regard to the evidence of the Crown's principal witness; the judge is to call attention with due care to the salient or essential details of the case and their bearing on the guilt or innocence of the accused in such a way as to let the jury understand what the defence really is. [R. v. Finch, 12 Cr. App. R. 77, applied.]

R. v. Baugh, 33 D.L.R. 191, 28 Can. Cr. Cas. 146, 38 O.L.R. 559.

Where two persons are being jointly tried, and particularly where an order for a separate trial has been refused, and proof is offered of statements made by one of the accused not in the presence of the other and not admissible as against the latter, but likely to be considered by the jury as evidence against both unless a proper direction is given to them, it is error in law for the Trial Judge to omit to give an instruction to the jury that the statements so sworn to have been made by the one accused is evidence only against him and not against his codefendant.

R. v. Murray and Mahoney, 38 D.L.R. 395, 28 Can. Cr. Cas. 247, 11 A.L.R. 502, [1917] 2 W.W.R. 805. [See also 33 D.L.R. 702, 27 Can. Cr. Cas. 247, 10 A.L.R.

275, [1917] 1 W.W.R. 404, 28 D.L.R. 372, 25 Can. Cr. Cas. 214, 9 A.L.R. 319, 33 W.L.R. 148, 9 W.W.R. 804.]

INSTRUCTION TO JURY—COMMENT ON FAILURE OF ACCUSED TO TESTIFY.

Upon an appeal to the Court of Appeal or an application for a new trial following a conviction, it is not permissible for the accused to read affidavits for the purpose of shewing that the judge who presided at the trial had, in his charge to the jury, made comments upon the failure of the accused to testify and so contravened the provision of s. 4 of the Canada Evidence Act, R.S.C. 1906, c. 145, where the Trial Judge has transmitted to the Court of Appeal a report containing his charge to the jury; the Court of Appeal is in such case bound to accept such report as complete, and has no power to order the taking of evidence or to receive evidence for the purpose of shewing the inaccuracy or incompleteness of such report. [See R. v. Angelo, 16 D.L.R. 126, 22 Can. Cr. Cas. 304, 19 B.C.R. 261.]

Di Lena v. The King, 24 Can. Cr. Cas. 301, 24 Que. K.B. 262.

(§ III E—261)—INQUEST EVIDENCE—NEW TRIAL.

Where the judge's charge leaves it, in effect, to the jury to treat as evidence, in proof of the indictment for murder, the depositions of a hostile Crown witness, previously taken before the coroner and the magistrate respectively, which are in contradiction to such witness's testimony at the trial, instead of instructing the jury that the previous statement, although under oath, could be used only to impeach the witness's testimony given at the trial, a new trial will be ordered although no objection to the charge was made by the accused at the trial.

R. v. Duckworth, 31 D.L.R. 570, 26 Can. Cr. Cas. 314, 37 O.L.R. 197.

MANSLAUGHTER.

On a trial for murder, if the circumstances are such that the jury might reasonably infer a case of manslaughter and not murder in the event of their negativing the defence raised, then a direction must be given to the jury as to manslaughter and its omission is a substantial wrong, under Cr. Code, s. 1019, constituting ground for a new trial.

R. v. Jagat Singh, 28 D.L.R. 125, 25 Can. Cr. Cas. 281, 21 B.C.R. 545, 32 W.L.R. 637, 9 W.W.R. 514.

INSTRUCTIONS—EVIDENCE OF ACCOMPLICE—CORROBORATION.

A new trial will be granted for the failure of a Trial Judge to caution the jury, on a trial for murder, against acting on the uncorroborated testimony of an accomplice, who had already been tried and convicted, where there was no corroborating evidence.

R. v. Ratz, 12 D.L.R. 678, 21 Can. Cr. Cas. 343, 6 S.L.R. 237, 24 W.L.R. 908, 4 W.W.R. 1231.

Upon a trial of a murder charge the Trial Judge is justified in not submitting the question of manslaughter to the jury where there is no more than mere surmise or conjecture on which to rest such a finding.

R. v. Eberts, 7 D.L.R. 538, 47 Can. S.C.R. 1, 3 W.W.R. 37, 20 Can. Cr. Cas. 273, affirming 7 D.L.R. 530, 20 Can. Cr. Cas. 262, 4 A.L.R. 310, 2 W.W.R. 542.

INACCURACY IN JUDGE'S CHARGE—PREJUDICE.

A slight inaccuracy in the judge's charge to the jury in referring to certain evidence as having been given at the preliminary inquiry whereas it was in fact given at the trial itself, and the depositions at the preliminary inquiry, were not then put in as evidence, but the preliminary inquiry was referred to in the testimony, will not constitute a ground for setting aside a conviction, where the inaccuracy could not have prejudicially affected the prisoner.

R. v. Haynes, 22 D.L.R. 227, 23 Can. Cr. Cas. 101.

REASONABLE DOUBT.

In a criminal case it is for the jury to decide whether there is reasonable doubt, and when instructed that they should convict only if guilt be shewn beyond a reasonable doubt, their verdict of guilty is not to be disturbed on the ground that they ought to have had a reasonable doubt if there was evidence from which a reasonable inference of guilt could be made.

R. v. Green; R. v. Bosomworth, 29 Can. Cr. Cas. 425.

(§ III E—263)—INSTRUCTION AS TO REASONABLE DOUBT.

In order to enable a jury to return a verdict against the prisoner, they must be satisfied beyond any reasonable doubt of his guilt; this is a conviction created in their minds not merely as a matter of probability and if it was only an impression of probability their duty was to acquit. [R. v. White, 4 F. & F. 384, and R. v. Krafchenko, 17 D.L.R. 244, 22 Can. Cr. Cas. 277, applied.]

R. v. Schurman, 19 D.L.R. 800, 23 Can. Cr. Cas. 365, 7 S.L.R. 269, 30 W.L.R. 56, 7 W.W.R. 680.

SHOOTING WITH INTENT TO MURDER.

On the trial of an indictment for shooting with intent to murder, it is proper that the jury be directed that if the evidence warrants, a verdict may be rendered of shooting with intent to maim or to do grievous bodily harm.

R. v. Kerr, 3 D.L.R. 720, 20 Can. Cr. Cas. 70, 22 Man. L.R. 353, 21 W.L.R. 652.

MURDER—JUDGE'S CHARGE TO JURY—COMMENT ON FACTS—STATEMENT IGNORING PART OF EVIDENCE CONTRA.

The King v. Paul, 18 Can. Cr. Cas. 219.

IV. Findings by the court.

Conclusiveness of verdict or of court's findings, see Appeal, VII L—485; VII M—535.

(§ IV—265) — Equitable issue as to fraud in obtaining plaintiff's release.

Where an equitable issue is raised as to whether a release under seal pleaded by a defendant railway company in answer to plaintiff's damage claim for personal injuries had been obtained by fraud or undue influence, such issue may, unless the judge otherwise directs, be tried by the judge without a jury and the action dismissed on his finding the release binding.

Arkles v. G.T.R. Co., 14 D.L.R. 789, 5 O.W.N. 462, 25 O.W.R. 456.

Correctness.

An accused person has a right where the trial takes place without a jury to have the judge's decision based upon a correct apprehension of the facts proved.

R. v. O'Neil, 25 Can. Cr. Cas. 323, 9 A.L.R. 365.

Motion to set aside judgment as against weight of evidence refused.

McIntyre v. White, 40 N.B.R. 591.

The court will not reverse the findings of fact made by a Trial Judge unless it clearly appears he was wrong. Appeal on the ground that judgment was against evidence dismissed.

Shaw v. Robinson, 40 N.B.R. 473.

V. Verdict or findings of jury.

A. In general.

(§ V A—270)—Explanations by foreman.

The oral statements of the foreman of a jury, explaining to the court the cause of an accident as found by the jury, cannot override the deliverate written verdict of the whole jury, so as to warrant the action of the Trial Judge in entering judgment against their verdict.

Gray v. Wabash R. Co., 28 D.L.R. 244, 35 O.L.R. 510, 20 Can. Ry. Cas. 391.

Form—Effect given to findings.

There is no sacramental form in which the jury may make known its decision on any question, and some intelligent effect must be given by the court to the findings of jurors who are not skilled in legal phraseology.

Temple v. Montreal Tramways Co., 23 D.L.R. 587, 47 Que. S.C. 121.

Discretion as to credibility of testimony.

The right of a jury to interpret the evidence is the same as that of the judge, and it may consider that the want of credibility in a part of the testimony of a witness throws doubt upon the whole remainder of his testimony.

G.T.R. Co. v. Brassard, 47 Que. S.C. 369.

Questions of law—Sufficiency—Review.

The parties may, with the judge's permission and consent, submit a question of law to the jury. A verdict is in conformity with the evidence provided there is in the evidence elements justifying it. An error of fact made by the judge in his charge is not sufficient to have the verdict set aside, an important error of law is necessary. The jury being the master of the facts, a Court of Appeal cannot substitute its appreciation for that of the jury.

Perron v. Drouin, 16 Que. P.R. 121.

(§ V A—270)—As to cause of death—Medical opinions—Presumption.

In a jury trial, where damages are claimed for the death of a person, a verdict cannot be found only on medical controverted opinions, but the case is different where the medical evidence is supported by a proof of noncontested facts. The jurors may then render their verdict by appreciating the facts and opinion of medical men, which they have before them. [Boilard v. Montreal, 18 D.L.R. 366, 21 Rev. Leg. 58, distinguished.] An affirmative verdict can be rendered upon facts and probabilities only if they establish presumptions; and if these presumptions are strong enough to bring about a reasonable conviction in the mind of a jury, the court should not interfere.

Montreal Tramways Co. v. Mulhern, 26 Que. K.B. 456. [Affirmed, 55 Can. S.C.R. 621, 39 D.L.R. 758.]

General verdict—Specific questions.

The law of British Columbia is that a jury may find a general verdict and ignore specific questions put to them, but if questions are put to them which they answer, a general verdict inconsistent with the answers to such questions will be set aside.

Bank of Toronto v. Harrell, 39 D.L.R. 262, 55 Can. S.C.R. 512, [1917] 2 W.W.R. 1149, reversing 31 D.L.R. 440, 23 B.C.R. 202, [1917] 1 W.W.R. 213.

Damages — Mental sufferings — Railway—Speed at crossings.

It has been the general practice of courts for many years to leave in the hands of the jury to determine of the total amount of the damages suffered by the victim of an accident as a single amount, without requiring them to specify the amount of damages caused by the several sources of damages. A judge does not go beyond his functions in instructing the jury that they had no right to grant damages for mental sufferings, and in requiring them to consider this verdict so as to leave out mental sufferings. It is most imprudent for a car on a railway track, where it crosses tracks running at right angles, to cross at high speed immediately behind another car. The jury in their verdict may take into consideration facts which, although not specifically alleged in the declaration, are the natural consequence of the cause of the accident mentioned by plaintiff.

Merry v. Montreal Tramways Co., 53 Que. S.C. 226.

DERAILMENT OF CAR—SPEED.

It is a judge's duty to examine carefully the jury's verdict and to see that it is rendered in a legal way. So, when a jury is of the opinion that the derailment of a tramcar was caused by the speed at which the car was going, and included in its verdict the words "the too great speed," a ground which was not pleaded in the action, the jury, under the direction of the judge, may strike these words out of its verdict.

Fortin v. Montreal Tramways Co., 54 Que. S.C. 428.

(§ V A—272)—JUDGE DIRECTING JURY TO ANSWER QUESTIONS.

Under s. 61 of the Ontario Judicature Act, the judge, instead of directing the jury to give either a general or a special verdict, may direct the jury to answer any questions of fact stated to them by him. The jury's answers to the questions so stated are not a verdict within the meaning of s. 35 (4) of the Act (R.S.O. 1914, c. 56).

Rowan v. Toronto R. Co., 43 D.L.R. 564, 43 O.L.R. 164, affirming 14 O.W.N. 173.

B. RETIREMENT; CONDUCT OF JURY; COERCION; POLL.

(§ V B—275)—CRIMINAL—RETIREMENT OF JURY—IMPROPER CONDUCT OF CONSTABLE IN CHARGE—DISCRETION OF JUDGE AS TO DISCHARGE OF JURY—SECTION 959 (3) CR. CODE.

Where a judge is trying a criminal case with a jury and it is brought to his attention, before the jury have returned their verdict, that the constable in charge of the jury has been present in the room with them for a considerable time while they were considering the verdict, the judge, if of the opinion that the disobedience of the constable might lead to a miscarriage of justice, may, under s. 959 (3), Cr. Code, discharge the jury, or if he be of opinion that the accused cannot be prejudiced thereby he may allow the jury to bring in their verdict as though the directions of the section had been followed.

The King v. Corrigan, 46 D.L.R. 491, 31 Can. Cr. Cas. 291, 12 S.L.R. 189, [1919] 2 W.W.R. 81.

JURY FINDINGS — RECONSIDERATION — RETIREMENT TO JURY-ROOM.

When a jury, after mature deliberation in a jury-room, renders a verdict for one party, giving reasons therefor, and is then instructed by the Trial Judge, on a crucial point, to reconsider its verdict, such reconsideration should take place in the privacy of the jury-room and not in open court.

Lowry v. Thompson, 15 D.L.R. 463, 29 O.L.R. 478.

C. SUFFICIENCY AND CORRECTNESS.

Effect of unqualified juror, see Jury, III-75.

Conclusiveness of verdict, as to injury in course of employment, see Master and Servant, V—340.

(§ V C—280)—EXPLOSIVE ON ROAD—INJURY TO CHILD—QUESTIONS TO JURY—FINDING—FINALITY.

In an action to recover damages for injury to an infant caused by an explosive stick which he said he found in a tool box left unlocked on the roadside by the defendants, the jury in answer to questions submitted to them, found: (1) that the infant plaintiff obtained the explosive which injured him from the defendants' box; (2a) that the defendants "may not have known" it was there; (2b) that the defendants ought, by the exercise of reasonable care, to have known that it was there; (3) that the explosive was in the possession of the defendants when the infant plaintiff obtained possession of it; (4) that the defendants were guilty of negligence in their care of the explosive; (5) that the negligence consisted in not locking their tool-box; (6) that the defendants' negligence caused or contributed to the accident; (7) that the infant plaintiff was not guilty of any negligence which caused or contributed to the accident:—The court held that the main question, whether the boy had obtained the explosive from the defendants' tool-box, was a question for the jury, their finding could not be disturbed, and that judgment was properly entered for the plaintiff on the findings.

Gerard v. Ottawa Gas Co., 43 D.L.R. 447, 43 O.L.R. 264.

INJURY TO PERSON BY MACHINE-GUN—SHELL EXPLODED BY TRESPASSER—GUN USED AT FAIR GROUNDS IN CHARGE OF MILITARY OFFICER—COMMITTEE OF CITIZENS PROCURING DISPLAY OF GUN TO AID RECRUITING — LIABILITY FOR INJURY — FINDINGS OF FACT OF TRIAL JUDGE—DAMAGES—SUGGESTED CASE FOR COMPENSATION OUT OF PUBLIC MONEY.

Le Groulx v. Kerr, 14 O.W.N. 140.

SUFFICIENCY AND CORRECTNESS—DAMAGES.

In a personal injury case where the jury award of general damages at $15,000 is attacked as excessive and the evidence shews that the injuries sustained were unusually severe, the award will not be disturbed where it stands the test that twelve reasonable men might reasonably find the damages at that amount. A jury cannot award as special damages an amount greater than the amount claimed, unless the pleadings are amended so as to cover the larger amount. [Chattell v. Daily Mail Publishing Co., 18 T.L.R. 165, applied.]

Staats v. C.P.R. Co., 17 D.L.R. 309, 17 Can. Ry. Cas. 38, 7 S.L.R. 184, 27 W.L.R. 627, 6 W.W.R. 401.

EVIDENCE TO SUPPORT.

When the meaning to be given to the finding of the jury is that the leaving of one of the gates at a railway crossing open was an invitation to the driver of a truck that he might safely cross the tracks, and where there is evidence to support this finding and

also a finding against contributory negligence, the findings will not be disturbed.

Armstrong Cartage & Warehouse Co. v. G.T.R. Co., 43 D.L.R. 122, 42 O.L.R. 660, 23 Can. Ry. Cas. 264.

RECONSIDERATION—SUBSTITUTED ANSWER.

When it appears to the Trial Judge from the answers brought in by the jury that a point has not been made clear to them, the judge may further instruct the jury and send them back to reconsider their answer to one of the questions, and upon the return of the jury with a substituted answer to such question may properly receive and act on the substituted answer.

Dowson v. Toronto & York Radial R. Co., 43 D.L.R. 377, 43 O.L.R. 158.

FINDING OF JURY—SUFFICIENCY—INCONSISTENCY.

Inconsistencies in the finding of a jury are not fatal unless so self-destructive that none of the effective findings can stand.

Dunlop v. Canada Foundry Co., 12 D.L.R. 791, 28 O.L.R. 140, affirming 2 D.L.R. 887, 4 O.W.N. 791.

ANSWERS OF JURY—SUFFICIENCY TO SUSTAIN VERDICT.

An electric railway company is not entitled to the verdict on an answer of a jury, under proper instruction as to the duty of the company, in an action against it for injuries caused by the heaping up of snow by defendant company when removing same from its tracks, where the answer was to the effect that such accumulation of snow caused or contributed to the plaintiff's injury, although there was no express finding that the snow was negligently left in the highway, since the answer was sufficient to shew that the conduct of the defendant was inconsistent with due care, and that the snow was not levelled to a uniform depth as required by R.S.N.S. 1900, c. 71, s. 194.

Wright v. Pictou County Elec. Co., 11 D.L.R. 443, 15 Can. Ry. Cas. 394, 47 N.S.R. 166, 13 E.L.R. 47.

Where questions are left to the jury in a negligence action and some of the questions are answered, but the jury disagree as to the answers to other material questions, and therefore omit to answer them, there must be a new trial as to the whole case in like manner as if the jury had not agreed upon any of the questions.

Emerson v. Cook, 5 D.L.R. 232, 3 O.W.N. 968.

The verdict of a jury will not be disturbed if it was one that reasonable men might have found, even though the Trial Judge was of a different opinion. [Metropolitan R. Co. v. Wright, 11 A.C. 152; Cox v. English S. & A. Bank, [1905] A.C. 168, applied.]

Waterous Engine Works v. Keller, 1 D.L.R. 880, 4 A.L.R. 77, 20 W.L.R. 82, 1 W.W.R. 602.

In an action by the administratrix of a railway section man for damages for his death through being struck by a train which was running on the left-hand track contrary to custom because of an accident on the right-hand track, the negligence found by the jury against the railway in not providing a headlight while running in a dense fog will, if supported by evidence, be sufficient to sustain the verdict, although joined in the finding with one not supported by the evidence that the railway company was negligent in not having switched the train to the right-hand track.

Graham v. G.T.R. Co., 1 D.L.R. 554, 25 O.L.R. 429, 19 Can. Ry. Cas. 232, 20 O.W.R. 965.

(§ V C—281)—SPECIFIC FINDING ON ONE GROUND OF NEGLIGENCE ONLY.

Where several grounds of negligence are alleged, and the jury make a finding on one only, the allegations in the other grounds are negatived by implication.

McEachen v. G.T.R. Co., 2 D.L.R. 588, 3 O.W.N. 628, 21 O.W.R. 187.

(§ V C—285)—IN CIVIL CASES.

Where an action has been twice tried with a jury, and upon the second trial the jury have found in favour of the same party, but have reduced the damages, a third trial will not be ordered merely because the findings of the jury at the second trial are contrary to what the Appellate Court regards as the weight of evidence, if there is some evidence upon which the verdict can be sustained.

Zufelt v. C.P.R. Co., 7 D.L.R. 81, 4 O.W.N. 39.

DEATH — GENERAL FINDING — NEGATIVING NEGLIGENCE.

A general finding by a jury in an action for negligence causing the death of a workman by the fall of lumber which he was engaged in removing, that the death was not caused by the negligence of the defendant, thereby sufficiently covers any allegation of negligence in the action, rendering it unnecessary for them to make more specific findings as to whether the accident was caused by the negligence of defendant's employees or the defective condition of the plant.

Ursulan v. Foley, 27 D.L.R. 240, 50 N.S. R. 21.

CONCLUSIVENESS OF VERDICT—NEGLIGENCE.

The court should not interfere with the verdict of a jury in an action for damages for injuries resulting from negligence where there is some evidence to support their findings, even though their findings and answers upon questions submitted to them as to negligence and contributory negligence may not appear altogether complete and satisfactory.

Jaroshinsky v. G.T.R. Co., 31 D.L.R. 531, 37 O.L.R. 111.

MISDIRECTION—MISCARRIAGE.

When the finding of a jury is not reasonable upon the facts, and it is apparent that a miscarriage of justice has taken place owing to the jury not thoroughly understanding the points put to it, because it has

not been sufficiently instructed by the Trial Judge, the verdict will be set aside.

Jackson v. B.C. Electric R. Co., 38 D.L.R. 145, 24 B.C.R. 484, [1917] 3 W.W.R. 1046.

VERDICT AGAINST EVIDENCE—CLAIM AND COUNTERCLAIM — JUDGMENT — PLEADING—ESTOPPEL.

In an action to recover certain live stock, which the defendant had removed from a farm, which the plaintiff had leased, together with the farm, to the defendant, the defendant admitted the removal of the stock, but claimed to have substituted other stock of equal value. On the trial the judge directed the jury that the defendant had no right to remove the stock and substitute other stock instead, even though such substituted stock was of equal or greater value than that removed. Notwithstanding this direction, the jury found the stock removed belonged to the defendant. Held, (1) that the finding should be set aside as against evidence, and perverse (2) that as estoppel had not been pleaded or raised on the trial it was not open to the defendant to contend, on the motion to set aside the verdict or for a new trial, that the plaintiff by his conduct allowed the defendant to assume that he could substitute stock for that removed, and was estopped from claiming title to the stock removed.

Rush v. Clark, 45 N.B.R. 393.

CONDITION OF MACHINERY—REVIEW ON APPEAL.

An expression in a jury's verdict that "machines were defective," or "machines were not in first class condition," have the same meaning. When the evidence upon the defectiveness of a machine is contradictory, jurymen may reasonably reach the conclusion that the machine was in bad condition, and one cannot say that any other verdict should have been given. Besides, a Court of Appeal ought not, in such circumstances, to change a verdict.

Montreal Ammunition Co. v. Parent, 27 Que. K.B. 558.

NEGLIGENCE—CAUSE OF DEATH.

Where there is no proper evidence of direct causal negligence, the verdict of a jury that the accident was caused by "a frog not properly packed," without indicating how the want of packing was the cause of death, cannot be sustained.

Ryan v. C.P.R. Co., 32 D.L.R. 372, 37 O.L.R. 543.

COMPROMISE VERDICT—ACTION BY HUSBAND AND WIFE — NEGLIGENCE — APPEAL — NEW TRIAL.

The plaintiffs, husband and wife, sued the defendant for damages arising from a collision upon a highway of the husband's buggy with the defendant's automobile, the buggy having been smashed and the wife personally injured. The jury found "slight" negligence on the part of the defendant, awarded the husband $125 (the amount of his actual outlay occasioned by the defendant's negligence), and the wife nothing. Held, on appeal from a judgment in accordance with the jury's findings, that the finding against the wife could not, upon the evidence, be allowed to stand; that it was not a case in which the Appellate Court should itself assess the damages under s. 27 (2) of the Judicature Act, R.S.O. 1914, c. 56; that the finding of negligence should not be reopened; that there should be a new trial, confined to the ascertainment of the quantum of damages to both plaintiffs; and that the defendant should pay the costs of the appeal in any event. The verdict appeared to have been the result of a compromise of the jurors—some being in favour of a verdict for the defendant, but agreeing to a verdict for the one plaintiff, if the damages were assessed at his actual money loss. The plaintiffs should have objected to the verdict when it was announced; if they had done so, the appeal might have been unnecessary.

Doan v. Neff, 38 O.L.R. 216.

JURY—PREJUDICE—IMPROPER COURSE TAKEN BY COUNSEL AT SECOND TRIAL OF ACTION —VERDICT FOR SMALL SUM—PERVERSE VERDICT—APPLICATION FOR NEW TRIAL —REFUSAL OF COURT TO ORDER THIRD TRIAL—COSTS.

Gage v. Reid, 13 O.W.N. 229.

CONCLUSIVENESS OF VERDICT.

The court will not interfere with the verdict of a jury unless it be one which could not reasonably be returned.

Montreal v. Turgeon, 26 Que. K.B. 496.

POLL—NOTICE OF ACTION—FORCE MAJEURE —NEW TRIAL.

In a trial by jury where there is an assignment of facts the verdict should be returned by at least nine of the jurors and should be special, explicit and articulated upon each fact submitted, and should bear upon all the points in issue. When the reply to a question whether or not the plaintiff had been prevented by force majeure from giving the notice of action required by statute is answered in the affirmative by seven jurors and in the negative by five, it constitutes ground for ordering a new trial.

Desautels v. Montreal Light, Heat & Power Co., 51 Que. S.C. 458.

COMMON FAULT — NONAPPROPRIATION OF DAMAGES—NEW TRIAL.

The verdict of a jury in an action for damages brought by a widow and her children under art. 1056 C.C. (Que.) which awards a lump sum of $3,000, without fixing the portion which should go to the wife and which to each of the children, is illegal, and a new trial will be ordered. The same is the case when a verdict admits common fault and does not establish the proportion of fault for each of the parties.

Monette v. Wright, 48 Que. S.C. 294.

(§ V C—286)—SPECIAL FINDINGS—VERDICT —NEGLIGENCE.

The finding of a jury in a railway per-

sonal injury case that the defendant railway company was guilty of negligence in "nonobservance of rules in going through a closed switch," does not necessarily refer to the company's printed book of rules, put in as evidence by the plaintiff, but may be supported as referring to a rule of operation to that effect proved by oral testimony as governing the conduct of employees, although not embodied in the printed rule-book.

Staats v. C.P.R. Co., 17 D.L.R. 309, 17 Can. Ry. Cas. 38, 7 S.L.R. 184, 27 W.L.R. 627, 6 W.W.R. 401.

VERDICT—SPECIAL FINDING—VAGUENESS.

A verdict finding the defendant street railway company negligent in the words "carelessness in handling the car" is too vague upon which to give a judgment in an action by a passenger for injuries sustained by the door of the car closing upon the passenger's hand; a more specific finding is necessary to establish liability on the basis of the car having been run at too high a speed and so jolted as to cause the door to close suddenly.

McGovern v. Montreal Street R. Co., 12 D.L.R. 628, 19 Rev. Leg. 356.

NUMBER OF JURORS—SPECIFIC FINDINGS.

Under the provisions that on trial of issues of fact in civil actions the verdict of 9 or more out of 12 jurors shall be the verdict of the jury (R.S.M. 1913, c. 108), it is essential that when specific questions are answered the same 9 or more jurors shall agree in the answers. There is no statutory provision (in Manitoba) for asking specific questions, though it has been practised, and its legality is doubtful.

Risk v. C.P.R. Co., 31 D.L.R. 780, [1917] 1 W.W.R. 652.

JUROR UNDER AGE.

At the trial of a civil action, a verdict rendered by 11 jurors, the twelfth being a minor, is null. The fact that neither of the parties made objection to the presence of the minor juror does not render the jury competent, because there can be no acquiescence in a matter which is against public policy.

Myers v. Montreal, 50 Que. S.C. 120.

NEGLIGENCE—FINDINGS.

In a trial by jury, where there has been an assignment of facts, the verdict must be special, explicit and distinct as to each fact submitted. The jury must specify wherein consists the fault of the party whom it finds responsible for an accident; it is not sufficient for them to answer that this party ought to have taken greater precautions. A fault does not determine the responsibility of the party against whom it is found except in so far as it has been the cause of the accident or has contributed to it.

Davis v. Julien, 25 Que. K.B. 35.

(§ V C—288)—NEGLIGENCE — INCONSISTENCY OF FINDINGS.

Where the actions of a jury plainly imports that they have treated the defendants in a negligence case as "insurers" of the safety of pedestrians, and award damages to the plaintiff after having failed to agree that the defendants were guilty of negligence, the defendants are entitled to judgment.

Mackenzie v. B.C. Electric Co., 21 B.C.R. 375, 8 W.W.R. 956.

(§ V C—290)—VERDICT NOT JUDGMENT—COSTS.

A verdict itself is not a "judgment for the defendant" in terms of Cr. Code, s. 1045; but the order of the court directing the defendant's discharge and made in the enforcement of the jury's verdict of not guilty is a "judgment" for the defendant upon which an order may be made against the private prosecutor for payment of costs in a criminal prosecution for defamatory libel. [R. v. Blackley, 8 Can. Cr. Cas. 405, approved.]

R. v. Fournier; Martin v. Fournier, 28 D.L.R. 379, 25 Can. Cr. Cas. 430, 25 Que. K.B. 556.

IN CRIMINAL CASES.

Upon a trial for murder, upon a request for a charge of manslaughter upon the alleged ground that the accused shot the deceased while "in the heat of passion caused by sudden provocation," the charge was properly refused where nothing was said in the evidence as to the accused having been aroused to a heat of passion and the circumstances were, in the view most favourable to the defendant: (1) That he was on the scene with the criminal intent to steal; (2) that he believed the deceased to be a secret police officer; (3) that the only provocation suggested by the defence was that such officer came up to the accused at a place where he was lurking under circumstances justifying suspicion and thereupon pointed a pistol toward him and told him "to go to hell."

R. v. Eberts, 7 D.L.R. 538, 47 Can. S.C.R. 1, 20 Can. Cr. Cas. 273, 3 W.W.R. 37, affirming 7 D.L.R. 530, 4 A.L.R. 310, 20 Can. Cr. Cas. 262, 2 W.W.R. 542.

CONVICTION — QUASHING BY APPELLATE COURT.

A conviction under s. 355 Cr. Code will be quashed where the evidence does not shew that the person who receives the money is a person who stands in the relation of an agent to the person to whom he is to pay or account, but shews that he is a person who, by virtue of some contract under which there are mutual obligations, is under an obligation arising out of the contract to pay or account.

R. v. Mackay, 40 D.L.R. 37, 29 Can. Cr. Cas. 194, 14 A.L.R. 182, [1918] 1 W.W.R. 945.

"GUILTY WITHOUT HIS KNOWLEDGE."

Knowledge is not an ingredient of the offence created by s. 490 (b) Cr. Code; a

verdict by the jury of "guilty without his knowledge" is in effect a verdict of guilty.

The King v. Newcombe, 40 D.L.R. 85, 52 N.S.R. 85, 29 Can. Cr. Cas. 249.

D. AMENDMENT OR CORRECTION.

(§ V D—295)—JURY—FORM OF VERDICT—FURTHER DELIBERATIONS—CHANGE OF VERDICT—MISDIRECTION BY JUDGE—NEW TRIAL.

While the Trial Judge may guide the jury in the matter or form of their verdict, he should not send them out further for deliberations once their decision is in form with the law, with the view of having them change the substance of their return; such may constitute a mistrial and ground for quashing the verdict.

Fleurquin v. Pilon, 20 D.L.R. 679, 45 Que. S.C. 263.

"ACTUAL MALICE" DISTINCT FROM "IMPROPER MOTIVE."

Where, in an action for malicious prosecution, preliminary questions were first submitted to the jury, on whose answers the Trial Judge found want of reasonable and probable cause, and then submitted the general question, whereupon the jury brought in a verdict for plaintiff, but added that there was "no attempt at malice on the part of the defendant," the jury should be asked to reconsider the verdict so as to clear up the inconsistency, and for this purpose a further question may be submitted as to whether the defendant was actuated by any "improper motive" in laying the charge; and upon answering the latter question in the affirmative the plaintiff is entitled to judgment for the amount of the verdict.

Morrison v. Wilson, 16 D.L.R. 852, 28 W.L.R. 202, reversing 14 D.L.R. 815.

WEIGHT OF EVIDENCE.

All possible weight should be given to the verdict of a jury, but, when viewing the case from every standpoint, it appears that the verdict is against the weight of evidence, and the verdict as rendered is such as could not reasonably have been found, such verdict may be set aside and judgment entered in accordance with the weight of evidence.

Hallett v. Bank of Toronto, 43 D.L.R. 115, 46 N.B.R. 62.

E. REMITTITUR—SETTING ASIDE.

(§ V E—300)—REASONABLENESS.

An Appellate Court will not set aside a verdict which reasonable men could have given on the evidence adduced.

Lancaster v. Halifax Electric Tramway Co., 33 D.L.R. 306, 50 N.S.R. 386.

After a judgment of the Court of Appeal has been perfected allowing an appeal and reversing a judgment of the Trial Court in favour of the plaintiff, in an action for negligently causing the death of his son, based both upon Lord Campbell's Act and the Employers' Liability Act (B.C.), on the ground that no negligence on the part of the defendant had been shewn, the court cannot remit it to the Trial Court for assessment of compensation under the provisions of the Workmen's Compensation Act, notwithstanding it might have done so had leave been asked before the perfection of such judgment.

McCormick v. Kelliher, 4 D.L.R. 657, 21 W.L.R. 542, 2 W.W.R. 655.

Upon a motion by the common defendants in four actions, each brought by a different plaintiff, for an order consolidating the four actions, or for staying three of them until after the trial and the final disposition of one, where the actions involved distinct issues, though each was based upon the same cause, it was properly directed that the actions should all be set down together for hearing in order that the Trial Judge could take steps to prevent the repetition of any evidence common to all four actions, if there were such.

Kuula v. Moose Mountain, 5 D.L.R. 814, 26 O.L.R. 332, 22 O.W.R. 64.

WHEN REFUSED—ISSUES SUPPORTED BY EVIDENCE.

Where the Trial Judge during the trial of an action, in his directions to the jury, presents the issues fully to them, and where the evidence supports it, the verdict of the jury should not be disturbed.

Creveling v. Canadian Bridge Co., 21 D.L.R. 662, 51 Can. S.C.R. 216, 8 W.W.R. 619, reversing 20 D.L.R. 528, 20 B.C.R. 137, 28 W.L.R. 906, 6 W.W.R. 906.

DEFECTIVE NOTICE NO GROUND FOR SETTING ASIDE.

Where a defective notice has been given under a law compelling a notice of injury (with a full detailed statement of such damages) to be given within a certain period before commencement of action, a defendant may, by preliminary exceptions, delay the trial until proper notice has been given, but, after the action has been tried on its merits, such defective notice will not be a ground for setting aside the verdict where no prejudice has been proven.

Temple v. Montreal Tramways Co., 23 D.L.R. 587, 47 Que. S. C. 121.

ADMISSION OF CUMULATIVE EVIDENCE.

If evidence is admitted by way of rebuttal which is cumulative and not properly rebuttal testimony, despite the objection of the opposing counsel, he having an opportunity to produce further evidence to meet the evidence so admitted, such evidence should be accepted as part of the case upon which to decide a motion to set aside the verdict.

Robinson v. Haley, 42 N.B.R. 657.

EXCESSIVE DAMAGES.

Application to set aside a verdict on the grounds of excessive damages, dismissed as the damages were not manifestly so unreasonable that no body of twelve men could have honestly given such a sum, and it had not been shewn that, in arriving at

the amount, the jury took into consideration something which they ought not to have taken or failed to take into consideration something which they ought to have taken, and this even though the amount of the damages awarded indicated that the jury did not properly appreciate the considerations on which they had to assess these damages.

Jackson v. C.P.R. Co., 9 W.W.R. 649, affirming 24 D.L.R. 380, 9 A.L.R. 137, 8 W.W.R. 1043, 31 W.L.R. 726.

REOPENING CASE—NEW EVIDENCE.

Subsequent to the trial, but before judgment therein, the defendants applied to reopen the trial in part and for leave to introduce in evidence a certain agreement in writing that at the trial the defendants had failed to produce and in respect of which the Trial Judge declined to allow secondary evidence. Held, on this motion, that in a proper case the Trial Judge may in his discretion, until judgment has been delivered, reopen the trial, but that such discretion should be exercised only with the greatest care, and that it would be opening too wide a door to permit a party after practically learning that the finding of the court was adverse to him on the facts (as in the present case) to seek to supplement his proof by the production of documents which he should and well knew he should have had at the trial.

Calder v. International Harvester Co., 11 S.L.R. 244, [1918] 2 W.W.R. 905.

(§ V E—301)—REARGUMENT AFTER TRIAL —OBJECTION THAT STATUTE OF FRAUDS NOT PROPERLY PLEADED RAISED FOR FIRST TIME — AMENDMENT OF PLEADINGS.

Frith v. Alliance Investment Co., 10 D.L.R. 765, 6 A.L.R. 197, 4 W.W.R. 88, 23 W.W.R. 830, affirming 5 D.L.R. 491, 4 A.L.R. 238, 20 W.L.R. 551, 1 W.W.R. 907.

CRIMINAL TRIAL—EVIDENCE—VERDICT.

Evidence making a prima facie case for the Crown in a criminal prosecution, if unanswered and believed by the jury, is sufficient to support a conviction of the person accused.

Girvin v. The King, 45 Can. S.C.R. 167.

CRIMINAL TRIAL—INSTRUCTION OF JURY—HURRYING THE VERDICT.

The King v. Ventricini, 17 Can. Cr. Cas. 183.

VERDICT—IRRELEVANT FACTS.

Trottier v. Deschenes, 40 Que. S.C. 355.

VI. Notice of trial; preliminary proceedings; expediting.

(§ VI—320)—NOTICE OF TRIAL.

A notice of trial is irregular unless the pleadings are closed as to all parties including a codefendant not served with the statement of claim within the time prescribed for service. [Ambroise v. Evelyn, L.R. 11 Ch. D. 759, followed.]

Sellick v. Selkirk, 1 D.L.R. 607, 22 Man. L.R. 323, 1 W.W.R. 1090.

ORDER POSTPONING TRIAL—OBLIGATION TO GO TO TRIAL AT ADJOURNED SITTINGS.

Where the plaintiff obtains an order of the Trial Judge for a postponement until the next term, he is bound, under the Nova Scotia practice, to go to trial at that term, and his failure so to do may constitute ground for dismissal.

Buckley v. Fillmore, 15 D.L.R. 307, 47 N.S.R. 493.

NOTICE OF TRIAL — TIME FOR GIVING — AMENDMENT OF STATEMENT OF CLAIM.

Where, after a cause is at issue, the plaintiff's statement of claim is amended under an order, 2 Manitoba K.B. r. 301 prevents the giving of notice of trial until ten days after service of an amended statement of defence. [Brown v. Telegram Printing Co., 21 Man. L.R. 775, followed.]

Pitura v. Haney, 14 D.L.R. 392, 23 Man. L.R. 753, 5 W.W.R. 450, 25 W.L.R. 841.

ORDER TO EXPEDITE—PLAINTIFF NOT IN DEFAULT—RULE 243.

McIntosh v. Grimshaw, 1 D.L.R. 923, 3 O.W.N. 848.

POSTPONEMENT—CHANGE OF VENUE—CON. RULE 529 (D) — CONVENIENCE — FOREIGN COMMISSION—COSTS.

Irwin v. Stephens, 1 D.L.R. 916, 3 O.W.N. 805.

MOTION TO EXPEDITE — JURISDICTION OF MASTER IN CHAMBERS — PLAINTIFFS NOT IN DEFAULT.

Campbell v. Sovereign Bank, 3 D.L.R. 865, 22 O.W.R. 105.

COMPUTATION OF TIME—TRANSFER OF ACTION.

Where the time for setting down for trial and the giving notice of trial has begun to run prior to the action being transferred from a District Court (Sask.) to the Supreme Court, such time will count as part of the time within which the action will have to be set down for trial in the Supreme Court.

Boll v. Montgomery, 23 D.L.R. 319.

NOTICE OF TRIAL—JURY SITTINGS—NON-JURY SITTINGS—RULE 246—PRACTICE.

Bethune v. Biggar, 9 O.W.N. 116.

TIME FOR SERVING.

Rule 706 provides that service of any notice effected after one p. m. on a Saturday shall be deemed to have been effected on the following Monday:—Held, that a notice of trial served by the plaintiffs on Saturday March 7 at two p. m., for a sittings beginning on March 17 was not sufficient, although the plaintiff attempted to effect service before one on the same day, but found the defendant's solicitor's office locked up; and the Master had no jurisdiction to order that the service should be validated as of Saturday, nor to require the defendant to take short notice of trial; but an order should be made allowing the plaintiffs to serve notice of trial for the sittings of the court commencing on March 17, with the proviso that the action should

not be tried until after the expiration of ten days from the service of the notice; and that the plaintiffs should pay the defendant's costs of the plaintiffs application for relief. [Baxter v. Holdsworth [1899] 1 Q.B. 266, followed.]

Securities Corp. v. Hamilton, 27 W.L.R. 634.

TIME FOR—COMPUTATION—NEW RULE 248.

Healey-Page-Chaffons v. Bailey, 5 O.W.N. 113, 25 O.W.R. 75.

INSCRIPTION EX PARTE—INTERVENTION NOT CONTESTED—GARNISHMENT AFTER JUDGMENT—C.C.P. 222, 534.

The plaintiff in an ex parte case need give only one day's notice to the defendant, because the latter has no evidence to prepare; but the defendant cannot do the same, seeing that the plaintiff would not have time to summon his witnesses and prepare his case. The defendant not being able to inscribe a case ex parte, neither can the plaintiff inscribe ex parte upon an intervention which he did not contest, seeing that he becomes defendant with respect to this action. But, if he has caused a garnishment to issue after judgment, he can continue the proceedings on the garnishment.

Tremblay v. Tremblay, 15 Que. P.R. 313.

The causes which may be placed on the special roll are those in which the plaintiff has only to ask for judgment without argument or evidence.

Maher v. Birchenough, 15 Que. P.R. 16.

DESIGNATION OF DIFFERENT PLACE OF TRIAL IN STATEMENT OF CLAIM.

Crosby v. Yarmouth Elec. Co., 8 E.L.R. 542.

ORDER TO PROCEED TO TRIAL—NOTICE OF SETTING DOWN, AS WELL AS TO STAY TRIAL UNTIL AFTER SIMILAR CASE IS HEARD BY PRIVY COUNCIL—CON. RULES 396, 398.

Stavert v. Barton; Stavert v. Macdonald, 3 O.W.N. 348, 20 O.W.R. 597.

MOTION TO SET ASIDE—OMISSION TO NAME PLACE OF TRIAL IN STATEMENT OF CLAIM.

Turcotte v. Finkelstein, 18 O.W.R. 912.

EXECUTOR DE SON TORT—SALE OF ASSETS—PURCHASER IN GOOD FAITH—CONVERSION.

Pickering v. Thompson, 24 O.L.R. 378, 19 O.W.R. 697.

VIII. Trial of several actions, different plaintiffs, common defendant.

(§ VIII—340)—DIFFERENT PLAINTIFFS, DEFENDANT.

Where a settlement between the parties is pleaded in bar to the action and the remaining issues would involve the taking of depositions under commission in a distant country at very large expense, the court will exercise its discretionary power to order a preliminary trial of the issue as to the agreement of settlement alleged.

Northern Crown Bank v. National Matzo & Biscuit Co., 1 D.L.R. 376, 3 O.W.N. 517, 20 O.W.R. 897.

SUSPENSION AND JOINDER OF PROCEEDINGS—WHEN THEY CAN BE MADE—C.C.P. 291, 292.

A joinder of cases can only be ordered when both are ready for trial; the adjudication of neither action can be delayed by the other. The court has no power to order the suspension of proceedings in a case ready for trial when another case is not even returned into court, although there is connexity in the causes of said actions.

Queen City Realty Co. v. Massicotte, 15 Que. P.R. 289.

(§ VIII—341) — APPLICATION FOR DIRECTION THAT TWO ACTIONS BE TRIED TOGETHER—EVIDENCE COMMON TO BOTH—JURY NOTICE IN ONE ONLY.

Rogers v. Wahnapitae Power Co., 4 O.W.N. 1489, 24 O.W.R. 766.

(§ VIII—345)—DANGEROUS WORKS—JOINT TORTFEASORS—JUDGMENT AGAINST ONE OF SEVERAL PERSONS RESPONSIBLE FOR DAMAGES—BAR TO ACTION.

Longmore v. McArthur, 43 Can. S.C.R. 640.

IX. Preliminary questions of law.

(§ IX—350) — PRELIMINARY LAW QUESTIONS.

An application to dispose of a preliminary question of law in an action should not be entertained as to one of several defendants unless the question to be so heard would dispose of the action as regards the applicant or would decide some important principle involved in the action. [Gardiner v. Bickley, 15 Man. L.R. 354, applied.]

Arenowsky v. Veitch, 14 D.L.R. 304, 23 Man. L.R. 755, 25 W.L.R. 658, 5 W.W.R. 260.

Leave to set a case down for a preliminary hearing upon points of law raised by the pleadings will not be granted where the decision on such points of law would in effect only settle the question of the onus of proof, in view of the avowal by the party who would be affected by an adverse decision that, in such event, he would apply to amend his pleading and take issue upon the facts which upon such preliminary hearing would have been taken as admitted. [National Trust Co. v. Dominion Copper Co., 14 B.C.R. 190, applied.]

Crosbie v. Prescott, 6 D.L.R. 529, 17 B.C. R. 199, 21 W.L.R. 269.

PRELIMINARY TRIAL OF ISSUE OF LAW—REFUSAL OF ORDER FOR CONVENIENCE—EXPENSE—DELAY.

Anderson v. Canada Furniture Manufacturers, 9 O.W.N. 32.

STATED CASE — CONTRACT — STATUTE OF FRAUDS—REFUSAL TO ENTERTAIN CASE —DETERMINATION OF CASE NOT DECISIVE OF ACTION—RULE 126—JUDICATURE ACT, S. 32 (2).

Constable v. Russell, 7 O.W.N. 746.

X. Publicity.

(§ X—360)—SUSPENSION OF PROCEEDINGS —CONDITIONS NECESSARY—CASE PENDING IN REVIEW—C.C.P. 291, 292.

In order that the suspension of a case in the Superior Court may be granted for the reason that there is an identical case in the Court of Review, the two cases must be between the same parties and of the same nature. When one asks for cancellation of rent, with damages, and the other for cancellation only, the cases will not be suspended.

Messier v. Senecal, 15 Que. P.R. 425.

(§ X—400) — HEARING IN CAMERA IN SPECIAL CASES.

An order for a trial in camera should not be made in an action for annulment of marriage. [Scott v. Scott, [1913] A.C. 417; Daubney v. Cooper, 10 B. & C. 237, 109 Eng. R. 438, applied.

Reid v. Aull, 16 D.L.R. 766, 5 O.W.N. 964.

TROLLEY.

See Street Railways.

TROVER.

I. RIGHT OF ACTION.
- A. In general.
- B. Conversion; what constitutes.
- C. Demand; tender.

II. LIABILITY; DEFENSES; EFFECT OF SUIT OR RECOVERY.

See Detinue.

Acquiring goods from conditional purchaser as conversion, see Sale, I C—15.

I. Right of action.

A. IN GENERAL.

(§ I A—1)—BY ADMINISTRATOR—SEIZURE OF CHATTEL DURING INTESTATE'S LIFETIME.

Where a wrongful seizure under execution had been made under defendant's direction of an automobile in the possession of the decedent who would not have made use of same nor derived any benefit from its possession, and the automobile is afterwards returned undamaged to the administrator of the deceased owner on the seizure being held to be illegal, no cause of action survives to the administrator for the mere detention during the period prior to the decedent's death, nor does a cause of action arise in favour of the administrator for such detention for the period between the decedent's death intestate and the date of the grant of letters of administration.

Day v. Horton, 14 D.L.R. 763, 23 Man. L.R. 623, 26 W.L.R. 72, 5 W.W.R. 751.

RECOVERY FOR CONVERSION NOT ALLEGED.

Where, without alleging a conversion, damages are claimed for a wrongful detention of chattels, and a conversion is clearly shewn, the defendant, when not taken by surprise, may be held liable for the conversion where his liability in that form would not exceed that for which he could be held in detinue.

McCutcheon v. Johnson, 13 D.L.R. 41, 23 Man. L.R. 559, 24 W.L.R. 868.

CONVERSION—FINDING OF JEWELRY BY MILLHAND IN RUBBISH—OWNERSHIP OF.

Buell v. Foley, 25 O.W.R. 177.

(§ I A—4)—POSSESSORY RIGHTS—ACTION BY DISSEISEE.

A person possessed of goods as his property has a good title as against every stranger and that one who takes them from him having no title in himself, is a wrongdoer and cannot defend himself by shewing that there was title in some third person, for as against a wrongdoer possession is title.

Dutton v. C.N.R. Co., 23 D.L.R. 43, 26 Man. L.R. 493, 31 W.L.R. 367. [Affirmed except as to damages, 30 D.L.R. 250, 26 Man. L.R. 493, 21 Can. Ry. Cas. 294, 10 W.W.R. 1006, 34 W.L.R. 881.]

(§ I A—5)—SALE OF GOODS—ACCOUNTING FOR GOODS RECEIVED — CONVERSION — DAMAGES — COUNTERCLAIM — COSTS —INDEMNITY.

Prozeller v. Wilton, 17 O.W.N. 125.

B. CONVERSION; WHAT CONSTITUTES.

(§ I B—10)—SALE BY WRONGDOER — ASSUMPSIT—WAIVER OF CONVERSION.

Where one wrongfully takes possession of another's property and sells and collects the price of it, the rightful owner may waive the wrongful conversion and treat the wrongdoer as his agent and sue in assumpsit for money had and received.

Whitchelo v. Colvin, 10 D.L.R. 635, 6 S.L.R. 214, 23 W.L.R. 542, 3 W.W.R. 1135.

The placing of a lock upon the door of a granary with the intent to exercise control over grain contained therein, inconsistent with the real owner's right of possession, amounts to a conversion of the grain sufficient to permit the latter to maintain an action of trover against the wrongdoer.

Delbridge v. Pickersgill, 3 D.L.R. 786, 21 W.L.R. 285, 2 W.W.R. 393.

One who took possession of the logs after notice of the claim of the true owner of the timber from which they were cut is liable to the latter for conversion although he had in good faith bought the logs from the trespasser who had cut down the timber.

Phillips v. Conger Lumber Co., 5 D.L.R. 188, 3 O.W.N. 1436, 22 O.W.R. 436.

TRIVIAL TRESPASS—CONTRACTOR'S EQUIPMENT.

Where a contracting painter leaves on the property owner's premises the blocks

and tackle he intends to use in the work, but without any undertaking by the property owner to take care of them, the equipment remains at the painter's risk, and the mere user of them by the property owner does not constitute a conversion, but amounts at the most to a trivial trespass, which the law would not regard.

McDonald v. Stockley, 16 D.L.R. 743, 48 N.S.R. 196, 14 E.L.R. 328.

TRADE FIXTURES—CONVERSION BY LANDLORD.

The refusal of a landlord or of his assignee to permit a tenant to remove trade fixtures from demised premises according to the term of the lease, amounts to an actionable conversion.

Simons v. Mulhall, 11 D.L.R. 781, 4 O.W.N. 1424, 24 O.W.R. 736.

WHAT CONSTITUTES—DEALING AS OWNER WITH GOODS OF ANOTHER.

Actually dealing with another's goods as owner, for however short a time and however limited a purpose, is a conversion, although done under a mistaken but reasonable supposition of being lawfully entitled thereto.

MacKenzie v. Scotia Lumber Co., 11 D.L.R. 729, 47 N.S.R. 115, 12 E.L.R. 464, affirming in part, 7 D.L.R. 409, 12 E.L.R. 120.

SALE OF GRAIN—BILLS OF LADING SIGNED AS DIRECTED BY AGENT—OWNER OF GRAIN ILLITERATE—FRAUD OF AGENT—NOTICE TO PURCHASERS OF OWNERS' INTEREST—DAMAGES FOR VALUE.

The owner of grain, being illiterate except that he could sign his name, instructed an agent to sell the grain to all the purchasers, and signed the bills of lading in blank as instructed by the agent. The agent fraudulently crossed out the owner's name and signed his own name as shipper, and sold the grain to the purchasers as his own. In an action against the purchasers for the price of the grain, or for damages for wrongful conversion, the court held that the purchasers could not obtain title through the forged bills; that the conduct of the plaintiff was not such as to estop him from recovering; that the alterations on the bills of lading should have put the purchasers on inquiry, and that the purchasers had express notice of the plaintiff's interest in time to stop payment of the cheques, that they had converted the goods to their own use and were liable for their value.

Leno v. Simpson-Hepworth Co., 45 D.L.R. 285, [1919] 1 W.W.R. 721.

WRONGFUL SEIZURE—QUESTIONS OF FACT.

Sattler v. Wilson, 24 W.L.R. 150.

WRONGFUL SEIZURE — IDENTIFY HORSES SEIZED.

Follis v. Baird, 31 W.L.R. 536.

(§ I B—15)—REFUSAL OF BROKER TO DELIVER STOCK TO PURCHASER.

Where shares of stock, purchased by a broker for the plaintiff, were, with the assent of the latter, retained by the former in order to be readily transferred and delivered on sale, the broker, on subsequently selling such shares, is not answerable for a conversion thereof, where, at all times, he had on hand a sufficient quantity of that particular stock, fully paid up, to meet a demand for its delivery; notwithstanding his books shewed a sale to the plaintiff of the particular shares afterwards sold by the broker.

Long v. Smiley, 12 D.L.R. 61, 4 O.W.N. 1452, affirming 6 D.L.R. 904, 4 O.W.N. 229, 23 O.W.R. 229.

REFUSAL TO DELIVER.

Where a son turned his father out of his house and refused to let him remove personal property belonging to him, it was held that the father might maintain an action of conversion without having made any demand therefor.

Lowe v. Lowe, 10 E.L.R. 277.

SALE OF GOODS—BEES AND HONEY—ILLEGAL DETENTION—DAMAGES.

Parks v. Simpson, 23 O.W.R. 837.

AGENT REFUSING TO DELIVER GOODS—LIABILITY.

A principal living in Ontario purchased from the plaintiff at Toronto, an engine under agreement providing that the purchaser should have the possession and right to the use thereof until default in payment when the vendor might without process of law take possession. The engine was shipped by the principal to his agent in Saskatchewan for use upon the principal's farm. Default having been made the plaintiff demanded possession from the agent who refused to deliver it up. Held, that as the agent's refusal was absolute he was properly sued for conversion.

Advance Rumely Thresher v. Service, 12 S.L.R. 294, [1919] 2 W.W.R. 647.

C. DEMAND; TENDER.

(§ 1 C—21)—NECESSITY OF.

Where the defendant after ousting the plaintiff from work which the latter had contracted to do for the former, took possession of the plaintiff's tools and used them on the work, such use was sufficient evidence of the conversion of the tools though no demand for their return was shewn.

Neros v. Swanson, 1 D.L.R. 833, 1 W.W.R. 711, 20 W.L.R. 175.

II. Liability; defenses; effect of suit or delivery.

(§ II—25)—EFFECT OF RECOVERY — CONVERSION—DAMAGES—LIEN.

Smyth v. McClellan, 11 D.L.R. 849, 4 O.W.N. 1442, 24 O.W.R. 740.

CONVERSION OF CHATTELS—RETURN OR PAYMENT OF VALUE—REFERENCE—EFFECT OF RECOVERY.

Jewell v. Doran, 14 D.L.R. 523, 5 O.W.N. 303, varying 12 D.L.R. 839, 25 O.W.R. 945.

[Affirmed, 16 D.L.R. 490, 49 Can. S.C.R. 88, 25 O.W.R. 804.]

SAISIE REVENDICATION (QUE.).

A motion by the plaintiff for an order giving him possession of goods in possession of the defendant seized in revendication, which would also decide the merits of the cause will be dismissed. The goods will be left in defendant's possession, he having the apparent title to them and being presumed to be the owner.

Aubin v. Yeotes, 14 Que. P.R. 374.

(§ II—26)—BAILEE'S ACTION—BAILOR GIVING TITLE TO THE WRONGDOER.

If before action brought by a bailee of goods against the party who has wrongfully taken them out of his possession, the bailor to whom such bailee would have to account has clothed the wrongdoer with the ownership of the goods, the bailee cannot recover from the wrongdoer, thus converted into the true owner, the full value of the goods no more than he could recover their full value from the bailor himself.

Eastern Construction Co. v. National Trust Co.; National Trust Co. v. Miller, 15 D.L.R. 755, [1914] A.C. 197, 25 O.W.R. 756.

WHO LIABLE GENERALLY — CARTAGE COMPANY HOLDING ITSELF OUT AS AUTHORIZED TO TAKE DELIVERY FOR ALLEGED BUYER—GOOD FAITH NO DEFENCE WHEN.

Where a carter held himself out to a merchant as authorized to take delivery of goods for a firm in whose name a fraudulent order had been sent to the merchant and the carter while on his way with the goods to the alleged buyer's address was intercepted by the perpetrator of the fraud and delivered the goods elsewhere on the false representation of the party giving the directions that he represented the purchaser, the carter is liable in conversion to the merchant for the value of the goods which were stolen by means of the fraud, where there was in fact no order by the party whose name was given as the buyer and possession was parted with only on the faith of the carter's representation of authority to take delivery; such result follows notwithstanding the circumstance that the carter acted in good faith and was himself imposed upon by the fraud of the thief. [Bank of England v. Cutler, [1908] 2 K.B. 208, 77 L.J.K.B. 889; Starkey v. Bank of England, [1903] A.C. 114, 88 L.T. 244; Yonge v. Toynbee, [1910] 1 K.B. 215, 102 L.T. 57; Austin v. Real Estate Exchange, 2 D.L.R. 324, 17 B.C.R. 177, applied; McKeown v. McIver, 40 L.J.Ex. 30, distinguished.]

Alberta Pacific Grain Co. v. Merchants Cartage Co., 18 D.L.R. 584, 20 B.C.R. 1, 6 W.W.R. 1517, 29 W.L.R. 19.

LIABILITY — OF PLEDGEE — WRONGFUL PLEDGE BY BROKER OF STOCK ENTRUSTED TO HIM FOR SALE.

Where a certificate for 46 shares of a company was delivered by the owner to a broker for the purpose of selling 25 of the shares, the certificate bearing a restrictive endorsement to the effect that, "for value received . . . hereby sell, assign and transfer unto . . . twenty-five shares," etc., and, instead of selling the shares, the broker pledged the certificate with a bank for its full value for an indebtedness of his own, and the certificate, on the amalgamation of such bank with the defendant bank, came into the possession of the latter, by whom the words "twenty-five" were stricken from such endorsement, and the entire 46 shares sold in satisfaction of the broker's indebtedness, the defendant bank is answerable as for a conversion to the owner of the shares for their full value in the absence of a proved custom or usage of banks, brokers or of the Stock Exchange justifying the deletion of the words "twenty-five," since the nature of such endorsement was notice that the broker's authority was limited to a sale of the 25 shares.

Mathers v. Royal Bank, 14 D.L.R. 27, 29 O.L.R. 141.

BUYING LOGS CUT IN TRESPASS.

A timber manufacturer who, under a contract with a jobber, accepts from him and appropriates logs cut in trespass, is liable for their value to the owner of the land. He is also liable for damage caused by the jobber to a third party in the execution of the contract, under a clause therein that gives him the option of requiring one of two modes of execution to be adopted.

Gray v. Perley, 44 Que. S.C. 418.

(§ II—27)—COMMON CARRIER — SALE OF GOODS TO PAY CHARGES—NEGLIGENCE AND DEFAULT OF AUCTIONEERS—CONVERSION OF GOODS.

Swale v. C.P.R. Co., 10 D.L.R. 815, 29 O.L.R. 634, 24 O.W.R. 224.

RAILWAY — CARRIAGE OF GOODS — CONVERSION — NEGLIGENCE — TERMS OF SHIPPING ORDER — DAMAGES — INTEREST — COSTS—MERCANTILE LAW AMENDMENT ACT, S. 7 (1)—RAILWAY ACT OF CANADA, S. 345—JUDICATURE ACT, S. 35 (3).

Getty v. C.P.R. Co., 17 O.W.N. 243.

(§ II—31)—DEFENCES GENERALLY.

Denial of property in the goods—Alternative claim as bona fide purchaser for value from chattel mortgagee—Validity of chattel mortgage.

Jordan v. Case, 7 D.L.R. 855, 1 W.W.R. 539.

(§ II—33)—COMPENSATION FOR IMPROVING GOODS WRONGFULLY IN POSSESSION.

If a person wrongfully takes possession of chattel property belonging to another and, whilst in possession thereof, alters, improves or otherwise deals with it, he is not entitled to payment for such services.

Rainy Lake River Boom Corp. v. Rainy River Lumber Co., 6 D.L.R. 401, 27 O.L.R. 131, 22 O.W.R. 952.

TRUSTS.

I. CREATION; VALIDITY; TERMINATION.
A. In general.
B. Express or declared trusts; precatory trusts.
C. Parol trust; Statute of Frauds.
D. Implied, constructive and resulting trusts.
E. Revocation.
F. Termination; release; discharge.
II. TRUSTEES.
A. Appointment; capacity; resignation; removal; number.
B. Rights, powers, duties and liabilities.
C. Suit for instructions.
III. INTEREST OF CESTUI QUE TRUST; RIGHTS OF CREDITORS; SPENDTHRIFT TRUST.
A. In general.
B. Rights of creditors; spendthrift trusts.

Annotation.

Appointment of trustees and receivers in charge of enemy companies and firms during war: 23 D.L.R. 375, 379.

I. Creation; validity; termination.

A. IN GENERAL.

See Wills.

Funds in bank as, see Garnishment, II A—35.

As to charitable trusts, see Charities, I D—35.

As to corporate stock and funds, see Companies, V C—189.

(§ I A—1)—WHO MAY CREATE—MUNICIPAL CORPORATION.

A municipality which acquires company shares under the British Columbia Municipal Amendment of 1913, c. 47, may transfer them to trustees to be held in trust for the city.

Lucas v. North Vancouver, 12 D.L.R. 802, 18 B.C.R. 239, 24 W.L.R. 966, 4 W.W.R. 1381.

CONVEYANCE ABSOLUTE IN FORM—SECURITY FOR DEBT.

A trust for the benefit of the grantor is created by a deed absolute in form, made for the express purpose of placing property where it could not be improvidently disposed of by him, and also to secure the grantee for money lent the grantor.

Buchanan v. Oakes, 15 D.L.R. 582, 26 W.L.R. 549.

CODEBTORS — DIRECTION BY PRINCIPAL TO AGENT TO PAY — RESPONSIBILITY OF AGENT — TRUSTEE AND CESTUI QUE TRUST.

An agent directed by his principal to pay to a third person money sent to him for that purpose (the direction or authority not amounting to an assignment of or charge upon the fund) is not in general responsible to such third person should he fail to execute his mandate. He may become so by assenting to the direction and communicating his assent to the intended payee or by undertaking with him to pay the money to him or to hold it for him, but even then the agent does not become a trustee for the intended payee, nor the latter a cestui que trust, nor is the fund impressed with a trust so that it becomes in equity the property of the intended payee as it would be if the relation of trustee and cestui que trust were established.

Thompson v. Merchants Bank, 45 D.L.R. 616, 58 Can. S.C.R. 287, [1919] 1 W.W.R. 855, reversing 39 D.L.R. 664, 14 A.L.R. 156, [1918] 1 W.W.R. 972.

REQUISITES — ABSENCE OF FIDUCIARY OR CONTRACTUAL RELATIONSHIP.

Where a prospective purchaser of real estate procures an agent to endeavour to effect the purchase of certain land for him, and the agent without disclosing the name of his principal, negotiates with the defendants who are real estate agents with whom the land had been listed for sale by the owner, but subsequently the defendants without informing the proposed purchaser become the purchasers themselves and obtain an agreement of sale from the owner and refuse to make the sale to the proposed purchaser's agent, returning to him his cheque which had been given by way of deposit with plaintiff's verbal offer, the conduct of the defendants, though reprehensible, does not entitle the prospective purchaser, on discovering the facts, to a declaration that the defendants are trustees of the land for him, or that they should convey to him, since there was no fiduciary or contractual relationship between him and the defendants. [Tate v. Williamson, L.R. 1 Eq. 528; Lees v. Nuttal, 39 E.R. 21; McDonnell v. Smith, 26 N.S.R. 259, distinguished.]

Armstrong v. Bastedo, 11 D.L.R. 241 6 S.L.R. 66, 4 W.W.R. 481, 24 W.L.R. 87.

ABSOLUTE CONVEYANCE.

A deed of land, although absolute in form, will only be enforced in a Court of Equity, subject to such trusts and conditions as the circumstances of the case shew were intended.

May v. Hainer, 38 D.L.R. 586, 40 O.L.R. 436.

TRUSTS — PURCHASE OF LAND AT MORTGAGE SALE—AGREEMENT TO HOLD IN TRUST FOR OWNER OF EQUITY OF REDEMPTION — EVIDENCE — FAILURE TO ESTABLISH TRUST — CONSPIRACY — FAILURE TO PROVE.

Fruchtenan v. Gurofsky, 14 O.W.N. 23.

MORTGAGE — RELATIONSHIP — MORTGAGEE TRUSTEE FOR SURPLUS.

During the continuance of a mortgage there is not a relationship of trustee and cestui que trust between the mortgagor and the mortgagee; but after the exercise of a power of sale the mortgagee is a trustee of the surplus in his hands. [Re Kingsland,

7 P.R. (Ont.) 460, approved; Western Canada v. Court, 25 Gr. 151, disapproved; London & County Banking Co. v. Goddard, [1897] 1 Ch. 642, followed.]

Re Worthington, 21 D.L.R. 402, 33 O.L.R. 191.

DECLARATION WITH REGARD TO LAND—NOTICE — ACCOUNT — WINDING-UP — REFERENCE—COSTS.

Loveland v. Sale, 8 O.W.N. 576.

B. EXPRESS OR DECLARED TRUSTS; PRECATORY TRUSTS.

Precatory trust, see Wills, III G—125.

(§ I B—5)—CONVEYANCE TO DAUGHTER OF LAND PURCHASED BY MOTHER—IMPROVIDENCE—ABSENCE OF INDEPENDENT ADVICE—DECLARATION OF TRUST—CHARGE FOR ADVANCES — LAND TO BE CONVEYED UPON PAYMENT OF AMOUNT CHARGED.

Limereaux v. Vaughan, 5 O.W.N. 978.

Where additional shares in a company in which plaintiff and defendant were both interested were allotted to the members, and defendant was unable to take up or pay for the shares allotted to her, plaintiff took up the shares and executed a declaration in writing that he held them in trust for defendant. This declaration was communicated to defendant, who acquiesced in the arrangement, and recognized the payment made by plaintiff as having been made on her account. It was held, that while defendant was not obliged to accept plaintiff's offer, having done so, she was obliged to accept it in the terms in which it was made, and that plaintiff was entitled to treat the advance made by him as a loan upon interest.

Chisholm v. Kinney, 45 N.S.R. 484.

(§ I B—6)—CREATION GENERALLY.

Where the plaintiff failed to furnish funds to make a large initial payment for property the defendant had an option to purchase, as the former had undertaken to do in consideration of an agreement for a one-half interest in the property, the defendant will not, upon himself furnishing such funds and purchasing the property, be declared a trustee for the benefit of the plaintiff as to an undivided one-half interest therein.

Stewart v. Saunders, 4 D.L.R. 312, 21 W.L.R. 499.

CONTRACT TO DEVISE — PRESENT DECLARATION OF TRUST.

A contract to devise a beneficial interest assumes an estate in the person who contracts to enable the contract to be performed, and not a promise to settle as a present declaration of trust.

Central Trust & Safe Deposit Co. v. Snider, 25 D.L.R. 410, [1916] A.C. 266, 35 O.L.R. 246, reversing Snider v. Carlton, 6 O.W.N. 337.

TRUST AGREEMENT—DIRECTION TO CONVERT SUBJECT OF TRUST INTO MONEY—COMPANY-SHARES — FAILURE OF BENEFICIARIES TO AGREE UPON ALLOTMENT IN SPECIE — DIRECTION TO SELL — REFERENCE—SALE EN BLOC OR IN PARCELS—DISCRETION OF MASTER.

Rose v. Rose, 9 O.W.N. 189.

PURCHASE OF CROWN LANDS—DECLARATION OF TRUST IN RESPECT OF SHARE OF PLAINTIFF'S ASSIGNOR—FORM OF JUDGMENT.

Cole v. Deschambault, 6 O.W.N. 673.

MONEY DEPOSITED IN BANK IN NAME OF SON OF DEPOSITOR IN TRUST—NATURE AND OBJECT OF TRUST — EVIDENCE — QUESTION WHETHER MONEY FORMED PART OF ESTATE OF DEPOSITOR AT TIME OF DEATH —WILL—MARRIAGE CONTRACT—SETTLEMENT.

Re Bellemare, 16 O.W.N. 24.

(§ I B —8)—WILL—PRECATORY WORDS—INTERPRETATION.

The leaning of the courts is against construing precatory words used in a will, not being words of a strict definite legal character or words that are beyond doubt as creating trust. [Re Atkinson, 80 L.J. Ch. 370, followed.]

Johnson v. Farney, 14 D.L.R. 134, 29 O.L.R. 223.

CONSTRUCTION—GIFT TO WIFE—"BEST ADVANTAGE FOR HERSELF AND SON"; PRECATORY TRUST — APPLICATION UNDER VENDORS AND PURCHASERS ACT — NOTICE TO GUARDIAN OF INFANT—RULE 602.

Re Kelly and Gibson, 6 O.W.N. 173.

(§ I B—9)—TRUST-DEED SETTLING SHARE OF BENEFICIARY UNDER WILL — JUDGMENT—OMISSION OF CLAUSE RESTRAINING ANTICIPATION OF INCOME—ASSIGNMENTS OF INCOME BY BENEFICIARY—APPLICATION BY BENEFICIARY FOR CORRECTION OF MASTER'S REPORT AND DEED SETTLED BY MASTER—APPLICATION REQUIRED TO DO EQUITY IN REGARD TO CLAIMS OF ASSIGNEES.

Re Hamilton, 9 O.W.N. 491.

CONVEYANCE OF LAND TO BROTHER — EXPRESS TRUST FOR SALE AND TO MAKE CERTAIN PAYMENTS—VALIDITY OF SALE ADVANCES—ACTION BY ADMINISTRATORS OF GRANTOR—ACCOUNT.

Trusts & Guarantee Co. v. Boal, 10 O.W.N. 212.

(§ I B—10)—CONSTRUCTION.

Where the widow and children of the deceased owner by various deeds granted to one of the children for a nominal consideration, the lands which had devolved upon them, and the grant in terms stated that the grantee was to support and maintain his mother and an invalid brother and that they should have certain rooms reserved in the dwelling-house for their use for life, such term is binding upon a subsequent encumbrancer from the grantee

whether considered as an express condition or a trust, or as a charge on the land. [Ringrose v. Ringrose, 170 Pa. 593, approved.]

Wolfe v. Croft, 6 D.L.R. 61, 46 N.S.R. 106, 11 E.L.R. 532.

C. Parol trust; Statute of Frauds.

See Evidence, VI J—570.

(§ I C—15)—How established.

The Statute of Frauds does not prevent the establishment of a trust by parol evidence. [Rochefoucauld v. Boustead, [1897] 1 Ch. 196, applied.]

Shepard v. Bruner, 24 D.L.R. 40, 31 W.L.R. 721, reversing 19 D.L.R. 869.

Executors and administrators — Parol Evidence of — Corroboration — Deeds — Pleadings — Amendment to set up fraud.

The widow of an intestate claimed to be the sole beneficial owner of certain real estate, the certificate of title to which stood in the name of the intestate. At trial she testified that she bought the land in question with her own separate money and conveyed it to her husband without consideration. The deed of conveyance, however, acknowledged a consideration of $100. Her evidence was corroborated on some material points but not on all but the Trial Judge was impressed with her truthfulness and believed her testimony. (1) Held, that parol evidence was admissible to prove the want of consideration notwithstanding the acknowledgment in the deed, and also to prove that the conveyance was a trust, and that effect ought to be given to the testimony of the widow notwithstanding the want of corroboration on all points. (2) That inasmuch as under the evidence it would have been fraud for the intestate to deny the trust and claim the land as his own, it was equally a fraud for his administrator so to do, and although the certificate of title to the intestate was under s. 169 of the Land Titles Act, R.S.S., 1909, c. 41, in the absence of fraud conclusive evidence in his favour, and although fraud had not been pleaded nevertheless as no one could be prejudiced an amendment to set up fraud should be allowed notwithstanding that it is unusual to allow an amendment for such purpose.

Western Trust Co. v. Lang, 12 S.L.R. 94, [1919] 1 W.W.R. 651.

As to interest in mine.

An oral agreement under which one party thereto becomes a trustee for the other of an undivided interest in a mine recorded in the trustee's name, may be asserted by the cestui que trust notwithstanding the Statute of Frauds. [Rochefoucauld v. Boustead, [1897] 1 Ch. 196, followed.]

Reynolds v. Jackson, [1917] 3 W.W.R. 507.

D. Implied, constructive and resulting trusts.

Constructive trusts, parol evidence, see Evidence, VI I—567.

Trust to use of husband or wife, Statute of Uses, see Deeds, II E—50; Husband and Wife, II G—100.

(§ I D—21)—Subscription agreement — Presumption.

On a share subscription agreement with a firm of stockbrokers described as trustees but without further disclosure of the trust whereby certain others called the subscribers severally purchased the number of shares to which each had subscribed in a company subject to the N.S. Companies Act, it is not to be presumed that the stockbrokers are acting in trust for the company itself if the agreement is consistent with its being made in trust for themselves and associate underwriters, where the subscription below par would be subject to attack if the same were an original allotment.

Borden v. Stanford, 21 D.L.R. 209, 48 N.S.R. 532.

A power of sale will not be implied where a mortgagee holds by a deed absolute in form; the mortgagee's remedy is by foreclosure by judicial process where there is no express trust for sale of the lands. [Oland v. McNeil, 32 Can. S.C.R. 23, distinguished.]

Wallace v. Smart, 1 D.L.R. 70, 22 Man. L.R. 68, 19 W.L.R. 787.

(§ I D—22)—"Person acting in a fiduciary capacity"—Duty — Partners.

A "person acting in fiduciary capacity" means a person who stands in a fiduciary relation toward any other person who may be entitled to call upon him to pay. Where two partners of a firm assume to sell certain partnership lands, without the required consent of all the partners, in a transaction obviously designed and resorted to in order to enable one or both of the designing partners to realize, and (as against the remaining partners) to keep for themselves all the profits which could be gained in a rapidly rising land market; such designing partners are both in a fiduciary relationship toward their remaining co-partners, and may be treated as "persons acting in a fiduciary capacity," and a full accounting may be decreed. [Marris v. Ingram, 13 Ch.D. 338, applied; Knox v. Gye, L.R. 5 H.L. 656; Piddocke v. Burt, [1894] 1 Ch. 343, distinguished.]

Gordon v. Holland; Holland v. Gordon, 10 D.L.R. 734, 23 W.L.R. 738, 4 W.W.R. 419, varying, 2 D.L.R. 327, 2 W.W.R. 158, 20 W.L.R. 887.

Agent to purchase land—Deed taken in name of agent — Action to have agent declared trustee — Question as to intention of parties—Appeal from judgment for plaintiff dismissed on equal division.

Plaintiff supplied money for the purchase

of land of which defendant took the deed in his own name. In an action to have defendant declared a trustee and for the recovery of mesne profits the defence chiefly relied on was that the purchase price was furnished by plaintiff with the intention that the land should be defendant's and that plaintiff should have a home with defendant during her lifetime. The findings of the jury as to the circumstances under which the purchase was made were in plaintiff's favour and judgment was given accordingly, disallowing defendant's claim for expenditure made in permanent improvements after the date of the purchase. Defendant's application for a new trial was refused, but without costs, on equal division of the court.

Ennos v. McLean, 52 N.S.R. 485.

MORTGAGEE — ASSIGNMENTS AND PREFERENCES ACT—LIMITATIONS.

A mortgagee of land which formed part of an estate which had been assigned for the benefit of creditors is not by virtue of the Assignments and Preferences Act, R.S.O. 1897, c. 147, nor of the terms of the resolution of the creditors appointing him one of the inspectors of the estate—with power in conjunction with the assignee, to realize upon the estate to the best advantage—constituted an express trustee, nor is he under the same liability as an express trustee in respect of the equity of redemption conveyed to him by the assignee; at most he is a constructive trustee; the Statute of Limitations applies to a constructive trust and may be invoked by a constructive trustee in answer to a claim for recovery of the property upon which the trust is in equity impressed, if there has been no concealed fraud which could not have been discovered by the exercise of reasonable diligence. [Segsworth v. Anderson, 21 A.R. (Ont.) 242, 24 Can. S.C.R. 699, distinguished; Dictum of Moss C.J.O., in Re Canada Woollen Mills, 9 O.L.R. 367, 368, disapproved.]

Taylor v. Davies, 41 D.L.R. 510, 41 O.L.R. 403, reversing 39 O.L.R. 205.

PURCHASE OF HOTEL PROPERTY FOR COMPANY NOT IN EXISTENCE—FAILURE TO FORM COMPANY—PURCHASER NAMED BY PROMOTERS—USE OF PURCHASER'S OWN MONEY TO MAKE DOWN-PAYMENT — ACTION BY PROMOTER FOR DECLARATION OF TRUST FOR COMPANY—DISMISSAL ON FACTS.

Boehmer v. Kelly, 14 O.W.N. 182.

SHARE OF PROCEEDS OF SALE OF FARM—ACCOUNT—CONTRACT — COUNTERCLAIM — FRAUD AND MISREPRESENTATION — COSTS.

Davison v. Forbes, 9 O.W.N. 22, 145, 319.

(§ 1 D—23)—SECRET TRUST.

Where persons purchased land in partnership and had the conveyance made to one of their number who was afterwards judicially declared a trustee thereof for the partnership, a sale made by him of the land ostensibly to a stranger, who was an innocent purchaser, but in reality to the stranger, and to one of the other partners jointly, a nonassenting partner would still be entitled to claim out of the interest of the partner who so acquired title, the same share as such nonassenting partner would otherwise have held under the partnership agreement.

Gordon v. Holland, 2 D.L.R. 327, 20 W.L.R. 887, 2 W.W.R. 158. [Affirmed in part and varied 10 D.L.R. 734, 4 W.W.R. 419.]

(§ I D—24)—TRUSTEE'S APPLICATION OF SECURITIES AS.

Testamentary trustees, who were directed by will to invest the proceeds of an estate in such manner as they should deem most advisable, cannot be said to have set apart and appropriated shares of stock belonging to the estate so as to create a specific trust in respect of the income thereof as distinguished from the general trust created under the will, in favour of a legatee to whom the interest on a certain sum was payable for life, where it does not appear that there was any definite allocation of the shares, and the evidence tends to shew that the trustees always treated them as an asset of the estate.

Re Nicholls, Hall v. Wildman, 14 D.L.R. 244, 29 O.L.R. 206.

Where the owner of several parcels of land conveys certain of them to a city corporation under a stipulation that the grantee shall "maintain," on the site so granted, its city hall, and where the deed of conveyance makes no provision that the city hall shall be maintained there "for all time" or to any such effect, and where it may reasonably be inferred that the grantor in executing the deed contemplated that a city hall so located near his remaining lots for a limited time would meet his purposes by enhancing the value of his adjacent property, there is no resulting trust in favour of the grantor, in the event of the grantee (owing to rapid city expansion) building a new city hall on a different site, approved by the ratepayers of the city. [Smith v. Cooke, [1891] A.C. 297, followed.]

Powell v. Vancouver, 8 D.L.R. 24, 17 B.C.R. 379, 3 W.W.R. 108 & 161, 23 W.L.R. 104.

INTEREST IN LAND—CREATION BY PAROL.

A parol acceptance by a purchaser after acquiring title to land of a third person's offer to take a half interest in it with him does not raise a resulting trust in favour of the latter to entitle him to a half interest on assuming payment of half of the purchase price on the terms of the purchase, where there was no part performance nor had the third person paid anything in respect of the half interest. [Rochefoucauld v. Boustead, [1897] 1 Ch.

196; Gordon v. Handford, 16 Man. L.R. 292, distinguished.]

Morris v. Whiting, 15 D.L.R. 254, 24 Man. L.R. 56, 26 W.L.R. 494, 5 W.W.R. 936.

CONVEYANCE OF LAND — CONSIDERATION — ESTABLISHMENT OF TRUST.

Smith v. Benor, 10 D.L.R. 824, 4 O.W.N. 985, 24 O.W.R. 521, modifying 10 D.L.R. 808, 4 O.W.N. 734, 23 O.W.R. 912.

CONVEYANCE TO DAUGHTER OF LAND PURCHASED BY MOTHER — IMPROVIDENCE AND ABSENCE OF INDEPENDENT ADVICE.

Limereaux v. Vaughan, 16 D.L.R. 880, 6 O.W.N. 254.

RESULTING TRUSTS—HOW ARISING.

A resulting trust is one in which the person in whose favour the trust arises is the person who provided the property or equitable interest vested in the person bound by the trust.

Baird v. Columbia Trust Co.; Columbia Trust Co. v. Baird, 22 D.L.R. 150.

FAILURE OF CONSIDERATION — REMEDIES — PROMISE TO SETTLE LAND—RIGHT TO SPECIFIC PERFORMANCE.

If property be conveyed in consideration of a covenant to pay money, the breach of the covenant to pay does not bring about a failure of consideration; the consideration is the covenant, and a failure to observe it results in a right of action at law on the covenant for its breach, and not in any equitable right based on failure of consideration.

An absolute conveyance of land for a nominal consideration and principally founded on the grantee's promise to pay half the income thereof less disbursement during the grantor's life and thereafter to settle the property itself to the latter's heirs, merely gives right to have the promise specifically performed, but does not create a trust in præsenti, as respecting the land, in the grantor's favour, nor a resulting trust in the event of a failure to carry out the promise. [Howard v. Miller, 22 D.L.R. 75, [1915] A.C. 318; Synge v. Synge, [1894] 1 Q.B. 466, applied.]

Central Trust & Safe Deposit Co. v. Snider, 25 D.L.R. 410, 35 O.L.R. 246, [1916] 1 A.C. 266, reversing Snider v. Carlton, 6 O.W.N. 337.

GIFT—POWER OF ATTORNEY.

Where a conveyance, intended as a gift, is absolute on its face, a power of attorney to manage the grantor's affairs executed in connection therewith does not necessarily establish a resulting trust.

Cripps v. Woessner, 36 D.L.R. 80, 28 Man. L.R. 74, [1917] 2 W.W.R. 1072, affirming 10 W.W.R. 1220.

ACQUIRING MINING OPTIONS IN NAME OF ONE TO USE OF SEVERAL—ENFORCEMENT OF TRUST.

Where a number of persons are concerned in acquiring options on mining properties, and the options are taken in the name of one of such persons, the person in whose name the options are taken holds as trustee for himself and his associates, and will be restrained from attempting to dispose of the properties over the heads of the others.

International Mining Syndicate v. Stewart, 48 N.S.R. 172.

PROPERTY CONVEYED TO OFFICER OF COMPANY —DECLARATION OF TRUST IN FAVOUR OF COMPANY.

North American Exploration & Development Co. v. Green, 4 O.W.N. 1485, 24 O.W.R. 843.

LAND CONVEYED BY HUSBAND TO WIFE—RESULTING TRUST FOR HUSBAND—DECLARATION — PAYMENT OF CLAIM OF CREDITOR.

Macdonald v. Teasdale, 4 O.W.N. 1268, 24 O.W.R. 534.

GIFT OF PROPERTY TO BE RECONVEYED—STATUTE OF FRAUDS.

The plaintiff who, if not of unsound mind, was under the influence of the defendant, transferred all his property to her without consideration in the absolute faith that she would hold it for him and subject to his directions. Held, that a resulting trust arose and the Statute of Frauds (s. 7) did not apply. [Haigh v. Kaye, 7 Ch. App. 474, applied.]

Houghton v. Foster, 33 W.L.R. 584.

CONVEYANCE OF LAND—ALLEGED TRUST FOR EXECUTION DEBTOR—ACTION BY EXECUTION CREDITORS FOR DECLARATION — BONA FIDE SALE FOR VALUE.

Seagram v. Halberstadt, 10 O.W.N. 308, 11 O.W.N. 28.

CONVEYANCE OF FARM BY FATHER TO SON —COVENANT BY SON TO PAY ANNUITY TO DAUGHTER.

Dawson v. Dawson, 23 O.L.R. 1, 18 O.W.R. 6.

DEED OF SETTLEMENT—IMPROVIDENCE—RESULTING TRUST UPON CONVEYANCE BY HUSBAND TO WIFE—POWER OF REVOCATION.

Fonseca v. Jones, 21 Man. L.R. 168, 18 W.L.R. 206.

RELEASE BY MORTGAGOR OF EQUITY OF REDEMPTION—ALLEGED TRUST AS TO SURPLUS AFTER SALE—ABSENCE OF WRITING —ORAL EVIDENCE.

McCue v. Smith, 17 W.L.R. 145.

PURCHASE OF LAND—ALLEGATION THAT ADVANTAGE WAS TAKEN BY TRUSTEE — OPPORTUNITY TO WITHDRAW — FAIR PRICE FOR LAND.

Joos v. Henschell, 18 W.L.R. 191.

TRANSFER OF PROPERTY—ALLEGED TRUST — ACCOUNT OF PROFITS.

Sedore v. Coleman, 17 W.L.R. 643.

PURCHASE OF PROPERTY BY ONE FOR SELF AND OTHERS—EVIDENCE REQUIRED TO SHEW CESSATION OF TRUST.

Angers v. Gelier, 20 Que. K.B. 351.

II. Trustees.

A. Appointment; capacity; resignation; removal; number.

(§ II A—41)—Appointment.

A cestui que trust may be one of the trustees of an estate in whom the fee is vested, without his equitable estate necessarily being merged in the legal estate held by him qua trustee.

Re Ley, 5 D.L.R. 1, 17 B.C.R. 385, 2 W.W.R. 790, 21 W.L.R. 757.

Ante-nuptial settlement — Presumption —Construction of deed of settlement—"Surviving" children.

Re Loscombe, 37 D.L.R. 784, 39 O.L.R. 521.

Sequestrator — Appointment — Interested person not party—Intervention—C.C.P. 973.

A demand for sequestration is a provisional measure which presumes an action between two parties, and a third party, even if interested in the case, cannot, without intervening therein, ask, by way of a simple petition, for the appointment of a sequestrator.

Roy v. Roy, 46 Que. S.C. 452.

(§ II A—43)—Removal and substitution.

The question of the removal of a trustee from his trust will not be considered in an Appellate Court when not raised either by the pleadings or notice of appeal in an action brought against him by the cestuis que trustent where the charges of fraud and misrepresentation made against him are dismissed.

Bingham v. Shumate, 3 D.L.R. 121, 17 B.C.R. 359, 20 W.L.R. 812, 2 W.W.R. 147.

Removal and substitution of trustees—Bonds—Corporation mortgage.

Harrisburg Trust Co. v. Trusts & Guarantee Co., 16 D.L.R. 876, 6 O.W.N. 110, 26 O.W.R. 158.

Purchasing stock on own account — When ground for removal.

A trustee is prevented not only from doing things which bring an actual loss upon the estate but from doing anything which has a tendency to interfere with his duty and to injure the trust; the fact that the trustee purchased a block of stock on his own account, and with his own money from a company controlled by the estate, in which the trustee was also a beneficiary, does not entitle the cestuis que trustent to a declaration by the court that he is a trustee for them of the shares so bought subject to a lien in his favour for the price paid; but if it be shewn that his interest and his duty conflict because of such purchase, that would be a ground for removing him from his office as trustee.

Rose v. Rose, 22 D.L.R. 572, 32 O.L.R. 481.

Appointment of trustees by will—Misconduct in disposal of trust property—Removal of trustees.

Defendants, as executors and trustees, were charged with and undertook the duty of carrying on the business of testator for a period of five years, but were authorized at any time during such period, if they deemed it advisable, to sell and dispose of any part of the real estate or personal property on the best possible terms. The business proved to be profitable, and defendants undertook to obtain it for themselves by disposing of it for a price far below its value to S., who was to transfer it to a limited liability company to be organized by defendants. Held, that, in thus attempting to secure the property for themselves, defendants were guilty of gross misconduct, adverse to the interests of the estate of which they were trustees. Held, that, notwithstanding notice by defendants, before action, that they would comply with all demands made upon them, the action was necessary for the protection of the estate, for the removal of the defendants and the appointment of new trustees, for investigation of the accounts by means of a reference, and for an injunction and decree declaring void the transfer to S.

Pentz v. Bruce, 52 N.S.R. 151.

Removal from Ontario—Appointment of new trustee.

Re Hogg, 6 O.W.N. 376.

(§ II A—44a)—Trustee Act—Application of—Direction for delivery of securities—Pledge of bonds.

Re Consolidated Gold Dredging & Power Co., 5 O.W.N. 346, 25 O.W.R. 281.

B. Rights, powers, duties and liabilities.

Liability of directors respecting trust funds of corporation, see Companies, IV G—131.

Application of trust funds, see Banks, IV A—58.

Rights of trustee liable for mortgage debt, see Mortgage, VI E—90.

Trustee Act, Creditors Relief Act, priorities, see Executors and Administrators, IV A—85.

(§ II B—45)—Conveyance of land to defendants — Parol agreement with plaintiff to sell and for payment to him of surplus of proceeds of sale after payment of what it "costs" defendants—Enforcement of trust—Ascertainment of "costs" — Deduction for improvements — Claim for wages—Services rendered by member of household.

McKibbon v. Welbanks, 15 O.W.N. 153.

Mortgage — Draft — Discount — Breach of trust.

The plaintiff having agreed to take a certain mortgage, the defendant company drew upon him for the amount of the loan, discounted the draft and deposited the proceeds in the general bank account of the company. The moneys coming from the plaintiff were paid by him into the branch of the defendant company at Charlottetown.

Held, that the proceeds of the draft were the plaintiff's money at the time of discount (he having, assented to the company's proposal to draw; his acceptance of the draft being, a ratification equivalent to prior authority), and, therefore, he was entitled to follow them.

Dalton v. Dominion Trust Co., 25 B.C.R. 240, [1918] 3 W.W.R. 42.

(§ II B—45)—Conversion.

If a conversion is rightfully made, whether by the court or a trustee, all the consequences of a conversion must follow, and there is no equity in favour of the beneficiary to take the property in any other form than that in which it is found.

Cudmore v. Cudmore, 12 E.L.R. 77.

Trust company—Separate trusts—Consolidation—Advances by trust company in respect of one trust—Balances due by trust company in respect of other trusts—Set-off—Insolvency of trust company — Rights of liquidator—Beneficiaries.

Re Beck Trusts, 9 O.W.N. 48.

Mortgage held by trust corporation under marriage settlement—Rights of beneficiaries — Compensation of trustee.

A trust corporation, trustee under a marriage settlement, had in its hands, as a part of the trust estate, a certain mortgage for a large sum. The shares of the beneficiaries, infant and adult, under the settlement, had been declared to be vested and not subject to be divested:—Held, that the trustee-corporation could not insist upon retaining the mortgage until complete realization; the beneficiaries could elect to take it in specie; and, upon their application, the corporation was ordered to assign the mortgage to the Accountant of the Supreme Court of Ontario to hold in trust for them. Remarks upon the vicious system by which a trustee is allowed an arbitrary percentage upon the money which passes through his hands.

Re Hughes, 42 O.L.R. 345. [Reversed in 43 O.L.R. 594.]

Purchase of residence for cestui que trust—Departure from terms of trust deed—Consent of all persons interested—Declaration—Costs.

Re Bacque Trusts, 15 O.W.N. 33.

Trusts and trustees — Right to indemnity against cestui que trust—Non-liability of trustee for negligence if no damage to cestui que trust shown—Taxation—School districts—School assessment ordinance ss. 27, 29—"Owner."

Defendant was appointed by the third parties trustee to hold certain land in its name pending the carrying out of an agreement of sale thereof from certain of the third parties as vendors to the other third party as purchaser. Under the agreement of sale the purchaser was to pay the taxes. The agreement between the vendors, purchaser and defendant contained a provision that the defendant in accepting the trust incurred no financial liability or responsibility except with respect to payment and disbursement of moneys actually received under the terms of the agreement. Held, that said provision must be construed as a covenant by the vendors and purchaser to indemnify defendant against any liability imposed upon it such as a judgment against it for taxes on the land. A trustee is entitled to be indemnified by the cestui que trust against any liability which may be thrust upon him by reason of the trust. The defendant would be the "owner" of the land notwithstanding it is a trustee for the benefit of others, and therefore it could not escape the liability to be assessed for the land.

Board of Trustees for the Ceepecar S.D. No. 3069 v. Security Trust Co. [1919] 1 W.W.R. 615.

(§ II B—46)—Title of trustee to realty—Directions to convert estate for distribution.

Testamentary directions to trustees to convert an estate for distribution will vest in them the legal title to the testator's real property.

Murphy v. McGibbon, 12 D.L.R. 748, 13 E.L.R. 160.

(§ II B—47)—Management and disposal of trust property generally.

Where a debtor upon his creditor's demand permits the latter to take over as collateral security certain promissory notes due the debtor, and the creditor refuses to return them to the debtor, he is under obligation not to be dilatory or negligent in collecting them and not to allow them to become statute-barred by his failure to enforce payment and will be liable to his debtor for the amount of notes so barred which might have been collected had due diligence been exercised.

Sawyer-Massey Co. v. Weder, 6 D.L.R. 305, 5 A.L.R. 362, 22 W.L.R. 150, 2 W.W.R. 965.

Management of trust — Non-compliance with terms—Evidence—Admissibility.

It is not open to a trustee, or to one acting knowingly in conjunction with him, where there has been a breach of trust and loss has followed, to tender evidence that if he had strictly followed the directions of the trust an equal or a greater loss might have taken place.

British American Elevator Co. v. Bank of B.N.A., 20 D.L.R. 944, 6 W.W.R. 1444, 29 W.L.R. 214.

Power of attorney — "Necessary operating expenses" — Misconception — Revocation.

A power of attorney to collect the earnings of certain power companies and to pay all "necessary operating expenses" in connection with the operating of the business, does not confer upon the trustees named

therein the wide discretionary power to determine, in case of dispute, as to what are necessary operating expenses, and though the instrument creating his appointment is expressed to be irrevocable, it becomes revocable, if through misconception of duty, without seeking professional advice, he acts in deciding upon matters of such importance and so vitally affecting the interests of the companies.

Canadian-Klondyke Power Co. v. Northern Light, Power & Coal Co., 27 D.L.R. 134.

INTERDICTION—CURATRIX—COMMON AS TO PROPERTY—REAL RIGHT OF COMMUNITY—ACTION TO SET ASIDE DEED—AUTHORIZATION BY FAMILY COUNCIL — QUE. C.C. 297, 304, 305, 306, 307, 658, 1061.

The curatrix, common as to property, appointed to a person interdicted for insanity does not need to apply for authorization from the family council to have set aside a deed by which she has promised to sell, amongst other things, a real right of the community.

Dunn v. Wheatley, 46 Que. S.C. 408.

(§ II B—48)—SETTLED ESTATES ACT — ORDER AUTHORIZING SALE OF LANDS.

Re Milligan Settled Estates, 2 D.L.R. 883, 3 O.W.N. 895, 21 O.W.R. 701.

Where a power expressly confers upon a trustee the right and privilege of selling upon certain terms the timber licenses held by him in trust without reference to the cestuis que trustent, the trustee, upon making a sale thereof within the terms of the power, can execute the necessary documents of sale without the cestuis que trustent joining as concurring parties. Where an absolute power of sale and of transfer is formally conferred upon a trustee with a fixed limitation as to price and terms and the power is expressed to be exercisable without reference to the cestuis que trustent, the court will not require the latter to join in the formal transfer of a sale by the trustee in terms of the power, where counterclaimed by him in an unsuccessful action brought against him by the cestuis que trustent charging him with fraud in connection with the trust agreement.

Bingham v. Shumate, 3 D.L.R. 121, 17 B.C.R. 359, 20 W.L.R. 812, 2 W.W.R. 147.

Where, by will, executors or trustees were clothed with discretion to devote the residue of an estate to keeping up and maintaining the testator's residence, until sold or disposed of, as a family home for his son, his family and descendants, or for whomsoever the son might give it by will or otherwise, the bequest is void as a perpetuity, and cannot be saved on the theory that the trust was imperative, and, as the amount to be expended was left to the discretion of the trustees, they could at once appropriate the whole of the fund, regardless of the amount thereof or of the necessity for its expenditure, for the benefit of the present owner of the residence, as, like all trusts, it must be executed in good faith.

Kennedy v. Kennedy, 3 D.L.R. 536, 26 O.L.R. 105, 21 O.W.R. 501. [Affirmed in part, 11 D.L.R. 328, 28 O.L.R. 1.]

SALE, MORTGAGE OR PARTITION OF TRUST PROPERTY.

Where a mortgage to secure bonds provides that a fund for the redemption of the bonds shall be constituted, and that from the bonds from time to time offered for redemption, the trustee shall purchase those bonds which are offered at the lowest price, the trustee is not guilty of a breach of trust in purchasing a quantity of the bonds offered en bloc, merely because other bonds in small lots are offered at a lower price, if the acceptance of all the lower priced offers taken collectively would leave a large number of bonds to be redeemed at a higher rate which would make the average cost higher than the price of the single block of bonds purchased by the trustee for the money available for redemption purposes and which could not have been obtained otherwise than en bloc, at the price; the duty of the trustee in such case is to select such offer to sell bonds as will enable him to redeem the largest number of bonds with the money at his disposal. [Whicher v. National Trust Co., 19 O.L.R. 605, 14 O.W.R. 888, restored; Whicher v. National Trust Co., 22 O.L.R. 460, 17 O.L.R. 788, 2 O.W.N. 383, reversed on appeal.]

National Trust Co. v. Whicher, 5 D.L.R. 32, [1912] A.C. 377.

POWER OF TRUSTEES UNDER WILL TO SELL LANDS.

Where by his will the testator directs that his undivided interest in property of which he was a tenant in common with others should not be sold as such, but that the property should be partitioned and thereupon the share apportioned to him or to his estate, should be held on the same trusts as he provided with respect to property of which he was the sole owner, the share apportioned in a partition action brought by the testator in his lifetime and continued by his executors and trustees after his decease will be subject to the like powers of sale and conditions as to the widow's consent as the will provides in the trust as to the land held in severalty.

Gilbert v. Gilbert, 14 D.L.R. 889, 42 N.B.R. 288, 13 E.L.R. 415.

(§ II B—49)—INVESTMENTS—DISCRETION OF TRUSTEES.

A provision in a will that the trustees appointed thereby should invest the proceeds of the real and personal estate "in such manner as they shall deem most advisable" is not restricted to investments authorized by law to be taken by trustees generally but will authorize the retention as investments of stocks of the same class held by

the testator. [Re Smith, [1896] 1 Ch. 71 applied.]

Re Nicholls, Hall v. Wildman, 14 D.L.R. 244, 29 O.L.R. 206.

INVESTMENTS SPECIFIED IN WILL—POWER OF TRUSTEE TO INVEST IN STATUTORY SECURITIES UNLESS EXPRESSLY FORBIDDEN.

Re McCormick, 25 D.L.R. 735, 22 B.C.R. 327, 9 W.W.R. 199, 33 W.L.R. 190.

MONEY IN BANK — INVESTMENTS — WITHDRAWALS BY CHEQUE.

A trustee authorized by the legislature to hold money on deposit pending investment and pay interest on the same may agree with its cestui que trust that pending such investment, and even afterwards, the cestui que trust may withdraw such sums as he wishes and may use cheque forms for making such withdrawals.

Re Dominion Trust Co.; U.S. Fidelity's Case; Reid's Case; Ramsay's Case, [1918] 3 W.W.R. 1023.

INVESTMENT OF TRUST FUND—TRUSTEE ACT (ONT.)—SCOPE OF—APPLICATION FOR "OPINION, ADVICE, OR DIRECTION"—FUND TO BE SETTLED.

Re Hamilton, 5 O.W.N. 230, 25 O.W.R. 198.

(§ II B—51)—MISAPPLICATION—OFFICER'S LIABILITY TO CORPORATION — INTEREST OR PROFITS EARNED ON FUNDS MISAPPLIED.

Property bought by a director on his personal account with money belonging to his corporation is presumed to have been bought on account of the corporation; and the method of accounting therefor is to return (in excess of the principal moneys so withdrawn) either all profits made in the use of such withdrawals, or legal interest thereon.

Rogers Hardware Co. v. Rogers, 10 D.L.R. 541.

TRUSTEES—NEGLIGENCE IN HOLDING BANK SHARES — SHAREHOLDER'S DOUBLE LIABILITY.

Trustees who detain bank shares long after knowledge of their rapid decline in value, are answerable to the estate for the amount of a claim proven against it on the insolvency of the bank by the liquidator in respect of shareholders' double liability, notwithstanding a discretionary power conferred by the will appointing them to invest in such manner as they deem advisable. Trustees who retain shares of stock until they become worthless, after becoming aware of their rapid depreciation in value under a discretionary power of retention without making an effort to dispose of them, are answerable for the resulting loss although they acted in good faith; nor are they entitled to protection under s. 36 of the Trustee Act, 1 Geo. V. (Ont.) c. 26 R.S.O. 1914, c. 121.

Re Nicholls, Hall v. Wildman, 14 D.L.R. 244, 29 O.L.R. 206, varying 10 D.L.R. 790, 4 O.W.N. 930.

WIFE'S LIABILITY FOR PROCURING HUSBAND'S BREACH OF TRUST—ACCOUNTING—INTEREST.

Misapplication of trust funds by a husband in payment of his wife's debts, to which she agreed, renders the wife liable to make good the breach of trust; she is also liable for such trust moneys as were made a gift to her, even without knowledge of their trust character, since she merely holds them as a volunteer, and not as a transferee for value; in accounting for it she is also chargeable with the interest which, but for the misapplication the fund would have produced from investment.

Harrison v. Mathieson, 30 D.L.R. 150, 36 O.L.R. 347. [See also 10 O.W.N. 117, 190.]

SHORTAGES—RELEASE—MISTAKE—FRAUD.

The defendant, as executor and trustee under the will of T., who died in 1882, held one-half of T.'s estate in trust to pay the income to Mary L. during her life, and to divide the corpus among the children of Mary L. who should attain the age of 26 years. The plaintiff was the only child of Mary L. In 1899, the plaintiff and his mother accepted a statement made by the defendant as to the amount of their share, took over the amount, and released the defendant. Mary L. died in 1913; and, in 1915, the plaintiff commenced this action for an account, alleging that the defendant had not fully accounted, and that the plaintiff and his mother had executed the release improvidently. In the action it was found that the defendant had, by an innocent error, paid to other beneficiaries under the will moneys that formed part of the share of the plaintiff and his mother:—Held, that innocent error was sufficient to invalidate the release. [Re Garnett (1885), 31 Ch. D. 1, followed.]

Lees v. Morgan, 40 O.L.R. 233, 39 D.L.R. 259, reversing 11 O.W.N. 222.

SEAT UPON STOCK EXCHANGE HELD IN TRUST BY MEMBER—PRACTICE AND RULES OF EXCHANGE—TRUST PROPERTY USED BY TRUSTEE FOR HIS OWN BENEFIT—EVIDENCE—ABSENCE OF INJURY TO CESTUI QUE TRUST—DAMAGES—COSTS.

O'Flynn v. Jaffray, 6 O.W.N. 648.

(§ II B—52)—DEALING WITH TRUST ESTATE—INDIVIDUAL INTEREST OF TRUSTEE.

Where one sold his interest in a partnership to his fellow-partners for a sum payable at a specified time and before that time died leaving a will by which he appointed as executors and trustees of his estate two of the remaining partners and the plaintiff, who was not connected with the firm, and payment of the debt was not enforced when due, though interest thereon was paid annually thereafter, the plaintiff as a beneficiary under the will is not entitled to an accounting of the profits earned by the loan after it became due and cannot claim such profits in lieu of interest. [Vyse v. Foster,

L.R. 8 Ch. App. 309, L.R. 7 H.L. 318, followed.]

Carvell v. Aitken, 2 D.L.R. 709, 10 E. L.R. 432.

RIGHT TO LAND PURCHASED WITH TRUST FUNDS — MORTGAGE TO CESTUI QUE TRUST.

Real estate purchased by a trustee with funds held in trust, but with knowledge of the cestui que trust and secured by a mortgage in the latter's favour in a sum exceeding the purchase price, does not entitle the cestui que trust to a declaration of title to the land in his favour.

Beamish v. Lawlor, 23 D.L.R. 141, 43 N. B.R. 426.

(§ II B—55)—TECNICAL BREACH—TRUSTEE ACTING IN GOOD FAITH.

The rule to be applied under the Trustee Act, 1 Geo. V. c. 26, s. 36, R.S.O. 1914, c. 121, as to relieving trustees from liability for technical breaches of trust, is that if it be found that the trustee has acted both honestly and reasonably the court is then to determine upon the circumstances whether the trustee ought fairly to be excused. [National Trustees Co. v. General Finance Co., [1905] A.C. 373, followed.]

Re Nicholls, Hall v. Wildman, 14 D.L.R. 244, 29 O.L.R. 206, 4 O.W.N. 1511.

BREACH OF TRUST—INVESTMENT IN LAND—SALE OF LAND TO REPLACE TRUST FUNDS—CONTRACT OF SALE — OBJECTION TO TITLE MADE BY PURCHASER—NECESSITY FOR ONE BENEFICIARY JOINING IN CONVEYANCE—EVIDENCE OF CONCURRENCE—POSSIBLE ELECTION OF BENEFICIARIES TO TAKE LAND IN SPECIE OR ASSERT LIEN—RIGHT OF PURCHASER TO BE SAFEGUARDED—ORDER UNDER VENDORS AND PURCHASERS ACT.

Re Jackson and Snaith, 17 O.W.N. 282.

(§ II B—56)—ACCOUNTING—ACTION FOR—RULES (ONT.) 938 ET SEQ.—NOTICE OF MOTION—WAIVER OF BY PERSON TO BE SERVED—RIGHTS OF GUARANTORS—RAILWAY BONDS.

Stothers v. Toronto General Trusts Co., 47 D.L.R. 176, 44 O.L.R. 432.

ACCOUNTING.

If the statement of claim does not state a case entitling the plaintiff to any relief against one of two defendants, an order should not be made compelling him to answer, on his examination for discovery, questions which would be relevant if a good cause of action had been disclosed.

Winnipeg Granite & Marble Co. v. Bennetto, 21 Man. L.R. 743.

DISPOSITION OF FUND IN COURT REPRESENTING SURPLUS PROCEEDS OF MORTGAGE SALE — ACCOUNT — SETTLEMENT — RIGHTS OF WIFE AND CHILDREN OF SETTLOR—DECLARATION—COSTS.

Janisse v. Curry, 16 O.W.N. 183, varying 15 O.W.N. 301.

(§ II B—57)—COMPENSATION.

While the position of a surviving partner imposes certain obligations and duties which are in their nature fiduciary, he is not an express trustee and, therefore, has no statutory right to remuneration under and by virtue of the Trustee Act, R.S.O., c. 129, s. 40.

Livingston v. Livingston, 4 D.L.R. 345, 26 O.L.R. 246, 21 O.W.R. 901.

COMPENSATION—MAKING MORTGAGE INVESTMENTS.

Where the will limits the executor's investments to be made from sales of land to real estate mortgages, an allowance for procuring and passing the loans may be made to the executor on passing his accounts, in addition to the agent's commission where the loan is brought in through an agent; and where the agent's commission was one per cent on five year loans, an additional one per cent may properly be allowed the executor-trustee in addition to all proper disbursements, for examining and passing each loan, excluding, however, mortgages taken back for balance of purchase-money of properties bought from the estate. Compensation to an executor-trustee for collecting and paying over the income on mortgage investments in Manitoba to the life beneficiary and for looking after the investment may properly be allowed at 7½ per cent of such income on farm loans and 5 per cent on city loans.

Re Paterson Estate, 17 D.L.R. 466, 24 Man. L.R. 217, 28 W.L.R. 177, 6 W.W.R. 882.

RIGHT TO COMPENSATION.

Section 49 of the Trustee Act, R.S.M. 1913, c. 200, does not give a trustee a statutory right to remuneration where his trusteeship is created for his own purposes and to protect his financial interest without any express provision for remuneration, and where the trustee assuming the trust under such circumstances had orally agreed with the other parties that he was not to be paid any remuneration, his petition under the Act for an allowance in that respect is properly refused.

Dart v. Drury, 23 D.L.R. 399, 25 Man. L.R. 258, 8 W.W.R. 173, 30 W.L.R. 809.

TRUSTEES NAMED IN WILL—LEGACY IN LIEU OF COMPENSATION.

Re Lendrum, 24 D.L.R. 885, 9 W.W.R. 245, 32 W.L.R. 556.

TRUSTS AND TRUSTEES—COMPENSATION OF TRUSTEES—TRUSTEE ACT, S. 67—REFERENCE, SCOPE OF—SCALE OF ALLOWANCE FIXED BY SURROGATE COURT IN RESPECT OF OTHER PARTS OF ESTATE—DILIGENCE AND CAPACITY OF TRUSTEES—REASONABLE ALLOWANCE — MINIMIZING OF RESPONSIBILITY — PERCENTAGE ON TAKING OVER AND DISTRIBUTING ESTATE—VALUE OF WORK DONE—VALUE OF ESTATE—ARBITRARY SUM ALLOWED WHERE ESTATE LARGE AND DUTIES OF TRUSTEES SIMPLE.

Appeal from report of the Master fixing

the compensation to trustees under a marriage settlement for settling the affairs of the trust in so far as they related to the portion of the trust represented in a mortgage made to the trustees to secure a part of the purchase-money of land included in the trust which was sold by the trustees, including the transfer of the mortgage to the Accountant of the Court, for which the trustees had not been compensated: Held, that the Master rightly treated the order of reference as requiring him to ascertain what compensation ought to be allowed to the trustees for their services in connection with this portion of the estate from the time of their appointment down to and including the transfer of the mortgage to the Accountant. (2) That the Master was not bound by what had been decided by the Surrogate Judges as to the scale upon which compensation should be fixed with regard to the rest of the estate. (3) That, the compensation ought to be upon the footing of what an ordinarily careful and competent trustee is entitled to receive. (4) That the trustees from time to time consulted their cestuis que trust as to questions presenting themselves for determination, and made applications for the advice of the court, thus abstaining from taking unnecessary risks, did not afford ground for cutting down the amount of compensation. (5) Semble, that what the trustees had done was sufficient to justify the allowance of a percentage on taking over and distributing the estate—the word "distribute" as used in Re Farmers' Loan and Savings Co., 3 O.W.R. 837, ad Re McIntyre v. London and Western Trusts Co., 7 O.L.R. 548, is intended to convey the same idea as the expressions used in Re Berkeley's Trust (1879), 8 P.R. 193. (6) The calculation of percentages upon the various parts of the estate and upon the receipts and disbursement of income is one of the means adopted of fixing a trustee's compensation; but neither the trustee nor the cestui que trust has the right to insist upon its adoption; the tribunal before which the matter comes has to ascertain as best it may what is a fair and reasonable allowance for the trustee's care, pains, and trouble, and his time expended in and about the estate (s. 67 of the Trustee Act, R.S.O. 1914, c. 121); the tribunal cannot be expected to ascertain, weigh, and set a value upon the actual work properly done, and allow such value and no more; regard must be had to the size of the estate. [Re Fleming, 11 P.R. 272, 278, 426, and Re Toronto General Trusts Corp. and Central Ontario R. Co., 6 O.W.R. 350, followed.]

Re Hughes, 43 O.L.R. 594.

TRUSTEE'S REMUNERATION — NOT NECESSARILY BASED ON PERCENTAGES OR COMMISSIONS—FAIR ALLOWANCE FOR TIME SPENT — TRUSTEE'S EMPLOYMENT OF SOLICITORS AND VALUATORS—DISBURSEMENTS FOR SUCH PURPOSE ALLOWED.

The court should not, in every case, limit the remuneration of a trustee (not being official administrator appointed under the Surrogate Courts Act, R.S.M., 1913, c. 47) to percentages and commissions. While such a basis may be favoured because it is desirable to hold out to trustees an inducement to realize as much as possible on the assets of the estate, there are instances where such a basis would be wholly inadequate. [Re Saskatchewan Coal Mining Co., 6 Man. L.R. 593, followed]. An allowance was fixed for the time spent by the estates officer of a trustee company who personally investigated the different items of assets of the estate. Disbursements were allowed to a trustee for the employment of a solicitor to examine the titles to real estate and a competent valuator to ascertain the values of the different properties.

Re Borthwick, [1919] 1 W.W.R. 59.

C. SUIT FOR INSTRUCTIONS.

(§ II C—59)—TRUSTEES OF BOND ISSUE—ORIGINATING SUMMONS.

The court may determine upon an originating summons the question whether the trustee of a bond issue may lawfully certify and deliver certain bonds to the issuing company under a stipulation in the trust deed for delivery to the latter on its acquiring additional property of bonds up to a declared percentage of the value of such additional property as shewn by a resolution of the directors of the issuing company.

Eastern Trust Co. v. Maritime Telegraph, etc., Co., 15 D.L.R. 653, 14 E.L.R. 519.

JURISDICTION—ADVICE OF COURT—MANITOBA TRUSTEE ACT.

It is only upon questions pertaining to the management and administration of trust property, and not upon those relating to the rights of the beneficiaries inter se, or to the validity of the provisions of a will that a judge can give advice or directions under ss. 42-47 of the Manitoba Trustee Act, R.S.M. 1902, c. 170. [Re Lorenz, 1 Dr. & S. 401; Re Hooper, 29 Beav. 656; Re Williams, 1 Ch. Chamb. 372; and Re Rally, 25 O.L.R. 112, followed.]

Re Crichton Estate, 13 D.L.R. 169, 23 Man. L.R. 594, 4 W.W.R. 1184, 25 W.L.R. 18.

MOTION UNDER TRUSTEE ACT—CONSTRUCTION OF WILL.

The provisions of a will cannot be construed on a motion under the Trustee Act, R.S.M. 1902, c. 170.

Re Dion, 12 D.L.R. 831, 23 Man. L.R. 549, 4 W.W.R. 942, 24 W.L.R. 701.

RELIEF FUND—SURPLUS IN HANDS OF COMMITTEE OF SUBSCRIBERS — CONSOLIDATION WITH ANOTHER FUND — DISPOSITION OF — FURTHER FIRE RELIEF — HOSPITALS.

Re Northern Ontario Fire Relief Fund Trust, 17 O.W.N. 233.

DEED—ASCERTAINMENT OF PERSONS ENTITLED TO TRUST-FUND AFTER DEATH OF LIFE-TENANT.

Re Farrell, 17 O.W.N. 30.

SETTLEMENT — "BENEFICIARY" — ISSUE — INCLUSION OF GRANDCHILD.

Re Smith Trusts, 16 O.W.N. 246.

CUSTOM OF REAL ESTATE AGENTS—REFERENCE — SUCCESS DIVIDED — NO COSTS

Toronto General Trusts Co. v. Robins, 19 O.W.R. 212, 2 O.W.N. 1023.

MORTGAGING TRUST ESTATE—AUTHORITY OF COURT AUTHORIZING—NO POWER TO COMPEL—REMOVAL OF TRUSTEES.

Shepard v. Shepard, 20 O.W.R. 810.

TRUSTEE GOING ABROAD — MEANING OF ABROAD—DUTIES OF TRUSTEES.

Re Will of James Curran, 19 O.W.R. 501, 2 O.W.N. 1268.

INVESTMENT OF MONEYS—TRUST COMPANY —ACTS OF OFFICERS—ESTOPPEL—LIABILITY.

McArthur v. Imperial Trust Co., 17 W. L.R. 415.

FUND IN HANDS OF TRUSTEES FOR BENEFICIARY.

Re McNeill Estate, 19 W.L.R. 691.

CONTRACT AS TRUSTEES FOR COMPANY ABOUT TO BE INCORPORATED—EXPRESS CLAUSE FOR NO PERSONAL LIABILITY.

Hand Fireworks Co. v. Baikie, 39 Que. S.C. 227.

III. Interest of cestui que trust; rights of creditors; spendthrift trust.

A. IN GENERAL.

(§ III A—60)—LIABILITY OF CESTUI QUE TRUST—TRESPASS.

Cestuis que trustent cannot resort to force when excluded from the trust property, without rendering themselves liable for the trespass to the trustees; their remedy, in case of a breach of trust, is for equitable relief.

Langille v. Nass, 36 D.L.R. 368, 51 N. S.R. 429.

TRUSTEES OF CESTUI QUE TRUST—ACCOUNTING.

If a trustee or person acting in conjunction with a trustee keep the trust money in his hands, meaning to appropriate it, or even to use it temporarily only, the actual loss ceases to be the measure of his responsibility; the beneficiary is entitled to claim the repayment of his money.

British America Elevator Co. v. Bank of B.N.A., 46 D.L.R. 326, [1919] A.C. 658, [1919] 2 W.W.R. 748, reversing 26 D.L.R. 587, 9 W.W.R. 1368, 33 W.L.R. 625 (amended in 32 D.L.R. 181), which varied 20 D. L.R. 944, 29 W.L.R. 214, 6 W.W.R. 1444.

MONEY USED IN PURCHASE OF LAND — MORTGAGE—PRIORITIES.

Part of the plaintiff's money was in breach of trust lent to one von Alvensleben and von Alvensleben, Limited, to purchase land which they subsequently mortgaged to the defendant company, and the company notified the other defendants, certain Scottish investors, that the moneys forwarded by them to the defendant company for investment had been placed in said mortgages and "guaranteed first mortgage investment certificates" were issued by the company to said investors. The mortgage from von Alvensleben Limited was not registered as required by s. 102 of the Companies Act. Held, that the defendants, the Scottish investors, were purchasers for value without notice of the plaintiff's interest, and were in priority to him, and that as the plaintiff was not a purchaser, mortgage or creditor in relation to von Alvensleben Limited, he was not entitled to avail himself, under said section, of the fact that the mortgage from said company was not registered.

Dalton v. Dominion Trust Co., 25 B.C.R. 240, [1918] 3 W.W.R. 42.

CONVEYANCE BY TRUSTEES — CONSENT OF CESTUI QUE TRUST—TITLE TO LAND—VENDOR AND PURCHASER.

Re Scott and White, 5 O.W.N. 766.

OVER-PAYMENT TO BENEFICIARIES — TRUSTEES OF INSURANCE FUND — MONEYS DUE TO BENEFICIARIES — SET-OFF — CLAIMS ARISING EN AUTRE DROIT.

Re Beck Trusts, 9 O.W.N. 283, 10 O.W.N. 218.

(§ III A—62)—MISAPPLICATION OF FUNDS — FIDUCIARY RELATION — FOLLOWING THE FUND.

Where a trust fund is traceable into land, and the entire land is clearly the fruit of the trust fund, the cestui que trust has a right to take the land itself whether the purchase was or was not of the description authorized by the trust; but where the diverted fund constitutes a part only of the money laid out in the purchase and is mixed with the trustee's own money there is a right only to a charge or lien on the land for the trust money and interest.

Weitzen Land & Agricultural Co. v. Winter, 17 D.L.R. 750, 28 W.L.R. 212, 6 W. W.R. 964.

B. RIGHTS OF CREDITORS; SPENDTHRIFT TRUSTS.

(§ III B—65)—PERSONAL CONTRACT OF TRUSTEE — LIABILITY OF PARTIES — PRIVITY.

Jones v. Burgess, 43 N.B.R. 126. [Varied by Canada Supreme Court, March 3, 1916.]

(§ III B—66) — SETTLEMENT — TRUST-DEED—RIGHTS OF SETTLOR—POWER OF APPOINTMENT—WILL.

Re Campbell Trusts, 17 O.W.N. 23.

IV. Liability of trust estate generally.

MOTION FOR PAYMENT OUT—TO CHURCH TRUSTEES—IMPOSSIBILITY OF LOSS OF MONEY IN COURT—FUND HELD IN PERPETUITY—INCOME FOR SPECIFIC OBJECT.

Becher v. Miller, 3 O.W.N. 357, 20 O.W. R. 615.

V. Rights and liabilities of transferees; following trust property.

(§ V—75)—Trust money—Misappropriation by trustee—Cestui que trust—Right to follow—Priority of mortgage over lien.

Where a trustee misappropriates trust money by using it to pay off a mortgage on land owned or partly owned by him the cestui que trust is entitled to follow such moneys and to be subrogated to the right of the mortgagees to the extent of the payments. The mortgagor, being the sole registered owner, although entitled only to an undivided interest in the property mortgaged, the other owner having, subsequently to the date of the mortgage, taken a vendor's lien on the lands for the amount of his interests, such lien is not entitled to priority over the mortgage.

McCullough v. Marsden, 45 D.L.R. 645, [1919] 1 W.W.R. 689.

Following trust property—Misapplication of company funds—Following property purchased with.

Where, at the time the defendant became a shareholder in the plaintiff company, the president agreed to take his script off his hands at any time, and subsequently the president substituted in exchange shares of another company on surrender of the script, but without any formal transfer in favour of himself or of any one else and paid therefor by cheque of the plaintiff company, the latter company through its liquidator in the winding-up proceeding may recover from the defendant the money so misapplied, where the president was the defendant's agent in the transaction; in such case the defendant may be treated as a volunteer into whose hands the property substituted for the trust estate may be followed.

Chandler & Massey v. Irish, 13 D.L.R. 829, 29 O.L.R. 112. [See 25 O.L.R. 211, 20 O.W.R. 249.]

Money.

A cestui que trust may follow the trust property into whatever it may have been converted by his trustee, and this applies to money also, though it cannot be earmarked. [Re Hallett's Estate, 13 Ch.D. 696; Re Oatway, [1903] 2 Ch. 356, followed.] But every step by which the trust property assumed its new form must be shown [Harford v. Lloyd (1855), 20 Beav. 310; Re Hallett, [1894] 2 Q.B. 237.], and a claim in respect of money will be disallowed unless it can be so traced. [Re Ulster Building Co. (1899), 25 L.R.Ir. 24.]

British Canadian Securities v. Martin, 27 Man. L.R. 423, [1917] 1 W.W.R. 1313.

Trustee's insolvency—Fraudulent preference.

Money deposited with a trustee does not become by such deposit the property of the trustee, and can therefore be claimed by the cestui que trust as his property. The insolvency of the trustee does not alter the rights of the latter. It is not a fraudulent preference on the part of a trustee who has misappropriated trust money to make it good on the eve of bankruptcy.

Jamieson v. Ross, 50 Que. S.C. 366.

(§ V—76)—Breach of trust—Mixing assets of estate with trustee's own property — Death of trustee — Liability of executor of trustee — Knowledge — Account — Appointment of new trustees.

Godkin v. Watson, 5 O.W.N. 811.

Pretended sale of trust property by trustee—Conveyance to wife—Subsequent resale at profit.

Huggard v. Bennetto; Smith v. Bennetto, 16 W.L.R. 523.

ULTRA VIRES.

See Companies; Municipal Corporations; Constitutional Law.

Annotation.

Ultra vires as defence in actions on corporate contracts: 36 D.L.R. 107.

UNDUE INFLUENCE.

See also Duress.

As affecting validity of instruments, see Wills; Deeds; Contracts; Bills and Notes; Mortgage.

Drunkenness, intimacy with woman, independent advice, see Deeds, II G—70.

Presumption as to, see Husband and Wife, II A-50.

Presumption as to voluntary conveyance to child by aged parent, see Deeds, II F—165.

Transfer of land by aged father to daughter — Adequacy of consideration—Lack of independent advice.

Grahn v. Litwin, 19 W.L.R. 144.

UNJUST DISCRIMINATION.

See Carriers, IV.

USEFUL OCCUPATION.

Paid official of labour organization.

Where the only evidence before the magistrate, on a charge of violation of the provisions of order-in-council No. 815, April, 1918, as to the occupation of the accused is that he is the paid official of a labour organization, which is recognized by such order-in-council as not illegal, there can be no reasonable inference that he is not engaged in a useful occupation.

R. v. Ruttka, 42 D.L.R. 276, 30 Can. Cr. Cas. 172, [1918] 2 W.W.R. 788.

USURY.

See Interest.

Money Lenders Act, see Interest II B–65.

I. In general; what constitutes.

II. Effect; remedies.

I. In general; what constitutes.

(§ I—7) — Money Lenders Act — Money lender, who is — Successive loans to same person.

One who, at intervals extending over a year makes various loans of money at usurious rates is a "money lender" within the meaning of the Money Lenders Act, R.S.C. 1906, c. 122, notwithstanding all the loans were made to the same person.

R. v. Morgan, 11 D.L.R. 794, 21 Can. Cr. Cas. 225, 19 Rev. Leg. 344.

A person is shown to be a "money-lender" within the Money Lenders Act, R.S.C. 1906, c. 122, if it be proved that he discounted promissory notes at a prohibited rate at various times each of less than $500 and so within the statute, although all for the same customer.

R. v. Eaves, 9 D.L.R. 419, 23 Que. S.C. 406.

Criminal offence—Limit of rate for small loans—Aggregate discounts for larger amount.

A person who is a money-lender within the terms of the Money Lenders Act, R.S.C. 1906, c. 122, is guilty of a criminal offence under s. 11 of that Act if he discounts for the customer at one time several notes made by various other persons maturing at various dates for less than $500 each, although the notes aggregate more than $500 and the net amount of the advance after deducting the discount was also more than $500, where the discount charge was separately computed and retained on each note at a rate of more than 12 per cent per annum, if there was no contract of open credit and the discount was made directly upon such notes without the customer giving his own note for the gross amount exceeding $500 as the subject of discount with the smaller notes as collateral only to the advance, so as thereby to make the transaction a single one for more than $500, to which the statute would not apply. The offence of "lending" money at a greater interest than is authorized by the Money Lenders Act, R.S.C. 1906, c. 122, for which a money-lender may be indicted under s. 11 of that statute, includes discounts made contrary to s. 6 thereof which in terms prohibits a money-lender from stipulating for, allowing on any negotiable instrument, contract or agreement, concerning a loan of money the principal of which is under $500, "a rate of interest or discount greater than 12 per cent per annum."

R. v. Eaves, 9 D.L.R. 419, 23 Que. S.C. 406.

Usury — Money lender — Discount and guarantee — Evidence of collusion between endorser and discounter.

The King v. Kehr, 18 Can. Cr. Cas. 202, affirming 18 Can. Cr. Cas. 57.

II. Effect; remedies.

(§ II—20)—Effect—Remedies—Penalty Money Lenders Act—Scope of.

If a money lender lent money to an amount less than $500 at 11 per cent and thereafter threatened to sue the borrower, who, to avoid action, gives him a promissory note bearing a higher rate than 12 per cent, the note would be in contravention of s. 6 of the Money Lenders Act, R.S.C. 1906, c. 122, but would not render the money lender liable to the penalty provided for "lending" money at a greater rate than 12 per cent.

Bellamy v. Timbers, 19 D.L.R. 488, 31 O.L.R. 613.

(§ II—22)—Bona fide holders.

The Money Lenders Act does not in any way forbid the negotiation of notes discounted at a forbidden rate, but on the contrary provides for the right of action to the bona fide holder for the face value of said notes, reserving only the privilege to the party discharging said notes to reclaim from the money lender any amount paid for interest illegally charged. A petition for an injunction to restrain the transfer of said promissory notes will be dismissed.

Friedenberg v. Eaves, 13 Que. P.R. 329.

(§ II—24) — Relief against — Counterclaim—Money Lenders Act.

A Court of Equity will grant relief against an excessive charge of interest or where the transaction is harsh and unconscionable, and if the transaction is one arising under the Money Lenders Act additional relief will be granted by way of counterclaim under the Act.

Stuart v. Boswell, 26 D.L.R. 711, 50 N. S.R. 16.

Remedies.

A party who signed promissory notes discounted at a rate of interest exceeding that allowed by the Money Lenders Act has no right to ask by a conservatory attachment that these notes be put under judicial custody for the purpose of reducing their amounts, especially if it is not alleged that the defendant is insolvent.

Friedenberg v. Bailey, 13 Que. P.R. 312.

(§ II—25)—Recovery of excess.

Any remedy provided for the relief of borrowers against usury by the Money Lenders Act, R.S.C. 1906, c. 122, is cumulative of and not in substitution for the common law right to recover the excess. A borrower who has paid interest in excess of the maximum rate for which a contract may legally be made under the Act has a right of action at common law to recover such excess. [Browning v. Morris, 2 Cowp.

790, 98 Eng. Rep. 1364; Smith v. Bromley, 2 Doug. 696, 99 Eng. Rep. 441, applied.]

Watts v. Tolman, 6 D.L.R. 5, 22 W.L.R. 55, 2 W.W.R. 1019. [Affirmed, 7 D.L.R. 811, 22 Man. L.R. 471, 3 W.W.R. 607.]

There may be an infraction of s. 6 of the Money Lenders Act, R.S.C. 1906, c. 122, which is not an offence within s. 11, which makes it a criminal offence to "lend" money where the amount is under $500 at a higher interest rate than 12 per cent, and where the transaction does not involve the criminal offence, but there has been merely an exaction of more than 12 per cent in respect of a loan made prior to the Act, s. 11 does not apply, but under s. 6 the rate is compulsorily reduced to 12 per cent from the date when the statute became effective; and if the lender illegally stipulates for or exacts more, it is invalid only as to the excess and a renewal note which included the excess charge is not wholly invalidated. [Bellamy v. Porter, 13 D.L.R. 278, 28 O.L.R. 572, distinguished, and dictum of Clute, J., disapproved.]

Bellamy v. Timbers, 19 D.L.R. 488, 31 O.L.R. 613.

REMEDIES UNDER MONEY LENDERS ACT—RECOVERING EXCESS.

Under the Money Lenders Act (R.S.C. 1906, c. 122, s. 7), the court can modify the terms and conditions of a loan of money at usurious interest under form of bonus only, in the case where it is alleged in the defence that the amount of interest paid or claimed exceeds the rate of 12 per cent per annum, though the demand for reduction of usurious interest made for the first time at the hearing be favoured, the court cannot exceed its powers when this allegation is not present. The borrower can always recover this excess of interest under the provisions of the above mentioned Act.

Vanasse v. Robillard, 47 Que. S.C. 487.

CRIMINAL USURY—LENDING SUMS OF MONEY LESS THAN $500 AT MORE THAN 12 PER CENT—"MONEY LENDER," STATUTORY MEANING OF—LIABILITY OF AGENT OR EMPLOYEE.

The King v. Smith and Luther, 17 Can. Cr. Cas. 445, 16 O.W.R. 542, 1 O.W.N. 956.

VAGRANCY.

Annotation.

Living on the avails of crime or prostitution, 30 D.L.R. 339.

(§ I—1)—DEFINITION OF—SECTION 238, CR. CODE.

A summary conviction for being the keeper of a disorderly house under ss. 238, 239, Cr. Code, is sufficient, although it does not in terms contain a finding that the accused is a "vagrant" or a "loose, idle or disorderly person" in the words of said sections which declare such offence to be vagrancy. [R. v. Leconte, 11 Can. Cr. Cas. 41, 11 O.L.R. 408, followed; R. v. Keeping, 4 Can. Cr. Cas. 494, not followed.]

The King v. Demetrio, 20 Can. Cr. Cas. 316.

(§ I—2)—ESSENTIALS OF OFFENCE—WANDERER WITHOUT MEANS OF SUBSISTENCE.

A commitment under Cr. Code, s. 238, for vagrancy does not disclose an offence where it recites that the prisoner was a "loose, idle person found wandering abroad and not giving a good account of himself, thereby being a vagrant," unless it is also recited that he had no visible means of subsistence, and a discharge will be ordered on habeas corpus where the conviction on which the commitment was based was similarly defective.

R. v. Kolenczuk; R. v. Chupak, 20 D.L.R. 341, 23 Can. Cr. Cas. 265, 7 S.L.R. 321, 7 W.W.R. 382.

PROSTITUTION IN PRIVATE BOARDING HOUSE—EVIDENCE — VENEREAL DISEASE — PREJUDICE—QUASHING CONVICTION.

There is nothing in any of the clauses of s. 238, Cr. Code, since the repeal of paras. (j) and (k) by 5 Geo. V. c. 12, s. 7, which can be relied upon to make immorality committed in a private house evidence of vagrancy. The defendant (a woman) was convicted by a magistrate "of being a vagrant." Upon a motion to quash the conviction, the only evidence returned by the magistrate was, that on several occasions the defendant had received money "for immoral purposes;" that one man had been infected with venereal disease; and that, upon examination, the defendant was found to be diseased. It was admitted that the oral evidence before the magistrate shewed that the defendant was employed as a servant in a boarding house, and that the acts of immorality had been with boarders. Held, that there was no evidence to support the conviction. Clause (1) of s. 238 did not apply, because that clause is not aimed at the prostitute, and because there was no evidence that the defendant had no peaceable profession or calling by which to maintain herself—and the receipt of $2 on each of two occasions did not shew that she for the most part supported herself by the avails of prostitution. Held, also, that evidence of the diseased condition of the defendant was improperly admitted, to her possible prejudice; and on that ground, as well as on the other, the conviction should be quashed.

R. v. Weller, 40 O.L.R. 296.

COMMON PROSTITUTE WANDERING IN PUBLIC PLACE.

The "satisfactory account of herself" which a common prostitute or night walker found wandering in public places must give to avoid being classed as a vagrant under Cr. Code, s. 238 (i), is an account of her presence on the street or other public place and not of her character or calling.

R. v. Levine, 30 Can. Cr. Cas. 305, [1919] 1 W.W.R. 637.

(§ I—5)—Being without visible means of maintenance.

A conviction for vagrancy in being without visible means of maintaining himself is justified in respect of a person who solicits alms for himself on the streets without the official certificate mentioned in Cr. Code, s. 238 (d), on a claim that he is unable to work and who had no way of maintaining himself without becoming a public burden or a nuisance on the public streets. The possession of a sum of money sufficient for the maintenance of the accused for several days will not bar his conviction as a vagrant if it appears that the money had been obtained for the most part by the defendant's begging in the public streets. [The King v. Sheehan, 14 Can. Cr. Cas. 119, not followed.]

The King v. Munroe, 19 Can. Cr. Cas. 86, 25 O.L.R. 223.

(§ I—7)—Living on avails of prostitution.

A woman who continues to have unlawful sexual relations with one man only is not a prostitute within the terms of the Cr. Code; but if she successively becomes the mistress of several men within the limitation period of six months covered by a charge of vagrancy brought under s. 238 (1) without having other means of subsistence and in such a manner as to create a public scandal in the locality where she happens to reside, she may be convicted of vagrancy by reason of her supporting herself by the avails of prostitution.

Bedard v. The King, 30 D.L.R. 326, 26 Can. Cr. Cas. 99, 22 Rev. Leg. 302.

Where it appears on a charge of vagrancy under Cr. Code, s. 238 (1), that the accused had six months previously left off working at his trade and that his only means of livelihood since were the running a gambling resort and obtaining the rake-off on poker games, he may properly be convicted under the statutory definition of vagrancy, although he had not failed to support his family or himself.

The King v. Kolotyla, 19 Can. Cr. Cas. 25, 21 Man. L.R. 197, 17 W.L.R. 640.

Prostitution.

On a charge of vagrancy brought under Cr. Code, s. 238 (i), for being a common prostitute wandering in the streets, the arrest by a police officer and the subsequent prosecution and conviction of the accused will be justified if the woman was caught in the act of soliciting, although the police officer did not before arresting her ask her to give "a satisfactory account of herself."

R. v. Jackson, 29 Can. Cr. Cas. 352, 40 O.L.R. 173, affirming 12 O.W.N. 191. [See 12 O.W.N. 77, 161.]

Where a woman's only visible means of maintaining herself is by prostitution, she is liable to summary conviction for vagrancy under Cr. Code, s. 238 (a), making it an offence for a person not having any visible means of maintenance to live without employment.

R. v. Cyr, 38 D.L.R. 601, 12 A.L.R. 320 at p. 325, 29 Can. Cr. Cas. 77, [1917] 3 W. W.R. 849, affirming 12 A.L.R. 320, [1917] 2 W.W.R. 1185.

Breach of municipal by-law—Failure to prove by-law—Motion to quash magistrate's conviction—Attempt to uphold under s. 238, Criminal Code—Vagrancy—Order quashing conviction—Costs—Protection of magistrate and persons acting under conviction.

R. v. Geiger, 11 O.W.N. 66.

Wilful refusal of parent to maintain his family—Meaning of word "family."

The King v. Barthos, 17 Can. Cr. Cas. 459.

VALUATION.

See Damages; Expropriation; Taxes.

VENDOR AND PURCHASER.

I. Rights and liabilities of parties.
A. In general.
B. Payment of purchase money; deductions.
C. Defective or unmarketable title.
D. Deficiency in quantity.
E. Rescission of contract.
II. Vendor's lien; foreclosure.
III. Rights of parties as to third persons; bona fide purchasers.

Construction of contracts for sale of land, see Contracts, II.

Purchase money mortgages, see Mortgage.

Registration of instruments, priorities, see Land Titles; Registry Laws.

Annotations.

Contracts; part performance; Statute of Frauds: 17 D.L.R. 534.

Equitable rights on sale subject to mortgage: 14 D.L.R. 652.

Payment of purchase money: purchaser's right to return of, on vendor's inability to give title: 14 D.L.R. 351.

Sale of land; rescission for want of title in vendor: 3 D.L.R. 795.

When remedy for specific performance applies: 1 D.L.R. 354.

Right of rescission for misrepresentation, and waiver of: 21 D.L.R. 329.

Foreclosure actions affected by Moratorium: 22 D.L.R. 865.

Assumption of mortgage debt upon transfer of mortgaged premises: 25 D.L.R. 435.

Vague and uncertain contracts as affecting specific performance: 31 D.L.R. 485.

Rescission of contract for fraud and damages for deceit: 32 D.L.R. 216.

Registration, caveats, notice: 33 D.L.R. 9.

Transfer of land subject to mortgage, implied covenants: 32 D.L.R. 497.

I. Rights and liabilities of parties.

A. In general.

Duty of purchasing agent to disclose that property purchased is in fact his own, see Principal and Agent, II C—20.

Enforcement of agreement by party in default, see Specific Performance, I E—30.

Registration of agreement lapsing, Quebec law, see Registry Laws, III A—10.

As affected by infancy, see Infants, I E—25.

Damages for breach of covenant to convey, see Damages, III A—62.

Liability for agent's misrepresentation, see Principal and Agent, II—8.

Purchaser's right to restitution, see Companies, IV D—76.

Remedies, parties, War Relief Act, see Moratorium.

Options on land, see Option.

(§ I A—1)—Remedies of vendor—Action on covenant and foreclosure—Concurrent remedies—Election between.

The vendor under an agreement for sale of lands is not entitled to both a personal judgment on the covenant and to an order for rescission or foreclosure, but must elect which remedy he will pursue. [Goodacre v. Potter, 18 D.L.R. 352, disapproved.]

Hargreaves v. Security Investment Co., 19 D.L.R. 677, 7 S.L.R. 125, 29 W.L.R. 317, 7 W.W.R. 1.

Equitable doctrine where fraud vitiates verbal contract.

The only ground upon which courts of equity compel the specific performance of a verbal contract to which the Statute of Frauds applies is where the refusal to perform the contract amounts to a fraud. The alleged purchaser cannot support an action for damages for breach of an oral contract for the sale of land to which the Statute of Frauds applies, by setting up part performance, since that doctrine is an equitable one and is applicable only where specific performance of the agreement is sought.

Berry v. MacKenzie, 9 D.L.R. 142.

Rights of purchaser—Land contract—Transfer to disinterested nominee—Ratification.

Although a purchaser of lands who has completed his purchase may direct the vendor to convey the property to a nominee not bound by the contract, this rule does not apply as to an executory contract in which the proposed nominee is in no way interested, and the doctrine of ratification of agency cannot be resorted to in such a case either for the benefit of the original contracting parties or of the third party. [Keighley v. Durant, [1901] A.C. 240, applied.]

Ecroyd v. Rogers, 11 D.L.R. 626, 23 Man. L.R. 633, 24 W.L.R. 318, 4 W.W.R. 601.

Wrongful sale by vendor to third person—Liability of vendor.

If, during the currency of a contract for the sale of land, the vendor wrongfully sells it to a third person in derogation of the rights of the original purchaser, the vendor is answerable to him or his assignee for creditors for the price received on such sale over and above what the original purchaser had agreed to pay, if the latter elects to seek his remedy in damages rather than in specific performance.

Allan v. Riopel, 14 D.L.R. 811, 7 A.L.R. 65, 26 W.L.R. 248, 5 W.W.R. 712.

Description of lands—Right of vendor to resubdivide — Finality of registered plan, how limited.

Springer v. Anderson, 19 D.L.R. 886, 7 W W.R. 529.

Agreement for sale—Remedies of vendor—Action on covenant and foreclosure—Concurrent remedies.

Goodacre v. Potter, 18 D.L.R. 352, 6 W W.R. 484.

Duty to furnish abstract of title.

It is necessary for a vendor to furnish an abstract of title only if the purchaser demands it.

Boydell v. Haines, 21 D.L.R. 371, 21 B.C. R. 171, 8 W.W.R. 17, 30 W.L.R. 842.

Specific performance of contract.

The trusteeship resulting from a contract for sale of lands under the rule that the vendor is as to his interest in the lands a trustee for the purchaser subject to a lien for the purchase money, is limited to cases in which a court of equity would grant specific performance.

Howard v. Miller, 22 D.L.R. 75, [1915] A.C. 318, 20 B.C.R. 227 at 230, reversing Miller v. Howard, 4 W.W.R. 1193. [Applied in Central Trusts v. Snider, 25 D.L.R. 410, 35 O.L.R. 246.]

Purchaser's right to damages—Delay.

Damages can be recovered by a purchaser from his vendor, unless the contract provides to the contrary, for delay in completing the purchase where the delay has been occasioned by default of the vendor, not in consequence of want of or defect in title or in consequence of conveyancing difficulties but by reason of the vendor not having used reasonable diligence to perform his contract. [Jones v. Gardiner, [1902] 1 Ch. 191; Jaques v. Millar, 6 Ch. D. 153, applied.]

Lobel v. Williams, 22 D.L.R. 127, 25 Man. L.R. 161, 7 W.W.R. 1042, 30 W.L.R. 352.

Purchaser taking possession—Liability for taxes—Sale or lease.

A purchaser under an agreement for sale by instalments, who is entitled to and does go into possession, is bound to pay the taxes and other outgoings in respect of the land.

Carmangay v. Snyder, 8 W.W.R. 567.

Misrepresentation as to legal effect of contract.

An innocent misrepresentation by a vendor's agent as to the legal effect of a forfeiture clause, based on an erroneous conception, whereby the purchaser was induced

to sign the agreement of sale, is sufficient to render the agreement unenforceable on the ground of mistake.

Robson v. Roy, 35 D.L.R. 485, 11 A.L.R. 418, [1917] 2 W.W.R. 995.

EXCHANGE OF PROPERTIES—PROVISION AS TO RENEWAL OF MORTGAGE—CONDITION PRECEDENT — WAIVER — POSSESSION — EVIDENCE TO VARY AGREEMENT—INADMISSIBILITY—FAILURE OF DEFENDANT TO PROCURE RENEWAL—RETURN OF PROPERTY.

Fleming v. Perrault, 12 O.W.N. 69.

SPECIFIC PERFORMANCE—INTEREST—COSTS.

Cain v. Standard Reliance Mortgage Corp., 12 O.W.N. 236.

EXCHANGE OF LANDS—MATERIAL MISREPRESENTATION—REFUSAL TO ADJUDICATE SPECIFIC PERFORMANCE.

Pinkerton v. Banks, 12 O.W.N. 270.

SALE OF MINING PROPERTY—COVENANT OF PURCHASER TO EXPEND MONEY ON IMPROVEMENTS — BREACH — PENALTY — EXCLUSIVE REMEDY — DAMAGES — MEASURE OF—REFERENCE—COSTS—ORDER OF REVIVOR—REGULARITY—RULE 303.

Chillingworth v. Grant, 12 O.W.N. 317.

EXCHANGE OF LANDS—ACTION FOR SPECIFIC PERFORMANCE—MISREPRESENTATIONS BY COMMON AGENT OF BOTH PARTIES—EVIDENCE—WAIVER—COSTS.

Hughes v. Goddard, 12 O.W.N. 345.

OPTION—PAYMENT—QUESTION OF FACT—FINDING OF REFEREE—APPEAL.—ACCEPTANCE OF MONEY PAID — STATUTE OF FRAUDS.

Robinson v. Longstaff, 13 O.W.N. 28. [Affirmed at p. 57.]

DISPUTE AS TO SUBJECT-MATTER—SALE AND PURCHASE OF LAND OR OF LOCATEE'S RIGHTS—EVIDENCE—LACHES.

Bruce v. Kelcey, 13 O.W.N. 255.

FAILURE TO REGISTER AGREEMENT—EFFECT.

Failure on the part of a vendor to register an agreement of sale in compliance with subss. (4), (5) of s. 28 of the Land Registry Act Amendment Act, 1914, does not debar him from recovering upon the covenants contained in the agreement.

McDonnell v. McClymont, 22 B.C.R. 1.

AGREEMENT FOR SALE OF LAND—FORMATION OF CONTRACT—OPTION—ACCEPTANCE—FAILURE TO MAKE PAYMENT—EVIDENCE—FINDING OF TRIAL JUDGE—APPEAL.

Shafer v. Ross, 7 O.W.N. 81.

APPLICATION UNDER VENDORS AND PURCHASERS ACT—PARTNERSHIP PROPERTY—PRIORITIES.

Re Smith and Wilson, 5 O.W.N. 550, 25 O.W.R. 463.

AGREEMENT FOR SALE OF LAND—DISPUTE AS TO DEPTH OF CITY LOT—INTERPRETATION OF AGREEMENT.

Walker v. Skey, 5 O.W.N. 366.

AGREEMENT FOR SALE OF LAND—ACTION FOR PURCHASE-MONEY—NECESSITY FOR TENDER OF DEED—STATEMENT OF INABILITY TO PAY—NEW AGREEMENT SET UP BY PURCHASER—FAILURE TO PROVE.

Fife v. Keating, 17 O.W.N. 145.

AGREEMENT FOR EXCHANGE OF LANDS—REFUSAL OF DEFENDANT TO CARRY OUT—SPECIFIC PERFORMANCE — DEFENCES — FRAUD—WANT OF FINALITY—DAMAGES—COMMISSION—COSTS.

Moore v. Imeson, 17 O.W.N. 43.

SEVERAL "OPTIONS" UPON SAME PARCEL—PRIORITY—NOTICE.

Healey v. Bailey, 5 O.W.N. 115, 25 O.W.R. 70.

ACTION BY VENDOR FOR SPECIFIC PERFORMANCE—PERSONAL JUDGMENT AND ORDER FOR SALE — SALE ABORTIVE — APPLICATION FOR SALE AT CERTAIN PRICE TO CERTAIN PURCHASER WITH RIGHT TO ISSUE EXECUTION FOR BALANCE—ORDER ALLOWING SAME REFERRED BACK TO MASTER TO ASCERTAIN IF PLAINTIFFS INTERESTED IN PURCHASER—PROPRIETY OF VENDOR BECOMING PURCHASER AT A PRICE LESS THAN AMOUNT DUE AND RETAINING JUDGMENT FOR BALANCE.

In an action by a vendor under an agreement for sale, the plaintiffs had obtained personal judgment and an order for sale, and, a sale under the order proving abortive, had subsequently obtained an order or the sale of the property to a certain proposed purchaser at a certain price with the right to issue execution against defendant for the balance then remaining unpaid. On appeal from this order it was referred back to the master to ascertain whether there was any arrangement or intention that the plaintiffs should acquire an interest in the property. A purchase by a vendor in the name of another or under an agreement with the named purchaser by which the vendor is to be entitled to an interest in the property is a grave impropriety as it is a concealment of a material fact, and if an offer by a third person to purchase is open to that objection it should be refused. Doubt expressed as to propriety of a vendor being permitted to purchase the property agreed to be sold by him at a price less than the amount due by the purchaser and to retain his judgment against the purchaser for the remainder. If, where a sale by auction has proved abortive, such a practice is followed, the court should be clearly satisfied that the price at which the vendor is permitted to purchase is the full value of the property, and if necessary for that purpose would retain the services of an independent valuator.

Creighton v. Dunkley, [1919] 1 W.W.R. 547.

PURCHASER COVENANTING TO PAY TAXES—FAILURE TO PAY—FORFEITURE OF LAND FOR TAXES—VENDOR ENTITLED TO BALANCE OF PURCHASE-PRICE.

A purchaser under an agreement for sale

of land covenanted to pay the taxes but failed to do so and the land was consequently forfeited under the provisions of the Town Act. The vendor was held entitled to recover the balance of the purchase-price notwithstanding his want of title (by reason of forfeiture as aforesaid) as for the purchaser to object to such availing himself of his own wrong.

Lebel v. Dobbie, [1919] 2 W.W.R. 483.

OPTION ON LAND—RESERVING RIGHT TO SELL UPON PAYMENT OF EXCESS OVER PURCHASE PRICE—CLAIM AGAINST ESTATE OF DECEASED PERSON—CORROBORATION.

A. obtained a written option from F., since deceased, to purchase certain property for $30,000 within three months. A. at the trial alleged a contemporaneous oral agreement that F. during the currency of the option might sell the land, A. to receive the purchase price therefor in excess of $30,000. After the expiry of the three months F. sold the land. A. in his statement of claim alleged that the agreement referred to was made at that time:—Held that there was no proof of any such oral agreement and that there was no consideration for it, in default of proof of any extension of the option, Duff, J., dissenting on the ground that A. and F. acted on the assumption that the time had been extended for three months and that the option was unilateral, being merely an offer irrevocable for three months and that the oral agreement dealt with a different subject-matter, the distribution of the proceeds. The uncorroborated evidence of a claimant against the estate of a deceased person will be regarded with jealous suspicion. [Re Garnet, 31 Ch. D. 1.] And the court will in general require corroboration. [Re Hodgson, 31 Ch. D. 183.]

Adamson v. Vachon, 6 W.W.R. 114.

PURCHASER'S DUTY TO INDEMNIFY VENDOR.

The rule of equity, that a purchaser is bound to indemnify his vendor against the payment of encumbrances upon the estate which, by the terms of the purchase the purchaser assumes and the amount of which is deducted from the consideration, does not apply against a purchaser in favour of a person who, although he actually made the conveyance, was not the vendor.

Peterson v. Wickson, [1918] 2 W.W.R. 259.

AGREEMENT FOR SALE OF LAND—BREACH BY VENDORS — CONVEYANCE TO ANOTHER PURCHASER—DAMAGES FOR BREACH.

Pilkey v. Pyne, 15 O.W.N. 162, reversing 14 O.W.N. 308.

WARRANTY—APPARENT DEFECTS.

A clause in a deed of sale "with warranty of all troubles and evictions" is only verbiage, and does not add anything to the legal warranty by which the vendor is bound. Defects in the foundation, pillars and beams of a house, are apparent defects for which the vendor owes no warranty, and by ordinary examination the purchaser may notice such defects.

Laberge v. Gervais, 53 Que. S.C. 370.

CONCURRENT AGREEMENT—OPTION TO RESCIND.

If a person buys land upon the faith of a circular announcing that the vendor undertakes to take back the property, with interest at 6 per cent upon the money paid, if the purchaser is not satisfied with his investment, it is a concurrent agreement of sale, but is not one of the conditions of the sale.

Lachance v. Petit, 53 Que. S.C. 368.

MISTAKE—WILL—NULLITY OF SALE—COMMUNITY.

When no will is found, and one of the heirs intestate purchases the share of another heir for $325, the purchaser may claim back the sum if it is discovered later that there is a will making him sole heir, to the exclusion of the vendor. His consent to the deed of sale is voided by error. If the vendor is a married woman, common as to property, and her husband is sued with her, and if it is proved that the husband had knowledge of his wife receiving $325, he will be condemned with her to return it to the purchaser. Although left by him in his wife's hands, the sum had no less fallen into the community.

De Repentigny v. Boucher, 24 Rev. Leg. 475.

ENCUMBRANCE — ENJOYMENT — DELIVERY —WARRANTY—ACQUIRED KNOWLEDGE—RETENTION OF SALE PRICE—PERSONAL OBLIGATION — C.C. QUE. ARTS. 1493, 1508, 1535.

A vendor who furnishes his purchaser with all title deeds as well as the registrar's certificate of search, has carried out the obligation to deliver imposed on him by law. If the sale of an immovable is made subject to a life tenancy of a third person, the purchaser, by accepting it, renounces his warranty against eviction which might result from such enjoyment. Even if an encumbrance is not mentioned at the time of sale, the vendor is not in the position of a guarantor, if it is otherwise established that the purchaser had a personal knowledge of the facts. The purchaser cannot in such case plead the danger of eviction in order to demand security and refuse, under art. 1535, C.C. (Que.), to pay the sale price. In a deed of sale of land where the right of enjoyment of a third party is impeached, the agreement made by the vendor to obtain for the purchaser the right to occupy the house jointly with a third person is only a personal obligation, rendering the vendor liable for damages in case of default, but it does not authorize the purchaser to retain the sale price by virtue of said art. 1535.

Lamarre v. Bibeau, 56 Que. S.C. 296.

OPTION TO PURCHASE REAL ESTATE—CONSIDERATION.

An option given by the owner of real es-

tate to purchase it at a stated price, within a given time, when accepted, is binding and cannot be withdrawn. The party to whom it is given has an action against the owner for specific performance of the sale. The improved chance of selling afforded by giving the option, is sufficient legal consideration under art. 989 C.C. (Que.).

Clendinneng v. Cox, 45 Que. S.C. 157.

AGREEMENT FOR SALE—NUMBERS OF SUBDIVISION — PRIVATE AND REGISTERED PLAN—CANCELLATION OF SALE—REGISTRATION—C.C. QUE. ARTS. 2098, 2167, 2175.

For the validity of agreements for sale, which do not require registration, it is not necessary that they contain the plan numbers of the lots which it is agreed to sell. The mention of these official numbers is only required in the deed itself. A person who has received an agreement for sale of certain lots shown on a plan of subdivision made by the surveyor of the vendor, on the representation that these subdivision numbers are official, while they are not, and have not been registered until after the date of the agreement for sale, cannot, for this reason, demand the cancellation of the contract, if the official subdivision numbers, although bearing the numbers and the names of different streets, have the same dimensions and the same situation as the number on the private plan, and can easily be located.

Daniel Mc A'Nulty Realty Co. v. Morin, 55 Que. S.C. 275.

REVENDICATION — RIGHT OF REDEMPTION — RIGHT OF VENDOR TO REVENDICATE.

A holder, by a precarious title, of real property cannot oppose to the party revendicating it the transfer that the latter had made of it before the action, with the right of redemption, when he has not set up such fact in his statement of defence, and only proves it at the trial by filing the deed without having previously obtained leave to amend his defence. When such sale, although apparently a sale with right of redemption, is, in fact, a pledge, the vendor keeps the jus in re which gives him the right to revendicate it. A holder, with a precarious title, of real property who erects buildings thereon has only the right to remove them when he is sued in revendication and condemned to vacate the premises.

Asselin v. Levesque, 23 Que. K.B. 86, [See 44 Que. S.C. 481.]

CONTRE-LETTRE—RETROCESSION—INTEREST.

A contre-lettre has, between the parties, the same effect as if it was included in the authentic deed to which it refers. A deed of sale accompanied by a contre-lettre "We the undersigned undertake to give back lot No. 38 of Robertson Canton in Second Range provided that he reimburse us the sum of $73 and interest at 8 per cent to run from to-day payable annually for 3 years" the vendor in order to have the right to retrocession of his property is not obliged to pay interest each year; he can pay it at any time, even immediately before the expiration of the 3 years by offering to the purchaser the capital and interest due.

Thibault v. Latour, 49 Que. S.C. 237.

AS TO TAXES.

A stipulation in a deed of sale, whereby the purchaser obliges himself to pay "taxes and local and land assessment for the future," has effect only between the contracting parties themselves, and does not constitute the purchaser the personal debtor for such taxes to the municipal or school corporations.

Gamanche v. Blais, 50 Que. S.C. 200.

A vendor who, after Nov. 1, sells property situated in the city of Montreal, free from all taxes or assessments, is obliged to pay the full amount assessed for the current year. A clause in a deed of sale, by which the vendor guarantees to the purchaser that the land sold is exempt from taxation as a factory site, purports a meaning that the land should be actually used and occupied as such.

Belgo-Canadian Pulp & Paper Co. v. Brown, 49 Que. S.C. 57.

An act, by which, in consideration of a fixed price, one of the coinheritors sells and transfers unto her other coinheritors all her rights in the real and personal property of an inheritance, will not be considered as partial division, but, on the contrary, will constitute, a perfect and final sale of the part thus acquired by the others.

Chaput v. Chaput, 18 Rev. de Jur. 62.

WARRANTY—LEASE.

Where an immovable injured by fire has been sold "with the existing leases" but upon representation to the purchaser that the damages caused to a portion of the building are so considerable as to put an end to the leases, the vendor has no recourse in warranty against the purchaser for the purpose of recovering from him the damages which he is obliged to pay in consequence of a lease and of his own neglect to repair the premises within a reasonable time.

Ruthman v. Massé, 25 Que. K.B. 193.

EFFECT OF USING "WITHOUT PREJUDICE" IN LETTER PROPOSING TO SELL LANDS — CONTRACT BY CORRESPONDENCE.

Latimer v. Park, 19 O.W.R. 776.

RESERVATION OF RIGHT TO REMOVE SAND AND GRAVEL—AGREEMENT NOT UNDER SEAL.

Farquhar v. Royce, 19 O.W.R. 849.

(§ I A—2)—SALE OF LAND—VERBAL AGREEMENT AS TO MONEY PAYABLE BY RELIEF COMMISSION—EVIDENCE—STATUTE 8-9, GEO. V., 1918, N.S., c. 61.

Under the statute regarding the Commission for the Relief of Halifax, moneys awarded by the Reconstruction Committee and allotted to certain property, must be spent on that property, and in the absence of an express agreement, will enure to the

benefit of a purchaser obtaining the property since the explosion of 1917.

Hill v. Smith, 50 D.L.R. 272.

SALE OF REAL ESTATE—PURCHASER'S UNDERTAKING TO INSURE AGAINST FIRE — HYPOTHEC—PRIORITY.

A stipulation in favour of the vendor in a sale of real estate, that the purchaser shall insure the buildings against fire, does not carry an implied consent that the legal hypothec, arising from mutual insurance, has priority over one who guarantees the sale price. The vendor is presumed to have intended, in the said stipulation, a fixed premium insurance, and not mutual insurance.

La Cie de Ass'ce Mutual des Industries v. Morency, 46 Que. S.C. 29, reversing 44 Que. S.C. 434.

TERM FOR PAYMENT—AGREEMENT TO INSURE.

Bourgeau v. Turnbull, 40 Que. S.C. 313.

(§ I A—3)—ILLEGAL SALE OF SUBDIVISION LOTS — NONREGISTRATION OF PLAN — VENDEE'S LIEN.

A sale of lots according to a plan purporting to be a subdivision plan, which is not registered at the time of the sale, is illegal under a statute forbidding the sale of lots before the registration of the plan, although the agreement covers the whole block and is not a sale of any particular lot, and the purchaser may recover the purchase price paid thereon and is entitled to a lien on the land until same is paid. [Veilleux v. Boulevard Heights, 20 D.L.R. 858, affirmed in 24 D.L.R. 881; 52 Can. S.C.R. 185, 26 D.L.R. 333; Abbott v. Ridgeway, 8 A.L.R. 315, followed.]

Sheppard v. Godfrey, 24 D.L.R. 646, 9 A.L.R. 416, 9 W.W.R. 345, 32 W.L.R. 730, affirming 31 W.L.R. 617, 8 W.W.R. 999.

AGREEMENT FOR SALE OF LAND TO RAILWAY COMPANY—UNDIVIDED SHARES IN PORTION OF LAND OWNED BY CHILDREN OF VENDOR—REFUSAL OF CHILDREN TO CONVEY—PAYMENT OF PURCHASE-MONEY TO SOLICITORS FOR VENDOR—LIEN OF PURCHASERS FOR AMOUNT NECESSARY TO GET IN TITLE—EXPROPRIATION—COSTS.

G.T.R. Co. v. Donnelly, 8 O.W.N. 231.

ACCEPTANCE — DELAY — TITLE — TENDER —MISE EN DEMEURE.

When the conditions of a contract of sale are accepted by both parties within the stipulated time, one of them may, even after the expiration thereof, put the other party en demeure to embody in a notarial deed the agreement on which the two are in accord. But if the consideration is payable in shares, the purchaser cannot bring action for title without having within the specified time tendered the certificates of the shares and put the vendor en demeure to sign the deed of sale agreed upon. It is not sufficient in such case that the purchaser demand that the vendor should sign a deed of sale to him; it is necessary that the deed of sale should be on record, already signed by the purchaser, and that conclusions be taken to the effect that it be signed by the vendor. The acceptance of a written agreement of sale must be in writing.

Désy v. Larivière, 26 Que. K.B. 11.

FORFEITURE CLAUSE—JUS IN REM OR PERSONAM.

A promise of a sale of a lot of ground stipulating that in default of payment it shall be null ipso facto, and all sums of money, already paid, and all buildings and improvements made on the lot, shall remain the vendor's property, does not transfer any jus in re on behalf of the purchaser, but only a personal obligation enabling him to acquire the ownership of the lot upon the fulfilment of the conditions stated in the promise of sale.

Gadbois v. Denovan, 52 Que. S.C. 81.

DEED—INTERPRETATION—WARRANTY.

Although by a deed of sale the vendor sells his rights and interest in an immovable, nevertheless it may, from the whole deed, appear that it is the immovable itself which is sold: as (1) when he specifies what his rights are and that these rights are those of an owner; (2) when the deed provides that the purchaser may "enjoy, use and dispose of the immovable in full ownership and right of possession from this day." A clause in the deed of sale "Without other warranty than that resulting from his acts, deeds and promises alone" is one of nonwarranty.

Drouin v. Gaudet, 51 Que. S.C. 45.

SALE OF BUSINESS—USE OF NAME.

The vendor of a going business, who leases his establishment to the purchaser and gives him the privilege of making use of his name for an indefinite period, cannot, shortly after and of his own initiative, put an end to this privilege. In such case it is for the court to fix the term, which should be sufficiently long to permit the purchaser to attain the object the parties had in view at the time of the contract.

Picard v. Proteau, 51 Que. S.C. 115.

CONDITIONS—REMEDY—ACQUIESCENCE.

The remedy of a purchaser against a vendor, who has inserted in the deed of sale conditions to which he has not consented, is not limited to an action to set aside the deed; he may also properly demand that these provisions shall be struck out. There is acquiescence in the condition (a) if the purchaser who has received a copy remains, for a year, in possession of the immovables sold without complaining; (b) if he pays the instalments due during this year and satisfies the charges against the property.

Montreal Trust Co. v. Le Comptoir Mobillier Franco-Canadian, 52 Que. S.C. 39.

SUSPENSIVE CONDITIONS — POSSESSION — TAXES.

The holder of an agreement of sale on condition that the title should be retained by the vendor, undertakes to pay the munic-

ipal taxes and agrees to a clause that if the agreement is rescinded the work done by him shall remain the property of the vendor, thereby agrees to a sale with suspensive conditions. In order that there may be possession within the meaning of art. 1478 C.C. (Que.) it is not necessary that the purchaser should have physical possession of the immovable, that is to have performed some acts of possession; it is sufficient that he has been in a position to do so.

Maisonneuve v. Michaud, 52 Que. S.C. 161.

(§ I A—4)—Tender of conveyance—Rejecting tender of purchase money—Claim of forfeiture.

The rejection of a tender of purchase money on the ground that the purchaser's rights had been forfeited for his default in payment, is a waiver of the tender of a conveyance for execution.

Bark Fong v. Cooper, 16 D.L.R. 299, 49 Can. S.C.R. 14, 5 W.W.R. 633, 701, reversing 11 D.L.R. 223, 18 B.C.R. 271, 24 W.L.R. 294.

Vendor's duty to tender conveyance.

In Manitoba it is the duty of the vendor to prepare and tender the conveyance.

Lobel v. Williams, 22 D.L.R. 127, 25 Man. L.R. 161, 7 W.W.R. 1042, 30 W.L.R. 352.

Selection of notary—Tender of deed to vendor.

Under Quebec law it is for the purchaser of land to select a notary and to see that a deed is prepared and tendered to the seller.

Poirier v. Archambault, 23 Que. K.B. 495, [Affirmed in sub nom. Lareau v. Poirier, 25 D.L.R. 266, 51 Can. S.C.R. 637.]

Where an agreement for the sale of land includes a right-of-way over other lands of the grantor, and contains a provision that he shall give a deed of the right-of-way "when and as soon as the same is surveyed," and it appears that the survey is necessary before a proper conveyance could be made, the grantee is relieved by the very nature of such a contract from tendering a conveyance for execution until the survey shall have been made by the grantor. A tender for execution of a deed of conveyance will be deemed to have been waived where it is clear from the circumstances existing at the date of the writ that the tender must have been refused if it had been made and for that reason would have been a mere useless formality, ex. gr., where the grantor had already sold to another person.

Burney v. Moore, 7 D.L.R. 357, 4 O.W.N. 173, 23 O.W.R. 161.

Offer to sell—Accepted orally—Subsequently sold to another purchaser—Time.

O'Gorman v. Fitzmaurice, 19 O.W.R. 876, 2 O.W.N. 1480.

B. Payment of purchase money; deductions.

Application of payments, principal and interest, see Payment, IV—30.

(§ I B—5)—Relief against forfeiture—Terms.

A purchaser who does not offer to perform his part of the contract is not entitled to be relieved against a forfeiture of the payments; the court in granting the relief may do so on terms that the purchaser pay for the use and occupation of the land, together with the expenses and costs incurred in connection therewith.

Cowie v. McDonald, 34 D.L.R. 159, 10 S.L.R. 218, [1917] 2 W.W.R. 356.

Purchase price notes—Defences—Maker only trustee—Admissibility of extrinsic evidence to prove relationship—War Relief Act.

Canadian Credit Men's Trust Assn. v. Anderson, 37 D.L.R. 805.

Time for—Rescission.

The failure of a purchaser of lands to make the cash payment within a reasonable time after the hour fixed therefor under the agreement of sale, is sufficient ground for rescission by the vendor. [Bristol, Cardiff, etc., A. B. Co. v. Maggs, 44 Ch. D. 613, applied.]

Bennett v. Newcombe, 11 D.L.R. 87, 24 W.L.R. 59.

Real party acting ostensibly as agent—Inability to make title.

Purchase money paid to and which is retained by one who, although acting ostensibly as agent in reality, acted for himself in agreeing to sell land and received the money entirely for his own benefit, may be recovered by the payer where the payee was unable to give a title to the land.

Reeve v. Mullen, 14 D.L.R. 345, 6 A.L.R. 291, 25 W.L.R. 445, 5 W.W.R. 128.

Acceleration clause — Election to invoke—Notice.

Notice of a vendor's election to invoke an acceleration clause in a contract for the sale of land and to declare the whole of the purchase money to be due and payable, may, on the vendee's default in making stipulated payments, be given by the vendor in the pleadings in his action for the specific performance of the agreement, where the contract provides that notice of such election may be given the vendee by personal service, registered letter or such other means as might appear likely to bring it to his attention.

Price v. Parsons, 14 D.L.R. 59, 6 A.L.R. 365, 25 W.L.R. 598, 5 W.W.R. 199.

Unpaid purchase money — Stipulation for distress by vendor for arrears.

The relation of landlord and tenant is not created so as to permit the vendor to distrain, where the parties did not contemplate the creation of a real tenancy or the payment of rent, by a stipulation of a contract for the sale of land to the effect that

the vendee attorned to and became the vendor's tenant, and that the former might distrain for all arrears of principal or interest. An unpaid vendor in a contract for the sale of land does not acquire the right to distrain for arrearages of principal and interest from s. 5 of c. 34 of Alta. Ordinances 1911, which permits a "mortgagee" of land to do so.

Hall v. Welman, 13 D.L.R. 17, 6 A.L.R. 239, 25 W.L.R. 222, 5 W.W.R. 6.

RECOVERY OF—FAILURE OF TITLE.

Where one of two vendees, both of whom claim the same land under unregistered contracts of sale from the same common source, is entitled to priority by reason of first filing a caveat in the land titles office, the other may recover from his vendee all payments made by him under the contract, with interest, together with the costs of investigating the title, or incident thereto.

Stephens v. Bannan, 14 D.L.R. 333, 6 A.L.R. 418, 25 W.L.R. 557, 5 W.W.R. 201.

EXHIBITING TITLE.

Where a contract for the resale of a title held under an agreement of sale from the registered owner stipulates that the sale is subject to approval of title by the vendee's solicitor and that the contracts are to be sent through a specified bank, there is a contractual obligation to exhibit a good title to the purchaser before he can be called upon to pay the balance of the cash payment.

Quail v. Beatty, 9 D.L.R. 784, 5 A.L.R. 482, 24 W.L.R. 242, 4 W.W.R. 55.

Where a vendor, under a contract for the sale of land in which time is of the essence, and in which the purchase price was to be paid for in four instalments, two of which amounted to one-half of the entire purchase price, rescinds the agreement on default of the vendee to pay the last two instalments, though the rescission is justifiable, the vendor will not be allowed to retain the money paid on account of the property; such money will be treated as payment on account and not as deposit money, though it is called "deposit money" in the agreement.

McGreevy v. Hodder, 8 D.L.R. 755, 4 O.W.N. 536, 23 O.W.R. 699.

The vendee in a contract for the sale of lands cannot, as a condition precedent to paying the stipulate instalments of the purchase money, require the vendor, who had only an equity in the lands, to shew that he had paid all instalments of the purchase money actually due from him to his vendor.

McIlvenna v. Goss, 3 D.L.R. 690, 21 W.L.R. 180, 2 W.W.R. 285.

Where an agreement for the sale of land expressly requires a certain down payment contemporaneously with the execution of the agreement, the purchaser is not entitled (as against an outstanding mortgage of which he had prior notice amounting to less than the remaining purchase instalments) to require the vendor to shew title to the land before making the down payment. Where an agreement for the sale of lands expressly requires the payment of a fixed large instalment on the purchase price in "cash on the signing of this agreement," the consideration for this payment is the execution of the agreement itself, that is to say, the constitution of the relationship of vendor and purchaser between the parties and the promise or undertaking of the vendor to sell and convey.

Cushing v. Knight, 6 D.L.R. 820, 46 Can. S.C.R. 555, 2 W.W.R. 704.

Where, by the terms of an agreement to purchase a mine, part of the purchase price was to be in stock of a company to be formed by the purchaser to acquire and work a certain creek or such parts as he may consider advisable, a tender of stock in a company which is formed for another object, is not sufficient, and the vendor will not be compelled to accept such shares, unless he had knowledge of the formation of such company and had by his conduct so acquiesced that he would be precluded from objecting to it. Where a tender of the said amount of stock computed at par does not necessarily fulfil the agreement, since the value of the stock depends on the state of the market at that time, and the vendor is entitled to so much of the stock as that part of the purchase price would then buy.

Treadgold v. Rost, 7 D.L.R. 741, 22 W.L.R. 300.

A stipulation in an agreement for the sale of land made by written offer and acceptance and negotiated through a real estate agent, that the agent's commission against the vendor be paid "out of and form part of the purchase money" permits the purchaser to pay such commission on closing the purchase and to deduct the amount so paid from the purchase money then payable to the vendor.

Robinson v. Reynolds, 4 D.L.R. 63, 3 O.W.N. 1262.

If a purchaser knows of an encumbrance, either before or after the execution of his conveyance, but before the payment of the whole purchase money, he will be liable to the extent of any purchase money which he subsequently, without the consent of the encumbrancer, pays to the vendor. [Rayne v. Baker, 65 Eng. Rep. 905, followed.]

Gillespie v. Wells, 2 D.L.R. 519, 22 Man. L.R. 355, 21 W.L.R. 231, 2 W.W.R. 272.

Where an agreement for the sale of land provides that, upon a resale of the land, the resale agreement may be assigned to the original vendor as security for the purchase price remaining due to him and, without any intention to mislead the original vendor, the resale agreement is so drawn that a larger sum appears thereby to be owing thereunder than is in fact so owing, the original vendor cannot, as assignee of the resale agreement, exact payment of such larger sum, but must take

the resale agreement subject to the true state of the accounts between the parties thereto.

Great West Land Co. v. Stewart, 3 D.L.R. 805, 3 O.W.N. 1141.

AGREEMENT PROVIDING FOR POSSESSION BY PURCHASER ON PAYMENT OF INSTALMENTS—FAILURE TO PAY—ORDER GIVING VENDOR POSSESSION — VENDOR ACCOUNTING UNDER CONTRACT.

An agreement for sale of land specifically provided that the right of the purchaser to occupy and enjoy the lands was upon the express condition that he would not make default in payment of the purchase price: default was made upon an intermediate instalment, long before the time provided for the completion of the agreement. The court held that an order, giving possession to the vendor was a proper one under the circumstances. The order was very much in the interest of the purchaser, as all his rights, other than possession under the contract were preserved, and the land made to fulfil its earning capacities, the vendor supplying labour and capital, but under an obligation to account under the contract which was still subsisting.

Torgersen v. Trettevik, 46 D.L.R. 474, 14 A.L.R. 448, [1919] 2 W.W.R. 404.

DEFERRED PAYMENTS — VENDOR'S RE-ENTRY ON DEFAULT—ACCELERATION.

An entry into possession made by a vendor on default of the vendee to meet instalments in arrear under his contract by virtue of a power reserved therein, will not operate as a demand for unmatured instalments nor accelerate their payment for the benefit of the purchaser so as to force the vendor to accept prepayment of unmatured interest-bearing instalments, where the vendor's proceedings were wholly referable to the arrears. [Bovill v. Endle, [1896] 1 Ch. 648, distinguished.]

Tytler v. Genung, 16 D.L.R. 581, 24 Man. L.R. 148, 27 W.L.R. 330, 6 W.W.R. 191, reversing 12 D.L.R. 426.

LIABILITY FOR PURCHASE MONEY — PAYMENT OF PORTION TO VENDOR'S SOLICITOR—CONVERSION BY.

Malcolmson v. Wiggin, 12 D.L.R. 849, 4 O.W.N. 1538, 24 O.W.R. 855.

RECOVERY OF—FAILURE OF TITLE.

Black v. Magill, 20 D.L.R. 968, 6 W.W.R. 623.

REALTY SALE — BY INSTALMENT — TITLE — RESCISSION—DAMAGES—COSTS.

Fehrenbach v. Grauel, 17 D.L.R. 848, 6 O.W.N. 584.

GUARANTY OF RISE IN VALUE—DEFAULT IN PAYMENT — JUDGMENT IN ALBERTA — ENFORCEMENT IN ONTARIO.

Prudential Securities v. Sweitzer, 28 D.L.R. 361, 10 O.W.N. 200, varied in 10 O.W.N. 207.

CHEQUE — CONSIDERATION — HOLDER FOR VALUE.

To agree to a sale of land upon receiving the cheque of the agent who brings about the sale is good consideration for the cheque, and the vendor of the land is a holder of the cheque for value.

Clavelle v. Russell, 40 D.L.R. 61, 11 S.L.R. 111, [1918] 1 W.W.R. 900.

PURCHASER PREVENTING TITLE — CROWN GRANT.

The purchaser of mill-site property under an agreement for sale whereby the final payment was to be made when the vendor obtained title from the Crown, having taken possession, and subsequently by his own conduct made it impossible for the vendor to obtain the Crown grant, is liable for the balance due notwithstanding the vendor's failure.

Meeker v. Nicola Valley Lumber Co., 39 D.L.R. 497, 55 Can. S.C.R. 494, affirming 31 D.L.R. 607, [1917] 1 W.W.R. 556. [Leave to appeal to Privy Council refused, February, 1918.]

ASSIGNMENT BY VENDOR—NOTICE—CAVEAT.

If notice of an assignment by the vendor of his rights under an agreement of sale of land has not been given to the purchaser, payment to the vendor of the balance due under the agreement will entitle the purchaser to a transfer of the land: a caveat, filed in the Land Titles Office after the assignment, is not notice, as such, to the purchaser, who is not bound to search the register before making payment. [See annotation, 33 D.L.R. 9.]

Grace v. Kuebler, 39 D.L.R. 39, 56 Can. S.C.R. 1, [1917] 3 W.W.R. 983, affirming 33 D.L.R. 1, 11 A.L.R. 295 at 303, [1917] 1 W.W.R. 1213, 28 D.L.R. 753, 11 A.L.R. 295, 10 W.W.R. 1199. [See 38 D.L.R. 149, 12 A.L.R. 392, [1918] 1 W.W.R. 182.]

AGREEMENT FOR SALE OF LAND—CROP PAYMENT—ABANDONMENT OF AGREEMENT—CROP GROWN ON OTHER LAND—INJUNCTION.

Stroscherer v. Schulz, 40 D.L.R. 162.

FAILURE OF ATTEMPT TO PROVE ABANDONMENT BY PURCHASER—AGREEMENT AS TO COLLECTION OF RENTS AND PAYMENT OF DISBURSEMENTS — ACCOUNT—SPECIFIC PERFORMANCE—COSTS.

Victor v. Romovitz, 14 O.W.N. 351.

ACTION FOR INSTALMENT OF PURCHASE MONEY — MISREPRESENTATIONS BY AGENT OF VENDOR—FAILURE TO PROVE—UNDERTAKING TO RESELL — ACQUIESCENCE—RATIFICATION—EVIDENCE.

Davis v. Whittington, 15 O.W.N. 160.

JUDGMENT DIRECTING PAYMENT—VENDOR TO ESTABLISH TITLE.

A vendor under an agreement of sale of land is not entitled to judgment directing the purchaser to pay the purchase-money or any instalment thereof until he establishes to the satisfaction of the court that he has a good title to the premises sold. [Cameron v. Carter, 9 O.R. 426, applied.]

Pedlar v. Ryder, 24 D.L.R. 427, 8 W.W.R. 559.

DEFENCES TO ACTION FOR PURCHASE MONEY —MISREPRESENTATIONS—WAIVER.

An election to affirm the contract to buy a block of land notwithstanding alleged misrepresentations as to its suitability for building lots may be predicated from the fact that the purchaser himself subdivided the property and undertook to offer it to the public as suitable for buildings lots and did not advance his objection until sued for purchase money after the lapse of a year from the making of the contract.

Stewart v. Cunningham, 22 D.L.R. 845, 21 B.C.R. 255, 8 W.W.R. 579.

NONREGISTRATION OF AGREEMENT—LIABILITY ON COVENANT FOR PAYMENT.

Failure on the part of a vendor to register an agreement of sale does not debar him from recovering upon the covenants contained in such agreement. [Thompson v. McDonald, 20 B.C.R. 223, applied.]

McDonald v. McClymont, 8 W.W.R. 990.

DEFERRED PAYMENTS — NONASCERTAINMENT OF DATE.

Under Quebec law the nonascertainment of the date for payment of the deferred part of the purchase money upon a contract of sale of lands does not necessarily make the contract nugatory, for, in default of agreement of the parties, the court may fix the time for payment of a debt as to which no date of payment has been fixed by the parties; failure to agree upon such a date may, in certain cases, warrant the inference that the parties have not come to a completed agreement, it being a question of construction in the particular case. [Compare Fenske v. Farbacher, 2 D.L.R. 634, as to the English law.]

Poirier v. Archambault, 23 Que. K.B. 495. [Affirmed in Lareau v. Poirier, 25 D.L.R. 266, 51 Can. S.C.R. 637.]

SALE BY PURCHASER TO SUBPURCHASERS—AGREEMENT THAT SUBPURCHASERS PAY DIRECT TO ORIGINAL VENDOR—MORTGAGE BY ORIGINAL VENDOR—NOTICE BY PURCHASER TO SUBPURCHASERS "TO PROTECT THE MORTGAGE" — SUFFICIENCY OF TO OBLIGE SUBPURCHASERS TO WITHHOLD PAYMENTS.

A purchaser under an agreement for the sale of land agreed to sell to third parties, and an agreement was thereafter made between the original vendor, the purchaser and subpurchasers whereby the latter agreed that the amounts due from them should be paid direct to the original vendor until the full amount owing on the original agreement was satisfied. Subsequently the original purchaser heard that his vendor had mortgaged the land and told one of the subpurchasers to "protect the mortgage." Such "warning" was held not sufficient to impose any obligation on the subpurchasers to withhold from the original vendor payments subsequently falling due.

Crump v. McNeill, 14 A.L.R. 206, [1919] 1 W.W.R. 52.

ASSIGNMENT—CAVEAT—INTEREST IN LAND —LAND TITLES ACT.

T. sold, under agreement of sale, real estate to S. and B.T., assigning in writing to the plaintiffs a portion of the unpaid purchase-money, and "for the more effectually carrying out said assignment" T. also assigned to the plaintiffs the agreement for sale and the land covered thereby, but T. did not transfer the certificate of title to the plaintiffs. The plaintiffs lodged a caveat, and thereafter T. transferred the land to S. subject to the caveat. S. with knowledge of the caveat, and of the assignment to the plaintiffs, transferred the land to the defendants, strangers. The moneys assigned to the plaintiffs were not paid either to the plaintiffs or to T. Held, that the plaintiffs were entitled to maintain their caveat. [Grace v. Kuebler, 56 Can. S.C.R. 1, distinguished.]

Drewry v. Cowie, 12 S.L.R. 255.

In construing the meaning of a document, the function of the courts is to ascertain what the parties meant by the words they have used, to declare the meaning of what was written in the instrument, not what was intended to have been written, to give effect to the intention as expressed, the expressed meaning being for the purpose of interpretation equivalent to the intention. Unless forced to do so, by the language used, the court will not place a meaning on one clause which makes that clause inconsistent with a previous one. In determining whether the parties intended to create a tenancy, the whole question is, did they have an honest intention of creating the relationship of landlord and tenant, or was it their intention to effect some other purpose. The amount of the rent reserved is one element in determining the bona fide intention of the parties, and, if it is grossly in excess of the real value of the land, the courts will take that circumstance as conclusive that it was not really intended to be paid as rent, but any excess, however slight, is not conclusive; it is only one element in determining the bona fides of the parties.

Independent Lumber Co. v. David and Hurlburt, 5 S.L.R. 1.

HALF—CROP PAYMENTS—CONSTRUCTION OF CONTRACT—ACCELERATION CLAUSE.

Sherrin v. Wiggins, 27 Man. L.R. 572, [1917] 2 W.W.R. 895.

CONDITION—MORTGAGE—INTEREST.

An agreement for the sale and purchase of land provided that part of the purchase price was to be paid as to $3,000 by assuming a certain mortgage. Held, in view of the extraneous evidence, that the purchaser was not obliged by such provision to pay the interest in arrear upon the mortgage at the time of the making of the agreement.

Burritt v. Stone, 38 D.L.R. 240, 10 S.L.R. 384, [1917] 3 W.W.R. 978.

ACKNOWLEDGMENT OF PAYMENT — UNDER SEAL—DEED—ESTOPPEL—ASSIGNMENT.

Coast Lumber Co. v. Bates, 37 D.L.R. 398, [1917] 2 W.W.R. 1223.

DEFAULT IN PAYMENT OF PURCHASE-MONEY —PROVISION MAKING TIME OF ESSENCE —WAIVER — RELIEF AGAINST FORFEITURE — TERMS — SPECIFIC PERFORMANCE —COSTS.

Pratt v. Ray, 12 O.W.N. 366.

PROMISSORY NOTE TAKEN FOR PURCHASE-MONEY — LAND CONVEYED TO PURCHASERS—NO MORTGAGE GIVEN BACK—NOTE NOT ACCEPTED IN SATISFACTION — VENDOR'S LIEN — PRESERVATION AND ENFORCEMENT—BREACH OF REPRESENTATIONS MADE BY OFFICERS OF VENDOR-COMPANY—ABSENCE OF FRAUD—COUNTERCLAIM.

Wychwood Corp. v. Howell, 13 O.W.N. 92.

DEFAULT IN PAYMENT—FORFEITURE.

Every conventional clause permitting one of the contracting parties at his option to deprive the other party of his rights and to confiscate the money already received should be strictly interpreted. A stipulation that default in payment of an instalment of the purchase price will ipso facto annul the agreement, will not have that effect for a default in payment of only a part of an instalment.

Guillemette v. Park Realty Co., 52 Que. S.C. 146.

FORFEITURE — WAIVER — DEMAND OF PAYMENT.

Where in a promise of sale of lots of ground, the price is payable by monthly instalments, and the promisor demands and constantly receives payment outside of the stipulated delays, he thereby tacitly waives the penal provisions in the deed to the effect that if the debtor does not make his monthly payments within stipulated delay, the promisor will have the right to annul the deed and to retain all payments previously made by the debtor. But notwithstanding this waiver, the promisor may yet take advantage of this penal clause, by putting his debtor in default to pay the arrears due in a reasonable delay, and by notifying him that if he does not comply with the demand, he will exercise his right of resolution. A simple demand of payment will not be sufficient. Where the payments are made payable at the office of the promisor, the right of cancelling the promise of sale can be exercised by giving to the debtor a mere notice without any mise en demeure of payment.

Caplan v. Montreal, 52 Que. S.C. 435.

RETENTION OF PRICE—POSSESSION.

A purchaser hindered in his possession, or who properly believes himself to be so, may retain the purchase price if he has not paid it, but if he has paid it he cannot demand that it should be returned to him so long as he is not dispossessed.

Massé v. Bertrand, 26 Que. K.B. 335.

A stipulation in a deed of sale of an immovable charged with a substitution, that a part of the price bearing interest will only be payable when the vendor has procured the discharge of the substitution, and the undertaking by the vendor to have it discharged as soon as the appelé becomes of age, does not make the deed of sale a contract under suspensive condition. Although the purchaser is not bound to pay the price of sale before the fulfilment of the condition, he has no right to refuse to pay the vendor the interest on the purchase money as long as he remains in possession of the immovable.

Lebel v. Morin, 26 Que. K.B. 231.

A vendor cannot demand the price of sale without at the same time making delivery of the thing sold. The delivery of an immovable is consummated by the abandonment made of it by the vendor and the handing over of the title deeds necessary to complete the conveyance.

Chercuitte v. Cummings, 51 Que. S.C. 63. [See 50 Que. S.C. 359.]

PURCHASE MONEY PAYABLE BY INSTALMENTS —TITLE TO BE MADE AFTER DEFERRED PAYMENTS COMPLETED — DEFAULT BY PURCHASER—POSSESSION RESUMED BY VENDOR — INTENTION TO TERMINATE AGREEMENT NOT SHEWN—ACTION BY PURCHASER TO RECOVER PART OF PURCHASE MONEY PAID—COUNTERCLAIM FOR SPECIFIC PERFORMANCE — CLAIM FOR CONVERSION — JUDGMENT — ACCOUNT — DEDUCTIONS — DAMAGES — INTEREST—APPEAL—COSTS.

Mann v. Gray, 15 O.W.N. 181.

ACTION FOR BALANCE OF PURCHASE PRICE— DEDUCTIONS—INTEREST—COSTS.

Proctor v. Décarie, 15 O.W.N. 272.

SALE OF MINING CLAIM—FORFEITURE—RECOVERING BACK MONEYS PAID—AMENDMENT.

An agreement to purchase a mining claim contained the following provision: "Time is the essence of this agreement, and any failure on the part of the first party to make any of the said payments as herein provided or within thirty days thereafter shall work a forfeiture of all his rights under the agreement and the said agreement shall become null and void at the option of the second party, and the second party shall give written notice to the first party of his intention to claim said forfeiture, and thereupon this agreement shall be null and void and of no further force and effect, and all payments made by the first party or his assigns in pursuance of the terms hereof shall be retained by the second party." Held, that a notice by the vendor, given before the expiration of thirty days, of his intention to claim forfeiture was ineffectual, and a further notice, given after default, claiming that the purchaser had forfeited

all his rights under the agreement, was doubtful in effect. [Canadian Fairbanks Co. v. Johnston (1909), 18 Man. L.R. 589; Kilmer v. B.C. Orchard Lands, [1913] A.C. 319, 10 D.L.R. 172, followed. Steedman v. Drinkle, 25 D.L.R. 420, distinguished.]

Price v. Ruggles, 28 Man. L.R. 132. [See [1917] 2 W.W.R. 1035.]

RIGHT TO INTEREST—COVENANT TO PAY TAXES—RIGHT OF VENDOR—ACTION.

Where an agreement for the sale of lands provides that the seller is not to be liable to a personal action for the purchase money but that the vendor is "to look to the lands and all other rights and remedies to realize the purchase money and all of his rights," and also provides that all overdue interest shall be treated as purchase money, overdue interest cannot be recovered by personal action against the purchaser; but where the agreement also contains a covenant by the purchaser to pay taxes from a certain date, such taxes, if paid by the vendor, may be recovered by personal action.

Parker v. Trustee Co., of Winnipeg, [1918] 2 W.W.R. 264.

PERFORMANCE — TENDER — JUDGMENT — CROSS DEMAND—REPUDIATION OF CONTRACT.

In a reciprocal contract, performance thereof on both sides should be made simultaneously, and neither of the contracting parties can be compelled to execute his obligation before the other party performs his. In a sale the vendor has a right to the price only when he has offered the thing sold, or at least offers it in his action; it is not sufficient that he should declare himself ready to make delivery. A court cannot render a conditional and hypothetical judgment, such as condemning the defendant to pay the price of a thing sold upon the delivery thereof. A vendor who retains the property and possession of the thing sold, cannot sue for the sale price without making legal tender of the thing, and if the purchaser unjustly repudiates the contract the vendor has a remedy in damages against him, but he cannot at the same time, keep the thing sold and claim the price. Any cancellation of a contract having, as a rule, to be made by the courts, the purchaser, after having put his vendor in default to deliver him the thing sold, cannot, on the latter's refusal, consider the contract as cancelled and sue to claim back the instalments paid on account; and should he do so by a cross demand, without asking the court to declare the sale void, his demand will be dismissed.

Robert v. Sarault, 53 Que. S.C. 484.

TITLE IN WIFE'S NAME—POWER TO CONVEY.

Where the vendor of property, the title to which stood in his wife's name, but a conveyance of which he had the right to call for at any time, notified the purchaser of that fact, but declined to send the agreement between his wife and himself to the purchaser's solicitors, and the purchaser did nothing further, he was not allowed to resist payment of the balance of the purchase money.

Beech v. Mullins, 33 W.L.R. 721, 9 W.W.R. 1168.

DEPOSIT IN ESCROW—MISAPPROPRIATION—RATIFICATION.

The onus is upon the party relying on a plea of ratification to shew that the ratification of the unauthorized conduct was done with a full knowledge of the facts. Where an agreement called for unconditional payments against title, deposit of a payment with a trust company in escrow until title was passed and conveyance executed is not a payment within the meaning of the agreement, and if the escrow holder misappropriates the money while the escrow is still running the loss must fall upon the purchaser.

Hayes v. Pacific Great Eastern, 34 W.L.R. 819, 10 W.W.R. 831.

TERMS OF PAYMENT—CONSTRUCTIVE NOTICE—NOTICE OF MORTGAGE.

Where an agreement for sale contains a provision that payment is to be made in part by the assumption of a loan made to the vendor by a third party, notice of unusual provisions in the mortgage securing that loan ought not to be imputed to the purchaser.

MacDonald v. McLean, 7 W.W.R. 997.

CROP PAYMENT—REFUSAL OF VENDOR TO ACCEPT—RIGHTS OF PURCHASER—SALE OF REJECTED CROPS—APPLICATION TO PURCHASE PRICE.

Where a vendor under a crop payment agreement refuses to accept delivery of his share at the proper place or to give any directions as to its disposal, the purchaser is entitled to sell the crop and pay the proceeds into a bank with notification to the vendor and cannot be regarded as in default under the agreement. Strict compliance with the terms of a cancellation clause is a condition precedent to effective exercise of the right of cancellation. [Banton v. March, 16 W.L.R. 337, followed.]

Todd v. Lundell, 6 W.W.R. 1197.

SALE OF LAND—CONTRACT—OFFER OF VENDOR ON RECEIVING CERTAIN PAYMENT AND QUIT CLAIM TO RELEASE PURCHASER FROM PAYMENT—TIME LIMIT—ACCEPTANCE OF OFFER BY LETTER—PAYMENT NOT MADE WITHIN TIME LIMIT—PURCHASER NOT ENTITLED TO RELEASE—OPTION—STRICT CONSTRUCTION OF CONDITIONS—TIME OF ESSENCE.

As the purchaser desired to be released from payment under an agreement of sale of land, the vendor on May 14, wrote S., the purchaser's managing director, offering to accept $1,900, together with a quit claim and for that consideration to release the purchaser from all liability "this offer to hold good until June 15, without further notice." On May 29, S. wrote the vendor accepting the offer. Held that the payment of $1,900 and giving of a quit-claim deed before June 15, was a condition precedent to right of the purchaser to release. The

vendor's proposal was an option and therefore the conditions imposed should be strictly construed and time was of the essence.

Fre.nold Investment Co. v. Westland, [1919] 2 W.W.R. 235, affirming [1918] 3 W. W.R. 312.

REFUSAL TO CONTINUE PAYMENTS—MISAPPLICATION BY VENDOR AS TO PAYMENT OF TAXES—ACCELERATION CLAUSE.

By an agreement in writing the plaintiff agreed to sell and the defendant agreed to buy certain land which the plaintiff had previously agreed to sell to another person. Some payments had been made by the first purchaser, and the new agreement was made with his assent, the expressed consideration being the balance unpaid of the original purchase price. The defendant agreed to pay taxes from the date of the agreement. The purchase money was payable in small instalments, and after several instalments had been paid the plaintiff demanded from the defendant a sum for taxes, which the defendant paid. Subsequently he ascertained that the taxes were due in respect of a period prior to the date of his purchase, and he demanded payment or credit, and on the plaintiff refusing either the defendant declined to pay any further instalments of purchase money, and this action was brought for the whole unpaid balance, the agreement containing the usual acceleration clause. Held, that both parties were in the wrong, the defendant clearly not being liable for the taxes in question, but that the wrongful casting of liability upon him in this respect did not justify him in refusing to make the payments in accordance with his agreement. [Mersey Steel & Iron Co. v. Naylor, 9 A.C. 434, applied.] Judgment was therefore given for the plaintiff for payment of the purchase money and for sale in default of payment, and for the defendant for repayment of the taxes; no order being made as to costs.

Paterson v. MacNeil, 30 W.L.R. 524.

ACTION BY VENDOR FOR BALANCE OF PURCHASE-MONEY—PLAINTIFF NOT REGISTERED OWNER.

McLorg v. Mersman, 25 W.L.R. 877, 5 W.W.R. 407.

CONDITIONS AS TO PAYMENT—SUBSTITUTION.

A stipulation in a deed of sale of an immovable subject to substitution, that a part of the price bearing interest will only be payable when the vendor has caused the substitution to disappear and the undertaking by the vendor to cause it to disappear as soon as the appelé becomes of age, does not make the sale a contract under suspensive conditions. The purchaser cannot take advantage of the above agreement in order to refuse to pay to the vendor the interest upon the price of sale.

Morin v. Lebel, 48 Que. S.C. 526.

AGREEMENT BY JOINT PURCHASERS OF LAND TO EACH PAY HALF PURCHASE PRICE—REFUSAL OF ONE PARTY TO PAY—REPUDIATION BY OTHER PARTY—ACTION AGAINST FIRST PARTY BY ENCUMBRANCES—STAY OF ACTION TO PERMIT PRESENT ACTION AGAINST REPUDIATING PARTY.

Thom v. McAra, 32 W.L.R. 869.

EXCHANGE OF LANDS—RETENTION OF MONEY TO PAY OFF MORTGAGES—RIGHT OF COVENANTOR TO BE INDEMNIFIED AGAINST OBLIGATIONS.

Campbell v. Douglas, 8 O.W.N. 501, 9 O.W.N. 148.

DEFAULT IN PAYMENT OF PURCHASE MONEY—FORFEITURE OF MONEYS PAID—CONSENT JUDGMENT—TERMS—COSTS.

O'Hearn v. Friedman, 9 O.W.N. 218, 381.

ASSIGNMENT BY VENDOR OF BALANCE OF PURCHASE MONEY—ACTION BY PURCHASER AGAINST ASSIGNEE TO RECOVER PAYMENTS MADE BECAUSE VENDOR UNABLE TO CONVEY—VENDOR'S INTEREST IN LAND NOT CONVEYED TO ASSIGNEE.

Trowern v. Dominion Permanent Loan Co., 10 O.W.N. 320.

CONTRACT—CONVEYANCE OF LAND TO DEFENDANT—SECURITY FOR MONEYS ADVANCED—BINDING AGREEMENT TO CONVEY—TENDER OF AMOUNT OF ADVANCES—INTEREST—COSTS—COUNTERCLAIM.

Robinett v. Marentette, 6 O.W.N. 606.

RESTRICTIONS AS TO USE—POSSESSION TAKEN BY PURCHASER—DEFAULT IN PAYMENT OF PURCHASE-MONEY—INJUNCTION AGAINST REMOVAL OF GRAVEL—FORFEITURE—RELIEF AGAINST—TERMS—RESTRICTION OF EXCAVATION—DECLARATION—PAYMENT OF PURCHASE-MONEY—COSTS.

Heward v. Lynch, 6 O.W.N. 388.

AGREEMENT FOR SALE OF LAND—MORTGAGE FOR PART OF PURCHASE-MONEY—ORAL BARGAIN—TERM OF MORTGAGE—EVIDENCE—FINDING OF FACT OR TRIAL JUDGE—SPECIFIC PERFORMANCE.

Lafontaine v. Brisson, 5 O.W.N. 858.

DEFAULT OF PURCHASER—TIME OF ESSENCE—WAIVER—RECOGNITION OF CONTRACT AS SUBSISTING.

Dahl v. St. Pierre, 5 O.W.N. 230.

DEDUCTIONS.

When an action is taken for the recovery of an annual instalment of $100, due on the sale of an immoveable, which was payable $50 in money and $50 in work, the plaintiff must allege and prove that he offered some work to the defendant or that the latter was put in default with respect to the same, otherwise the prothonotary cannot give judgment for that amount.

Burns v. Cousineau, 14 Que. P.R. 389.

TIME—TENDER OF AMOUNT.

One who agrees to purchase property on condition that the contract shall be executed before a notary within a fixed time is not obliged to sign the deed of sale after such a date. When the price, or part of it, is pay-

able cash down, the purchaser should make a legal tender of the sum due before he can compel the vendor to sign the deed of sale; he should also deposit the amount in court with his action. A party to a contract cannot claim performance of the other party's obligations, unless he himself has first fulfilled his own.

Charlebois v. Emond, 40 Que. S.C. 256.

TENDER—DELAY—CONDITIONAL JUDGMENT.

In a bilateral contract, the carrying out of the obligations by each of the parties should be concurrent. So a purchaser of real property, before bringing an action for delivery and execution of deed, should, within the time agreed upon, make a legal tender of the price or of the part of the price of sale which could be demanded, and deposit the money in court with his action. Courts cannot supply such want of tender and deposit by decreeing, as a condition of the judgment and delivery of the property, that the purchaser should pay what is due on the price of sale within a delay fixed.

Desjardins v. Bélanger, 54 Que. S.C. 77.

FORFEITURE CLAUSE.

A clause in a deed of sale providing that "if the purchaser or his representatives make default in the first or any payment of the day for payment or within 60 days after and likewise the payments of interest each year, the sale shall be cancelled of right in favour of the vendor, who shall have the right to re-enter into the possession and the ownership of the property above sold, without any formal demand, demand of payment or other formality of law, and without being bound to reimburse the purchaser any sum for money received on account and for improvements made upon the said property," only admits that the agreement shall be automatically cancelled by the single omission of the purchaser to make one of the payments agreed on; the vendor must signify to the purchaser his wish to take advantage of the provision for cancellation.

Perreault v. Foncière Victoriaville, 54 Que. S.C. 249.

PACTE COMMISSOIRE—DEFAULT OF PAYMENT.

A clause in a deed of sale, which stipulates "that on default of the purchaser making any payment within 60 days of the date when it becomes due, the sale shall become void and of no effect, without the vendor being required to make restitution of any money previously paid," only constitutes an ordinary pacte commissoire stipulated in favour of the vendor; and the purchaser who is behind in his payments cannot take advantage of it. A clause in an act of sale containing a pacte commissoire, cannot be explained by witnesses.

Mountain Sights v. Dagenais, 53 Que. S. C. 372.

CUSTOM—CHEQUE—ERROR.

Where the custom followed between vendor and purchaser, as to the monthly payments due by the latter, was that about the beginning of each month, an unaccepted cheque was mailed to the vendor and accepted by him as payment, the vendor cannot, after some trouble has arisen between them, receive cheques, keep them in his possession, and, afterwards, deny having received them as payment. A small error in the amount of a cheque given in payment of a debt, resulting from the common error of the creditor and the debtor, does not annul the payment and does not constitute the debtor in default to pay.

Paxton v. Walker, 53 Que. S.C. 281.

NOTICE OF SALE—RETENTION OF PRICE—SECURITY—DEFECTIVE TITLE.

Art. 1352 C.C.P. which provides that the notice in the papers should be inserted "15 days at the latest before the sale," does not mean that not more than 15 days should elapse between the publication of the notice and the sale, but it should be understood to mean that the notice itself ought not to be given later than 15 days before the sale, namely, that there should be at least 15 days between the notice and the sale. The purchaser of an immovable, who might be disturbed by a third person because of defects in the title to the property, cannot keep back payment of the price or require the vendor to furnish him with security.

Hudon v. Connolly, 24 Rev. Leg. 23.

ASSIGNMENT OF AGREEMENT—EFFECT.

An agreement of sale and an assignment thereof should be interpreted together, and constitute but one contract, namely, a sale; and where the vendor was not able to give a title to the purchaser, because he had only an option, he cannot sue the purchaser for the price stipulated in the assignment.

Dansereau v. Dubois, 24 Rev. Leg. 66.

TITLE—FRANC ET QUITTE.

In the case of a promise of sale of immovables for $31,000, payable $3,000 cash, $3,000 3 months later, and the balance at various times, the purchaser being entitled to a deed of sale at the time of the second payment, with the clause "franc et quitte," the vendor having to furnish all his title deeds and a certificate of search, the purchaser cannot be compelled to pay the last mentioned $3,000 before the vendor has furnished him with his title deeds and a certificate of the registrar.

Ross v. Amiot, 24 Rev. Leg. 281.

SALE OF LAND — AGREEMENT — CONSTRUCTION—INSTALMENT PAYMENTS—INSOLVENCY OF VENDEE—"DUE"—EXTRINSIC EVIDENCE.

D'Hart v. McDermaid, 9 E.L.R. 183.

AGENT FOR SALE OF LAND—PAYMENT OF PURCHASE MONEY TO AGENT—RATIFICATION BY VENDOR — MISAPPROPRIATION BY AGENT.

Hendry v. Wismer, 18 O.W.R. 350.

ACTION FOR PURCHASE-MONEY—PLEADING—NONSUIT—SETTING ASIDE ON APPEAL—TERMS—COSTS.

Judgment of nonsuit entered by Macdon-

ald, J., 14 W.L.R. 172, set aside on terms by the Court of Appeal.

McPherson v. Edwards, 16 W.L.R. 648.

(§ I B—7)—Deduction from purchase money for deficiency in quantity—Description "more or less"—Absence of fraud.

Hunter v. Kerr, 7 D.L.R. 829, 21 W.L.R. 823.

Computation.

On an election by a purchaser to accept what a vendor, who has the fee to a portion only and a limited interest in the remainder of land he has contracted to sell, can actually convey, the amount to be abated from the purchase price is the difference in value based on the proportionate part of the purchase money attributable to what the vendor is able to convey.

Ontario Asphalt Block Co. v. Montreuil, 15 D.L.R. 703, 29 O.L.R. 534, varying 12 D.L.R. 223.

Quantity—False representation.

A purchaser of land who is induced to enter into the contract by the false representation of the vendor that the lot in question has a certain depth, is not bound to exercise diligence to detect a discrepancy in the depth between the contract of purchase and the deed, but on discovering the fraud he is entitled to demand the depth called for in the contract or damages for the breach of the party in question has passed to an innocent third party.

Wishart v. Bond, 10 D.L.R. 776, 4 O.W.N. 931, 24 O.W.R. 199.

Quantity—Survey.

A printed stipulation in a contract for the sale of land for a lump sum, that the vendor shall not be obliged to produce any abstract of title or any title deeds or evidence of title or survey except such as he may have in his own possession, does not raise a presumption that the parties intended a survey to be made before closing, and, in the event of deficiency in acreage, to abate the purchase price. Where an intending purchaser of land under an agreement containing an innocent misrepresentation as to the area of the land, assigns his interest in the agreement without knowledge of the misrepresentation, merely turning over what he had acquired the right to purchase, and using ipsissima verba of his own contract, he is not liable to make an abatement of purchase money for the deficiency.

Re Paterson and Canadian Explosives, 11 D.L.R. 122, 4 O.W.N. 1175, 24 O.W.R. 486.

Where a right of redemption in house property was sold under a deed of sale describing the property by its boundaries and as having a frontage of 45 feet and further describing the property as being the same as is actually enclosed and possessed by the vendor, a deficiency of 7 feet in the frontage will not give rise to a claim for diminution of price or annulment of the contract if the purchaser was not deceived or misled either as to the value or as to the extent of the property to which the right of redemption applied, in view of the fact that the property had been sold en bloc and that the entire frontage was taken up by the buildings thereon.

Martin v. Lussier, 2 D.L.R. 584, 41 Que. S.C. 412.

Error in description as to acreage — Reduction of price — Art. 1501, Que. C.C.

Where rural real property is described in the contract of sale as "Lot situated in the parish . . . containing about 4 arpents of frontage by about 22 arpents in depth, being nos. 13b, 13c, 13d and 14a, according to the registered survey," the purchaser, to whom delivery is made of property of the acreage agreed upon (but composed of the three last lots of the registered survey, the first lot having been inserted in the description by mistake), cannot use this pretext to claim a reduction in price; Art. 1501, C.C. (Que.) does not apply.

Gendron v. Beaulieu, 45 Que. S.C. 417.

Gross misstatements by vendor — Relied on by purchaser — Abatement in price.

Chapman v. Wade, 20 O.W.R. 680.

Deposit of purchase price pending title — Interest on purchase price.

Quinlan v. O'Connell, 4 S.L.R. 61, 16 W.L.R. 238.

C. Defective or unmarketable title.

Vendor's right to enforce agreement after removing caveat against title, see Specific Performance, I E—35.

Sufficiency of title, Vendor and Purchasers Act, see Deeds, II B—25.

Vendors and Purchasers Act, title, "heirs and assigns forever," fee simple, see Deeds, II E—50.

Title free from all encumbrances, reservations, caveat, see Land Titles, V—50.

Presumption of ownership from possession, see Taxes, I E—48.

Covenant to convey as conferring no ownership, see Insurance, III E—80.

(§ I C—10)—Inability to make title — Absence of fraud.

Where upon an agreement for the purchase and sale of land, if the vendor is unable to make title to the land which formed the subject-matter of the contract the purchaser is not entitled to damages for the loss of his bargain. [Bain v. Fothergill, L.R. 7 H.L. 158, followed.]

Meighen v. Couch, 9 D.L.R. 829, 23 Man. L.R. 117, 23 W.L.R. 523, 4 W.W.R. 64.

Action for purchase-price — Abstract of title not delivered — No demand — Covenant to convey "on" payment of price — Dependent or independent covenants.

Mayberry v. Williams, 3 S.L.R. 350, 15 W.L.R. 553.

A vendee in a contract for the sale of lands who does not promptly repudiate the agreement because of the vendor's failure to deliver an abstract of title, or of the delivery of one that is unsatisfactory, will be deemed to have accepted such title as his vendor actually had.

McIlvenna v. Goss, 3 D.L.R. 690, 21 W. L.R. 180, 2 W.W.R. 285. [See also 10 D.L.R. 837, 22 W.L.R. 955.]

DOUBTFUL TITLE — CONSTRUCTION OF WILL — SUMMARY APPLICATION.

Where the vendee of land, under a contract for the sale thereof, raises a question of the doubtfulness of the vendor's title by reason of testamentary language in a will in the vendor's chain of title, the proper practice is for the matter of construction to be brought up on originating summons with all parties before the court, and this may be done pending a summary application under the Vendors and Purchasers Act (Ont.) for an opinion on some point arising out of or connected with the contract.

Cameron v. Hull, 9 D.L.R. 843, 4 O.W.N. 581, 23 O.W.R. 736.

REGISTRY OF AUTHORITY TO AGENT TO SELL — CLOUD ON TITLE.

Where an instrument executed by the owner of a parcel of land giving an agent authority to sell the same is on record (whether properly or not) at the time an executory contract for the sale of land is made, it constitutes for a year at least (s. 75 of the Ontario Registry Act, 10 Edw. VII. c. 60) a cloud upon the vendor's title and a release or discharge thereof must be procured and registered by and at the expense of the vendor before he can compel the purchaser to take title. [Ontario Industrial Loan & Investment Co. v. Lindsey, 3 O.R. 66, 4 O.R. 473; Baker v. Trusts & Guarantee Co., 29 O.R. 456, applied.]

Re Rosenberg and Bochler, 10 D.L.R. 422, 4 O.W.N. 757, 24 O.W.R. 59.

RIGHTS AND LIABILITIES OF PARTIES — MISTAKE.

A purchaser of real estate who accepts the title thereto through a misapprehension of law as to its validity, is afforded no ground of relief in consequence. [Smith v. Bonnisteel, 13 Gr. (Ont.) 29, followed.]

Nelson v. Charleson, 15 D.L.R. 660, 19 B.C.R. 100, 26 W.L.R. 865, 5 W.W.R. 995.

MAKING TITLE — TRANSFER OF TITLE TO UNREGISTERED LANDS.

Title to land in British Columbia which has never been registered under the Land Registry Act (B.C.) may be transferred by conveyance, registration under that Act not being obligatory; and a purchaser of such unregistered land cannot insist upon the vendor placing it under the Land Registry Act if the agreement does not so stipulate.

Thompson v. McDonald, 17 D.L.R. 487, 20 B.C.R. 223, 28 W.L.R. 205.

TORRENS SYSTEM — VENDOR'S IMPLIED OBLIGATION — WHAT HE MUST PRODUCE.

On an open contract for sale and purchase of land in Alberta it is an implied term that the vendor is bound, when the time for shewing title has come, to produce on request of the purchaser a registrar's abstract and general certificate, and, in case the registrar's abstract does not shew a sufficient title, he must produce also a written statement shewing how the apparent defects are met. A good title is shewn if, although the vendor is not in fact the registered owner, he is entitled to compel a transfer to him: it is good although subject to encumbrances, even though exceeding the purchase price, provided the encumbrancer is compellable to take his money by the time a good title is to be proved.

Goodchild v. Bethel, 19 D.L.R. 161, 8 A.L.R. 98, 30 W.L.R. 280, 7 W.W.R. 832.

RESCISSION OF CONTRACT — DAMAGES — COSTS OF INVESTIGATING TITLE.

An order made under the Vendors and Purchasers Act (Ont.), declaring that the title to the land in question was doubtful and not such as the purchaser was bound to accept is not subject to recall or modification until passed and entered, if it has been acted upon or if the parties have changed their position on account of it, and such order in such contingency will be res judicata between the parties, although the formal order was not issued, in support of the purchaser's action to rescind the agreement; but, except as to the giving of any damages to which the purchaser may have been entitled in addition to the costs of investigating the title, it was competent for the purchaser to have sought in the "vendor and purchaser" proceeding under the Act, a return of the money paid and interest thereon and the costs of investigating the title.

McNiven v. Pigott, 19 D.L.R. 846, 31 O. L.R. 365.

TITLE — OBJECTIONS TO — TAKING POSSESSION — WAIVER — SUBMITTING QUESTIONS OF TITLE TO COURT.

Taking possession is no waiver of the right to object to a defective title where the contract provided for giving possession prior to the time within which the vendor was to furnish a good title. A vendor's claim that the purchaser had accepted the title is waived by the vendor submitting the question whether the vendor had made out a good title to the decision of the court under the Vendors and Purchasers' Act (Ont.).

McNiven v. Pigott, 19 D.L.R. 846, 31 O. L.R. 365.

ADVERSE CLAIMS FOR TAXES—ABSENCE OF FRAUD — EXECUTED CONTRACT—REMEDIES, HOW LIMITED.

Where everything has been done that was necessary to vest the title in the purchaser of an outstanding interest in land already registered in his name and the contract has become an executed one, the purchaser can-

not, on the ground of adverse claims for taxes or otherwise, recover money which has been paid, but must rely on the covenants for title; in the absence of covenants or agreements of that nature he is without remedy except in case of fraud.

Broder v. Glenn, 20 D.L.R. 106, 7 S.L.R. 122, 29 W.L.R. 368, 7 W.W.R. 71.

TRANSFER THROUGH ASSIGNEE FOR CREDITORS.

A purchaser of land, under an executory contract for the sale thereof is not entitled to reject the title on the ground that the creditors of one of the mesne grantors, who had made an assignment to a trustee for the benefit of his creditors, did not join with the grantor in the deed in which the trustee himself was the grantee, where it is not made to appear that the trustee in question, who also executed the deed of assignment, was a creditor or that any knowledge of the deed was communicated to the creditors or that they assented to it, and thereby made it irrevocable as regards the trust for creditors.

Re Snell and Dyment, 10 D.L.R. 364, 4 O.W.N. 759, 24 O.W.R. 64.

REGISTERED AGREEMENT — PROBABILITY OF LITIGATION—DOUBTFUL TITLE.

Re Pigott and Kern, 12 D.L.R. 838, 4 O.W.N. 1580, 24 O.W.R. 863.

A finding by a master or referee that a good title can be made to land upon certain things in the nature of mere conveyancing being done, is not a conditional finding or a finding against the title but a mere finding as to the conveyancing necessary to perfect the good title shewn to be in the vendor.

Leckie v. Marshall, 4 D.L.R. 94.

PETITION UNDER STATUTE—TITLE.

Re Heward and Steinberg, 6 D.L.R. 860, 4 O.W.N. 133.

Under an agreement for sale of Saskatchewan lands, providing for a transfer under the Real Property Act (Sask.) or for a deed without covenants other than as against encumbrances and further providing that the purchaser "accepts the title of the vendor," the purchaser is not entitled to compel the vendor to free the property from a caveat, for which the vendor was not responsible, filed against the lands by third parties, claiming to set aside the prior transfer to the party from whom the vendor had purchased.

Cole v. Cross, 1 D.L.R. 127, 22 Man. L.R. 1, 19 W.L.R. 780, 1 W.W.R. 458.

Where land is devised to the testator's widow for life, and then to the testator's sons living at the date of the death of the widow, but if during her life any sons shall die leaving children, the children are to take the share their parent would have taken if he had lived, the interest of such of the sons as may be alive at the death of their mother does not vest until such death, and the executors, widow and sons of the testator cannot make title to a purchaser during the lifetime of the widow.

Re Lane and Beacham, 7 D.L.R. 311, 4 O.W.N. 243, 23 O.W.R. 250.

WARRANTY OF TITLE—COVENANT— BREACH.

The limited statutory covenant of a right to convey (Real Property Conveyance Act, R.S.B.C. 1911, c. 47), does not constitute a warranty of title; only that the vendor has done no act to derogate from his title. If he had no title whatever, there is no breach of the covenant by failure to give one. [Thackeray v. Wood, 6 B. & S. 766, followed.]

Amar Singh v. Mitchell, 30 D.L.R. 719, 23 B.C.R. 249, [1917] 1 W.W.R. 201.

WANT OF TITLE—LIABILITY OF AGENT.

Campbell v. Rogers, 31 D.L.R. 244.

REPUDIATION BY PURCHASER—ESSENCE OF TIME.

If the vendor in a contract for the sale of land has no title in himself to the land sold and is not in a position to compel a conveyance of it from the registered owner, the purchaser may (as soon as he becomes aware of that fact) repudiate the contract, and he does not need to give the vendor time to secure title. [Bannerman v. Green, 1 S.L.R. 394; Bellamy v. Debenham, [1891] 1 Ch. 412; Krom v. Kaiser, 21 D.L.R. 700, applied.] If the vendor is in a position to compel a conveyance to himself and time is not of the essence of the contract the purchaser, on paying his last instalment of purchase-money, must give him a reasonable time to obtain the necessary conveyance.

Gunne v. Consolidated Land & Mortgage Co., 28 D.L.R. 258, 9 S.L.R. 94, 33 W.L.R. 716, 9 W.W.R. 1185.

EFFECT OF POSSESSION.

By taking possession and exercising ownership over property the purchaser waives any objection he may have to the title thereto; a mere imperfection of title, capable of being perfected, as distinguished from a total want of title, does not give the purchaser the right to repudiate the contract.

Rogerson v. Cosh, 37 D.L.R. 694, 24 B.C.R. 367, [1917] 3 W.W.R. 911.

POSSESSION—RESERVATION OF EASEMENT—"MODERN DESCRIPTION."

A break in the chain of title is no defect, if there is a sufficient possessory title, and no adverse rights are asserted; the reservation of an easement or right of way ceases to be a cloud on the title by a merger or union of the dominant and servient tenement; a vague description, as that used in previous deeds, is merely a defect in the form of conveyance, and the purchaser has merely the right to demand a "modern description."

Blackadar v. Hart, 35 D.L.R. 489, 51 N.S.R. 419.

WANT OF TITLE TO MINERALS.

Absence of title in the vendor to the mines and minerals in land entitles the purchaser to a rescission of the agreement of sale.

Universal Land Security Co. v. Jackson, 33 D.L.R. 764, 11 A.L.R. 483, [1917] 1 W.W.R. 1352.

TENANT IN TAIL—ENLARGEMENT OF ESTATE —MORTGAGE — REGISTRATION—BAR OF ENTAIL—ACT RESPECTING ASSURANCES OF ESTATES TAIL, R.S.O. 1887, c. 103, s. 9.

Re Brown and Kellar, 11 O.W.N. 401.

TITLE UNDER WILL — LIFE ESTATE—DIRECTION TO SELL—DISTRIBUTION OF PROCEEDS—VESTED INTERESTS — EXECUTOR —IMPLIED POWER OF SALE — CONVEYANCES—PARTIES TO.

Re Doak and Freeman, 12 O.W.N. 43.

RIGHT TO GOOD TITLE BEFORE TAKING POSSESSION.

The purchaser is not bound to take possession until a good title has been shewn but may hold the vendor liable for his failure to take the same care that a prudent owner would take of his own property until the title has been completed. [Foster v. Deacon, 3 Madd. 394; Royal Bristol v. Bomash, 35 Ch.D. 390, applied.]

Lobel v. Williams, 22 D.L.R. 127, 25 Man. L.R. 161, 7 W.W.R. 1042, 30 W.L.R. 352.

EXPROPRIATION PROCEEDING NO GROUND FOR RESCISSION.

An expropriation of a portion of land which is subject to a contract of sale is not an act of the vendor as affecting his covenant for title, and will not entitle the purchaser to a rescission of the contract on that account. [Reynolds v. Crawford, 12 U.C.Q.B. 168; Payne v. Meller, 6 Ves. 349; Robertson v. Skelton, 12 Beav. 260, applied]

Mauvais v. Tervo, 25 D.L.R. 192, 22 B.C.R. 207, 9 W.W.R. 434, 32 W.L.R. 811.

ACCEPTANCE AND APPROVAL OF TITLE.

In an action by vendor on a contract for sale of land it is only where the purchaser has accepted the title or in his contract has expressly agreed to pay irrespective of the plaintiff having title, that the court will decree payment without the plaintiff having first shewn a good title and thus satisfied the court that he is able to deliver the property if the defendant pays the purchase money; but the vendor is entitled to a decree fixing a time within which defendant must pay under a penalty of his rights under the contract being foreclosed and judicially declared to have ceased. [Hicks v. Laidlaw, 2 D.L.R. 460, 22 Man. L.R. 96, applied.]

Schrader v. Manville, 21 D.L.R. 189, 8 S.L.R. 83, 7 W.W.R. 1376, 30 W.L.R. 528.

LAND IN OTHER PROVINCE—PROOF OF TITLE.

Where an agreement is entered into in the Province of Quebec for the purchase of land in another province and where no satisfactory proof is given of what the law is as to the requisites of good title and proper conveyance in such other province the law of Quebec will prevail.

Babineau v. Railway Centre Park Co., 23 D.L.R. 688, 47 Que. S.C. 161.

TENDER OF DEED — TITLE PAPERS—CERTIFICATE OF SEARCH.

The seller of land may, under Quebec law, take action against the purchaser to recover the price without tendering any deed, but he must shew his title and stand ready to sign a deed when the buyer presents it in proper form. Though the seller of land may appropriately be held to exhibit his deeds and in case of a sale evidenced by deed to hand over such title papers as he actually holds and which relate solely to the land sold, he is under no obligation to have a certificate of search made by the registrar for the satisfaction of the buyer; the latter must himself have the requisite searches made at his own expense. [Banque Ville Marie v. Millar, 22 Que. S.C. 162, criticized.]

Poirier v. Archambault, 23 Que. K.B. 495. [Affirmed in sub nom. Lareau v. Poirier, 25 D.L.R. 266, 51 Can. S.C.R. 637.]

TRANSFER FROM PERSON OTHER THAN VENDOR.

A plaintiff asking for specific performance of a contract for the sale of land cannot force upon an objecting defendant a transfer made by a person other than the one from whom he bought the land.

Gibbs v. Gibson, 9 W.W.R. 190.

EQUITABLE INTEREST UNDER UNREGISTERED TITLE—POSSESSION.

The plaintiff being the owner of all the shares of stock of an incorporated company agreed to sell all the assets of the company to the defendant and the cash payment was made and the shares transferred. The company's title to the lands occupied by it was an unregistered one derived through two unregistered transfers in the hands of the company's solicitor at the time of the sale. The transfers could not be registered as the description referred to and depended on the location of a highway not recognized by the land titles office. In an action for the balance of the purchase price, it was held that the defendant could not resist payment on the ground of breach of a warranty that the company owned the land it occupied, as the company was equitable owner of the lands and in possession with evidence thereof sufficient under the Statute of Frauds.

Turner v. McGavin, 30 W.L.R. 505, 31 W.L.R. 465.

INABILITY TO FURNISH TITLE.

Douglas v. Burlie, 23 D.L.R. 895, 8 W.W.R. 1038, 31 W.L.R. 677.

SALE OF MINING CLAIMS—TERMS OF AGREEMENT — IMPERFECT TITLE — GUARANTY OF TITLE—FAILURE TO MAKE TITLE—RECOVERY OF PURCHASE-MONEY — EVIDENCE—JURISDICTION OF MINING COMMISSIONER—MINING ACT OF ONTARIO, 8 EDW. VII., c. 21, s. 65—PARTIES.

Curry v. Mattair, 8 O.W.N. 148.

AGREEMENT FOR SALE OF LAND — TITLE — APPLICATION UNDER VENDORS AND PURCHASERS ACT—PARTIES.

Re Godson and Casselman, 8 O.W.N. 480.

EXECUTION — CAVEAT UNDER — EXECUTION DEBTOR NOT REGISTERED OWNER — VENDOR AND PURCHASER.

One H. purchased land under agreement of sale from the C.P.R. Co., who were registered owners. Subsequently H. assigned his agreement to S. who died. The executors of S. agreed to sell the land to the plaintiff. At the time of the execution of this agreement the executors were in default in payment of purchase-moneys to the C.P.R. Co., but nevertheless the estate of S. had a substantial interest in the land. The defendant obtained a judgment against the executors of S. under which they issued execution and lodged a caveat against the land covered by the agreement. In course of time the agreements for sale were completed by payment and the title to the land transferred to the plaintiff subject to the defendant's caveat, the certificate of title however having endorsed thereon a memorandum of the defendant's caveat and execution. Held, that the land was bound by the defendant's execution, and that the execution was therefore properly registered against it. [Foss v. Sterling Loan, 8 S.L.R. 289; Weidman v. McClary, 10 S.L.R. 142, distinguished.]

Ruttle v. Rowe, 12 S.L.R. 280, [1919] 2 W.W.R. 706.

INABILITY TO FURNISH TITLE.

Herman v. Blain, 42 D.L.R. 785, 11 S.L.R. 288, [1918] 2 W.W.R. 1014.

POWER OF APPOINTMENT—VALIDITY OF EXECUTION — CONVEYANCING AND LAW OF PROPERTY ACT, S. 24—DISCHARGE OF MORTGAGE MADE TO EXECUTORS—NECESSITY FOR EXECUTION BY ALL—SPECIAL POWER GIVEN TO MAJORITY.

The exercise of a power of appointment of land, where the instrument creating the power does not provide for the manner in which it is to be executed, is not invalid because not made in the manner provided for in s. 24 of the Conveyancing and Law of Property Act, R.S.O. 1914, c. 109. Where a mortgage is made to all of the executors and trustees under a will, there is no power in any less than all of them, who are living, to give a valid discharge of the mortgage, unless some special power has been conferred upon them to do so; where the will confers upon a majority of the executors power to discharge mortgages which under the will they are empowered to take, there is no reason in law why such a mortgage should not be so discharged. Quære, whether one of several living executors could alone give a valid discharge of a mortgage made to their testator. Objections made to the title to land, upon an agreement for sale and purchase, declared invalid.

Re Spellman and Litovitz, 44 O.L.R. 30.

INABILITY OF PURCHASER TO MAKE TITLE TO SMALL PORTION — MATERIALITY — SPECIFIC PERFORMANCE WITH COMPENSATION — APPLICATION OF RULE — COMPENSATION, HOW TO BE FIXED—RESALE BY VENDOR—ATTEMPT TO FORFEIT SALE-DEPOSIT — ACTION BY PURCHASER TO RECOVER—PROVISION IN AGREEMENT FOR RETURN OF DEPOSIT.

The plaintiff agreed to buy from the defendant and the defendant to sell to the plaintiff a dwelling-house with grounds and outbuildings, for $32,000. The plaintiff, upon the execution of the agreement, paid the defendant $3,000 as a sale-deposit. It turned out that the defendant could not make title to one part of the premises sold —a small but material part, as was found. The agreement provided that, on any objection to title being taken which the vendor should be unable or unwilling to remove, the agreement should be null and void and the cash-payment should be returned without interest. There was not on the part of either party, after the defect in title had been discovered, an offer of specific performance with compensation and a submission to an authoritative ascertainment of the proper compensation—and the plaintiff and defendant were wide apart in their conceptions of what a proper sum for compensation would be. Almost immediately after the day fixed for closing the defendant resold the land to a stranger, for $30,000, the contract providing that the vendor should not be called upon to make title to the small part. The plaintiff thereupon sued to recover his $3,000, which the defendant sought to retain:—Held, that the defendant could not rescind the contract and forfeit the sale-deposit when he had not title to the property to be conveyed. Discussion of the equitable doctrine of specific performance with compensation, and review of the authorities. And held, that the defendant could not invoke the equitable doctrine at all, because, by the resale of the land, he had put it out of his power to resort to equity—he could not now give specific performance even with compensation. If the equitable doctrine were applicable, the defendant was not the one to fix compensation; and he never expressed his readiness to submit to specific performance subject to such compensation as might be deemed just. Held, also, that, when the agreement itself provides for what is to happen upon certain events, it alone is to be resorted to; there cannot be any recourse either to law or equity for any other remedy. [Ashton v. Wood, (1857), 3 Jur. N.S. 1164, followed.] And

here, according to the terms of the agreement, in the event which had happened, the cash-payment was to be returned.

Bowes v. Vaux, 43 O.L.R. 521.

AGREEMENT FOR SALE—SUBSEQUENT SALE SUBJECT TO AGREEMENT — DEFECT IN TITLE—APPLICATION FOR JUDGMENT.

The fact that a vendor, after having sold land to S. under an agreement for sale, subsequently, and before final payment was due, sold the land to H., subject to the agreement with S., is not a sufficient ground to support an application by S. for judgment on admissions in an action for rescission.

Solton v. Northern Loan & Mortgage Guarantee Corp., 25 B.C.R. 529.

BOND TO SECURE PAYMENT OF PRICE—CONDITIONS AS TO TITLE.

Colwell v. Neufeld, 48 Can. S.C.R. 506, 1 W.W.R. 779.

CAVEAT—RIGHT OF PURCHASER ON PAYMENT OF LAST INSTALMENT—SPECIFIC PERFORMANCE—DAMAGES.

Under an agreement for sale of land containing the usual clause that the vendor will convey the land on payment of the full purchase money, and a special provision that "the purchaser is to receive a good marketable title," the purchaser is not bound to pay the last instalment of the purchase money if there is an incumbrance in the way of a caveat registered against the vendor's title which the vendor is unable or unwilling to remove; and, if the purchaser is ready and willing to make the payment on the removal of the caveat, the vendor is not entitled to enforce payment until he has removed the caveat. In such a case the purchaser is entitled to counterclaim for specific performance by the removal of the caveat or, if that cannot be secured, damages in lieu of specific performance. Judgment for payment by the purchaser of the amount admitted into court and that proceedings be taken for the removal of the caveat at the expense of the vendor. Further directions reserved till after the termination of proceedings to remove the caveat.

Warren v. Rogers, 24 Man. L.R. 492, 28 W.L.R. 637.

ACCEPTANCE OF TITLE — RESTRICTIONS IN CROWN GRANT UNDISCLOSED.

A purchaser of land from a vendor with authority from the registered owner to sell is not bound by a clause in the agreement for sale to the effect that the purchaser accepts the title of the vendor so as to preclude him from objecting to such title on the grounds that it is subject to a statement in the grant from the Crown that the land is liable to forfeiture upon failure of the grantee to place a settler thereon or to sell the same according to the requirements in that behalf contained in clause 44 of the Dominion Lands Act. [Haedicke v. Lipski's Contract, [1901] 2 Ch. 666, and Bousfield v. Hodges, 33 Beav. 90, followed.]

The case of a purchase from the registered owner, the register disclosing the stipulation was mentioned, but not discussed.

Strickle v. Ruckeman, 7 S.L.R. 371, 7 W.W.R. 970.

RIGHT TO REPUDIATE—ESTOPPEL.

The defendant agreed to sell land to the plaintiff on instalments. Before payment of the last instalment the plaintiff discovered a caveat recorded by one who claimed an interest under a prior agreement from the defendant. In August, 1913, it was agreed that defendant should have 90 days in which to remove the caveat. After a final notice given to the defendant, action was commenced on February 13, 1914, for the rescission of the contract and return of the instalments paid. The caveat was removed on April 27, 1914:—Held, that though the plaintiff had given time for removal of the caveat, he did not lose his right to rescission of the contract and return of sums paid and interest if defendant failed to remove same within a reasonable time or time limited by a notice. Held, also, that such purchase money was a lien on the land.

Ballantyne v. Hettinger, 8 A.L.R. 412, 29 W.L.R. 937, 7 W.W.R. 526.

TITLE — REQUISITIONS — DESCRIPTION IN DEEDS — ADMISSIBILITY OF PAROL EVIDENCE TO IDENTIFY LANDS DESCRIBED WITH LANDS OCCUPIED BY VENDOR, SUBJECT OF AGREEMENT — FINDING UPON EVIDENCE—GOOD PAPER TITLE SHEWN.

Re Brenzel and Rabinovitch, 14 O.W.N. 37, 42 O.L.R. 394.

AGREEMENT TO GIVE CLEAR TITLE—EXISTENCE OF CAVEAT—DUTY OF VENDOR.

An undertaking to give a clear title under the Torrens system is one to give a certificate of title clear of anything in the way of endorsement either of executions, mortgages or caveats, or any other thing that is an encumbrance within the more comprehensive meaning of that term.

C.N.R. Co. v. Peterson, 6 W.W.R. 1194.

AGREEMENT TO SELL LAND BY PERSON HAVING NO TITLE—GOOD TITLE PROCURED FOR PURCHASER—RIGHTS OF PARTIES AS TO PROFITS.

A. agreed to sell to B. land which he did not own and which he had not agreed to purchase from the owner. The price asked by A. and agreed to by B. was simply the owner's price plus A.'s profit. A. subsequently induced the owner, as vendor, to enter into an agreement for the sale of the property to B. who paid directly to A. the difference between the contract price and the owner's price. The agreement between the owner and the purchaser was afterwards cancelled by the owner:—Held, that the money which B. had paid to A. could not be recovered since the latter had obtained for the former all that he had bargained to give him, namely, a good title.

Martin v. Anderson, 29 W.L.R. 568.

SALE OF LAND—NO TITLE IN VENDOR—DAMAGES RECOVERABLE BY PURCHASER—RULE IN BAIN V. FOTHERGILL.

Where vendors by mistake agreed to sell land to which they held no title, the rule in Bain v. Fothergill, L.R. 7 H.L. 158, was applied, the damages recoverable by the purchaser for breach of contract being limited to his expenses incurred; such expenses included fencing done by purchaser before learning of the want of the vendor's title.

Krezul v. Anglo Canadian Lands, [1919] 3 W.W.R. 747.

INABILITY OF VENDOR TO GIVE TITLE WITHOUT CONCURRENCE OF THIRD PERSON—RIGHT OF PURCHASER TO RECOVER MONEYS PAID.

A purchaser under agreement of sale was held entitled to return of moneys paid with interest by reason of vendor to make title without concurrence of a third person which he could not compel.

Metcalfe v. Van Houten, [1919] 2 W.W.R. 410.

ABSENCE OF COAL RIGHTS IN VENDOR—TRANSFER OF PORTION RESERVING COAL—KNOWLEDGE BY PURCHASERS—EXTENT OF WAIVER—SPECIFIC PERFORMANCE WITH COMPENSATION.

Knowledge got by purchasers of land of the absence of coal rights in the vendor from the fact of the reservation of coal in transfers of certain portions of the land to subpurchasers, should be treated only as a specific waiver in regard to such portions and not a waiver generally by the purchasers of their rights to the coal under their agreement of sale. In such case where it is impossible to give rescission because some of the land has passed into the hands of third parties, there should be a decree of specific performance with compensation for the absence of the coal.

Fonciere Franco Belge v. Duggan, [1919] 2 W.W.R. 880.

TACIT AUTHORITY—MORTGAGE—DISCHARGE—RES JUDICATA—THIRD PARTY—C.C. QUE. ART. 1241, 1701.

A stipulation in a deed of sale by which the vendor gives notice to the purchaser of a mortgage covering the land sold, but promises to discharge it, constitutes a tacit authority from the purchaser to the vendor authorizing him to take, in his name, all necessary steps to that end. A judgment obtained by the purchaser of an unfinished house against his vendor to have determined the cost of the necessary work to complete the building on default of the vendor who agreed to do so, and who had given a mortgage on another lot to guarantee the completion of the work, is res judicata as to the value of the work against a third person in possession of the latter piece of land, and the mortgagee has a right to bring an hypothecary action against such third person to recover the amount of the said judgment.

Forget v. Savard, 56 Que. S.C. 91.

RESTRICTIVE COVENANT—RIGHT OF PURCHASER—MEASURE OF DAMAGES.

In an action to recover the balance of the purchase price due upon an agreement for the sale of land, the defence that the plaintiff has no title or had none when the action was begun, is met by evidence that, before action, the owner had agreed to give the plaintiff a transfer, on payment to him of the amount due from the defendant to the plaintiff, and by filing in court a transfer to the defendant to be delivered to the defendant on the fulfilment of the above condition. Where an agreement for the sale of lots in a city block provides that the vendors, when selling the adjoining block, will provide with the purchaser thereof that the lots therein will be made to front in a specified direction, and subsequently to the making of such agreement the plan which includes the adjoining block is cancelled by the owner with the consent of the vendor, but without the consent of knowledge of the purchaser, the latter is entitled to damages, and in assessing such damages it will be assumed that such covenant is incapable of performance and never will be performed. The amount of damages is the difference between the values of the block sold with such a covenant as to the adjoining block and without the covenant.

Queen's Park Corp. v. Levenick, [1918] 1 W.W.R. 549.

LACK OF TITLE TO MINERALS—POSSESSION.

A purchaser under an agreement for the sale of land who has gone into possession thereunder and who seeks to repudiate the agreement because of defects of title must give up the possession and all claim to a right thereof under the contract in order to make the repudiation effective. [Innis v. Costello, 33 D.L.R. 602; Universal Land Co. v. Jackson, 33 D.L.R. 764, distinguished; Re Gloag & Miller's Contract, 23 Ch.D. 320, followed.]

Pemberton v. Cole, [1918] 1 W.W.R. 269.

EXCHANGE OF PLAINTIFF'S LAND FOR DEFENDANT'S GOODS — TITLE TO LAND—FAILURE OF DEFENDANT TO PERFORM CONTRACT—DAMAGES—VALUE OF GOODS—CONVEYANCE OF LAND — VENDOR'S LIEN.

Lindsay v. Almas, 12 O.W.N. 49.

OBJECTIONS TO TITLE DEALT WITH UNDER R. 603—REFERENCE AS UNDER QUIETING TITLES ACT.

Re Jenkins and Hutchinson, 12 O.W.N. 201.

OBJECTIONS TO TITLE — MORTGAGE—NOTICE OF SALE UNDER POWER — MISDESCRIPTION OF LAND IN NOTICE—REGISTRATION OF NOTICE—REGISTRY ACT, R.S.O. 1914, C. 124, S. 75 — PROVISION IN MORTGAGE RELIEVING PURCHASER FROM INQUIRY AS TO SUFFICIENCY OF NOTICE —FORECLOSURE PROCEEDINGS—PARTIES HUSBAND OF MORTGAGOR.

Re Winberg and Kettle, 12 O.W.N. 327.

VENDOR'S ABILITY TO SHEW TITLE—SPECIFIC PERFORMANCE — RESCISSION — RETURN OF MONEYS PAID—REFERENCE—COSTS.

Miller v. Young, 12 O.W.N. 382.

OBJECTION TO TITLE—POWER OF LIQUIDATOR OF INCORPORATED COMPANY TO CONVEY —PROOFS OF AUTHORITY—SUFFICIENCY —DECLARATION UNDER VENDORS AND PURCHASERS ACT.

Re Soper and Ackerman, 13 O.W.N. 278.

SALE OF ANOTHER'S PROPERTY — RAILWAY SIDING.

In a sale of land which included a railway siding constructed by the vendor upon the land of the C.P.R. Co., the vendor is considered as having conveyed all that belonged to him, and the purchaser should know that in law the vendor had not acquired and could not sell any part of the railway.

Deschateletes v. Maillé, 26 Que. K.B. 547.

EVIDENCE—MISTAKE IN DESCRIPTION—RECTIFICATION OF AGREEMENT.

Pacaud v. Lebrecque, 14 O.W.N. 318.

OBJECTION TO TITLE — MISTAKE IN DEED OF CONVEYANCE — GRANTEE, PARTY OF SECOND PART, DESCRIBED IN GRANT AS PARTY OF FIRST PART AND IN HABENDUM AS PARTY OF THIRD PART—APPLICATION UNDER VENDORS AND PURCHASERS ACT.]

Re Minty and Blackburn, 17 O.W.N. 38.

OBJECTION TO TITLE—COVENANT IN CONVEYANCE TO VENDORS—BUILDING RESTRICTION—INFRINGEMENT—RIGHTS OF OTHER PURCHASERS — NO GENERAL BUILDING SCHEME.

Re Seaman and Ward, 17 O.W.N. 8.

OBJECTIONS TO TITLE — CONVEYANCE MADE TO PERSON AS "TRUSTEE"—NATURE OF TRUST AND POWERS OF TRUSTEE NOT INDICATED—RIGHT OF PERSON TO SELL AND CONVEY—EVIDENCE—AFFIDAVIT OF SOLICITOR — INSUFFICIENCY — LAND SUBJECT TO EASEMENT—RIGHT TO PLACE POLES AND WIRES THEREON—VALIDITY OF OBJECTIONS TO TITLE.

Re Thompson and Beer, 17 O.W.N. 4.

OBJECTION TO TITLE—DISCHARGE OF MORTGAGE — EFFECT OF — MISTAKE — PROCEEDINGS IN FORECLOSURE ACTION.

Re Hodgkiss and Murray, 16 O.W.N. 385.

AGREEMENT FOR SALE OF LAND — ASSIGNMENT OF ANOTHER AGREEMENT — EXCHANGE — MISREPRESENTATION AS TO VALUE OF SECURITY—FRAUD—FINDING OF TRIAL JUDGE—RIGHT TO RESCIND— INABILITY TO MAKE RESTITUTION IN INTEGRUM—ESTOPPEL—JUDGMENT AND FINAL ORDER OF FORECLOSURE IN FOREIGN ACTION—BAR TO PRESENT ACTION —DELAY TO ALLOW OF PROCEEDINGS TO SET ASIDE JUDGMENT AND ORDER — LEAVE TO APPLY.

Masson v. Shaw, 16 O.W.N. 343.

TITLE TO LAND—SALE BY MORTGAGEE—EVIDENCE—POSSESSION— RIGHTS OF MORTGAGOR — LIMITATIONS ACT — APPLICATION UNDER VENDORS AND PURCHASERS ACT—COSTS.

Re Russell and Billing, 16 O.W.N. 273.

OBJECTION TO TITLE — DEFAULT OF PURCHASER UNDER PREVIOUS AGREEMENT— POWER OF SALE ON ONE MONTH'S DEFAULT WITHOUT NOTICE—EXERCISE OF, BY NEW SALE—RIGHTS OF FIRST PURCHASER AND HIS ASSIGNEES.

Re Lee and Sanagan, 15 O.W.N. 437.

CONSTRUCTION—LEGAL TITLE NOT IN VENDOR—TIME FOR MAKING CONVEYANCE— "ALL REASONABLE DILIGENCE TO OBTAIN TITLE" — ACTION FOR RETURN OF PURCHASE-MONEY—ABSENCE OF NOTICE TO CONVEY WITHIN CERTAIN TIME — VENDOR NOT IN DEFAULT.

Jermy v. Hodson, 15 O.W.N. 323. [Affirmed, 17 O.W.N. 268.]

DELAY—TIME FOR MAKING TITLE — NOTICE —WAIVER BY SUBSEQUENT TENDER OF CONVEYANCE — UNREASONABLY SHORT TIME— SPECIFIC PERFORMANCE—BUILDING RESTRICTIONS — COVENANT—OBJECTION TO TITLE—WAIVER.

Miller v. Young, 14 O.W.N. 130.

SHERIFF'S DEED — SALE OF EQUITY OF REDEMPTION—EVIDENCE — AGREEMENT TO PAY OFF MORTGAGE—SALE OF PART OF LAND SUBJECT TO MORTGAGE—EVIDENCE —VALIDITY OF SALE AND DEED.

Re Hewitt and Armstrong, 14 O.W.N. 139.

SUBDIVISION OF BLOCK—BUILDING RESTRICTIONS — COVENANT OF GRANTEE — PROTECTION OF LAND RETAINED BY ORIGINAL VENDOR — COVENANT ENFORCEABLE AGAINST PURCHASER FROM COVENANTOR.

Foley v. Lipson, 14 O.W.N. 269.

SALE OF UNDIVIDED INTEREST IN LAND— PROOF OF VENDOR'S TITLE — HIGHWAY SHEWN ON REGISTERED PLAN — RIGHTS OF MUNICIPALITY AND OF PERSONS PURCHASING ACCORDING TO PLAN — APPLICATION UNDER VENDORS AND PURCHASERS ACT.

Re Knowles and Lawrason, 14 O.W.N. 284.

OBJECTIONS TO TITLE — BUILDINGS ENCROACHING ON OTHER LAND — FAILURE TO SHEW EASEMENT — ABATEMENT OF PURCHASE MONEY—APPLICATION UNDER VENDORS AND PURCHASERS ACT—DISMISSAL—COSTS.

Re Davis and Moss, 15 O.W.N. 111.

OBJECTION TO TITLE — BUILDING RESTRICTIONS — APPLICATION UNDER VENDORS AND PURCHASERS ACT — CONFLICTING AFFIDAVITS — DIRECTION FOR TRIAL OF QUESTIONS ARISING UPON ORAL EVIDENCE.

Re Foster and Rutherford, 15 O.W.N. 113.

TITLE—EVIDENCE AS TO HEIRS AND NEXT OF KIN OF DECEASED OWNER — DEATH OF OWNER AND WIFE AND CHILDREN IN SAME ACCIDENT—PRESUMPTION OF SURVIVORSHIP — QUESTION OF FACT — BURDEN OF PROOF — SETTLEMENT WITH NEXT OF KIN OF WIFE — APPLICATION UNDER VENDORS AND PURCHASERS ACT.

Re Barber and Walker, 17 O.W.N. 215.

OBJECTION TO TITLE—CONVEYANCE MADE IN 1888 TO PERSON "IN TRUST"—EVIDENCE OF NATURE AND TERMS OF TRUST AND OF RIGHT OF PERSON TO SELL, REQUIRED BY PURCHASER — ABSENCE OF ACTUAL NOTICE OF ADVERSE RIGHT—CONSTRUCTIVE NOTICE—REGISTRY ACT, SS. 71 (1), 72, 73—PRESUMPTION—LAPSE OF TIME — OBJECTION DECLARED INVALID.

Re McKinley and McCullough, 17 O.W.N. 265.

DELIVERY OF CONVEYANCE — TENANTS IN COMMON — JOINT OWNERS — EXECUTIONS—INCUMBRANCES.

Re Smith and Wilson, 5 O.W.N. 437.

ABSENCE OF TITLE IN VENDOR—VENDOR NOT IN POSITION TO CALL FOR CONVEYANCE AT TIME OF AGREEMENT—REFUSAL OF SPECIFIC PERFORMANCE.

Argue v. Beach, 7 O.W.N. 522.

TITLE—DOUBT AS TO—WILL—CONSTRUCTION —DEVISE—ESTATE TAIL OR FEE SIMPLE SUBJECT TO DEVISE OVER IN EVENT OF DEATH "WITHOUT LEAVING ANY ISSUE" — APPLICATION UNDER VENDORS AND PURCHASERS ACT.

Re Gifford and Wagner, 7 O.W.N. 217.

WRITING EVIDENCING COMPLETED BARGAIN—FINDING OF FACT — INABILITY OF VENDOR TO MAKE TITLE—KNOWLEDGE OF PURCHASER — ABSENCE OF DECEIT — DAMAGES FOR BREACH OF CONTRACT — LIMITATION TO AMOUNT OF EXPENSE INCURRED BY PURCHASER—RECOVERY OF SMALL SUM—COSTS—DISCRETION.

Brett v. Godfrey, 6 O.W.N. 484.

OUTSIDE OF PROVINCE — SPECIFIC PERFORMANCE—TITLE—FAILURE OF VENDORS TO ACQUIRE — JUDGMENT FOR RETURN OF PURCHASE-MONEY—STAY OF EXECUTION TO ENABLE VENDORS TO MAKE TITLE.

Campbell v. Barrett, 6 O.W.N. 360.

OBJECTIONS TO TITLE — TENDER BY VENDOR OF CONVEYANCE—REFUSAL OF PURCHASER TO ACCEPT—TERMINATION OF AGREEMENT UNDER PROVISION THEREFOR—ACTION BY VENDOR FOR SPECIFIC PERFORMANCE OR DAMAGES—DISMISSAL.

Fine v. Creighton, 5 O.W.N. 677.

BINDING OFFER—AFFIRMANCE BY PURCHASER — SPECIFIC PERFORMANCE — REFERENCE AS TO TITLE.

Eisenstein v. Lichman, 5 O.W.N. 887.

SALE UNDER POWER IN MORTGAGE — EVIDENCE OF DEFAULT — SHORT FORMS OF MORTGAGES ACT, R.S.O. 1897, C. 126, SCHEDULE NO. 14 — REQUISITION ON TITLE—VENDORS AND PURCHASERS ACT.

Re Georgian Land & Building Co., and Medland, 5 O.W.N. 859.

ORIGINATING NOTICE UNDER VENDORS AND PURCHASERS ACT—TITLE DERIVED FROM DEVISEE UNDER WILL—CONDITION IN RESTRAINT OF ALIENATION — VALIDITY — DETERMINATION OF — PARTIES—NOTICE TO PERSONS CONCERNED—R. 602.

Re Godson and Casselman, 5 O.W.N. 814.

CONTRACT FOR SALE OF LAND — REQUISITIONS AS TO TITLE—APPLICATION UNDER VENDORS AND PURCHASERS ACT—COSTS.

Re Wilson and Holland, 5 O.W.N. 768.

IMPROVEMENTS—TIMBER—BASIS OF SETTLEMENT—CONVEYANCE UPON PAYMENT OF HALF OF VALUE OF PROPERTY AND RENT CHARGEABLE—COSTS.

Hedge v. Morrow, 6 O.W.N. 224.

TITLE TO LAND — INTESTACY — STEP-CHILDREN OF INTESTATE—VENDORS AND PURCHASERS ACT — QUESTION BETWEEN OWNER AND MORTGAGEE.

Re Bustard and Dunlop, 7 O.W.N. 135.

SALE OF MINING CLAIMS — GUARANTY OF TITLE — FAILURE TO MAKE TITLE—RECOVERY OF PURCHASE-MONEY.

Curry v. Mattair, 7 O.W.N. 465.

AGREEMENT FOR EXCHANGE OF LANDS—MISTAKE AS TO INCUMBRANCE — IMPOSSIBILITY OF CARRYING OUT AGREEMENT—COVENANT—REFUSAL OF SPECIFIC PERFORMANCE.

Gilmour v. Charpentier, 7 O.W.N. 519.

SALE OF LANDS — POSSESSION—RESERVATIONS AND EXCEPTIONS IN ORIGINAL DEED.

Sewargngen v. Hyndman, 18 O.W.R. 157.

RETURN OF PAYMENTS WHEN VENDOR UNABLE TO MAKE TITLE — PAYMENT IN SHARES WHICH AFTERWARDS BECOME WORTHLESS.

Johnson v. Henry, 21 Man. L.R. 347, 17 W.L.R. 327.

VENDOR AND PURCHASERS ACT—MOTION UNDER BY PURCHASER — VENDOR HAD FAILED TO PROVE TITLE.

Re Breckon & Delaney, 20 O.W.R. 516.

ACTION FOR POSSESSION — AGREEMENT TO PURCHASE — FAILURE BY PLAINTIFF TO CONVEY—SALE OF BUILDING.

Wile v. Joudry, 9 E.L.R. 263.

(§ I C—12)—POSSESSORY TITLE—WHAT IS.

A documentary title dating from a quit claim deed made in 1842, the land having been granted in 1784, without any documentary title connecting the original owner with the grantor in the deed of 1872, does not establish a possessory title within the meaning of a contract providing "a title by possession shall not be deemed a satisfactory title unless the purchaser so elects."

Floyd v. Hanson, 24 D.L.R. 320, 48 N. B.R. 339.

(§ I C—13)—COVENANT AGAINST ENCUMBRANCES — TORRENS TITLE — TAXES.

An agreement to convey land by a transfer under the Torrens system (Real Property Act, R.S.M. 1913, c. 171), free from all encumbrances, obligates the vendor to make good for taxes outstanding against the land under the Land Drainage Act, though not discovered until after the transfer has been completed. [Midgley v. Coppock, 4 Ex. D. 309, followed. Review of authorities.]

Freeman v. Calverley, 27 D.L.R. 394, 26 Man. L.R. 330, 34 W.L.R. 514, 10 W.W.R. 567.

MORTGAGE—PROMISE TO DISCHARGE.

The fact that the vendor of property encumbered by an undischarged mortgage has not the legal power to compel the mortgagee to discharge the mortgage before the time fixed for closing the sale does not affect his ability to convey the fee if it can be shewn that he had obtained a promise from the mortgagee to discharge the mortgage at the time of closing, and that promise has not in the meantime been revoked.

Brickles v. Snell, 30 D.L.R. 31, [1916] 2 A.C. 599, [1917] 1 W.W.R. 1059, reversing 20 D.L.R. 209, 49 Can. S.C.R. 360, 12 D.L.R. 753, 28 O.L.R. 358, restored.

ENCUMBRANCE — RESTRICTIVE COVENANT—EXECUTION.

The vendor's inability to convey land free from restrictive covenants, having been unsuccessfully set up and a decree of specific performance having been made, cannot be again raised, but the purchaser cannot be compelled to take the land until the effect of a fi. fa. placed in the sheriff's hands after the agreement of sale was made has been removed.

Robinson v. Moffatt, 31 D.L.R. 490, 37 O.L.R. 52. [See also 25 D.L.R. 462, 35 O.L.R. 9.]

SALE OF LAND FREE FROM ENCUMBRANCE — UNPAID TAXES — DISPUTE AS TO VALIDITY — INDEMNITY.

Where the purchaser of land on learning that claim was made by the municipality for a tax returned by the tax collector as paid but subsequently alleged to have been so returned in error notwithstanding the issue of a tax certificate, stopped payment of a cheque given for the purchase price, and it appeared that the seller had assured him that the land was free from taxes, the latter's action to recover the amount of the cheque should be allowed only upon his indemnifying purchaser from liability for the disputed tax or on deducting a sufficient amount from the purchase money to be retained in court for such purpose until the determination of the validity of the tax claim.

Phillips v. Monteith, 11 D.L.R. 779, 4 O.W.N. 1420, 24 O.W.R. 743.

INCUMBRANCES.

Where a contract of sale of real estate provided as terms of payment a specified sum "cash," and balance on deferred payments with privilege of paying the whole amount off at any time, the last of the deferred payments being intended to correspond with the maturity of an existing mortgage on the property, the fact that the mortgage was not subject to a like stipulation or privilege of advance payment and that in consequence the vendor could not fulfil his contract in respect of such privilege, constitutes a defect in title justifying the purchaser in withholding the payment not only of the intermediate deferred payments under the contract but of the portion stipulated as "cash," until the vendor shall provide an indemnity or equitable adjustment to protect the purchaser from having to pay more than his contract calls for because of the mortgagee's refusal to accept prepayment. [Gamble v. Gummerson, 9 Gr. 199; Cameron v. Carter, 9 O.R. 431; Armstrong v. Anger, 21 O.R. 100, followed.]

Knight v. Cushing, 1 D.L.R. 331, 4 A. L.R. 123, 20 W.L.R. 28.

Under an agreement for the sale of land wherein the vendor covenants to transfer the fee simple upon payment of the purchase price, the purchaser is justified in refusing to pay the balance until the vendor can give satisfactory assurance as to title and as to arrears of taxes. Where the parties are dealing at a distance from the registrar's office, the mere tender on the part of the vendor of an abstract from the land titles office, shewing him to be the registered owner, free from incumbrances, of the lots in question, is not sufficient. The purchaser is entitled to be protected against the risk of having to deal with incumbrances of any nature that might be recorded against the title between the time of delivery of the transfer to him and its recording at the registry office. He has the right to notify the vendor that he will appear at the registry office on the date of payment and will there tender the vendor the price on the vendor depositing with the registrar a proper transfer and the vendor's duplicate certificate of title under the Land Titles Act and on ascertaining from the records that the title is free of all incumbrances.

Auriol v. Alberta Land & Investment

Co., 7 D.L.R. 306, 4 A.L.R. 198, 20 W.L.R. 185, 1 W.W.R. 787.

RESTRICTIVE COVENANT OR EASEMENT — REFERENCE TO PLAN.

A building restriction contained in a registered plan does not operate as a negative covenant or easement enforceable against and amongst all subsequent purchasers of lots described by reference to the plan; to constitute it such there must be a direct provision to that effect in the agreement or conveyance, and the easement must be created in accordance with provisions of the Land Titles Act.

Sumner v. McIntosh, 35 D.L.R. 336, 10 S.L.R. 63, [1917] 1 W.W.R. 1404. [Affirmed in 40 D.L.R. 301, 11 S.L.R. 152, [1918] 2 W.W.R. 293.]

COAL RESERVATION.

An agreement of sale of land, subject only to conditions and reservations in the grant from the Crown, is not enforceable if the coal therein is at the mine without the purchaser's knowledge, the property of a third party, even though the vendor procures and tenders title to the coal with a transfer of the land.

Innis v. Costello, 33 D.L.R. 602, 11 A.L.R. 109, [1917] 1 W.W.R. 1135, reversing 27 D.L.R. 711, 33 W.L.R. 880, 9 W.W.R. 1308.

OBJECTION TO TITLE — INCUMBRANCE — EXECUTION — ABANDONMENT OF CLAIM BY EXECUTION CREDITOR — RECITAL IN ORDER MADE UNDER VENDORS AND PURCHASERS ACT.

Re Bourne and Dunn, 13 O.W.N. 227.

TITLE — INCUMBRANCES — BUILDING RESTRICTIONS — ALTERATION IN CHARACTER OF NEIGHBOURHOOD — EFFETE COVENANT — POSSESSORY TITLE.

Re Montgomery and Miller, 13 O.W.N. 399.

FREE FROM INCUMBRANCES—LEASE.

A purchaser who acquires an immovable free and clear of all privileges and hypothecs is not obliged at his own cost to get rid of the privilege of a lease which appears upon the registrar's certificate as affecting the immovable. He has a right to compel the vendor to procure a radiation of the registration.

Economic Realty v. Montarville Land Co., 26 Que. K.B. 51. [Appeal quashed, 54 Can. S.C.R. 140.]

INSTALMENTS — ACTION TO RECOVER — VENDOR UNABLE TO GIVE CLEAR TITLE.

Hagen v. Ferris, 21 D.L.R. 868, 8 S.L.R. 203, 8 W.W.R. 1039, 31 W.L.R. 661.

FAILURE TO DELIVER GOOD TITLE — CAVEATS — RETURN OF MONEY PAID — ORDERS OF LOCAL MASTER.

Melfort Invest. Co. v. Mackenzie, Mann & Co., 23 D.L.R. 881, 32 W.L.R. 76.

OBJECTION TO TITLE — REGISTRATION OF JUDGMENT — CLOUD ON TITLE — LANDS OF COMPANY IN LIQUIDATION — WINDING-UP ACT, R.S.C. 1906, c. 144, s. 84.

Re Clarkson and Bastedo, 7 O.W.N. 833.

INCUMBRANCE — ORAL AGREEMENT IN RESPECT OF — ONUS — FAILURE OF PROOF — DISCHARGE OF ENCUMBRANCE — PAYMENT OF AMOUNT TO PURCHASER — COUNTERCLAIM — SET-OFF.

Slatky v. Kaufman, 8 O.W.N. 234.

COVENANT AGAINST ENCUMBRANCES.

A clause in a contract of sale, by which a vendor declares that the lots sold are free and clear from all patent and latent servitudes, is only a formal clause which adds nothing to the legal obligations binding on the vendor.

Langlois v. Charpentier, 47 Que. S.C. 97.

ENCUMBRANCE — AGREEMENT OF SALE — RIGHTS OF SUBPURCHASER.

An agreement for the sale of land cannot be enforced by a vendor who himself has merely an equitable interest in the land under a contract of sale from the registered owner; nor can such interest be properly considered an encumbrance so as to entitle him to require the subpurchaser to pay the money into court for the purpose of discharging it; such vendor must be in a position, as a condition precedent to his right for the purchase price, to deliver of himself a valid certificate of title. [Goodchild v. Bethel, 19 D.L.R. 161; Lee v. Sheer, 19 D.L.R. 36; Robinson v. Harris, 21 O.R. 43, distinguished.]

Greene v. Appleton, 25 D.L.R. 333, 9 A.L.R. 36, 8 W.W.R. 867, 31 W.L.R. 548.

SEWERAGE TAX AS ENCUMBRANCE — RIGHT TO DEDUCTION.

A covenant in a deed warranting the property to be free from all encumbrances and that the vendor will pay taxes, local improvements and other assessments due on the property, entitles the purchaser to an allowance of the full amount of a sewerage rate charged against the land, notwithstanding that the sewerage tax is payable in annual instalments and that all instalments were paid to date.

Munroe v. McDonald, 23 D.L.R. 105, 49 N.S.R. 110.

SERVITUDE — RIGHT OF WAY — DUTY OF VENDOR TO DISCLOSE.

It is the duty of a vendor to make known to the purchaser the burdens and servitudes on the immovable sold and his reticence on this matter puts him in bad faith. When a vendor does not make known to his purchaser the existence of a servitude that he has himself created, he is bound by warranty against his personal act whatever may be the nature of this servitude. When a way communicating with the public road over all the length of a lot is apparent, the purchaser is justified in presuming that it was established for the benefit of the lot and not for use of the adjoining lots, even in the case where there is a fence at the end of the way on the side of the adjoining land.

Lemelin v. Demers, 47 Que. S.C. 452.

AGREEMENT FOR SALE — INSTALMENT DUE UNDER — MORTGAGE AGAINST LAND — RIGHTS OF PARTIES.

Preston v. Adilman, 21 D.L.R. 869, 31 W.L.R. 663.

SALE OF LAND — TITLE — INABILITY OF VENDOR TO GIVE TITLE TO COAL — RIGHT OF PURCHASER TO COMPENSATION — WAIVER — EVIDENCE OF.

Where an agreement for the sale of land does not provide for any reservation of the coal thereunder, the purchaser, in the absence of any waiver of his right thereto, is entitled to the coal or its value. [Innis v. Costello, 33 D.L.R. 602, 11 A.L.R. 109; Universal Land Security Co. v. Jackson, 33 D.L.R. 764, 11 A.L.R. 483; Pugh v. Knott, 36 D.L.R. 52, 12 A.L.R. 399, followed.] In order to establish waiver a clear and unequivocal intention of waiver must be shown in the evidence. The defendants, who were purchasers under an agreement for the sale of land, held not to have waived their rights to the coal thereunder and, their vendor being unable to give title to the coal and restitutio in integrum not being possible, were held entitled to compensation, except as to the coal under certain lots already transferred direct to subpurchasers it being held that the purchasers had accepted title thereto.

Crump v. McNeill, 14 A.L.R. 206, [1919] 1 W.W.R. 52.

SALE OF LAND — AGREEMENT FOR — EXISTENCE OF MORTGAGE — WHETHER DEFECT OF TITLE — RIGHT OF VENDOR TO SPECIFIC PERFORMANCE.

The existence of a mortgage against land agreed to be sold is a matter of conveyancing and not of title, and so long as the vendor is in a position to give title when the time for performance arrives, the mortgage does not deprive him of the right to a decree for specific performance.

Crump v. McNeill, 14 A.L.R. 206, [1919] 1 W.W.R. 52.

MORTGAGE—LIS PENDENS.

The existence of a mortgage on land contracted to be sold does not constitute a defect of title such as to give the purchaser the right to repudiate the contract; nor does it prevent the vendor from recovering instalments of the purchase price which have accrued due prior to the discharge of the mortgage, although the vendor may be required to give security for the ultimate conveyance of the lands contracted to be sold free from encumbrances. The filing of a lis pendens in the land registry office does not per se afford a cause of action to a purchaser of the land affected by the lis pendens, who has registered his agreement to purchase before the filing of the lis pendens.

Bostwick v. Coy, 21 B.C.R. 478.

VERBAL CONDITION, ON TRANSFERRING LAND, FOR USE OF LAND BY TRANSFEE — LICENSE MERELY — REVOKED BY CONVEYANCE — "FRAUD" UNDER THE LAND TITLES ACT, 1917, SS. 59, 174, 194.

"Fraud" under ss. 59, 174, 194 of the Land Titles Act, 1917, means actual fraud, i. e., dishonesty of some sort, not what is called constructive or equitable fraud. Semble, knowledge by directors of one company does not necessarily imply knowledge to another company of which they are also directors. A verbal condition by defendant on his transferring land that he was to have the use of the land for farming purposes until the land was required for residential purposes was considered by the court as merely a license which was revoked by a conveyance of the land without reserving the privilege to the licensee and knowledge of such agreement by one subsequently taking a transfer of the land could not be construed as fraud.

Dominion Fire-Brick & Clay Products v. Pollock, [1919] 2 W.W.R. 245.

VENDOR TENDERING TRANSFER TO PURCHASER — EXISTING EASEMENT — EASEMENT NOT NOTED AGAINST TITLE — RIGHT OF PURCHASE TO OBJECT TO TITLE — PURCHASER'S RIGHT TO SPECIFIC PERFORMANCE WITH ABATEMENT.

In pursuance of an agreement plaintiff tendered to defendant a transfer of land demanding payment of the moneys payable on delivery of transfer. Defendant refused payment on account of a certain easement against the land granted by plaintiff to the city of Edmonton for the purpose of a sewer which had been constructed under the land. The city had filed a caveat to protect said easement which however by some inadvertence was not noted on the title to the land in question. Plaintiff brought action against defendant for payment and subsequently obtained registration of transfer of said land to defendant who at the trial was the registered owner free from encumbrance upon the registered title. Held, plaintiff could not compel defendant to accept such title but defendant was entitled to specific performance with an abatement of the purchase-price. The city was joined as defendant (under r. 28) for the purpose of determining the amount of such abatement.

Rowland v. Ransford, [1919] 2 W.W.R. 486, reversing [1919] 1 W.W.R. 773.

INCUMBRANCES — WORKMAN'S LIEN — NOTICE.

An agreement of sale of real estate accompanied by delivery and actual possession, being equivalent to a sale, the notices mentioned in arts. 2013e and 2103, C.C. (Que.) for the keeping in force of a workman's lien are validly given to the party agreeing to purchase. These notices, not being required under pain of nullity, the party thereto entitled may renounce thereto, and the acknowledgment thereof made by him, in a petition to the court, is equiva-

lent thereto. The denunciation of a charge upon real estate sold, made by the vendor coupled with his statement that the same is illegal and under reserve of his right to contest the same, does not relieve him from his obligation to guarantee his purchase.

Lavoie v. Desrosiers, 46 Que. S.C. 89.

ENCUMBRANCES — SERVITUDE NOT APPARENT — PROOF — EXTINCTION OF SERVITUDE — KNOWLEDGE BY PURCHASER AT THE TIME OF SALE — WARRANTY.

A purchaser of real estate who sets up against his vendor, in an action to recover the purchase price, the existence of a servitude not apparent, and fears disturbance in consequence, must establish the existence of the servitude by the production of the title creating the right—a copy certified by the registrar is not authentic, and is not proof. If it appears that the servient land has changed its intended purpose so much since the constitution of the servitude that it can no longer exercise it, it is thereby extinct. The knowledge of the existence of the servitude which the purchaser had at the time of the sale takes away his right to take action against the vendor under arts. 1519, 1535, C.C. (Que.). The registration of the deed creating the right, and mention of it in a certificate of search by the registrar given to the purchaser's notary, are equivalent to a declaration of the servitude which the vendor would have made to him. The vendor, against whom the purchaser sets up the existence of the servitude, has a right of action in warranty against his own vendor. He can, upon production of the purchaser's pleadings exercise the right of formal warranty, and compel his warrantor to intervene and take his part, and suit, or he can exercise the right of simple warranty and move that his warrantor be ordered to indemnify him for the loss which might be caused to him by the judgment to intervene, and, in this case, the rejection of the pleadings and the maintaining of the principal action, thereby puts an end to the action in warranty. But the vendor must not assume that his guarantor (especially after he has entered into litigation with his purchaser, and suit has been instituted) is bound to take his part and suit, and to indemnify him as well. A vendor sued as warrantor is in no way bound by the personal acts of his purchaser.

Legault v. Marcil, 45 Que. S.C. 481.

In a sale of land "with legal warranty" and "free and clear from encumbrances," the vendor is bound to deliver the land free from all debts and mortgages. If at the time of the sale the land is burdened with a hypothec, even prescribed, the vendor is obliged to discharge it at his own expense. If after being put en demeure the vendor does not discharge the hypothec, the purchaser has the right to have it discharged at the expense of the vendor; he may also demand the rescission of the contract of sale.

Ducharme v. Quintal, 49 Que. S.C. 528.

AGREEMENT TO CONVEY LANDS—CONSIDERATION — RECOVERY FOR "MONEY HAD AND RECEIVED" — SALE OR EXCHANGE — DAMAGES.

Webster v. Snider, 45 Can. S.C.R. 296.

SALE BY AUCTION — MORTGAGE PROCEEDINGS — WARRANTY BY AUCTIONEER AS TO TITLE — SUBSEQUENT DISCOVERY OF PRIOR ENCUMBRANCE.

Moritz v. Christopherson, 4 S.L.R. 147, 18 W.L.R. 63.

INABILITY OF VENDOR TO MAKE TITLE — DEPOSIT — RIGHT TO RETURN.

Spencer v. Davidson, 4 S.L.R. 172, 17 W.L.R. 574.

(§ I C—13a)—BUILDING RESTRICTIONS.

One who agrees to purchase land is not obliged to accept a conveyance containing building restrictions, where none were mentioned by the vendor prior to the making of the agreement of sale, and no restrictions were contained in the documents evidencing the agreement.

Coaffee v. Thompson, 5 D.L.R. 9, 21 W.L.R. 905. [Affirmed, 7 D.L.R. 806, 22 W.L.R. 386.]

BUILDING RESTRICTIONS — SPECIFIC PERFORMANCE.

Failure of the vendor to specifically disclose building restrictions under the registered conveyance to him will not constitute an answer to an action for specific performance where the offer to purchase was prepared by the purchaser's agent on his own printed form containing a stipulation that the purchaser "takes the property subject to any covenants that run with the land."

Soboloff v. Reeder, 22 D.L.R. 770, 8 O.W.N. 40.

OBJECTION — BUILDING RESTRICTIONS — RIGHTS OF PERSONS NOT BEFORE THE COURT — APPLICATION UNDER VENDORS AND PURCHASERS ACT.

Re Beatty and Brown, 7 O.W.N. 846.

TITLE—OBJECTION OF PURCHASER—DEED—BUILDING RESTRICTIONS — COVENANTS RUNNING WITH LAND — RELEASE — CONVEYANCE FREE FROM RESTRICTIONS — APPLICATION UNDER VENDORS AND PURCHASERS ACT — EVIDENCE — REFERENCE.

Re Rooke and Smith, 6 O.W.N. 382.

BUILDING RESTRICTION — ERECTION OF BUILDINGS — DISTANCE FROM STREET LINE — RESTRICTION LIMITED TO STREET ON WHICH LOT FRONTS — SPECIFIC PERFORMANCE.

McKerchen v. McCombe, 6 O.W.N. 224.

TITLE TO LAND AGREED TO BE SOLD—BUILDING RESTRICTION — COVENANTS — INTENTION — BUILDING SCHEME — APPLICATION UNDER VENDORS AND PURCHASERS ACT — PROBABILITY OF LITIGATION — TITLE NOT ONE TO BE FORCED ON UNWILLING PURCHASER.

Re Palmer and Reesor, 6 O.W.N. 622.

(§ I C—17)—OBJECTIONS TO TITLE.

An outstanding incumbrance is a mere question of conveyance as distinguished from a question of title, and it is not ordinarily necessary for the purchaser to serve a formal objection to title in regard thereto. [Townsend v. Champernowne, 1 Y. & J. 538, approved.]

Fuller v. Maynard, 5 D.L.R. 520, 3 O.W.N. 1602, 22 O.W.R. 809.

LAPSED AGREEMENT ESTABLISHING HIGHWAY OVER LAND.

An agreement stipulating the establishment of a highway across a piece of land which had been spent by lapse of time, or an action to remove such agreement as forming a cloud upon the title, does not affect the title to the land as to entitle the purchaser to a rescission of the contract of sale where the vendor is otherwise willing and able to make a good title.

McNiven v. Pigott, 22 D.L.R. 141, 33 O.L.R. 78, reversing 19 D.L.R. 846, 31 O.L.R. 365. [Varied in 22 D.L.R. 147.]

OBJECTIONS TO TITLE—TIME FOR PERFECTING—TENDER OF PURCHASE PRICE—SUFFICIENCY OF TENDER.

Krom v. Kaiser, 18 D.L.R. 226, 7 A.L.R. 467, 7 W.W.R. 185.

VENDOR HONESTLY BELIEVING HE HAD TITLE—INABILITY TO OBTAIN AFTER REASONABLE EFFORTS—SPECIFIC PERFORMANCE REFUSED TO VENDOR—MEASURE OF DAMAGES—RULE IN BAIN V. FOTHERGILL 43 L.J. EX. 243.

Besnard v. R.C. Episcopal Church of Saskatchewan, 34 W.L.R. 721, 10 W.W.R. 806.

INABILITY OF VENDOR TO SHEW TITLE—REFUSAL OF PURCHASE TO MAKE LAST PAYMENT UNTIL SHEWN—DEFAULT OF VENDOR FOR YEAR—PURCHASER READY AND ABLE TO PAY—SUBSEQUENT ACTION FOR INTEREST UNSUCCESSFUL.

Clare v. Lawrence, 34 W.L.R. 643.

CLOUD ON TITLE—APPLICATION UNDER VENDORS AND PURCHASERS ACT, R.S.O. 1914, c. 122, s. 4—MORTGAGE—VALIDITY.

Re Pine River L. & P. Co. and Orangeville, 10 O.W.N. 408.

OBJECTION TO TITLE—APPLICATION UNDER VENDORS AND PURCHASERS ACT—TITLE DERIVED UNDER CONVEYANCE MADE IN EXERCISE OF POWER OF SALE IN MORTGAGE — STATUTORY DECLARATIONS — SUFFICIENCY.

Re Brass and Wall, 11 O.W.N. 30.

OBJECTIONS TO TITLE—REFERENCE TO MASTER.

Re Orr and Cash, 5 O.W.N. 195.

OUTSTANDING INTEREST—VENDORS AND PURCHASERS ACT.

Re Mackenzie and Hamilton, 4 O.W.N. 1606, 24 O.W.R. 965.

CONVEYANCE BY TRUSTEE UNDER WILL—REGISTRATION OF WILL—LETTERS PROBATE NOT ISSUED.

Re Tozman and Lax, 5 O.W.N. 51, 25 O.W.R. 49.

POWER OF EXECUTORS TO SELL LAND FOR PAYMENT OF DEBTS—CONTRACT FOR SALE OF LAND BE EXECUTORS.

Re MacKay and Nelson, 4 O.W.N. 1607, 24 O.W.R. 963.

EXECUTORS—IMPLIED POWER OF SALE—REMAINDERMAN JOINING IN CONVEYANCE.

Re Mair and Gough, 25 O.W.R. 219.

RIGHT OF WAY—CONVEYANCE.

Re Barthelmes and Cherry, 5 O.W.N. 27, 24 O.W.R. 979.

CLAUSE IN WILL—TAX TITLE—CONFIRMATION BY STATUTE—PURCHASE BY PERSON ENTITLED TO INCOME FROM LAND FOR LIFE—ACQUISITION OF TITLE IN DEROGATION OF RIGHT OF CESTUI QUE TRUST—SUSPICION OF COLLUSION.

Re McCurdy and Janisse, 11 O.W.N. 67.

OBJECTIONS TO TITLE—POWER OF SALE—NOTICE—SIGNATURE OF MORTGAGEE.

Re Bell and Smith, 10 O.W.N. 414.

VENDOR'S ACTION FOR SPECIFIC PERFORMANCE—ACCEPTANCE OF TITLE—POSSESSION—OBJECTION NOT GOING TO ROOT OF TITLE—LACHES AND ACQUIESCENCE.

Toronto General Trusts Corp. v. Rombough, 10 O.W.N. 192.

FAILURE TO MAKE TITLE—ACTION TO RECOVER DEPOSIT.

Parkes v. Sanderson, 18 O.W.R. 368.

(§ I C—18)—OWNERS OF UNDIVIDED PARCEL—OPTION TO PURCHASE LAND—CONDITIONAL ON OWNER OF UNDIVIDED PART CONFIRMING SAME—ABSENCE OF CONFIRMATION.

Mercer v. M., 7 D.L.R. 860, 2 W.W.R. 167.

SOLICITOR'S ABSTRACT.

Where there is no stipulation, either express or implied, to the contrary, in an agreement for the sale of land held under Torrens title system of registration in British Columbia, upon a certificate of title which is for less than the absolute and indefeasible title, the English rule of law requiring the vendor to furnish a solicitor's abstract of title to the purchaser if demanded, will apply. [Brewer v. Broadword, 22 Ch. D. 105, followed.]

Newberry v. Langan, 8 D.L.R. 845, 47 Can. S.C.R. 114, 23 W.L.R. 93, 3 W.W.R. 426, affirming 2 D.L.R. 298, 17 B.C.R. 881.

D. DEFICIENCY IN QUANTITY.

Description of land, minor encroachment, see Deeds, II C–30; Specific Performance, I E–30; correction of description; see Judgment, I G–55.

(§ I D—20)—Compensation for deficiency.

After a conveyance has been made under a contract of sale of land, damages may be claimed for breach of covenant of title in respect of any portion of the land bargained for but not conveyed, and the grantee is also entitled to rectification; the value of the land not conveyed would be the measure of damages, in addition to any special damage within the contemplation of the parties when the contract was made; loss of profits through delay in registration of title caused by the vendor's negligence is too remote to be recovered as damages on a covenant for good title.

Bagley v. B.C. Southern R. Co., 37 D.L.R. 733, 24 B.C.R. 400.

Discrepancy.

Where a specific lot of land is pointed out by the vendor's agent to the vendee at the time of making the sale and the depth of the lot is measured by the parties and its limit pointed out to the purchaser as fixed by a certain disclosed boundary, the purchaser is entitled to a depth up to that boundary, although the agreement of sale recited that the depth was "about 90 feet more or less" and the actual depth was, as a matter of fact, 91 feet 7 inches; and such right is not waived by the purchaser's relying on the vendor's good faith; and inadvertently accepting a deed conveying only a 75 foot depth.

Wishart v. Bond, 10 D.L.R. 776, 24 O.W.R. 199, 4 O.W.N. 931.

Abatement of price.

Where a person contracts to sell more land than that to which he is able to make a good title, the vendee is entitled to what the vendor actually has, with an abatement of the price in respect of that which cannot be conveyed.

Ontario Asphalt Block Co. v. Montreuil, 12 D.L.R. 223, 29 O.L.R. 534, 24 O.W.R. 838.

Description—Variance between signed contract and conveyancer's endorsement—Effect.

Where in a contract the land sold is described in a certain way and the parties thereto have affixed their signatures to that contract, a subsequent purchaser is justified in relying on the description contained in the contract certified by the signatures of the parties as against a summarized description varying therefrom and unsigned, which had been endorsed by the conveyancer upon the contract.

Munro v. Hoeschen, 20 D.L.R. 485, 7 S.L.R. 265, 29 W.L.R. 545.

Material difference in subject-matter of sale—Right-of-way—Parties not ad idem.

Fesserton v. Wilkinson, 17 D.L.R. 858, 6 O.W.N. 347.

A vendor who acquires immovables under the cadastral system, i.e., where the land dealt with is described by its cadastral numbers, buys the cadastral lots as they appear on the official plan and book of reference, and, should the area indicated in the title deed not correspond with that on the official plan, it is the latter which must prevail: C.C. (Que.) 2168.

Hamel v. Ross, 3 D.L.R. 860.

Mistake as to quantity—Implied warranty—Rescission.

The word "containing 271 acres" following the description of land as a definite part of a defined section, both parties being innocently mistaken as to the acreage which is in fact much less, do not amount to an implied warranty as to the quantity of land sold; after completion of the purchase, rescission will not be granted for deficiency.

Hansen v. Franz, 41 D.L.R. 457, 57 Can. S.C.R. 57, [1918] 2 W.W.R. 40, reversing 36 D.L.R. 349, 12 A.L.R. 406, [1917] 3 W.W.R. 77. Leave to appeal to privy council refused June 19, 1918.

Description—"More or less"—Quantity—Sale en bloc—Parol evidence.

When in a sale of real property the latter is described by its official number, with an indication that it contains 70 arpents "more or less," to be charged the profit or loss of the purchaser, the deed mentioning no definite price, the sale is of a thing certain and determined, en bloc and not by quantity, and if the purchaser has no claim against the vendor if the property contains only 55 arpents. An agreement after the sale, whereby the vendor consented to reduce the price if the property contained less than 70 arpents, cannot be proved by witnesses, and his consent to measure the land does not constitute a commencement of proof in writing.

Themens v. McDuff, 53 Que. S.C. 452.

Abatement.

Jackson v. Irwin, 12 D.L.R. 573, 18 B.C.R. 225 at 228, 24 W.L.R. 947, 4 W.W.R. 1301, reversing 11 D.L.R. 188, 18 B.C.R. 225, 4 W.W.R. 511.

Specific performance—Substantial misdescription—Compensation for deficiency.

Springer v. Anderson, 27 D.L.R. 709, 33 W.L.R. 365, 9 W.W.R. 922, varying 19 D.L.R. 886, 7 W.W.R. 529.

Deduction from purchase price.

In the absence of fraud in respect of a misrepresentation as to the width of a building lot, the purchaser sued for the balance of purchase money and not claiming rescission is entitled to an abatement for deficiency in area where the frontage was in fact only 30 feet while the contract called for a frontage of 33 feet, but the purchaser who has taken possession and made improvements covering the additional 3 feet to which title cannot be made is not entitled to damages by reason thereof in addition to such abatement where the sale was of an entire lot bearing a descriptive number under a registered plan of sub-

division and the true boundary was shewn by the registered plan and by the stakes on the ground.

Hayes v. Goddard, 22 D.L.R. 566, 21 B.C. R. 389, 31 W.L.R. 424.

DEFICIENCY IN ACREAGE—COMPENSATION—PROVISION IN AGREEMENT FOR SALE—MISREPRESENTATION NOT AMOUNTING TO FRAUD.

Fee v. Dorr, 7 O.W.N. 680.

MISTAKE AS TO QUANTITY OF LAND—PARTIES NOT AD IDEM—RETURN OF PURCHASE-MONEY OR SPECIFIC PERFORMANCE WITH ABATEMENT OF PRICE—ELECTION OF VENDOR—COSTS.

Allen v. Crowe, 8 O.W.N. 454.

REPRESENTATION BY VENDOR OF "SUBSTANTIAL CORRECTNESS" OF DESCRIPTION—FAILURE TO SHOW "SUBSTANTIAL CORRECTNESS"—SPECIFIC PERFORMANCE REFUSED.

On an exchange whereby plaintiff sold to defendant land which defendant had not seen, plaintiff represented the "substantial correctness" of certain statements and diagram did not represent an area nearly so great as 25 acres, and also that the statement of there being "some rocks" on the land did not correctly describe the fact that there were a number of large boulders called "haystack rocks" and certain rocky ridges, and held that these were very material variations from the statements made and, plaintiff having failed to show that his representations were substantially correct, his claim for specific performance should be dismissed.

Hollister v. Gehrman, [1919] 1 W.W.R. 369.

AGREEMENT DESCRIBING BOUNDARIES WITHOUT REFERENCE TO LENGTH—OVER-ESTIMATE OF LENGTH BY VENDOR—VENDOR FURNISHING PLAN OF, AND STAKING, THE LAND—PURCHASER BUILDING IMPROVEMENTS BEYOND AREA ACTUALLY DESCRIBED IN AGREEMENT—FAULT OF VENDOR—PURCHASER GRANTED RECTIFICATION WITH SPECIFIC PERFORMANCE.

Defendant agreed to sell plaintiff certain land included in a triangular area formed by the production of two street lines and another street intersected thereby. Defendant gave to plaintiff a calculation of measurement which as subsequently ascertained were much more than the actual boundaries of the area so described. In a receipt given to plaintiff, defendant agreed to "furnish rough plan and set the stakes on the property." For this purpose defendant employed V. V.'s plan also showed measurements which he claimed were within the property as staked by V. and as shown on V.'s plan, but which were actually outside the area as described. A transfer was registered which inadvertently omitted some of the land and a transfer of further land was given but plaintiff protested that he was not getting all that he had bought and refused to accept said transfer. At the trial Scott, J. gave judgment for rectification of the agreement with specific performance. Appeal therefrom was dismissed on even division of the court. The intention of the parties was to buy and sell a defined area as shown by lines to be drawn on the map, and there was no mistake in that respect which was the only question raised. There was a mistake by both parties as to the size of the area as indicated by its boundary measurements which however were only given as approximate and not as binding, there was no clear evidence of staking not being in accordance with described boundaries or of the improvements not being within said boundaries, in any case plaintiff's only remedy would be in an action for damages for breach of the agreement to have proper plan and staking, the representation of measurement would not support an action for deceit and a claim for rescission did not arise. The judgment at trial was right. Plaintiff had seen and was relying on V.'s staking (for which defendant was responsible) and signed the formal agreement supposing the description conformed to that. Franz v. Hansen [1918] 2 W.W.R. 40, is not applicable as the transaction was not completed by conveyance. If plaintiff's remedy were not properly a conveyance of the additional land but compensation or damages the amount ought to be ascertained by a reference. The case is distinguishable from Franz v. Hansen, supra, the contract is still executory, and compensation can be awarded, this right being based upon the equitable doctrine of mistake. Also the covenant to stake the property carried with it obligation to do the same in such a way as to not damage the purchaser. The writing represents the parcel intended to be sold. Plaintiff's claim for rectification fails but upon payment of costs he should be entitled to amend and to a new trial limited to the claim for compensation.

Milner v. Potter, [1919] 1 W.W.R. 993.

EXCHANGE OF LANDS—MISREPRESENTATION—DAMAGES.

Wake v. Smith, 11 O.W.N. 94.

SALE—CORNER—HOMOLOGATED LINE—GUARANTEE — ERROR — NULLITY — CAVEAT EMPTOR—C.C. QUE. ARTS. 993, 1491, 1508, 1509.

The buyer of a corner lot who, previous to the sale, has examined the plans of the property upon which appeared an homologated city line marking off a strip of land of 20 feet along a street facing the immovable to be expropriated by the city of Montreal, which strip was not sold with the lot, has no recourse in warranty against the vendor, if the city abolishes the homologated line or for error of substance of the thing bought; or if on that account the projected corner disappears, even if the sale was made with a guarantee of fournir et faire valoir. Conjectures and motives do not form part of the contract

of sale and remain at the risk of the buyer, except in certain cases where the buyer was induced in error by fraud.

Knowles v. Rabinovitch, 56 Que. S.C 306.

DESCRIPTION—"MORE OR LESS."

A lot of land sold under the description of an official number, with metes and bounds, as containing 26 feet frontage by a depth of 100 feet more or less, is a sale of a thing certain and determined, without regard to the contents thereof, and there can be no ground for an action in warranty should it be found that the lot has only 24 feet and one inch frontage and 24 feet and six inches on the rear line.

Gingras v. Gariépy; Gariépy v. Hébert; Hébert v. Déguise, 50 Que. S.C. 88.

The buyer of an immovable described by its number on the official plan and in the book of reference thereto, for the registration of real rights, with an erroneous statement that it is 40 feet in width by 135 feet in depth, whereas the latter is only 90 feet, is the buyer of a certain determinate thing, and has no action quanto minoris against the vendor, more particularly in the case of urban property consisting entirely of buildings whose extent and boundaries are plainly visible.

Menard v. Couillard, 44 Que. S.C. 174.

VENDOR ABLE TO CONVEY ONLY ONE-HALF INTEREST—OTHER HALF IN WIFE'S NAME AND SHE REFUSED TO SIGN.

Kennedy v. Spence, 20 O.W.R. 61.

DESCRIPTION OF QUANTITY—AREA—ACTION EN BORNAGE.

Saint-Aubin v. Brunet, 40 Que. S.C. 83.

(§ I D—21)—RESCISSION FOR DEFICIENCY.

In cases of sales of immovables the purchaser may, in case he is evicted, repudiate the sale tainted with a cause of eviction, but, until judgment is rendered declaring the sale set aside, the vendor may prevent the setting aside by furnishing the purchaser with a good title or causing the eviction to cease, and the purchaser is presumed at law to consent to remain proprietor until the sale is annulled; so where, in an action in vacation of a sheriff's sale based upon defects in title, the vendor before judgment is granted obtains a good title to the property sold, the buyer must accept the same and the sale will not be set aside.

Swan v. Eastern Townships Bank, 8 D. L.R. 312, 22 Que. K.B. 142.

Where a vendor properly rescinds an agreement for the sale of land, and thereafter the purchaser registers the agreement, and the vendor, without knowledge of such registration, agrees to sell the land to another, the first purchaser will be compelled to execute a release of the registered agreement.

Jewer v. Thompson, 3 D.L.R. 628, 22 O. W.R. 610, 3 O.W.N. 1122.

Article 1502, C.C. (Que.), which provides for the abandonment of a sale of land by the purchaser and recovery from the vendor of the price, if paid, where there is a deficiency of quantity so great as to raise the presumption that the purchaser would not have bought if he had known of it, is applicable only for the protection of an actual purchaser of an immovable property and not for the protection of the transferee of a right of redemption conferred by a "contre-lettre" given by the transferee back to the transferor concurrently with the making by the latter of an absolute conveyance by the terms of which "contre-lettre" the transferor was given the privilege of redeeming the property within a fixed period at a certain price but was under no obligation to do so. The remedy of the purchaser of a mere right of redemption which he has the option to exercise but without any obligation to redeem in respect of a deficiency in quantity in the land, is dependent upon art. 992 and upon proof being made of error, fraud, violence or fear under said statute.

Martin v. Lussier, 2 D.L.R. 584, 41 Que. S.C. 412.

(§ I D—22)—SALE "EN BLOC"—WHAT CONSTITUTES.

An agreement for sale describing the property as "Nos. 763-765 Mount Royal Avenue, measuring twenty-five by one hundred feet," is a sale "en bloc," and falls under art. 1503 and not art. 1501 C.C. (Que.).

Friedman v. Mageau, 24 D.L.R. 224, 24 Que. K.B. 21.

E. RESCISSION OF CONTRACT.

Rescission for innocent misrepresentation, see Sale, III C—72.

Rescission for fraud, agent, see Principal and Agent, III—30.

(§ I E—25)—NOTICE—BONA FIDE DELAY.

Where an agreement for the sale of land stipulates that, in case of default by the vendee, rescission by the vendor is to be effected by a prescribed written notice, such notice is a condition precedent to cancelation by the vendor, and a short delay in making the down payment (pending negotiations for a sale between the same parties of contiguous land to obviate a restrictive building clause in the original agreement) is not ground for rescission, although time was expressly of the essence of the agreement, it appearing that the vendee was always ready and willing to carry out his contract. [Cushing v. Knight, 6 D.L.R. 820, 46 Can. S.C.R. 555, distinguished.]

Manson v. Pollock, 12 D.L.R. 82, 24 W.L. R. 28, 4 W.W.R. 212. [Reversed on other grounds, 16 D.L.R. 618, 24 Man. L.R. 67, 27 W.L.R. 370, 6 W.W.R. 205.]

Where time is expressly made of the essence of the contract in an agreement for the sale of land to be paid for in four instalments, and two of the instalments have been paid, and default is made in the pay-

ment of the other two, though one-half of the purchase price has been paid by the purchaser, the vendor is justified in rescinding the agreement where the default continues for about three years from the time the last instalment was due.

McGreevy v. Hodder, 8 D.L.R. 755, 4 O. W.N. 536, 23 O.W.R. 699.

Where the purchaser in a contract for the sale of a block of land, before completing his payments and acquiring title, contracted to sell a lot from the same to a subpurchaser and then defaulted in his payments, after which he directed the subpurchaser to pay instalments of purchase money to the owner, who refused to take payment from or to give title to the subpurchaser unless the latter paid a bonus in addition to what he had contracted with the original purchaser, an agreement to pay such bonus will not be set aside on the ground that such circumstances constitute duress nor will a mortgage given therefor by the subpurchaser to the owner be declared invalid.

Duggan v. Wadleigh, 1 D.L.R. 871, 4 A. L.R. 114, 20 W.L.R. 102, 1 W.W.R. 595.

Where time was not expressly or impliedly the essence of a contract for the sale of real estate and the vendor failed afterwards to give the purchaser such reasonable notice to complete the contract within a definite and specified period as would make time the essence thereof, and the delay in completing the contract on the part of the purchaser was due to his waiting to hear as to an application he had made with the knowledge of the vendor for a loan on the property for the purpose of completing payment therefor, a determination of the contract by the vendor was unjustifiable, and the purchaser would be entitled to recover any special damage he had suffered by reason of having entered into possession and made extensive and costly improvements with the knowledge and approval of the vendor. A cash payment $200 was too large an amount in comparison with the total price $1,350 to be paid to be deemed a mere deposit, but was payment on the contract which the purchaser was entitled to recover from the vendor's unjustifiable determination of the contract by entering into possession of the property and reselling the same. [March v. Wells, 45 Can. S.C.R. 338, applied.]

Mitchell v. Wilson, 2 D.L.R. 714, 5 S.L. R. 161, 20 W.L.R. 671, 2 W.W.R. 124.

One who agrees to take a transfer of a half section of land free and clear of all encumbrances, is not obliged to accept one subject to a highway across the land, which was not shewn on the Government survey.

Emerson v. Cook, 5 D.L.R. 232, 3 O.W.N. 968.

Where, under an agreement for the sale of land a purchaser by his refusal to comply with an express provision of the document requiring a certain down payment on the purchase price repudiates the agreement thereby entitling the vendor to rescind, and where the vendor thereupon gives reasonable notice of rescission, and at the expiry of the time given the purchaser still refuses to comply, the contract is at an end and the purchaser cannot later insist upon specific performance. Under an agreement for the sale of land where the property is of a speculative character and time therefore of the essence of the agreement, where the purchasr has refused to comply with an express requirement of the contract for a large down payment on the purchase price, a four-day notice by the vendor for payment, or, in the alternative, for cancellation, is reasonable, and, on the purchaser continuing in default beyond the period so fixed by the notice, the vendor is entitled to treat the agreement as cancelled.

Cushing v. Knight, 6 D.L.R. 820, 46 Can. S.C.R. 555, 2 W.W.R. 704.

CONTRACT TO PURCHASE—RESCISSION FOR DEFECT IN TITLE.

A contract purchaser of land is entitled to rescind his agreement for a defect in the vendor's title, consisting in the fact that a mortgagee who exercised a power of sale under which the vendor derives title was administrator of the mortgagor's estate; it being his duty, as administrator, to satisfy the mortgage out of personal assets of the estate and otherwise look after the interests of the estate.

Millard v. Gregorie, 11 D.L.R. 539, 47 N.S.R. 78, 12 E.L.R. 401.

RESCISSION FOR NONPAYMENT OF PURCHASE MONEY—VENDOR'S DEFAULT IN TENDERING DEED.

A contract for the sale of land cannot be terminated by the vendor for default in payment of the purchase money when due although time was declared to be the essence of the agreement, where the vendor, who by the terms of the contract, was to furnish a deed at his own expense, tendered one executed by a third person who held title to the land, without having submitted a draft deed to the vendee's solicitor as had been demanded; the purchaser was entitled to a conveyance containing the vendor's own covenants, and not merely the covenants of such third parties.

Knibb v. McConvey, 11 D.L.R. 777, 4 O.W.N. 1417, 24 O.W.R. 731.

CONTRACT FOR SALE OF LAND—BREACH—WAIVER—RESCISSION—NOTICE.

After the waiver by a vendor of a default of the vendee in a contract for the sale of land, the former can terminate the agreement only after reasonable notice to the vendee.

Dahl v. St. Pierre, 11 D.L.R. 775, 4 O.W. N. 1413, 24 O.W.R. 705. [Affirmed, 14 D. L.R. 514, 25 O.W.R. 261.]

AGREEMENT TO CONVEY—BREACH BY PURCHASER—NOTICE OF CANCELLATION.

Notice by the contract vendor, of cancel-

lation of agreement to convey, is construed strictly and subjected to the closest compliance with the power enabling it.

Massey v. Walker, 11 D.L.R. 278, 23 Man. L.R. 563, 24 W.L.R. 168, 4 W.W.R. 557.

RESCISSION—NOTICE OF—BRINGING ACTION TO RECOVER PAYMENT AS.

The commencement of an action to recover money paid on an agreement to purchase land, on the ground that the vendor was without title, is a sufficient notice of rescission by the vendee to cast on the vendor the obligation of shewing in defence that he has a good title.

Reeve v. Mullen, 14 D.L.R. 345, 6 A.L.R. 291, 25 W.L.R. 445, 5 W.W.R. 128.

DEFICIENCY IN QUANTITY.

Where a vendor, believing that he is the owner, agrees to sell a house and lot, and partial payments have been made by the purchaser, rescission of the agreement, and repayment of the money, will not be ordered because the house encroaches on adjoining land if the vendor has obtained title to the land encroached upon, and tendered it to the purchaser. [Chamberlain v. Lee, 10 Sim. 444, followed.]

Greer v. Clark, 27 D.L.R. 699, 9 A.L.R. 535, 34 W.L.R. 543, 10 W.W.R. 659.

USE OF PROPERTY PREVENTED BY MUNICIPAL BY-LAW.

Rescission of a sale and the recovery of purchase money paid on account thereof cannot be had merely because the prospective use of the property is rendered impossible by a municipal by-law.

Milk Farm Products & Supply Co. v. Buist, 26 D.L.R. 459, 35 O.L.R. 325.

LACHES—SPECIFIC PERFORMANCE—RETURN OF DEPOSIT—RIGHTS OF PARTIES.

A purchaser of land under an agreement of sale who has never in fact abandoned or receded from his contract, but who has by reason of laches or otherwise deprived himself of the right to specific performance is, in case the vendor refuse to accede to specific performance, prima facie entitled to a return of the deposit or part payment. But where the vendor is ready and willing to complete but the purchaser is unwilling to remedy his default, such purchaser is not entitled to a return of the purchase-money where the agreement has not actually been rescinded. [March v. Banton, 45 Can. S.C.R. 338, applied.]

Lawton v. Lindsay, 46 D.L.R. 53, 12 S.L.R. 203, [1919] 2 W.W.R. 71.

A representation by an agent of a vendor of land, which is merely an expression of opinion, and not a misrepresentation of a material ascertainable fact, does not, in the absence of fraud, constitute ground for the cancellation of the agreement of sale. A statement by the agent of a vendor that land adjoining that sold to the purchaser had been reserved by a railway for trackage and other purposes, when honestly made, is not, in the absence of fraud, such a material inducement to the formation of the contract as would justify cancellation of the agreement of sale, where it later appears that such was not the case. [Dunn v. Alexander, 2 D.L.R. 353, distinguished.]

Jackson v. People's Trust Co., 7 D.L.R. 384, 22 W.L.R. 325, 3 W.W.R. 99.

AGREEMENT THAT VENDOR MAY CANCEL ON DEFAULT — CONSEQUENCES — COURT OF EQUITY—RELIEF—PROMPT TENDER OF AMOUNT IN DEFAULT—COSTS.

Where a purchaser of land upon deferred payments has contracted that his vendor may cancel the contract and retain moneys paid on account of the purchase price he can avoid this consequence only by satisfying a court of equity that he should be relieved from the forfeiture caused by his default; this he may do by promptly tendering the amount in default on receiving notice of the cancellation and if this be not accepted, by promptly coming to the court for relief.

Where a vendor cancels an agreement for sale of land pursuant to a clause permitting him on default to do so and to retain the moneys paid on account of the purchase price, he cannot afterwards sue for the purchase money nor is he entitled to ask the court to determine the contract which he has determined himself; but he may ask the court to decree that he had validly determined the contract and that it therefore no longer affected his title which declaratory judgment if uncontested must be obtained at his own expense; semble, an alternative claim for rescission may well be pleaded in case it should appear that the cancellation notice was defective. [Wilson v. Abbott, 18 D.L.R. 34, followed.]

Moore v. Stewart, 20 D.L.R. 700, 7 S.L.R. 434, 7 W.W.R. 991.

NOTICE OF RESCISSION—TWO VENDORS—NOTICE BY ONE.

A notice to rescind a contract of sale of land for default must be executed by both vendors where the agreement stipulates for execution of any such notice "by the vendors." [Hedican v. Crow's Nest Pass Lumber Co., 17 D.L.R. 164, applied.]

Pitt River Lumber Co. v. Shaake, 17 D.L.R. 768, 28 W.L.R. 299, 6 W.W.R. 994.

EFFECT AS TO OBLIGATION TO PAY PURCHASE MONEY.

Where a vendor by his own act rescinds a contract for the sale of land, the purchaser's obligation to pay the purchase price thereby ceases.

Wilson v. Abbott, 18 D.L.R. 34, 7 S.L.R. 107, 28 W.L.R. 437, 6 W.W.R. 1097.

"GROSSLY INADEQUATE PRICE" — TRANSFEREE'S OUTLAY, HOW MET.

Where an ignorant man not able to speak English is prevailed upon to sign a conveyance or transfer of his land at a grossly inadequate price, and the transfer is annulled, the relief may be made conditional on the repayment of the cost of sur-

vey and preparation of plan of subdivision of the land expended by the transferee, the benefit of which the grantor will obtain.

Gladu v. Edmonton Land Co., 19 D.L.R. 688, 8 A.L.R. 80, 20 W.L.R. 685, 7 W.W.R. 279.

CONTRAVENING STATUTE — SUBDIVISION LANDS—REGISTRATION—PARI DELICTO.

The provisions of subs. 7 of s. 124 of the Land Titles Act (Alta.) 1911-12, c. 4, s. 15 (25), amending s. 124, c. 24, 1906, as amended by s. 12 of c. 2, of 1910, sess. 2), prohibiting the sale of land according to any townsite or subdivision plan until after the same has been duly registered, are directed against the vendor for protection of the purchaser, and though the effect of the statute is to render void any sale made in contravention of it, the purchaser cannot be deemed in pari delicto with the vendor, and is therefore not deprived of the remedy of rescission to recover back moneys paid in virtue of the agreement of sale. [Lapointe v. Messier, 17 D.L.R. 347, 49 Can. S.C.R. 271, applied.]

Boulevard Heights v. Veilleux, 26 D.L.R. 333, 52 Can. S.C.R. 185, 9 W.W.R. 742, affirming 24 D.L.R. 881, 31 W.L.R. 10, 8 W.W.R. 440, 20 D.L.R. 858, 8 A.L.R. 16, 29 W.L.R. 140, 7 W.W.R. 616.

SALE OF LAND—DEFAULT—FORFEITURE OF SUMS PAID—JUDGMENT—COSTS.

Young v. Poltymeki, 5 D.L.R. 887, 4 O. W.N. 94, 23 O.W.R. 56.

MISTAKE IN QUANTITY—RIGHTS OF PARTIES.

Where the vendor of property has made an error in the description in good faith and upon discovering it offers to rescind the contract, the purchaser is not entitled to refuse this offer and ask for a reduction in the price.

Friedman v. Mageau, 24 D.L.R. 224, 24 Que. K.B. 21.

MISREPRESENTATION.

To justify rescission of a contract for sale of land on the ground of misrepresentation there must have been a definite assertion of alleged fact as distinguished from a vague affirmance of the excellence of the property:

Stewart v. Cunningham, 22 D.L.R. 845, 21 B.C.R. 255, 8 W.W.R. 579.

NECESSITY OF MAKING RESTITUTION.

In order to claim rescission of his agreement to purchase lands the purchaser must have a present ability to make restitution: it is not enough that he alleges he can get in the interest in them that he has sold and then make restitution in case the decree gives him that relief.

Boydell v. Haines, 21 D.L.R. 371, 21 B.C. R. 171, 8 W.W.R. 17, 30 W.L.R. 842.

RIGHT TO CHATTELS UPON CANCELLATION OF AGREEMENT.

By an agreement in writing the plaintiff sold to the defendants certain lands and chattels. The defendants took possession of both, but having made default in payments provided by the agreement, the plaintiff brought an action and obtained a decree for the foreclosure of the agreement for sale, which was afterwards made absolute, and the agreement for sale cancelled. No mention was made of the chattels in this action. The plaintiff seized one horse, and then brought this action for detinue. The defendants defended and then counterclaimed for the one horse taken. Held, that the agreement for sale was an absolute sale so far as the chattels were concerned, and that the property in the same had passed to the defendants. The agreement being cancelled, the plaintiff could not recover the price of the chattels or damages for their detention. That the defendants were entitled to recover the value of the horse seized by the plaintiff.

Churchill v. McRae, 7 S.L.R. 190.

INTERESTS OF SUBPURCHASERS — RESTITUTION — HOW AFFECTED BY OCCUPATION.

The rule as to "restitutio in integrum" is, that a person seeking relief by way of rescission cannot succeed if restitution is prevented by his own act or default; but mere occupation of the land sold, or a portion thereof, is not a bar, so long as the land has not been so wasted that the depreciation in value cannot be met by compensation, nor because of interests acquired by subpurchasers in the absence of notice of such subsales to the vendor.

Plainview Farming Co. v. Transcontinental Townsite Co., 25 D.L.R. 594, 25 Man. L.R. 677, 9 W.W.R. 247, 32 W.L.R. 499.

DELAY—KNOWLEDGE OF DEFECT.

A vendor must be in a position to make a good conveyance at the date fixed for completion; if he fails to do so, the purchaser may, on discovering the vendor's lack of title, repudiate the contract, but he must do so forthwith or with reasonable promptness, but where the purchaser knew of the defect, and thereafter himself tried to sell the land made payments and tendered his mortgage upon it, and in all things acted as though the contract was valid, it is not open to him to repudiate on that ground alone. [Murrell v. Goodyear, 1 D.F. & J. 432; Re Bryant, 44 Ch. D. 218; Re Head's Trustees, 45 Ch. D. 310; Re Thompson, 44 Ch. D. 492, applied.]

Robinson v. Moffatt, 25 D.L.R. 462, 3 O.L.R. 9.

TOWNSITE SUBDIVISION LOTS — VENDOR'S NONCOMPLIANCE AS TO FILING PLAN.

By subs. 7 of s. 124 of the Land Titles Act it is provided that: "No lots shall be sold under agreement for sale or otherwise according to any townsite or subdivision plan until after the same has been duly registered in the Land Titles office for the registration district in which the land shewn on said plan is situate, providing that this section shall not apply to any plan now in existence and approved by the minister." Held, that where this section

is not complied with, the purchaser has a right to repudiate the contract. [Veilleux v. Boulevard Heights, 20 D.L.R. 858, 24 D.L.R. 881, 8 A.L.R. 16, followed.] Held, also, that the section covers the case of an agreement for a sale as distinguished from a completed sale, and therefore the prohibition of the statute is not avoided by registration of the plan before the transfer is made. Definition of "sold" in Cornwallis v. C.P.R. Co., 19 Can. S.C.R. 702, and R. v. C.P.R. Co., [1911] A.C. 328, 80 L.J.P.C. 125, held not applicable.

Abbott v. Ridgeway Park, 8 A.L.R. 314, 30 W.L.R. 667, 7 W.W.R. 1280.

REFUSAL TO CONVEY.

A refusal to convey land as agreed, because of a dispute as to the liability for taxes, does not amount to a repudiation of the contract.

Tarrabain v. Ally, 36 D.L.R. 546.

DELAY—JUS TERTII.

Delay in repudiating a contract for the sale of land after discovery of misrepresentation will not prejudice a party seeking rescission, if he has done nothing to affirm the contract after the discovery, and the rights of innocent third parties are not affected by the delay. [Clough v. London & North Western R. Co., L.R. 7 Ex. 26, followed.]

Consolidated Investments v. Acres, 32 D.L.R. 579, 12 A.L.R. 210, [1917] 1 W.W.R. 1426.

CANCELLATION BY VENDOR — RIGHTS OF SUBPURCHASERS — DAMAGES — ENTICING AWAY SERVANT—COUNTERCLAIM—MONEY LENT—COSTS.

Diamond v. Western Realty Co., 12 O.W.N. 226.

RESOLUTORY CLAUSE.

The effect of annulment ipso facto of a promise of sale, in virtue of a resolutory clause, is to make void and without effect all the privileges and mortgages registered against the immovable by the creditors of the holder of the promise of sale.

Gadbois v. Denovan, 52 Que. S.C. 81.

NO TITLE—REPUDIATION BY PURCHASER.

If the vendor in a contract for sale of land has no title in himself, or is not in a position to compel the registered owner to supply him with title, the purchaser may, as soon as he becomes aware of the fact, repudiate the contract and need not give the vendor time to secure title. [Forrer v. Nash, 35 Beav. 167, 55 E.R. 858; Bellamy v. Debenham, [1891] 1 Ch. 412, followed.]

Smith v. Crawford, 40 D.L.R. 224, 11 S.L.R. 170, [1918] 2 W.W.R. 298.

PURCHASER'S DEFAULT—NOTICE OF CANCELLATION—RETURN OF PART PAYMENT.

Where the real cause of the rescission of a contract to purchase land is the purchaser's default, and such purchaser does not seek specific performance nor submit his willingness to carry out the contract, he is not entitled to a return of the part payments made, when the vendor has given formal notice of cancellation. [Brickles v. Snell, [1916] 2 A.C. 599, 30 D.L.R. 31; Steedman v. Drinkle, [1916] 1 A.C. 275, 25 D.L.R. 420, distinguished.]

Walsh v. Willaughan, 42 D.L.R. 581, 42 O.L.R. 455.

LEASE OF LAND—RIGHT OF LESSOR TO SELL — ASSIGNMENT BY LESSOR — SALE OF LAND—SALE ABORTIVE — TERMINATION OF LEASE—RIGHTS OF LESSOR.

Rink v. Milos, 42 D.L.R. 782, 11 S.L.R. 271, [1918] 2 W.W.R. 1021.

CANCELLATION BY VENDOR — EVIDENCE — WAIVER OF RIGHT TO CANCEL—COUNTERCLAIM—MONEY LENT.

Diamond v. Western Realty, 14 O.W.N. 94, affirming 12 O.W.N. 226. [Reversed in 47 D.L.R. 333, 58 Can. S.C.R. 620.]

EXCHANGE OF LANDS—TIME FOR COMPLETION — EXTENSION — WAIVER — PROVISION IN CONTRACT FOR RESCISSION—OBJECTION TO TITLE — QUESTION OF CONVEYANCE—NEGOTIATIONS AS TO OBJECTION—LAPSE OF TIME BEFORE ATTEMPTED EXERCISE OF POWER TO RESCIND.

Markle v. Mackay, 14 O.W.N. 280.

NOTICE OF.

A stipulation in an agreement for the sale of land providing for notice "by the vendors" in writing if they elect to rescind for default in payment, is to be construed strictly.

Pitt River Lumber Co. v. Shaake, 17 D.L.R. 768, 28 W.L.R. 299, 6 W.W.R. 994.

RETURN OF DEPOSIT—DEFECTIVE TITLE—DEFECT REMEDIED — COUNTERCLAIM — SPECIFIC PERFORMANCE.

The purchaser's acton to rescind and for a return of his deposit on the ground that the vendor was unable to make title at the time fixed by the contract for closing when time was of the essence of the contract, is not defeated by shewing that the defect had been cured since the issue of the writ: but if the defendant not only defends but counterclaims for specific performance the title may ordinarily be made good pendente lite subject to any defence available to the counterclaim.

McNiven v. Pigott, 19 D.L.R. 846, 31 O.L.R. 365.

LANDS REPRESENTED AS "HIGH AND DRY"—RELIANCE UPON—IMMATERIAL REPRESENTATION, WHEN.

To justify the rescission of an agreement of sale of subdivision lands for alleged misrepresentation that they were "high and dry," it must appear both that the representation was untrue and that the other party acted on it and was thereby induced to some extent to make the purchase.

Gagnon v. Nelson, 19 D.L.R. 32.

PURCHASER'S ABANDONMENT — PART PAYMENTS—FORFEITURE.

Where under an agreement for the sale

of lands the purchaser after paying part of the price abandons the contract, the vendor may subsequently cancel the contract on the ground of such abandonment without refunding the part payment already received from the purchaser; the right of retention by the vendor upon the purchaser's abandonment of the contract is not limited to the deposit, but extends to subsequent payments on account of purchase money.

Vancouver Land & Improvement Co. v. Pillsbury Milling Co., 15 D.L.R. 775, 26 W.L.R. 880, 5 W.W.R. 1324, 19 B.C.R. 40.

SALE OF LOT BY PROPOSED PLAN—CONVEYANCE BY METES AND BOUNDS—EFFECT.

The fact that the agreement of sale refers to the land as a lot of a particular number according to a subdivision plan "to be registered" and that a deed with that description cannot be recorded until after the recording of the plan will not entitle the vendee to rescind on vendor's failure to record the plan, if the vendor offers a deed which can be recorded containing a description of the same land by metes and bounds.

Fraser v. Columbia Valley Lands, 19 D.L.R. 1, 20 B.C.R. 508, 30 W.L.R. 327, 7 W.W.R. 780.

PROMISE OF SALE—CANCELLATION—SERVITUDE — DAMAGES — C.C. QUE. 1013, 1018, 1065, 1073, 1075, 1472, 1478, 1536.

An instrument in which a vendor states that he sells his land for a fixed price, of which a part is payable on the signing of the contract, without actual possession, is only an agreement for sale, notwithstanding that the word "sale" is used, the instrument only declaring a conditional and suspensive agreement. C.C. Que. art. 1536, respecting the dissolution of a sale, does not apply to an agreement of sale, which is governed in this respect by art. 1065, under which an agreement for sale can be cancelled when the purchaser refuses to fulfil the obligations thereby imposed on him. A purchaser of land who, at the time of sale, has knowledge of a right-of-way which a railway company possesses over the land, cannot take advantage of this servitude to refuse to execute his contract. When a purchaser refuses to sign a deed of sale of real property which he has bought, and thus forces his vendor to have the agreement for sale which he had given him cancelled by the courts, the purchaser is liable for the damages caused to the vendor for loss of time, travelling, costs of deed of sale, and steps and proceedings.

Shea v. Decary, 46 Que. S.C. 453.

SYNDICATE AGREEMENT—RESCISSION.

Clark v. Robinet, 16 D.L.R. 865, 6 O.W.N. 66.

WHAT CONSTITUTES—EFFECT—RIGHT TO REPAYMENT OF PURCHASE PRICE—WANT OF STIPULATION.

Saulsberry v. Ozias, 24 D.L.R. 885, 32 W.L.R. 409.

RETURN OF PURCHASE PRICE—SHARES OF STOCK AS—CREDIT FOR RENTS—INTEREST.

Lundy v. Knight, 24 D.L.R. 886, 9 W.W.R. 561, 32 W.L.R. 939.

MENTAL INCAPACITY OF VENDOR—INTERDICTION—INSCRIPTION EN DROIT.

In an action to set aside a sale on account of the mental alienation of the vendor, subsequently interdicted, the defendant cannot attack the validity of the interdiction without bringing into the cause the person on whose petition it was granted; and an inscription en droit may properly be filed against the allegations of the declaration relating to such demand.

Charland v. Bissonnette, 47 Que. S.C. 202.

HYPOTHEC — RADIATION — RESILIATION OF SALE.

If in certain cases a purchaser can demand that his vendor shall radiate the hypothecs which affect the property purchased he should ask for a condemnation for damages, or for resiliation of the sale, in case the vendor should fail to do what is ordered; if he does not take conclusions for that purpose, his application for radiation cannot be granted as the judgment that he would obtain could not be executed Nemo potest cogi ad factum.

Dorion v. Jodoin, 47 Que. S.C. 414.

HYPOTHEC — RADIATION — OFFER OF PAYMENT.

One who makes an offer of money to obtain the reconveyance of an immovable, should, if he is sued, deposit into court the amount of his offer, even when the holder of the property has placed a hypothec upon it, in order to demand the radiation of the latter.

Giguère v. Colas, 48 Que. S.C. 198.

DELAY OF VENDOR IN REMOVAL OF CAVEAT—RESCISSION.

Ballantyne v. Hettinger, 7 W.W.R. 526, 29 W.L.R. 937. [Affirmed in 8 W.W.R. 440.]

Where an agreement for the purchase of land contained three different modes of cancellation, one of which was that on default the vendor might, with or without notice to the purchaser, cancel the contract. Held, that, upon plaintiff making default, the defendant had a right to select any one of the three modes, and that a notice pursuant to that above mentioned, personally served upon the defendant, was valid and effectual as a cancellation of the agreement, subject to the power of the court to give equitable relief if the circumstances should warrant it. The defendant having, in his statement of defence, submitted to redemption by the plaintiff upon payment of the arrears and certain expenses, judgment was given accordingly, allowing the plaintiff two months after the Master's report to pay the amount found

due by him and costs, and in default that the agreement should be cancelled.

Perks v. Scott, 21 Man. L.R. 570.

MISREPRESENTATION—AFFIRMATION BY PURCHASER AFTER KNOWLEDGE—ELECTION—DAMAGES—SPECIFIC PERFORMANCE ORDERED WHEN NOT PLEADED.

In an action for rescission of 4 agreements for sale of lands on the ground of fraudulent misrepresentation, and for damages, the Trial Judge found fraud on the part of the defendant, but also found that the plaintiff had, before launching the action, elected to abide by the contracts after full knowledge of the fraud. He refused rescission, and assessed damages at the amount of the difference between the purchase price and the actual value of the lands when purchased. There was no plea for specific performance of the agreements for sale, but a reference was ordered to inquire into the title to the lands and to take accounts on the basis of deducting from the amount of damages found the balance due on the purchase price under the agreements for sale, that there be judgment for the plaintiff for the balance, and that the defendant execute a conveyance of the land in question in the plaintiff's favour. Held, on appeal, that the judgment below be affirmed with the variation that there should be no order as to specific performance of the agreements for sale, as there was no such plea in the statement of claim, nor was it raised on the trial. An action for specific performance lies only where there has been a refusal to perform; there has been no refusal to perform, and no such issue has been raised.

Williams v. Shields, 25 B.C.R. 198.

ELECTION OF REMEDIES—CROP AGREEMENT.

During the pendency of an action for specific performance under an agreement for sale of lands on half crop payments in which the plaintiff (vendor) asked for foreclosure, the plaintiff obtained from the Local Master an order declaring that one-half of the grain grown on the land for the current year was the property of the plaintiff, and directing the defendant to deliver the same up to the plaintiff, or to deposit in court the storage receipts therefor. Held, that the share of the crop was a means provided for securing payment of the purchase money; that the plaintiff could not in the same action obtain the purchase price or a portion of the purchase price and also rescission, but must elect which remedy he will pursue, and the order of the Local Master was therefore set aside with costs.

Bateman v. Romphf, 9 S.L.R. 122, 34 W.L.R. 62.

CONDITION OF AGREEMENT—SALE OF LAND—PAYMENT ON ACCOUNT OF PRICE—CANCELLATION—NOTICE—RETURN OF MONEY PAID—RESCISSION—FORM OF ACTION—PRACTICE.

March v. Banton, 45 Can. S.C.R. 338, 20 W.L.R. 322.

Where the consideration stated in a transfer of land is merely nominal, the onus is cast upon the transferee to prove that valuable consideration was given. If the Court of Appeal is satisfied that the Trial Judge erred in any of his conclusions on the facts, such court may overrule such finding, and give judgment according to the facts as found by the Court of Appeal. Where, at the time of the inception of the fraud no certificate of title had issued for the land in question, the provisions of s. 173 of the Land Titles Act did not apply to prevent the court exercising its jurisdiction, the provisions thereof only applying where certificate of title has issued.

Coventry v. Annable, 4 S.L.R. 426.

TITLE—MORTGAGE—CERTIFICATE OF REGISTRAR — MISTAKE — COSTS — C.C. QUE. ARTS. 2177, 2178—C.C.P. ART. 549.

The holder of an agreement for a sale of land, with the right to obtain a title of sale when all his payments are made, and who after having fulfilled his obligations, discovers on the evidence of a certificate of the registrar, that this property is burdened with a mortgage, cannot for this reason obtain the cancellation of the agreement for sale and the repayment of the money paid, if in fact this certificate is erroneous and there is no mortgage on the land. But in these circumstances the purchaser being justified in having commenced his action, and the vendor not having set out the true fact, having made in his defence some allegation of bad faith and having offered a title which the purchaser had the right to refuse, he will be condemned to pay all the costs.

Grenier v. Gendreau, 55 Que. S.C. 370.

The hidden defects, in the sense of the law, in the matter of the sale of a house are not those which the vendee did not know, but those which he could not know either by his own or by an expert examination. The vendor will not be held responsible for defects the existence of which the vendee had the power to ascertain. By terms of the art. 1522 C.C. (Que.) in order that the thing sold would give a cause of action, the effect of which is determined by art. 1526, it must have hidden defects which will render it improper for the use for which it was designated, or which will so diminish its usefulness that the vendee would not have bought it or would not have given so high a price, if he had known of such defects, and this disposition must be understood in the sense that the hidden defects are so inherent to the thing and so irremediable by their nature, that the thing sold would be for ever improper, in whole or in part, for the use for which it was intended.

Senegal v. Meunier, 18 Rev. de Jur. 264.

RESOLUTORY CLAUSE—LAPSING.

Where an agreement of sale contains a

resolutory clause, the performance of the contract causes it to lapse.

Greaves v. Cadieux, 50 Que. S.C. 361.

In a sale of a moving picture theatre, the vendor is not liable to the purchaser if the latter, who was acquainted with the premises and satisfied therewith, is forbidden by the municipal authorities from carrying on the exhibitions because the establishment had not been built in conformity with legal requirements, and refuses to make the necessary alterations.

Lacouture v. Desmarteau, 49 Que. S.C. 276.

RETURN OF MONEY PAID—MISREPRESENTATION.

At the suit of the purchaser against the vendor, an agreement for the sale and purchase of land was set aside, and the vendor was ordered to repay the sums paid by the purchaser on account of the purchase-price, on the ground of misrepresentation by the vendor, in that—whether innocently or not—the vendor, professing to shew the purchaser the land, had shewn him entirely different land. As the land shewn to the purchaser was not the land of the vendor, the parties were not ad idem.

Oliphant v. Alexander, 15 D.L.R. 618, 27 W.L.R. 56.

DELAY IN REGISTERING TRANSFER — FILING OF PLAN OF RAILWAY RIGHT-OF-WAY — INABILITY TO REGISTER TRANSFER — RIGHT OF PURCHASER TO RESCISSION OF CONTRACT.

A purchaser who kept a transfer for 20 months without any effective attempt to register it and then was unable to obtain registration, because of the filing of a plan of a railway right of way, but who had not formally demanded a transfer with a registerable description, held not entitled to rescission of the contract for sale. [Ballantyne v. Hettinger, 8 A.L.R. 412, 7 W.W.R. 52 distinguished.]

Prosser v. Hudson's Bay Co., [1919] 1 W.W.R. 10.

The plaintiff who agreed to purchase certain lands, entered into possession, put up buildings, and planted a crop that failed, and then repented of his bargain, was nevertheless held entitled under the provisions of the Land Registry Act (B.C.) c. 36, s. 46, as amended in 1913, to avoid the transaction on the ground that no plan had been registered at the time of a sale to him, according to such plan, and to recover damages. The measure of such damages discussed.

Chauncey v. Palmer, 34 W.L.R. 978.

SALE OF LAND—CONTRACTS—AGREEMENT OF PURCHASE DELIVERED BY PURCHASER CONDITIONALLY IN ESCROW — CERTAIN DOCUMENTS TO BE COMPLETED BY VENDORS—UNREASONABLE DELAY IN COMPLETION—PURCHASER ENTITLED TO RESCISSION.

Purchaser held justified in treating agreement of sale of land as abandoned and to be entitled to rescission through vendor's unreasonable delay in delivering certain documents.

Smith and Huron & Erie Mortgage Corp. v. Ash, [1919] 1 W.W.R. 633.

ACTION BY VENDOR FOR BALANCE OF PURCHASE MONEY—DEFENCES—FRAUD AND MISREPRESENTATION — NEW AGREEMENT —COUNTERCLAIM—FINDINGS OF FACT OF TRIAL JUDGE—JUDGMENT FOR INSTALMENT OF PURCHASE MONEY AND INTEREST — NO ACCELERATION CLAUSE IN AGREEMENT—COSTS.

Rowell v. Isenberg, 17 O.W.N. 289.

PAYMENTS MADE — RELEASE OF LOTS IN TRACT — COUNTERCLAIM BY VENDOR — RESCISSION — FORFEITURE — AMENDMENT—COSTS.

Riverdale Land & Improvement Co. v. Chappus, 17 O.W.N. 234.

POSSESSION TAKEN BY PURCHASER — DEFAULT IN PAYMENT OF INSTALMENTS OF PURCHASE MONEY—ACTION FOR RESCISSION, DAMAGES, FORFEITURE, AND POSSESSION—TENDER OF OVERDUE INSTALMENTS AFTER ACTION BROUGHT—PAYMENT INTO COURT — JUDGMENT FOR VENDOR FOR AMOUNT PAID IN—FAILURE OF ACTION IN OTHER RESPECTS—COSTS —RULES 313, 314.

Sylvestre v. Schwartz, 16 O.W.N. 359.

FEAR OF EVICTION—RESCISSION.

Pepin v. Provencher, 40 Que. S.C. 155.

(§ I E—26)—MISTAKE—ACQUIESCENCE BY MAKING PAYMENTS—EFFECT ON RESCISSION—RIGHTS OF JOINT PURCHASERS—PRESCRIPTION.

There is a substantial error sufficient to set aside an agreement for sale of lots when the vendor indicates to the purchaser that the lots are situated upon a street with a view of the St. Lawrence river and when other lots less advantageous situated upon another street and having no view of the river are described in the agreement for sale. The purchaser does not lose his right by acquiescence on making a payment on account without reserve, if by not making this payment he would run the risk of losing all that he had paid before, or by endeavouring to avoid a lawsuit by selling his rights under the agreement for sale. The action of the purchaser for rescission is not the redhibitory action provided for by art. 1530 C.C. (Que.), but the action to annul which, under art. 2258, is only prescribed by ten years. An agreement for sale of lots of land executed by several purchasers but not jointly, can be set aside on demand by one of them, as to him. If all the parties are not in the cause the defendant may apply to stay the action by dilatory exception until they have been summoned, but if he does not succeed he cannot prevent the judgment being pronounced upon the merits.

Montreal Investment, etc., Co. v. Sarault, 24 Que. K.B. 249.

SALE OF LAND AND BUSINESS—MISTAKE—RESCISSION—INABILITY OF PURCHASER TO MAKE RESTITUTION — EXECUTED OR EXECUTORY CONTRACT — ABSENCE OF FRAUD—FAILURE OF CONSIDERATION.

Milk Farm Products & Supply Co. v. Buist, 8 O.W.N. 491.

MISTAKE—FRAUD—EFFECT.

It is a mistake, which renders a contract of sale nonexistent, when a person wishing to purchase a lot of land at V. buys one situated at B. even when actual fraudulent design on the part of the vendor has not been proved, if there are indications which shew that the purchaser has been designedly left in ignorance and in error as to the situation of the lot sold. Mistake by one of the parties to a contract is sufficient to render it absolutely void.

Forte v. Security Trust, 46 Que. S.C. 201.

MISTAKE—DESCRIPTION.

A description of real property in a deed of sale is equivalent to a warranty of the area of the piece of land, but, in order that the contract may be avoided under this head, it is necessary, under art. 1517, C.C. (Que.), that the part from which he finds himself evicted be of such importance in relation to the whole that the purchaser would not have acquired the property without this part. When a purchaser has a right of action for the voidance of a deed of sale of lands, and he offers to keep them on condition of a reduction in price, such offer must be considered as made with the intention of avoiding a lawsuit, and it has no effect if it is not accepted. It is an error sufficient to void a deed of sale, when a person buys two lots of land with a house and stable, and that these two buildings are located part on one of the lots bought and part on an adjoining lot, the purchaser not being able to perceive this fact, because the lots sold and the two adjoining lots were enclosed together, and appeared to make but one single estate.

Denis v. Deschamps, 54 Que. S.C. 74.

FALSE DESCRIPTION—SITUS—VALUE.

It is substantial error which will void sale when the lots sold are situated in a place other than that where the agent stated they were, and if, for that reason, they are of less value.

Boisjoly v. Land of Montreal, 24 Rev. Leg. 234.

ERROR AND FRAUD—AGENT—FALSE DESCRIPTION—FORFEITURE.

When agents of a vendor point out to the purchaser, as the situs of the land, a place other and less advantageous than that where the land actually is situated and the promise of sale describes the property as situated in the place falsely designated by the agents, the sale will be cancelled on the ground of error and fraud. If the promise of sale contains a clause that on default by the purchaser to make his payments when they become due, money paid up to that time shall be forfeited; and that to avoid this loss, he made the payments, his so doing cannot be considered as an acquiescence or a ratification of the promise of sale which would take away his right to ask for cancellation on the ground of error and fraud, even if the latter knew the reasons for cancellation at the moment of payment. It is the same if the purchaser, in order to avoid a lawsuit, tried to sell the property. The purchaser is not divested of his rights to have the sale cancelled if he only brings his action 11 months later, because a similar suit was pending in the court, and he was awaiting the result. Besides, an action for cancellation of a sale of land on the ground of error and fraud is not a redhibitory action and the delay named in art. 1530 C.C. (Que.) in which to bring it does not apply.

Denis v. Montreal Investment & Realty Co., 54 Que. S.C. 116.

MISTAKE — RIGHT-OF-WAY — NULLITY — PARTIES—NEGATORY ACTION.

One who owns several adjoining properties, and who sells one of them with "a right in common with others in the lane known under the number 1," namely, the neighbouring lot, cannot, in a negatory action to do away with this servitude, claim that he granted, by mistake, this right-of-way; such error is not contemplated by art. 992 C.C. (Que.). The purchaser of a lot of land upon which a servitude has been created, being the representative of his vendor, cannot plead the error.

Riopelle v. Papineau, 54 Que. S.C. 451.

CONTRACT FOR SALE OF LAND—MISTAKE AS TO LOCATION—CLAIM FOR RESCISSION OF DAMAGES — IMPROVEMENTS MADE ON WRONG LOT.

Zorner v. Burger, 18 W.L.R. 598.

CONTRACT FOR SALE OF LAND—MISREPRESENTATION BY VENDOR AS TO SITUATION.

McIvor v. Kerr, 18 W.L.R. 209.

(§ I E—27)—SALE TO PARTNERSHIP — FRAUD—SECRET PROFIT MADE BY ONE PARTNER.

Where one member of a partnership, formed expressly to purchase certain property for which his associates furnished the money, received a secret profit from the seller, who knew of the existence of the partnership, the defrauded partners may, on discovering the fraud, rescind the contract of sale, and recover from the vendor all payments made to him. [Grant v. Gold Exploration & Development Syndicate, [1900] 1 Q.B. 233; Panama & South Pacific Tel. Co. v. India Rubber Gutta Percha, etc., Co., L.R. 10 Ch. 515, 526, followed; Lands Allotment Co. v. Broad, 2 Manson's Bky. Cas. 470, distinguished.]

Hitchcock v. Sykes, 13 D.L.R. 548, 29 O.L.R. 6, reversing 3 D.L.R. 531, 3 O.W.N. 1118.

MISREPRESENTATION—RETURN OF DEPOSIT.

Were a vendor demanded the return of a deposit he had made on signing a contract

to purchase land, claiming as cancellation of the agreement for the misrepresentations of the vendor, which were denied by the latter, who informed the vendee that he should hold him to his agreement, and after action was begun for the cancellation of the contract, the vendor sold the land to a third person, the vendee is not entitled to recover the deposit where, on the trial no misrepresentation was found, and, at the time of such resale, the original purchaser was in default. [Howe v. Smith, 27 Ch.D. 89, followed; Johnstone v. Milling, 16 Q.B. D. 460, distinguished.]

Stinson v. Hoar, 13 D.L.R. 524, 18 B.C.R. 360, 25 W.L.R. 53, 4 W.W.R. 1273.

RIGHT TO RESCIND—MISDESCRIPTION.

A contract purchaser at auction of leasehold property described in an advertisement of sale as located at "No. 171 Chesley street," was entitled to rescind his agreement on discovering that the property fronted on an alley and was located 100 feet away from the named street; it appearing that the premises were not known by that description, except so far as a tenant's address was improperly given at that address.

Porter v. Rogers, 11 D.L.R. 304, 42 N.B. R. 82, 12 E.L.R. 551.

WRONG LOT POINTED OUT—KNOWLEDGE ON PART OF VENDOR — INTENTIONALLY DECEIVING.

Mid-West Agency v. Munro, 19 O.W.R. 810, 2 O.W.N. 1449.

MISREPRESENTATION AS TO QUALITY.

A representation by a vendor that a farm was as good as any in the district means, as compared with any in the immediate vicinity, especially where the purchaser inspected the land before buying, and was aware of the nature of the surrounding land. A representation by a vendor that a "good road" led to farming land sold, is satisfied if the road is such as is usually traveled in the vicinity, and over which, under ordinary circumstances, but not necessarily at all times, farm implements may be transported.

Houghton Land Corp. v. Ingham, 14 D.L.R. 773, 24 Man. L.R. 497, 25 W.L.R. 962, 5 W.W.R. 544, reversed 18 D.L.R. 660.

CONCEALMENT AS TO REAL PURCHASER—BAR TO SPECIFIC ENFORCEMENT, WHEN.

Where negotiations for the purchase of land are carried on with the knowledge by the party on whose behalf the purchase is really being made, that the vendor would not sell to him at the price, the concealment or misrepresentation of the identity of the real purchaser acting in the name of another is ground for refusing specific performance asked jointly by the nominal purchaser and the real purchaser to whom the former had assigned his interest. [Gordon v. Street, [1899] 2 Q.B. 641; Archer v. Stone, 78 L.T.R. 34; Smith v. Wheatcroft, 9 Ch. 223, applied.]

Page and Jacques v. Clark, 19 D.L.R. 530, 31 O.L.R. 94.

SALE BY VENDOR KNOWING HE CANNOT MAKE TITLE.

Where a vendor fraudulently makes an agreement of sale knowing that he has no valid title to the land nor any right to sell it and is unable to give title, he is liable for damages for breach of his contract to sell and convey.

Bazin v. Bonnefoy, 16 D.L.R. 109, 27 W.L.R. 86.

FRAUD INDUCING CONTRACT.

A contract for the sale of vacant land will be set aside at the instance of the purchaser, where he was induced to enter into the agreement by the material false representations of the vendor, upon which the purchaser relied, as to the character of its banks on an adjoining stream as affecting the desirability of the land for residential building purposes.

Cram v. Tinck, 17 D.L.R. 14, 28 W.L.R. 239.

DAMAGES—FRAUD.

In an action by the purchaser to rescind an agreement for the sale of land brought against both the owner and his agent on the ground of misrepresentation and for damages, proof of even an honest material misrepresentation inducing the agreement may suffice for rescission, but to support damages fraud must appear. [Derry v. Peek, 14 A.C. 337, at 359, applied.]

Melvin v. McNamara, 16 D.L.R. 65, 26 W.L.R. 825. [Varied in 17 D.L.R. 18, 7 A.L.R. 368, 28 W.L.R. 223.]

MISREPRESENTATIONS—TIMBER—QUANTITY.

A representation as to the estimated amount of timber on areas does not entitle a purchaser to a rescission of an agreement of sale if the estimate prove to be excessive where no fraudulent misrepresentation is shewn.

Alberta N. W. Lumber Co. v. Lewis, 38 D.L.R. 228, 24 B.C.R. 564, [1917] 3 W.W. R. 1007, reversing 27 D.L.R. 722, 33 W.L.R. 128.

FRAUD—ELECTION OF REMEDIES.

A purchaser of land under an agreement for sale who, upon discovering that statements by the land agent, which led him to make the purchase are untrue, writes, through his solicitor, a letter to the brokers, enclosing money on the purchase and stating that he was completing it rather than lose the money already paid on the purchase price before he learned of the false and fraudulent representations made to induce him to purchase, and stating also that he does not waive his right to insist on reparation for the deceit practised upon him, and that he proposes to bring an action on account thereof; and who subsequently makes additional payments and offers to exchange the lots for others, elects not to

rescind the contract. Discovery later of other false representations does not entitle him to rescission, but entitles him to damages for deceit.

Barron v. Kelly, 41 D.L.R. 590, 56 Can. S.C.R. 455, [1918] 2 W.W.R. 131, reversing 37 D.L.R. 8, 24 B.C.R. 283, [1917] 3 W.W. R. 65. [See [1918] 3 W.W.R. 466.]

FRAUD OF AGENT—MISREPRESENTATION.

An agent for the sale of land who, without knowledge or justification, makes false statements in regard to the land and thereby induces a sale to purchasers who rely on such representations, is liable in damages for such representations to the amounts paid on the contracts of purchase, and as against the vendor company the purchasers are entitled to have the contracts rescinded. [Derry v. Peek, 14 App. Cas. 337, followed.]

Yost v. International Securities Co.; Dannecker v. International Securities Co., 43 D.L.R. 28, 42 O.L.R. 572, affirming 12 O. W.N. 410.

An executed conveyance of land will not, in the absence of evidence of positive fraud, be set aside on the ground that it was taken in the name of a person other than the real purchaser, where it does not appear that the vendor would have refused to sell had he been aware that the vendee named in the conveyance was not the real purchaser.

Kelly v. Enderton, 5 D.L.R. 613, 22 Man. L.R. 277, 21 W.L.R. 337, 2 W.W.R. 453. [Affirmed in 9 D.L.R. 472, [1913] A.C. 191, 3 W.W.R. 1003, 23 W.L.R. 310.]

A formal transfer of lands will be set aside where the transferee relied upon false representations of value of the transferor's property, made by the latter and his agents, and where the deceptive maps and plans were shewn to the transferee, misrepresenting that the transferor's land was on a certain avenue, the transferee never having seen the land in question.

Toffey v. Sutherland, 7 D.L.R. 319, 4 A.L.R. 195, 20 W.L.R. 182, 1 W.W.R. 799.

MISREPRESENTATIONS — LACHES — CONCLUSIVENESS OF FINDINGS.

Rescission of an agreement of sale may be decreed notwithstanding a considerable delay in bringing action therefor, where there is evidence of the vendor's misrepresentations as to the drainage of the land and its fitness for agricultural purposes; the findings of the Trial Court, based on such evidence, cannot be disturbed on appeal.

Higgins v. Creech, 31 D.L.R. 110.

MISREPRESENTATION BY AGENT—LEASE.

Where lands purchased by an agent for his principals upon authority, under a written agreement executed by the agent under power of attorney, subsequently proved to be subject to a lease to third persons for one hundred years, to mine and take minerals from the lands, the existence of such lease being known to the agent, but not known to his principals nor communicated by him to them, the rescission of the agreement, and the payment back to the purchasers of the instalments of purchase money paid by them under the terms of the agreement was ordered.

Greig v. Franco-Canadian Mortgage Co., 29 D.L.R. 260, 10 A.L.R. 44, 34 W.L.R. 1102, reversing 23 D.L.R. 860, 10 A.L.R. 44, 9 W. W.R. 22, 32 W.L.R. 280. [Affirmed, 38 D.L.R. 109, [1917] 2 W.W.R. 121, 55 Can. S.C.R. 395. Leave to appeal to Privy Council refused.]

QUANTITY—"MORE OR LESS."

Where the purchaser of property under an agreement of sale, which described the property as containing "86 acres more or less," was given a deed of conveyance of the property, which he accepted without requiring or receiving in the deed any covenant or warranty as to the acreage and gave back a mortgage as part payment under the agreement, he cannot set up as a defence, in an action for foreclosure of the mortgage, the fact that he afterwards discovered the property to contain only 66 acres. Neither, having accepted the conveyance without question, can he successfully counterclaim for rescission of the contract, on the ground of fraud and misrepresentation. [Jolliffe v. Baker, 52 L.J.Q.B. 609, followed.]

Hand v. Warner, 31 D.L.R. 189, 44 N.B.R. 215, 331.

VENDOR ESTOPPED BY ACQUIESCENCE IN—SPECIFIC PERFORMANCE AGAINST VENDOR.

Merrick v. Lantz, 20 D.L.R. 950.

TIMBER LICENSES—MISREPRESENTATION.

Where a purchaser enters into an agreement to purchase timber licenses on the footing that the licensed property is a "logging proposition," when in fact it is not, and this fact is known by the vendor, but not communicated to the purchaser, the agreement will be set aside. A vendor of timber licenses is bound to acquaint the purchaser of the existence of other licenses, if any, over the same area, if he knew or ought to have known thereof; failure to do so amounts to a misrepresentation.

Foulger v. Lewis, 28 D.L.R. 505, 22 B.C. R. 372, 33 W.L.R. 309.

REPRESENTATION AND WARRANTY — "IRRIGABLE LANDS"—ONUS.

The term "irrigable lands" means lands which by reason of their level, relative to the irrigation works, are capable of having water carried over them from the works by gravity, and which, having regard to the character of the soil and of the climate, will be rendered more productive by means of irrigation properly applied in the growing of crops adapted to the locality, and a sale of lands under such description amounts to an express representation and implied warranty that the lands will answer that description; but the burden of proof is upon the purchaser to shew either misrepresenta-

tion or breach of warranty to entitle him to a rescission of the contract on that account.

Babcock v. C.P.R. Co., 27 D.L.R. 432, 9 A.L.R. 270, 33 W.L.R. 941, 9 W.W.R. 1484.

MISREPRESENTATION — ACTION FOR RESCISSION — DELAY IN BRINGING ACTION — PAYMENT OF TAXES BY PURCHASER— RIGHT TO RESCIND.

A purchaser induced by misrepresentation to purchase a piece of land will succeed in an action to rescind the contract. The contract is not affirmed merely by delay in bringing the action on the part of the purchaser nor by payment of the taxes on the property for which he was personally liable.

Cobb v. Schattner, 49 D.L.R. 659, [1919] 3 W.W.R. 1019.

AGENT FOR BOTH PARTIES—CONCEALMENT.

Clark v. Hepworth, 34 D.L.R. 177, 10 A. L.R. 465, [1917] 1 W.W.R. 806, reversing 33 W.L.R. 175, 9 W.W.R. 802. [Affirmed, 39 D.L.R. 395, 55 Can. S.C.R. 614, [1918] 1 W.W.R. 147.]

SYNDICATE TO PURCHASE LAND—FRAUD ON ONE OF PURCHASERS — WITHDRAWAL FROM TRANSACTION—RETURN OF MONEY —RIGHTS OF THIRD PARTIES.

Where a syndicate is formed for the purchase of land the purchasers become partners as to the particular transaction and the utmost good faith is due from every member of the syndicate towards every other member. The concealment from one of the members of special advantages offered to another of the associates whose entry into the syndicate is influential in causing such member to join in the purchase, justifies such member from withdrawing from the transaction except in so far as the rights of third parties are affected. [Kildonan Investment v. Thompson, 38 D.L.R. 96, 55 Can. S.C.R. 272, applied.]

Morran v. Hannah, 49 D.L.R. 447, [1919] 3 W.W.R. 1052.

FRAUD—SALE OF LAND—CONDITION—REPRESENTATIONS—FAILURE TO PROVE TRUTH OF — RESCISSION — EVIDENCE — EXCLUSION.

Walker v. Maxwell, 5 D.L.R. 888, 4 O. W.N. 95, 23 O.W.R. 57.

THIRD PARTIES—RES JUDICATA.

Oshawa Lands & Investments v. Newsom, 27 D.L.R. 744, 9 O.W.N. 355, affirming 21 D.L.R. 838, 8 O.W.N. 260. [As to costs, see 10 O.W.N. 360.]

RESCISSION OF AGREEMENT OF SALE OF LAND —FRAUD.

Creighton v. Dunkley, 28 D.L.R. 745, 34 W.L.R. 937.

FRAUD.

Where the owner's agent conspiring with the owner induces the defendant to enter into an agreement to purchase a suburban tract of land of a speculative value, by falsely pretending under sham negotiations that he is a copurchaser taking equal chances with the defendant, the contract as against the defendant is vitiated for fraud and cannot be enforced by the owner.

Emerson v. Quinn, 18 D.L.R. 241, 28 W. L.R. 405.

MISREPRESENTATION.

Where statements are in fact untrue and are made with the object of inducing a person to purchase property by creating in the mind of such person a belief that they are the real opinion of the person making them, based upon his knowledge of local conditions, and if such belief operated as a material inducement to the person to whom they were made to make such purchase, and the maker either did not believe such statements or had no opinion at all or real belief on the subject, then the purchaser is entitled to rescission of his contract of purchase and a refund of all moneys paid in connection therewith. The law is the same as to the statements made by vendors to another with knowledge and intention that such statements would be by him passed on to an intending purchaser for the purpose of inducing him to buy.

MacLellan v. Henderson, 6 W.W.R. 992.

FRAUD AND DECEIT.

In an action to set aside a sale and conveyance on the ground that the sale was induced by fraud and misrepresentation, the fraud alleged must be distinctly and clearly proven and the false representation must be of something material which had induced the grantor to act on the faith of it and execute the deed sought to be annulled.

Alexander v. Enderton, 15 D.L.R. 588, 26 W.L.R. 535, 5 W.W.R. 1022, 50 C.L.J. 277. [Affirmed in 19 D.L.R. 897, 25 Man. L.R. 82.]

REMEDIES—ACTION FOR DECEIT.

Separate representations by the vendor to members of the purchasing syndicate leading to a purchase agreement by a trustee for the syndicate will not, even if false sustain an action to rescind a later agreement between such vendor and an incorporated company to which no representations were made by the vendor on his entering into a new agreement direct with the company and accepting a surrender from the syndicate trustee, particularly where some of the syndicate members elect to stand by the purchase; the plaintiffs' remedy under such circumstances is not an action for rescission but one for damages for deceit.

Stanley v. Struthers, 22 D.L.R. 60, 7 W. W.R. 1060.

WHEN RIGHT TO REMEDY—FAILURE OF CONSIDERATION—FRAUD.

Where an agreement of sale has been completed by conveyance, it is no longer open to the purchaser, in the absence of fraud, to complain of misrepresentation by the vendor, except in cases in which the consideration for the conveyance has totally failed.

Hamilton v. Margolius; Morrison v. Mar-

golius, 22 D.L.R. 387, 391, 24 Man. L.R. 484, 489, 28 W.L.R. 504, 508.

FALSE REPRESENTATIONS.

False representations made by a party to a contract are a cause of nullity, if they have led the other party into error as to the qualities of the subject-matter which was principally in view in making the contract, and if without them it would not have been entered into.

Le Syndicate de Rosemont v. Gagnon, 24 Que. K.B. 484.

An innocent misrepresentation as to the value of land on a sale thereof is not upon the same footing as a misrepresentation as to facts which cannot be matters of opinion, as a ground for repudiating the contract in the absence of fraud.

Brauchle v. Lloyd, 21 D.L.R. 321, 8 A. L.R. 247, 7 W.W.R. 1343, 30 W.L.R. 659.

MATERIALITY.

In order to operate as a ground for rescission of a contract for the sale of land misrepresentation made by the vendor as to the quality of the land such as that the lots were "high and dry," must have been the inducing or effective cause of the buyer entering into the agreement of purchase.

Nelson v. Gagnon, 22 D.L.R. 179, 21 B.C. R. 356, 8 W.W.R. 907, 31 W.L.R. 346.

MISREPRESENTATION AS TO EXTENSIONS BY MORTGAGEE.

A purchaser of land who seeks damages from his vendor because the latter concealed from him the fact that the right to call upon the mortgagee to postpone his mortgage in favour of a new mortgage had already expired, is bound to prove that injury resulted to him from the deliberate concealment of that fact.

Bergh v. Frost, 23 D.L.R. 406.

MISREPRESENTATION AS TO ERECTION OF HOTEL IN VICINITY — RESCISSION AGAINST VENDOR'S ASSIGNEE.

A purchaser, who is induced to purchase land by the fraudulent representations of the vendor's agent that the vendor would erect a costly hotel in the vicinity of the lot, is entitled to a rescission of the contract which remedy he may exercise against the vendor's assignee suing for the balance due on the contract, although he is not entitled to counterclaim for damage against the assignee in consequence of the fraud.

Harvey v. Lawrence, 25 D.L.R. 706, 9 W.W.R. 91, 32 W.L.R. 297.

MISREPRESENTATIONS AS TO ERECTION OF HOTEL—PURCHASER'S RIGHT OF RESCISSION — REMEDY EXERCISABLE AGAINST VENDOR'S ASSIGNEE—ESTOPPEL.

Rolt v. Griese & Wood, 25 D.L.R. 740, 8 S.L.R. 336, 9 W.W.R. 462, 32 W.L.R. 874.

FRAUDULENT OPTION.

Owners who had given an option for sale of their land at a certain price are guilty of fraud where they had replaced the option with another at a higher price for the same period of time at the optionee's request for the latter's use in obtaining others to join him in taking up the option but with a secret agreement to give the original optionee the benefit of the difference.

Schrader v. Manville, 21 D.L.R. 189, 8 S.L.R. 83, 7 W.W.R. 1376, 30 W.L.R. 528.

AGENT'S MISREPRESENTATIONS—AGENT ACTING FOR BOTH PARTIES.

Misrepresentations as to the character of land made by the agent of the vendor who also acted as agent for the purchaser for the purpose of subdividing and reselling it, does not impute to the purchaser knowledge of the true character of the land as affecting his right of rescission of the agreement of sale.

Stewart v. Canadian Financiers, 23 D.L. R. 707, 22 B.C.R. 133, 9 W.W.R. 82, 32 W.L.R. 121.

FRAUD OF AGENT—AGENT BECOMING PURCHASER.

Where the vendor's agent for sale of the property himself becomes the purchaser, with the assent of his principal, of an undivided share in the property on a joint purchase thereof and makes material misrepresentations in respect to the property to the other purchasers of shares therein which induced them to buy, rescission may be granted on the application of all the other purchasers in an action in which the vendor and his agent are parties, although the agent does not concur so far as his share is concerned; the court has, under such circumstances, jurisdiction to restore the status quo ante fraudem. [Braun v. Hughes, 3 Man. L.R. 177, and Morrison v. Earls, 5 O.R. 434, distinguished.]

Kildonan Investment v. Thompson, 21 D.L.R. 181, 25 Man. L.R. 446, 7 W.W.R. 1299, 30 W.L.R. 626.

AGENT COPURCHASER—FAILURE OF VENDOR TO DISCLOSE.

Where the vendor's agent for the sale of property on a commission basis had induced a third party to become his copurchaser of the property without disclosing to him the agency and commission agreement with the vendors, it is the duty of the vendors, upon learning of the fiduciary relationship existing between their paid agent and his copurchaser, to inform the copurchaser of such agency agreement, and failure to do so will entitle him to rescission of the purchase agreement, and return of any purchase moneys paid thereunder.

Hitchcock v. Sykes, 23 D.L.R. 518, 49 Can. S.C.R. 403, affirming 13 D.L.R. 548, 29 O.L.R. 6.

FRAUD—AGENT ACTING FOR BOTH PARTIES.

An agreement for the sale of land should be declared void when the sale was consummated without knowledge on the part of the purchasers of the fact that their agents were also the agents of the vendors

and interested in the sale of the extent of their commission.

Clark v. Hepworth, 9 W.W.R. 802, 33 W.L.R. 175.

AGENT FOR BOTH PARTIES—RECKLESS STATEMENTS—SECRET COMMISSION — DECEIT —DAMAGES.

Kennedy v. Martin, 8 O.W.N. 427.

FRAUD OF SUBAGENT.

The fraud of a subagent may be ground for rescission of a contract for sale of the lands of the ultimate principal if the proved circumstances of the case are such that the ultimate principal and the intermediate agent must be deemed to have intended and agreed that the latter should or might appoint a substitute for the purpose of discharging, in his stead and on behalf of the ultimate principal, duties including or involving the making of representations of the character of that sued upon though no authority had been given to make any false representation. [De Bussche v. Alt, 8 Ch.D. 310; Powell v. Evan Jones, [1905] 1 K.B. 11, applied.]

Kildonan Investment v. Thompson, 21 D.L.R. 181, 25 Man. L.R. 446, 7 W.W.R. 1299, 30 W.L.R. 626.

FRAUD—WAIVER.

If after discovery of the whole of the material facts giving him the right to avoid the contract, the representee has by word or act definitely elected to adhere to it, the representor has a complete defence to any proceedings for rescission. The making of payments on a purchase agreement after notice of a fraud which might be set up as a ground for repudiation is evidence of an election to affirm. [Lawrence's Case, L.R. 2 Ch. App. 421, applied.]

Schrader v. Manville, 21 D.L.R. 189, 8 S.L.R. 83, 7 W.W.R. 1376, 30 W.L.R. 528.

FORM OF JUDGMENT.

In an action by a vendor for purchas-money, the defendant alleged that he had been induced to buy by the fraudulent misrepresentations of the vendor and his agents, and he counterclaimed for repayment of the cash deposit, rescission of the contract, and damages. Held, upon the evidence that there had not been any misrepresentations, and that in dealing with this question, evidence of representations alleged to have been made by the vendor on the sale to other persons of adjacent similar lots, was not admissible. The agreement contained a provision in the usual form for forfeiture of payments in the event of default and for termination of the agreement. The plaintiff's title was registered and unencumbered, and the amount due was definitely ascertained, and the defendant was in possession. Held, that the judgment should be for (a) payment to the plaintiff of the amount claimed with interest and costs; (b) foreclosure in default of payment within six months; (c) vacation of registration of the agreement; (d) forfeiture to the plaintiff of moneys paid and (e) delivery of possession to the plaintiff.

Bauman v. Crosbie, 30 W.L.R. 510.

RESCISSION — FRAUDULENT MORTGAGE — DAMAGES.

Pomeroy v. Miller, 25 D.L.R. 804, 32 W.L.R. 391.

ACTION BY VENDOR FOR PURCHASE-MONEY—MISREPRESENTATIONS OF VENDOR—EVIDENCE—FINDINGS OF FACT OF TRIAL JUDGE—RIGHT OF PURCHASER TO RESCIND—NOTICE TO VENDOR — FINDING AGAINST ELECTION TO AFFIRM—CLAIM FOR VALUE OF CHATTELS—DEMAND FOR RETURN — COUNTERCLAIM — DAMAGES —USE AND OCCUPATION—REFERENCE— COSTS.

Wallace v. Gummerson, 8 O.W.N. 35.

FRAUD AND MISREPRESENTATION — AGREEMENT FOR SALE OF FARM—DISMISSAL OF VENDOR'S ACTION FOR SPECIFIC PERFORMANCE—RESCISSION OF AGREEMENT.

Hopkins v. Edington, 8 O.W.N. 236.

PURCHASE OF MINING CLAIMS—MISREPRESENTATIONS — UNDERTAKING BY ONE VENDOR TO RETURN PORTION OF PURCHASE-MONEY IN EVENT OF PROPERTIES NOT BEING AS REPRESENTED—POSITION OF COVENDOR—RESPONSIBILITY FOR MISREPRESENTATIONS THOUGH INNOCENT— EXECUTORY CONTRACT—RESCISSION.

Lake View Consols v. Flynn, 8 O.W.N. 333.

AFFIRMANCE OF CONTRACT.

An agreement for the sale of land will not be rescinded for fraud where the plaintiff has elected to affirm the bargain, or where his acts and conduct are inconsistent with an intention to claim rescission.

Barron v. Kelly, 37 D.L.R. 8, 24 B.C.R. 283, [1917] 3 W.W.R. 65.

RIGHT TO SET ASIDE CONVEYANCE FOR FRAUD —ACTION FOR DECEIT—EVIDENCE.

Anderson v. Morgan, 34 D.L.R. 728, 11 A.L.R. 526, [1917] 2 W.W.R. 969.

FAILURE TO PROVE—RELIANCE ON OPINION RATHER THAN ALLEGATIONS OF FACT— ACTION FOR RESCISSION OF CONTRACT OR DAMAGES FOR DECEIT—DISMISSAL—APPEAL.

Mills v. Farrow, 11 O.W.N. 324, affirming 10 O.W.N. 440.

STATEMENTS OF VENDORS—ACTION FOR RESCISSION — MISREPRESENTATION OF MATERIAL FACT—FAILURE TO SHEW—FINDINGS OF TRIAL JUDGE—APPEAL.

Fox v. DeBelleperche, 12 O.W.N. 275, 13 O.W.N. 21.

EVIDENCE — RESCISSION OF AGREEMENTS — RETURN OF MONEY PAID—DAMAGES— COSTS.

Yost v. International Securities Co.: Dannecker v. International Securities Co., 12 O.W.N. 410.

FRAUDULENT INDUCEMENT—AGENT.

It is a fraud sufficient to set aside a deed of sale of land when the agent of the vendor employs a friend to state to the

purchaser that if he will agree to take a certain number of lots he himself is prepared to do the same, and the latter is a fictitious purchaser in bad faith.

Auger v. McCarthy, 52 Que. S.C. 270.

In the absence of evidence of fraud or undue influence, a conveyance should not be set aside merely on the ground that the grantor was of advanced years and conveyed to one of his own family, without independent advice.

Grahn v. Litwin, 4 S.L.R. 270.

AGENT TO PROCURE PURCHASER — AGENT JOINING IN PURCHASE—NONDISCLOSURE TO COPURCHASER—FRAUD—RESCISSION OF CONTRACT.

H. was owner of mining land and offered S. a commission of 10 per cent for finding a purchaser thereof. H. afterwards wrote to S. stating that the mine was very rich and urging him to induce some of his friends to join in a syndicate or company to purchase and work it. S., without disclosing his agency, induced W. to take up the matter and they agreed to join in the purchase and divide the profits. A. contract was entered into with H. and W. paid $20,000 on account of the purchase price on which S. was paid his commission. Default having been made in the further payments H. brought action claiming possession of the property and the right to retain the amount paid. W. counterclaimed for rescission of the contract and return of the money paid with interest and on the trial swore that he knew nothing of S.'s agency for several months after the contract was signed. Held, that it was the duty of H., on becoming aware that S. was a copurchaser with W. to satisfy himself that the latter was aware of the agency of S.; and that W. was entitled to the relief asked by his counterclaim.

Hitchcock v. Sykes, 49 Can. S.C.R. 403, affirming 29 O.L.R. 6.

[Leave to appeal to Privy Council was refused with costs. [See memorandum of 49 Can. S.C.R.]

ACTION BY ASSIGNEE—DEFENCES—COVENANT TO PAY—CONDITION PRECEDENT—FRAUDULENT MISREPRESENTATION BY ASSIGNOR AS TO PRICE — EQUITY OF COVENANT TO RESCIND—ASSIGNMENT SUBJECT TO EQUITY—FAILURE OF ACTION BY ASSIGNEE—COSTS.

The defendant gave M. $1,000 to invest as he (M.) pleased; the defendant said he would put in no more money. M. then said he had bought a parcel of land for $16,000 and had put the $1,000 into it; he proposed that the defendant should pay $2,200 more, in instalments, and take a one-fifth interest in the parcel; he sent the defendant for his signature a written agreement to pay the $2,200. The defendant, after investigation, signed the agreement:—Held, that the defendant could not be heard to say that he did not promise to pay as he covenanted—that the $1000 was paid as a condition precedent to an understanding that he was not to comply with his covenant. M. said that the parcel cost $16,000, so that the defendant was obtaining his one-fifth at cost. The price was in fact $15,000, as M. knew. Held, that the misrepresentation made was material, and gave the defendant an equity to rescind the contract; the plaintiffs, to whom H. had conveyed the land and assigned the defendant's agreement, took subject to this equity; and their action for the $2,200 failed. There was nothing to prevent the assignor, M., from disclosing his fraud or to preclude the defendant from relying upon it. [Stoddart v. Union Trust, [1912] 1 K.B. 181, and Roxburghe v. Cox (1881), 17 Ch. D. 520, 526, distinguished.]

London & Western Canada Investment Co. v. Dolph, 43 O.L.R. 449.

Misrepresentation by a vendor of lands, that he had a charter for and was intending to build a street car line to connect a neighbouring city with the purchased lands, entitles the purchaser to rescission of the contract of sale.

McCallum v. Dominion Co-Operative N.T. & Realty Co., [1917] 1 W.W.R. 821.

ACTION FOR PURCHASE MONEY—COUNTERCLAIM FOR RESCISSION AND DAMAGES—EVIDENCE—FORM OF JUDGMENT.

In an action by a vendor for purchase money the defendant alleged that he had been induced to buy by the fraudulent misrepresentations of the vendor and his agents, and he counterclaimed for repayment of the cash deposit, rescission of the contract, and damages:—Held, upon the evidence, that there had not been any misrepresentations, and that in dealing with this question evidence of representations alleged to have been made by the vendor on the sale to other persons of adjacent similar lots, was not admissible. The agreement contained a provision in the usual form for forfeiture of payments in the event of default and for termination of the agreement. The plaintiff's title was registered and unencumbered, and the amount due was definitely ascertained, and the defendant was in possession:—Held, that the judgment should be for (a) payment to the plaintiff of the amount claimed with interest and costs, (b) foreclosure in default of payment within six months, (c) vacation of registration of the agreement, (d) forfeiture to the plaintiff of moneys paid, and (e) delivery of possession to the plaintiff.

Bauman v. Crosbie, 30 W.L.R. 510.

SALE OF FARM — REPRESENTATION AS TO ACREAGE—PROOF OF FRAUD INDUCING CONTRACT — EVIDENCE — FINDING OF TRIAL JUDGE — APPEAL — REMEDY — RESCISSION—DAMAGES—MEASURE OF.

Morrison v. Connor, 17 O.W.N. 181.

ACTION BY PURCHASERS FOR RESCISSION—FRAUD OF AGENTS — AUTHORITY OF AGENTS — RECOVERY OF MONEYS PAID AND INTEREST—COSTS.

White v. Belleperche, 15 O.W.N. 443.

EXCHANGE OF PROPERTIES — EVIDENCE — CONFLICT—FAILURE TO PROVE MISREPRESENTATIONS INDUCING CONTRACT.

Glen Eden Securities v. McKenzie, 15 O.W.N. 307.

EXCHANGE OF PROPERTIES — FAILURE TO PROVE FRAUD.

Stacey v. Smith, 10 O.W.N. 455.

FAILURE TO PROVE MISREPRESENTATIONS—RELIANCE ON OPINION NOT FACT—RESCISSION—DAMAGES FOR DECEIT.

Mills v. Farrow, 10 O.W.N. 440.

MATERIAL MISREPRESENTATION AS TO MATTERS OF FACT—RELIANCE ON BY PURCHASER—RETURN OF MONEY PAID AND PROMISSORY NOTE GIVEN—INFANT PURCHASER.

Gatchell v. Taylor, 10 O.W.N. 42.

STATEMENT OF WHAT WAS EXPECTED IN REGARD TO WATER-MAINS AND SEWERS—MISREPRESENTATION OF FACT.

Fox v. Belleperche, 11 O.W.N. 224.

PROMISSORY NOTE—COUNTERCLAIM—RESCISSION—DAMAGES.

Gentles v. Georgian Bay Milling & Power Co., 8 O.W.N. 618, 9 O.W.N. 382.

FRAUDULENT SCHEME—PROMISSORY NOTES—CANCELLATION.

Trepannier v. Lalonde, 8 O.W.N. 427.

RETURN OF MONEYS PAID.

Pratt v. Robert Hyland Realty Co., 4 O.W.N. 771, 24 O.W.R. 34.

FRAUD AND CONSPIRACY OF PURCHASERS—VOID AGREEMENT—CANCELLATION—REFUSAL OF SPECIFIC PERFORMANCE—FORFEITURE OF DEPOSIT.

Page v. Clark, 5 O.W.N. 143, 25 O.W.R. 82.

MISREPRESENTATIONS OF AGENT OF VENDOR COMPLICITY OF VENDOR—CANCELLATION OF AGREEMENT—RETURN OF MONEY PAID.

Scobie v. Wallace, 4 O.W.N. 881, 24 O.W.R. 130.

RESCISSION — FALSE REPRESENTATIONS BY VENDOR INDUCING PURCHASE — MATERIALITY—PARTIES RELEGATED TO FORMER POSITIONS — DAMAGES — OCCUPATION RENT—SET-OFF—COSTS.

Aspden v. Moore, 5 O.W.N. 971.

(§ I E—28)—INSTALMENT CONTRACTS—RESCISSION FOR PURCHASER'S FAILURE TO PAY.

Upon an agreement to purchase lands, imposing on the purchaser, in the event of default on any instalment, a forfeiture of all partial payments, there may be a default, through negligence or temporizing on the purchaser's part, of such a character as to disentitle him to specific performance without at the same time enforcing the forfeiture against him of the payments made, especially where the amount claimed to have been forfeited bears no just relation to the breach, the governing principle being relief against the penal clause rather than sympathy with the party penalized.

Verma v. Donohue, 14 D.L.R. 749, 18 B. C.R. 468, 26 W.L.R. 257, 5 W.W.R. 555.

PENALTY—EQUITABLE RELIEF.

Where the purchaser, under an agreement for sale of lands on deferred payments was let into possession on paying the first instalment but defaulted upon the second instalment, the vendor's claim in an action to annul the contract and to forfeit the money paid is properly dismissed if the arrears are paid into court when the statement of defence and counterclaim for specific performance of the agreement is filed, if the stipulation for forfeiture is, in fact, one for a penalty.

Kilmer v. B.C.Orchard Lands Co., 10 D. L.R. 172, [1913] A. C. 319, 82 L.J.P.C. 77, 23 W.L.R. 566, 3 W.W.R. 1119.

EQUITABLE RIGHT TO REDEEM.

In an action brought by an assignee of an agreement of sale against the purchaser for a declaration that the agreement of sale shall be declared to have been cancelled and that the assignee be entitled to retain any moneys paid under it and to possession of the lands, because of the purchaser's failure to pay pursuant to the terms of the agreement, the defendant is entitled to the usual three months within which to redeem, although liability is admitted and the only relief asked for by the defendant on the trial is the usual order granting time for redemption. [Canadian Fairbanks Co. v. Johnston, 18 Man. L.R. 589, followed.]

Pentland v. MacKissock, 9 D.L.R. 572, 23 Man. L.R. 1, 22 W.L.R. 947.

VENDOR'S RIGHT.

A stipulation in a deed of sale or promise of sale of land that if the buyer fails to make any payment in capital or interest at the specified dates such deed shall become null and void ipso facto without mise en demeure, is exclusively in the interest of the vendor, who has the right on default to choose between rescission or performance of the contract.

Gagnon v. Lemay, 42 D.L.R. 161, 56 Can. S.C.R. 365, affirming 27 Que. K.B. 59. [Appeal to Privy Council refused.]

TENDER OF PAYMENT—BROKER—INTENTION TO RESCIND.

Where the vendor of land is out of the country and there is no place mentioned in the agreement of sale at which the deferred payments are to be made, the purchaser is justified in tendering the purchase money to the agent who listed the property and who has been held out as the vendor's agent. An assent by the purchaser to the request of such agent to wait for some time before making payment in order that the transfer may be received from the vendor is not an agreement to extend the time nor evidence of an intention not to rescind,

although time is stated to be of the essence of the agreement.

Simson v. Young, 41 D.L.R. 258, 56 Can. S.C.R. 388, [1918] 2 W.W.R. 62, reversing 33 D.L.R. 220, 10 A.L.R. 310, [1917] 1 W. W.R. 1141.

FAILURE TO PAY PURCHASE MONEY—NOTICE, WHAT CONSTITUTES.

An agreement for the sale of land on periodical payments is not cancelled by a conditional notice that unless the payments (then overdue) are paid within a certain time, the agreement will be forfeited, where the agreement itself calls for an absolute notice.

Constantino v. Dick, 15 D.L.R. 413, 26 W. L.R. 741, 5 W.W.R. 1319.

The usual practice in an action to annul the contract of sale for the purchaser's default in payment is for the court exercising its equitable jurisdiction to fix a time within which the defaulting purchaser may redeem and to decree cancellation only in case the default continues for that time.

Draper v. Bielby, 10 D.L.R. 746, 6 S.L.R. 301, 23 W.L.R. 902, 4 W.W.R. 489.

In an action in dissolution of sale by reason of nonpayment of price the buyer may pay the instalments due, with interest and costs, not only before judgment is rendered by the Superior Court, but, if the case be inscribed in review, at any time before judgment is pronounced by the Court of Review and thus avoid the cancellation of the sale. (C.C. (Que.) 1538, C.C.P. 1203.)

Starke Cooperage Co. v. Migneault and Vallee, 2 D.L.R. 173.

(§ I E—28) — AGREEMENT TO CONVEY — BREACH BY PURCHASER — NOTICE OF CANCELLATION — SUFFICIENCY — TIME THE ESSENCE.

Notice by the contract vendor, of intention to cancel the agreement for the purchasers' default in making payment, addressed to the purchasers by name, was not insufficient as not being addressed to the purchasers, nor because one of the purchasers was served two days later than the other, since that would not affect the right of the one first served to redeem up to the expiration of the redemption period, dating from the service upon the purchaser last served. Time being of the essence of a contract to convey, the contract is at law determined by the vendor giving the notice of intention to cancel provided for in the agreement in case of default by the purchaser in making payments, and by the purchaser's failure to remedy the default within the time allowed under the notice and agreement, though, in equity, the court would relieve against or enforce specific performance, notwithstanding default, if it could do justice between the parties and if there is nothing in the express stipulations between the parties, the nature of the property or the circumstances which would make it inequitable to interfere with or modify the legal right. Written notice by the contract vendor to the purchaser, of intention to terminate the agreement and to exercise power of cancellation and reentry, provided in such agreement, sufficiently shewed an immediate intention to cancel, within provision in the agreement that in default of payment by the purchaser, the vendor may put an end to the agreement, by mailing notice intimating an intention to determine the agreement.

Massey v. Walker, 11 D.L.R. 278, 23 Man. L.R. 563, 24 W.L.R. 168, 4 W.W.R. 557.

STIPULATION FOR RESCISSION FOR NONPRODUCTION OF DEED — ACTION FOR INSTALMENT OF PURCHASE MONEY — WAIVER — PAYMENT INTO COURT.

Sutcliffe v. Smith, 7 D.L.R. 861, 21 W. L.R. 326.

Where the purchaser of land under a crop payment plan himself makes default in carrying out his agreement and such default is found to have been the cause of the vendor's default to a mortgagee of the property by reason whereof the property was sold under the mortgage, the original purchaser first mentioned has no right of action in damages against his vendor for allowing the property to be sold.

Dool v. Robinson, 7 D.L.R. 337, 22 W. L.R. 246. [Affirmed, 11 D.L.R. 840, 24 W. L.R. 803.]

An option to purchase for a certain sum, which provides for payment of part of such sum in cash, can be effectually accepted only by making the cash payment, and, until such payment, no contractual relationship arises. [Cushing v. Knight, 6 D.L.R. 820, 46 Can. S.C.R. 555, followed.]

Beer v. Lea, 7 D.L.R. 434, 4 O.W.N. 342. [Affirmed in 14 D.L.R. 236, 29 O.L.R. 255.]

Where an agreement for the sale of lands expressly requires payment of $10,000 on the purchase price contemporaneously with the execution of the agreement and the purchaser refuses to comply with this requirement, the vendor's obligation to sell did not become absolute. [Ridgway v. Wharton, 6 H.L. Cas. 238, followed.]

Cushing v. Knight, 6 D.L.R. 820, 46 Can. S.C.R. 555, 2 W.W.R. 704.

Where an option stipulates for payment of part of the purchase price in cash, acceptance of the option by letter is not sufficient, and no contractual relationship can exist until the cash payment has been made. [Cushing v. Knight, 6 D.L.R. 820, 46 Can. S.C.R. 555, followed.]

Miller v. Allen, 7 D.L.R. 438, 4 O.W.N. 346.

Where, under a written agreement, lands are sold, the purchase price being payable one-fourth in cash and the balance in three equal consecutive annual instalments, with a stipulation that upon default in the payment of principal, interest, taxes or premiums of insurance, or any part thereof, the whole purchase money shall become due and payable; and where the purchaser punc-

tually made the cash payment upon the execution of the agreement, but upon the maturity of the first annual instalment makes default in its payment; and an action is brought by the vendor, under such acceleration clause the vendor is entitled to have a time fixed within which the purchaser must pay the full amount of the purchase money and interest, and, in default of payment within the time limited to a declaration that the agreement has been forfeited, and is null and void, and at an end, and that all payments made thereunder and the improvements on the land are the property of the vendor in terms of a forfeiture clause contained in the contract. Where lands are sold under an agreement for payment by annual instalments with an acceleration clause making the entire purchase money due and payable upon default in the payment of any of the instalments, such clause is to be construed literally and cannot be relieved against.

Houghton v. Nicoll, 6 D.L.R. 108, 22 Man. L.R. 489, 22 W.L.R. 59, 2 W.W.R. 1020.

STIPULATION FOR NOTICE—PENALTY CLAUSE.

Where a contract for the sale of land on deferred payments is made to several purchasers individually named, it is not to be inferred that they are partners in the transaction so as to validate a notice to one as a notice to all; notice of intention to forfeit the contract for their default must be given to each of the purchasers under a stipulation therein for a thirty-days' notice in writing demanding payment of the arrears to be delivered to "the purchasers, their heirs, executors, administrators or assigns," and authorizing the vendor to repossess on the default being continued under such notice.

Bark Fong v. Cooper, 16 D.L.R. 299, 49 Can. S.C.R. 14, 27 W.L.R. 174, 5 W.W.R. 633, 701.

ACCEPTANCE OF PART OF PURCHASE MONEY FOR NEW TERM — NOTICE — INSUFFICIENCY OF.

A land purchase agreement contained provisions that if the purchaser did not sell 50 lots every six months from December 1st —half of every payment by the subpurchaser being remitted to the vendor—the vendor could cancel the agreement, and the purchaser would be liable for the balance on any of his sales for which a deed was demanded. The purchaser during the first year and a half resold over 150 lots, but fell a few short of the required 50 in the last six months of that period which expired May 31st, although he had sold an average of 50 lots per each six months. After having entered on and made a few sales in the fourth six-monthly period, the purchaser on account of illness fell behind and in July the vendors served him with notice under the clause to terminate the agreement. Held, that the notice served was too late to be effective and in any event that the vendors had by accepting and crediting the purchaser with sales made during June, when the 4th six-monthly period had been entered upon, elected in law to overlook the nonobservance of the literal terms of the contract and could not in July rescind or terminate the agreement.

Diamond v. Western Realty Co., 47 D. L.R. 333, 58 Can. S.C.R. 620.

AGREEMENT FOR SALE — ASSIGNMENT BY WAY OF SECURITY — DEFAULT IN PAYMENT — JUDGMENT ORDER FOR PAYMENT INTO COURT WITHIN CERTAIN TIME — FAILURE — FORECLOSURE.

When the vendor obtains a judgment against the purchaser and other encumbrances for default under an agreement for sale and the judgment provides for the payments of all moneys due on a certain date failing which the agreement may be cancelled and rescinded, the purchaser having failed to fulfil his obligation, the vendor may obtain the relief above referred to, and the matter cannot be reopened.

Best v. Dussessoye, 50 D.L.R. 640.

CONTRACT FOR SALE OF LAND — BREACH — TRIAL — JUDGMENT IN FORMER ACTION — PLEADING — EVIDENCE.

Hitchcock v. Columbia Valley Land Co., 48 D.L.R. 737, [1919] 2 W.W.R. 969.

SPECIAL CLAUSE—FAILURE TO PAY INSTALMENTS—RIGHTS OF PARTIES.

An agreement for sale of land contained the following clause: "The first party will have the right to cancel this agreement and the same shall ipso facto be cancelled without its being necessary to put the second party in default, should the latter fail to pay any instalment of price or interest within ninety days after maturity and in such event the vendors shall retain all payments made to them on account of the price or interest as liquidated damages for such default." The court held that this clause was exclusively in favour of the plaintiff and that the defendant had no right to avail himself thereof to cancel the agreement and avoid payment of the balance of price. [Gagnon v. Lemay, 42 D.L.R. 161, followed.]

Holt v. Maher, 46 D.L.R. 163, 55 Que. S.C. 266.

SASK. STATS. 1917, 1ST SESS. C. 31—TERMINATION OF CONTRACT — COURT OF COMPETENT JURISDICTION — RIGHT OF COURT TO LAY DOWN TERMS AND CONDITIONS.

Chapter 31, 1917 (Sask.), 1st Sess., whereby all proceedings by a vendor to determine or put an end to or rescind or cancel an agreement for sale of land shall be had and taken by proceedings in a court of competent jurisdiction, gives such court the right to lay down the terms and conditions upon which its aid will be granted. The court is not required to grant cancellation in all cases in which the vendor himself could have cancelled if the Act had not

been passed. [Steedman v. Drinkle, 25 D. L.R. 420, distinguished.]

Provincial Securities Co. v. Gratias, 46 D.L.R. 104, 12 S.L.R. 155, [1919] 2 W.W.R. 83.

AGREEMENT FOR SALE OF LAND—PROVISION FOR CLOSING SALE AT FIXED TIME—TIME OF ESSENCE—RIGHT OF VENDOR TO CANCEL ON DEFAULT OF PURCHASER—EXTENSION OF TIME—NEW AGREEMENT—CONSIDERATION—IMPORTATION OF TIME—CLAUSE—PAYMENT OF PART OF PURCHASE MONEY—REFUSAL OF VENDOR TO COMPLETE SALE ON NEW DAY FIXED—RIGHT OF PURCHASER TO TREAT AGREEMENT AS TERMINATED—RIGHT TO RETURN OF SUM PAID—SUBSEQUENT OFFER OF PURCHASER TO CARRY OUT SALE—EQUITABLE RELIEF—COMMON LAW RIGHT OF VENDOR NOT EXCLUDED BY SPECIAL PRIVILEGE IN FAVOUR OF PURCHASER.

Winnifrith v. Finkleman, 32 O.L.R. 318.

AGREEMENT FOR SALE OF LAND—ACTION FOR INSTALMENT OF PURCHASE-MONEY—ABILITY OF VENDOR TO CONVEY—RIGHT TO RESCISSION—DAMAGES—LIMITATION OF—ABATEMENT OF PURCHASE-MONEY—APPLICATION OF PAYMENT—COSTS.

Fehrenback v. Grauel, 6 O.W.N. 39.

NOTICE OF CANCELLATION FOR DEFAULT IN PAYMENT OF PURCHASE-MONEY—PROVISO FOR ONE MONTH'S NOTICE—ACTUAL NOTICE GIVING THIRTY DAYS ONLY.

Le Neveu v. McQuarrie, 21 Man. L.R. 399.

DEFAULT IN PAYMENT OF INSTALMENT—FORFEITURE—ACCEPTANCE OF LEASE BY PURCHASER.

Macammond v. Govenlock, 18 O.W.R. 357.

(§ I E—29)—DEFECTIVE TITLE—CONTRACT TO PURCHASE—RESTORATION OF VENDOR.

In relieving plaintiff from a contract to purchase farm land and farm utensils and stock, as an entire agreement, because of defective title to the land, defendant vendor is entitled to be restored to his original situation, so far as possible, and an allowance for articles not restored by the purchaser. Ordinarily, on abandonment of a contract to purchase land for a defect in title, the purchaser in possession is not liable for its use and occupation for a reasonable time, but he must not remain in possession after the contract is clearly abandoned.

Millard v. Gregorie, 11 D.L.R. 539, 47 N.S.R. 78, 12 E.L.R. 401.

A purchaser who, on the date fixed for completion, learns that the vendor's title is defective and that the latter is unable to give a good title, has the right to repudiate the contract and to demand the return of any part of the purchase price already paid in, although the matter of the defect appears on record in the land titles office. [Smith v. Butler, [1900] 1 Q.B. 694, applied.]

Christie v. Taylor, 15 D.L.R. 614, 26 W.L.R. 673, 5 W.W.R. 1034.

REPUDIATION—EQUITABLE RIGHT PLEADABLE AGAINST SPECIFIC ENFORCEMENT, HOW.

A purchaser's right to repudiate the contract on the ground of want of title is an equitable right arising from want of mutuality and may be a defence to an action for specific performance. Where the vendor has obtained a decree for specific performance, the purchaser cannot, without leave of the court, repudiate the contract on the ground that the vendor cannot make a good title, but he may move the court to be discharged from the contract. [Halkett v. Dudley, [1907] 1 Ch. 590, followed.]

Lee v. Sheer, 19 D.L.R. 36, 8 A.L.R. 161, 30 W.L.R. 273, 7 W.W.R. 927.

PURCHASER'S RIGHTS.

A purchaser under an agreement for the sale of lands who has paid or tendered the purchase price pursuant to the contract is entitled to have the contract rescinded and to be restored to his original position, if the vendor is neither ready nor able to make title to the property. [Forrer v. Nash, 11 Jur. (N.S.) 789, 53 E.R. 854, applied.]

Hamann v. Galbraith, 17 D.L.R. 71, 28 W.L.R. 294, 6 W.W.R. 920, 7 S.L.R. 236.

INABILITY TO CONVEY—KNOWLEDGE OF PURCHASER AS DEFENCE.

A delay of more than thirteen months to furnish title to lands sold cannot be considered reasonable, and the fact that the purchaser was aware of the vendor's inability to convey until the vendor received a transfer for the land does not disclose a defence to an action for a rescission of the sale and return of the money paid thereon.

Shier v. Hackett, 23 D.L.R. 84, 31 W.L.R. 757.

A subsequent purchaser is justified in demanding the annulment of a sale where the immovable is subject to a real servitude of "non-aedificandi," of which he has not been informed.

Marcil v. Legault, 23 D.L.R. 756, 24 Que. K.B. 1.

DELAY IN MAKING TITLE—ESSENCE OF TIME.

In the absence of a stipulation making time of the essence of the contract, a delay of four months in perfecting title to land is unreasonable and will entitle the other party to repudiate the contract.

Williams v. Black, 23 D.L.R. 287, 8 W. W. R. 1139, 31 W.L.R. 844.

RESTITUTION TO STATUS QUO.

Where a rescission of a contract for the sale of lands is sought by a purchaser upon no ground of fraud but upon the inability of the vendor to make a satisfactory title to the land conveyed, it is the duty of the purchaser to make restitution of what he had received under the contract; and where in pursuance of such contract the purchaser removes building upon the land and is unable to make complete restitution, damages equivalent to the value thereof may be al-

lowed in restitution of the vendor to his status quo.

McNiven v. Pigott, 22 D.L.R. 141, 33 O. L. R. 78, reversing 19 D.L.R. 846, 31 O.L.R. 365. [Varied in 22 D.L.R. 147.]

PURCHASER OF REALTY—TENDER OF LAST INSTALMENT DUE UNDER CONTRACT—FAILURE OF VENDOR TO FURNISH TITLE—RIGHT OF PURCHASER TO HAVE CONTRACT RESCINDED AND PURCHASE MONEY RETURNED.

A purchaser of realty is entitled to have the contract of purchase rescinded and the purchase money returned, if upon tender of the last instalment due, the vendor is not able to furnish title, and takes no pains to procure same until action is commenced, although shortly after action is commenced he becomes in a position to furnish title. [Baskin v. Linden, 1 D.L.R. 789, followed.]

Grossenback v. Goodyear, 48 D.L.R. 58, [1919] 3 W.W.R. 12, affirming 45 D.L.R. 629, [1919] 1 W.W.R. 730.

ABSENCE OF WRITTEN CONSENT OF WIFE—FULL KNOWLEDGE OF TRANSACTION—DOWER ACT.

Choma v. Chmelyk, 40 D.L.R. 731, 13 A. L.R. 298, [1918] 2 W.W.R. 382.

OBJECTIONS TO TITLE—RIGHT OF WAY—ADMISSION BY VENDOR OF VALIDITY OF OBJECTIONS—TERMINATION OF CONTRACT—REGISTRATION—DISCHARGE.

Jewer v. Thompson, 3 D.L.R. 886, 3 O. W.N. 1450, 22 O.W.R. 610.

SALE OF REAL ESTATE—PUBLIC WORK—EXAGGERATION—NULLITY—QUE. C.C. 993, 1012.

When, at a sale of real estate, the vendor informs the purchaser of the proposed construction in the neighborhood of important buildings likely to improve the property, the purchaser should verify these facts, and if the buildings are in the nature of public works which the purchaser is supposed to to know and could easily look into, he has only himself to blame if he has not made these inquiries before buying the property or accepting an agreement of sale. A little exaggeration on the part of the vendor during the negotiations does not constitute fraud and false representations sufficient to annul the contract, but an injury which is not a cause for nullity among persons of the age of majority.

Roy v. Jacques Cartier Park, 46 Que. S.C. 370.

ACTION AGAINST NONRESIDENT—BLANK PROVISO—SALE OF LAND NOT IN JURISDICTION.

Burley v. Knappen, 20 Man. L.R. 154, 13 W.L.R. 715.

II. Vendor's lien; foreclosure.

See Execution, I—8.

(§ II—30)—INCONSISTENT REMEDIES—SPECIFIC PERFORMANCE — PERSONAL JUDGMENT—SURETY.

The remedies of the vendor for a judgment for the purchase price capable of immediate execution and the equitable relief of specific performance and foreclosure of the vendor's lien are inconsistent and cannot stand together; an order which provides for a personal judgment, on which execution can issue before the expiration of the period fixed for redemption, is objectionable, and likewise if it fails to provide for a reconveyance to the purchaser if he pays the purchase price; but these objections are untenable by a surety for the purchaser's defaults.

Regina Brokerage & Invest. Co. v. Waddell, 27 D.L.R. 533, 9 S.L.R. 154, 34 W.L.R. 229, 10 W.W.R. 364.

REMEDIES — SPECIFIC PERFORMANCE — PERSONAL JUDGMENT—EXECUTION.

A personal judgment for the unpaid amount under an agreement of sale, obtained in an action for the specific performance of the agreement and the enforcement of the vendor's lien, is subject to immediate execution; the remedies of personal judgment and specific performance are not inconsistent, and the exercise of one does not necessarily imply the negation of the other. [Standard Trust Co. v. Little, 24 D.L.R. 713, 8 S.L.R. 205, distinguished.]

Morgan v. De Geer, 36 D.L.R. 161, 10 S. L.R. 312, [1917] 3 W.W.R. 177.

FORFEITURE — WAIVER — SPECIFIC PERFORMANCE—PRÊTE-NOM.

A condition in an agreement of sale whereby the vendor is to become entitled to the property and payments thereon in case of the purchaser's default, and the agreement is thereupon to become null, is one for the benefit of the vendor, who may waive the condition, and sue upon the contract for the balance of the purchase price; the purchaser, having entered into the agreement in his own name, cannot, to escape personal liability, set up that he was merely a prête-nom or acting for another.

Pépin v. Savignac, 35 D.L.R. 715, 51 Que. S.C. 207.

VENTE À RÉMÉRE—REDEMPTION—TIME.

It is sufficient under art. 1550 C.C. (Que.), that the vendor in a vente à réméré signifies, within the time limited for redemption, his intention to redeem. It is unnecessary to take judicial proceedings for redemption within that time. Where property has been sold subject to a right of redemption within a certain time, it is sufficient to satisfy art. 1550 C.C. (Que.) that the vendor, before the expiration of the period of delay, acquaint the purchaser of his intention to redeem, and no payment or tender of the amount due is necessary; an action to compel the return of the property need not be commenced until after the period of delay has expired. [Trudel v. Bouchard, 27 L.C.J. 218; Walker v. Sheppard, 19 L.C.J. 103, distinguished; art. 1662 French Code, considered.] A vendor who stipulates for a right of redemption preserves only a "jus ad rem" to the property sold, and upon obtaining a discharge or retrocession from his buyer must by virtue of art 2098, C.C. (Que.)

have these deeds registered, as they transfer the ownership. [Sirois v. Carrier, 13 Que. K.B. 242, followed.]

Johnson v. Laflamme, 32 D.L.R. 401, 25 Que. K.B. 464. [Affirmed in 36 D.L.R. 572, 54 Can. S.C.R. 495.]

FORECLOSURE—FAILURE TO APPEAL AGAINST ORDER NISI.

Where in an action for specific performance of an agreement for the sale of land an order nisi is not appealed against within the manner and period prescribed by the rules, and having been refused leave to appeal after the time has expired, the order of sale founded upon it must likewise stand.

Johnson v. Madson, 27 D.L.R. 238, 9 A.L.R. 332, 10 W.W.R. 331.

CONVEYANCE À DROIT DE RÉMÉRÉ—DELAY IN REDEMPTION—EXTENSION.

Upon a failure to exercise within the stipulated period, or extension thereof, the right to redeem lands conveyed droit de réméré, as security for a loan, the purchaser becomes absolute owner after the time limited for redemption, and the courts of Quebec have no power to grant relief by extending the time for redemption; the purchaser's letter, after the expiration of the redemption period, demanding payment of the loan before a certain date, does not operate as an extension of the right. [Arts. 1549-50, 2248, C.C. (Que.) applied.]

Gagnon v. Belanger, 30 D.L.R. 40, 53 Can. S.C.R. 204.

WHO ENTITLED TO—SELLER WITH EQUITABLE TITLE.

The fact that the defendant, who before acquiring the legal title, sold land he had agreed to purchase (his vendor conveying directly to the purchaser) will not prevent the defendant claiming a vendor's lien for the unpaid purchase money, since his equitable title was sufficent to support the lien. [Warren v. Fenn, 28 Barb. (N.Y.) 333, followed.]

Kaulbach v. Jodrey, 13 D.L.R. 782, 13 E.L.R. 409.

ACTUAL VENDOR DEALING THROUGH A NOMINAL OWNER.

The actual vendor of land may be entitled to a vendor's lien for unpaid purchase money, although the land was nominally held in the name of another by whom the conveyance was made, where the introduction of a nominal holder was not fraudulent.

Kirk v. Harvey, 15 D.L.R. 488, 18 B.C.R. 645, 26 W.L.R. 747, 5 W.W.R. 980.

SECURITY FOR DEBT—NEGOTIATION—EFFECT ON LIEN.

An unpaid vendor of real estate has a lien for the purchase money, which is wholly independent of any possession on his part, and it attaches to the estate as a trust, equally whether it be conveyed or only be contracted to be conveyed. Such vendor's lien is not lost by the taking of security for the purchase money, in the form of a draft, promissory note, or bill of exchange, even though negotiated by the vendor.

Denny v. Nozick, 48 D.L.R. 310, [1919] 3 W.W.R. 366, reversing [1919] 2 W.W.R. 792.

REMEDIES OF VENDOR.

An unpaid vendor cannot have the land and the instalments of the purchase money; he must elect either remedy.

Gale v. Powley, 24 D.L.R. 450, 22 B.C.R. 18, 8 W.W.R. 1312, 32 W.L.R. 65.

ACTION FOR PURCHASE MONEY—SPECIFIC PERFORMANCE — NECESSITY OF CONVEYANCE.

An open contract or any contract under which a purchaser is entitled to a conveyance upon payment of the purchase money, the vendor cannot maintain an action at law for the purchase price unless he has actually conveyed the land, or unless the action is for an intermediate instalment. [Landes v. Kusch, 24 D.L.R. 136; Clergue v. Vivian, 41 Can. S.C.R. 607; East London Union v. Metropolitan R., L.R. 4 Ex. 309; Laird v. Pim, 7 M. & W. 474, applied.] The remedies of specific performance and an action for the purchase price are inconsistent, since one operates as an affirmance while the other as a rescission of the contract; and where a vendor elects to proceed with the remedy of specific performance or foreclosure of the purchaser's interest under an agreement for the sale of land, a judgment for an unpaid instalment is thereafter no longer enforceable except as to the costs. [Lee v. Sheer, 19 D.L.R. 36, distinguished; Hargreaves v. Security Inv. Co., 19 D.L.R. 677, followed; Jackson v. Scott, 1 O.L.R. 488, applied.]

Standard Trust Co. v. Little, 24 D.L.R. 713, 8 S.L.R. 203, 8 W.W.R. 1112, 31 W. L.R. 769.

SPECIFIC PERFORMANCE — ACTION FOR PURCHASE PRICE—PLEADING.

The remedies of specific performance of an agreement for the sale of land or an action for the purchase price thereof are both the same; but the latter carries, both as to pleadings and orders, the incidence of an action for specific performance. [Groves v. Mason, 2 A.L.R. 181; Ellis v. Rogers, 50 L.T. 660, applied.]

Landes v. Kusch, 24 D.L.R. 136, 8 S.L.R. 32, 7 W.W.R. 1076, 30 W.L.R. 444, reversing 19 D.L.R. 520, 7 S.L.R. 83, 6 W.W.R. 1309.

NECESSARY ALLEGATIONS — TITLE—POSSESSION.

In an action for the foreclosure of a contract for the purchase of land, the court will not order the recovery of the possession of the land and the cancellation of the agreement of sale in the absence of any allegations that possession of the land was given to the purchaser, or that the agreement of sale, or the vendor's title, had been registered.

Gale v. Powley, 24 D.L.R. 450, 22 B.C.R. 18, 8 W.W.R. 1312, 32 W.L.R. 65.

ASSIGNMENT TO SEVERAL—CONTRIBUTION—SALE IN LIEU OF PARTITION.

M having purchased certain lands under an agreement for sale from C, assigned the agreement to himself, his two coplaintiffs, and the defendant, the latter three agreeing to indemnify him, each to the extent of one quarter of the purchase price, and the four also agreed to pay one G, $15,000 for an interest claimed by him in the said lands. The defendant made default in his contribution of part of his share and the plaintiffs had to pay his share as well as their own to C and G. In an action for a declaration of a lien upon the defendant's interest in the lands for the moneys so advanced and for foreclosure. Held, that no such lien existed in favour of the plaintiffs. The plaintiffs asked leave to amend to ask for sale (in lieu of partition) with leave to all parties to bid at such sale, and for directions as to distribution of the proceeds. Held, such amendment should be granted and judgment was given for the plaintiffs for the amount advanced with an order for sale as asked on the terms set out in the judgment.

Bending v. Fitzgerald, 31 W.L.R. 507.

SALE OF LAND—ACTION BY VENDOR—APPLICATION FOR ORDER NISI—PLAINTIFF TO ELECT BETWEEN FORECLOSURE AND PERSONAL JUDGMENT.

Prince Rupert Development Syndicate v. Lustig, [1919] 1 W.W.R. 496.

CROP-PAYMENTS—VENDOR'S PORTION OF CROP TO BE DELIVERED AT ELEVATOR—THE CROP PAYMENTS ACT, C. 34 OF 1915—RIGHT OF VENDOR TO SEIZE THRESHED CROP ON LAND.

Where under an agreement of sale of land the purchase price is payable by delivering to a certain elevator in the name of the vendor the crop or a specified portion of it grown on the land, the agreement providing that the crop shall be the personal property of the vendor, the vendor (in view of s. 3 of the Crop Payments Act, c. 34 of 1915, (Sask.), and said provision in the agreement) has a legal interest in the crop before its delivery at the elevator and may enter on the land and seize his proper quantity of the grain threshed and stored thereon. The right to seize extends only to the portion belonging to the vendor for that year under the agreement. An agreement between the parties in view of the purchaser going overseas, which however he eventually did not do, by which he agreed to make certain payments, was held under the circumstances not to have changed the crop-payment provision to one of cash payment, the purchaser's agreement for these payments not having been accepted in lieu of the original agreement.

Rose v. Edmonds, [1919] 3 W.W.R. 47.

OCCUPATION BY PURCHASER — DEFAULT — ORDER FOR POSSESSION.

The defendant had purchased from the plaintiff, under agreement for sale, certain land and occupied the house upon the land under the usual clause in agreements for sale to the effect that the purchaser can occupy until default. Default in payment having been made, the plaintiff served a 30 day demand for possession upon the defendant and then upon application to a Judge in Chambers obtained an order for possession on the strength of Doe d. Hiatt v. Miller, 5 Car. & P. 595; Ball v. Cullimore, 2 C.M. & R. 120, 4 L.J. Ex. 137, and Doe v. Jackson, 1 B. & C. 449, which are to the effect that permission to a purchaser to take possession under an agreement for sale, as above creates a tenancy which upon default being made in the agreement becomes a tenancy at will, so that after notice to determine the tenancy an order for possession may be made.

Green v. Longhi, 7 W.W.R. 924.

EXCHANGE OF LANDS—LIEN FOR CHARGES IN EXCESS THAN STIPULATED.

Where an owner of lands gives the same in exchange for an hotel and is obliged by the terms of his agreement to assume an encumbrance then existent upon the hotel, which subsequently turns out to be of a larger amount than mentioned in the agreement, and is compelled to pay the taxes on the hotel, which under the terms of the agreement were to be paid by the other party to the exchange, then the above-mentioned first party to the exchange is entitled to a lien upon the lands exchanged for the amount paid in excess of that stipulated for in the agreement, but not to a lien for the costs of an action brought against the hotel owner.

Drager v. Robinson, 7 W.W.R. 125.

VENDOR'S LIEN—ELECTION OF REMEDIES—JUDGMENT FOR PURCHASE MONEY—RESCISSION.

Saskatchewan General Investment Co. v. Applegate, 10 W.W.R. 522.

PROCEEDINGS TO ENFORCE PAYMENT OF INSTALMENT OF PRINCIPAL OF PURCHASE-MONEY — PROCEEDINGS IN FOREIGN COURT FOR PURPOSE OF REACHING FOREIGN ASSETS—MORTGAGORS AND PURCHASERS' RELIEF ACT, 1915.

O'Connor v. Charleson, 10 O.W.N. 35.

The acceptance by the purchaser, after the expiry of the delay for redemption, of interest on the selling price that became due during the delay, implies no consent on his part to prolong the stipulated term.

Johnson v. Turgeon, 25 Que. K.B. 476.

(§ II—31)—PROMISSORY NOTE FOR UNPAID PURCHASE PRICE.

Where a promissory note for the unpaid purchase price of lands sold is given, not to the vendor, but to the wife of the vendor, assuming that the note is the property of the wife, the vendor's lien passes with the note to the wife.

Graham v. Crouchman, 39 D.L.R. 284, 41 O.L.R. 22.

WAIVER OF—TAKING NOTE FOR UNPAID PURCHASE MONEY.

A seller of land does not waive his right to a vendor's lien for unpaid purchase money by taking the purchaser's promissory note for the amount thereof. [Mackreth v. Symmons, 15 Ves. 329, followed.]

Kaulbach v. Jodrey, 13 D.L.R. 782, 13 E.L.R. 409.

The taking of the notes by the vendor cannot be construed as conclusive evidence of his intention to abandon his lien for the unpaid purchase money; the presumption is that the lien exists, and the taking of notes, whether of the purchaser or of a third person, will not displace that presumption, so long as the reasonable inference from all the circumstances is that the notes were only taken on condition that they would be paid.

Dick v. Lambert, 29 D.L.R. 42, 9 S.L.R. 355, 34 W.L.R. 1156, 10 W.W.R. 1320, 9 S.L.R. 355, affirming 25 D.L.R. 730, 33 W.L.R. 259, 9 W.W.R. 905.

WAIVER—INSURANCE PREMIUMS.

The vendor of an immovable who receives an undertaking from the purchaser that the latter will insure the building on the land so to secure the unpaid portion of the purchase money and who accepts a policy issued in his favour on application by the purchaser who gives his note for the premium, impliedly agrees that the legal hypothec on the immovable for the amount of the note shall take precedence over his hypothec for the price of sale.

Mutual Ass'ce Co. v. Morency, 44 Que. S.C. 434.

(§ II—32)—PURCHASER OF VENDEE—ASSUMPTION OF LIEN.

Where the purchaser of land under contract resells the land, and a subpurchaser assumes the indebtedness to the original vendor, and agrees to indemnify the original purchaser therefrom, the latter's lien as against the subpurchaser's interest in the land extends not only to the cash portion of the unpaid purchase money due him, but to the balance so assumed by the subpurchaser in respect of which the original purchaser remained under obligation to the original vendor.

Ronald v. Lillard, 23 D.L.R. 392, 25 Man. L.R. 393, 7 W.W.R. 1128, 30 W.L.R. 382.

PURCHASER ASSUMING HYPOTHEC—LIEN DE DROIT—QUEBEC JURISPRUDENCE.

Under Quebec law, where a purchaser assumes an obligation to pay the hypothecary creditor any sum of money which may be due him on the property purchased, the creditor can at any time accept that obligation and establish a direct lien de droit against such purchaser as a personal debtor to pay the money.

Archambeault v. Lapierre, 43 D.L.R. 42, 54 Que. S.C. 266.

(§ II—33)—"MORTGAGE"—DEFINITION OF, UNDER MORTGAGES ACT — INSURANCE MONEY—APPLICATION.

The definition of "mortgage" in the Mortgages Act, R.S.O. c. 112, is wide enough to cover the charge known as a vendor's lien and the holders of such vendor's lien are entitled as mortgagees to have insurance money on the property applied in accordance with the provisions of s. 6 of that Act. Although they are entitled to the security of the insurance money, they are not entitled to apply the insurance money in payment of purchase instalments not yet due, but such money should be held in trust or invested or paid into court if the parties cannot agree as to its disposal. [Corham v. Kingston, 17 O. R. 432; Edmonds v. Hamilton Provident, 18 A.R. (Ont.) 347, followed.]

Scott v. Crinnian, 44 D.L.R. 20, 43 O. L.R. 430.

ENFORCEMENT—DEFICIENCY JUDGMENT.

The better practice on settling the form of judgment in favour of vendor for a judicial sale to realize the balance of purchase money on the purchaser's default, is not to include an order for payment by the purchaser of the deficiency, if any, which may arise on the judicial sale yet to take place, but to reserve leave to plaintiff to make a future application in the event of there being a deficency.

Robinson v. Starr, 14 D.L.R. 767, 23 Man. L.R. 84, 26 W.L.R. 261.

ENFORCEMENT OF VENDOR'S LIEN.

A vendor's lien upon real estate is enforceable by sale but not until it has been established by a judgment of the court binding the persons affected by the lien; the vendor has the alternative right to rescind the contract and recover possession of the land.

Ronald v. Lillard, 23 D.L.R. 392, 25 Man. L.R. 393, 7 W.W.R. 1128, 30 W.L.R. 382

CONCURRENT REMEDIES—FORECLOSURE—PERSONAL JUDGMENT.

A vendor suing to enforce an agreement for sale of land on the purchaser's default is not entitled to pursue concurrently the remedies of personal judgment against the purchaser and of foreclosure and sale of the lands. [Hargreaves v. Security Investment, 19 D.L.R. 677, followed.]

Boydell v. Haines, 21 D.L.R. 371, 21 B.C. R. 171, 8 W.W.R. 17, 30 W.L.R. 842.

DEFICIENCY JUDGMENT—PRAYERS FOR.

Where, in an action for specific performance of an agreement for the sale of land there is no express prayer for a declaration of a lien, the prayer for an order of sale in effect entitles the vendor to a decree for a lien and sale thereunder, and to a judgment for any deficiency under the sale.

Anglo-American Trust Co. v. Longworth, 24 D.L.R. 222, 8 W.W.R. 1193, 31 W.L.R. 950.

SALE OF PROPERTY BY VENDOR—DEFAULTS BY NEW PURCHASER.

The liability for the purchase price under an agreement for the sale of mining lands, even though expressly reserved in an agreement whereby the property is subsquently sold to a new purchaser, does not continue against the orginal purchaser after a foreclosure by the vendor for defaults by the new purchaser.

Vivian v. Clergue, 24 D.L.R. 856, 51 Can. S.C.R. 527, affirming 20 D.L.R. 660, 32 O. L.R. 200.

FORECLOSURE — LAND SITUATE OUTSIDE OF PROVINCE.

The proceedings required to be taken under the Foreclosure and Sale Act, (Alta.), 1914, c. 6, for the enforcement of agreements for the sale of land do not apply where the land is situated outside of the province.

Craig v. Pegg, 25 D.L.R. 581, 31 W.L.R. 257.

SALE—POSTPONEMENT OF.

Leckie v. Marshall, 10 D.L.R. 806, 4 O. W.N. 889.

ASSIGNMENT—DEFAULT IN PAYMENT—JUDGMENT—FORECLOSURE—POWERS OF LOCAL MASTER.

De Visscher v. Weir, 40 D.L.R. 757, 11 S.L.R. 180, [1918] 2 W.W.R. 399.

EFFECT OF TAX-SALE—LIEN AGAINST PROCEEDS.

Where land which has been transferred, but not paid for, is sold for taxes, the unpaid vendor has a lien upon the proceeds in excess of the amount required for taxes. An unpaid vendor's lien is an interest in the property, and it is not so much a question of the lien attaching to the proceeds of a sale thereof as of the unpaid vendor being directly entitled to them as being the real owner of the property.

Hetu v. Morinville Oil City Land Co., 13 A.L.R. 115, [1918] 1 W.W.R. 666.

DEFAULTS — CONDITIONAL RESOLUTORY CLAUSE—DEMEURE.

When in a contract a resolutory clause is conditionally stipulated for, the party who wishes to take advantage of it should prove that he has fulfilled the conditions necessary to give effect to it. The creditor of an obligation payable by periodical instalments and subject to the following conditional agreement: "Should the debtor make default in the said payments, during a period of eight weeks, the company shall be at liberty to ask for the balance then due on purchase price," cannot demand the application of this penal clause without a prior mise en demeure. The fact that the debt will be payable at his domicile does not relieve him of the necessity of this mise en demeure.

Quebec County Realty Co. v. Tcharos, 48 Que. S.C. 540.

DEFAULT IN PAYMENT OF PURCHASE MONEY—FORFEITURE OF MONEYS PAID—LIQUIDATED DAMAGES—ACTUAL DAMAGE SUFFERED BY VENDOR — MORTGAGORS AND PURCHASERS RELIEF ACT, 1915, ss. 2 (1) (e), 4 (3)—RECOVERY OF POSSESSION—COSTS.

O'Hearn v. Friedman, 9 O.W.N. 218.

DAMAGES FOR BREACH OF COVENANT TO CONVEY LAND—VENDOR'S LIEN.

Snider v. Webster, 20 Man. L.R. 562, 18 W.L.R. 48.

SALE OF TIMBER LICENSE—REAL ESTATE—VENDOR'S LIEN.

Laidlaw v. Vaughan-Rhys, 44 Can. S.C.R. 458.

SALE OF LAND SOLD ON CROP PAYMENTS—LIEN.

Smith v. Thiesen, 20 Man. L.R. 120.

CONDITION—IMPROVEMENTS TO BE MADE BY PURCHASER—EQUITY OF PERSON MAKING ADVANCE.

Croasdaile v. Paddon, 19 W.L.R. 318, 1 W.W.R. 28.

III. Rights of parties as to third persons; bona fide purchasers.

(§ III—35)—WHO IS BONA FIDE PURCHASER—SALE OF LAND CONVEYED AS SECURITY.

One claiming land under an unregistered contract of sale on which the balance of the purchase money had not been paid, is not a bona fide purchaser for value so as to be entitled to a conveyance of the land in priority to a right of redemption in one who had conveyed the land to the vendor by a deed absolute in form but intended as security for a debt. [Molony v. Kernan, 2 Dr. & War. 31, followed.]

Hetherington v. Sinclair, 23 D.L.R. 630, 34 O.L.R. 61.

EXECUTION CREDITOR—PRIORITIES.

An execution creditor is not a purchaser for value without notice as to rank in priority over a purchaser of the land, even though the purchaser registered no caveat. A purchaser under an instalment agreement entered into before the filing of a writ of execution against the lands of the registered vendor has a prior right to the lands as against the execution creditor.

Traunweiser v. Johnson, 23 D.L.R. 70, 11 A.L.R. 224, 8 W.W.R. 1028, 31 W.L.R. 712.

ASSIGNMENT BY VENDOR—CONDITIONS AS TO PAYMENT.

Where the payment for an assignment of an agreement for the sale of lands is made dependent upon the condition of the payment of the contract instalments, the fact that the assignee foreclosed and acquired the purchaser's interest cannot be substituted in lieu of the condition where the instalments were not in fact paid.

Meindl v. Bravender, 23 D.L.R. 108, 31 W.L.R. 924.

ASSIGNMENT — PURCHASER'S EQUITIES—RESCISSION—LIEN.

The assignee of an agreement for the

sale of land takes it subject to the purchaser's equities, including his right to rescind the contract for fraud; he is bound to make restitution of the money received by him under such contract, and the purchaser is entitled to a lien therefor.

Quebec Bank v. Greenlees, 33 D.L.R. 696, 10 A.L.R. 419, [1917] 2 W.W.R. 144, affirming 32 D.L.R. 282, [1917] 1 W.W.R. 746.

ASSIGNMENT OF AGREEMENT—RIGHT TO PAYMENTS—QUIT CLAIM DEED—ASSIGNOR'S RIGHT TO SUE.

Wilson v. Zeller, 34 D.L.R. 199, [1917] 2 W.W.R. 424.

FAILURE TO REGISTER AGREEMENT—DEFINITENESS—REMEDIES—PARTIES.

A purchaser, who fails to register the agreement of sale, may be debarred from the equitable relief of specific performance, after a subsequent purchaser has bona fide acquired the property; but he still has a remedy against the vendor in an action for damages for breach of contract. He cannot however, join as a party defendant, the subsequent purchaser who was not instrumental in inducing the breach. An agreement for a mortgage is not unenforceable by reason of indefiniteness because it provides for "one-half cash, balance on suitable mortgage."

Bennett v. Stodgell, 28 D.L.R. 639, 36 O. L.R. 45.

Where a purchaser under an agreement to purchase lands with prior notice of an outstanding mortgage has paid certain instalments and the amount of the unpaid instalments is approximately the amount of the outstanding mortgage, and where he is electing, pursuant to the agreement to pay up the entire balance of purchase money he is thereby entitled to force the vendor to redeem the mortgage so outstanding, no matter how unexpectedly onerous that may prove to the vendor.

Cushing v. Knight, 6 D.L.R. 820, 46 Can. S.C.R. 555, 2 W.W.R. 704.

It is not necessary, under s. 91 of the Real Property Act (Man.), for one who contracts with the registered owner of land for its purchase, to make inquiry as to the latter's title, and the former will be protected as an innocent purchaser, notwithstanding he acquired notice of another's equity in the property, before the completion of the contract of purchase. A contract for the purchase of land is within s. 91 notwithstanding such Act deals specifically with actual transfers, mortgages, encumbrances and leases, since the words "contracting or dealing with, or proposing to take an instrument from a registered owner," which are used in such section, clearly comprehended contracts of purchase.

Cooper v. Anderson, 5 D.L.R. 218, 20 W. L.R. 347, 21 W.L.R. 902, 1 W.W.R. 848, 1092.

REALTY SALE—OPTION IN LEASE—ACCEPTANCE.

Bennett v. Stodgell, 17 D.L.R. 835, 6 O. W.N. 333.

ASSIGNMENT OF AGREEMENT WITH VENDOR'S APPROVAL—CAVEAT BY SUBSEQUENT PURCHASER—EFFECT ON COVENANT FOR TITLE.

In February 1906, plaintiff sold certain land to defendant P. By assignment dated February 1907, P. assigned his interest in said contract to defendant G. which was approved by the plaintiff. In June 1907, defendant B. registered a caveat against the lands, claiming under an agreement for sale from defendant P. to her. Plaintiff sued for specific performance, asking for the purchase money, and in default, cancellation of the agreement as against P. and G. No relief was asked against defendant B. Defendant G. defended setting up that the plaintiff could not give clear title. The action being dismissed, the plaintiff appealed. On appeal:—Held, that the defendant G. was in no better position to call for clear title than the defendant P. and as P. could not compel the plaintiff to remove the caveat in question, G. could not compel its removal. That the approval of the assignment of P.'s contract to the defendant G. had not the effect of a fresh covenant on the part of the plaintiff to the defendant G. to convey the land free of all encumbrances to him.

C.N.R. Co. v. Peterson, 7 S.L.R. 166.

SALE À RÉMÉRE—RESERVATION OF RIGHT TO INHABIT—SUBSEQUENT SALE — ARTS. 495 ET SEQ. 1487, 1546, 1552, C.C. QUE.

Jacques v. Normandeau, 25 D.L.R. 866, 24 Que. K.B. 377.

AGREEMENT OF SALE—POSSESSION—MORTGAGE TAKEN BY CREDITOR.

A holder of an agreement of sale of real property who, in conformity with the obligations he has assumed, pays the interest on the sale price and the municipal taxes, who visits the lot purchased, to know it and to identify it, and who, when there is a cancellation clause, fulfills all the conditions of his agreement of sale, by that very fact takes possession of the property and becomes the owner. A sale by the original owner, even with the consent of the holder of the agreement of sale, cannot, in these circumstances, prejudice the rights of a creditor of the latter who has taken a judicial mortgage on the real property.

Archambault v. Perrault, 46 Que. S.C. 401.

LAND OUTSIDE OF PROVINCE—ASSIGNMENT OF INTEREST BY A VENDOR AFTER AGREEMENT — NOTICE — OBLIGATION OF ASSIGNEE TO CONVEY TO PURCHASER — SPECIFIC PERFORMANCE — PAYMENTS MADE BY PURCHASER BEFORE AND AFTER ASSIGNMENT — AGREEMENT BETWEEN VENDOR AND ASSIGNEE, NATURE OF—COSTS FORM OF JUDGMENT.

Campbell v. Barrett, 32 O.L.R. 157.

REGISTRATION OF JUDGMENT PRIOR TO DEED—EFFECT.

An agreement of sale of real estate subject to the condition that the "purchasers

shall have their deed of sale as soon as they have paid one-half of the purchase price or build a $3,000 house on each lot" with the stipulation that, in default of their fulfilling these and other conditions enumerated in the deed, the party agreeing to sell "may require the cancellation of these presents, but without putting in default" is made under a condition cancelling the contract. If, therefore, it is accompanied with delivery to the purchasers and actual possession it is equivalent to a sale, and their creditor, who has recovered judgment and had it registered on the real estate after the agreement of sale, acquires a valid mortgage for the payment of his claim.

Archambault v. Perrault, 46 Que. S.C. 59.

A purchaser of land which is not fully paid for by the owner and subject to a clause providing that no assignment of the owner's interest therein should be valid or effectual unless or until approved by the party from whom he claims title fails to obtain such approval, acquires in point of time, a prior equity thereto as against a third party to whom such lands were subsequently assigned, and the approval to such assignment was procured by fraud. Where by the terms of a land contract it is provided that the land cannot be conveyed without the approval of the owner unless it is fully paid for, an assignee of such land who procures such approval by fraud stands in equity in no better position than as if no consent had been obtained, and cannot defeat the equity of a prior purchaser for value who purchased the land in fee and to whom approval for transfer had been refused.

MacLeod v. Sawyer & Massey Co., 46 Can. S.C.R. 622, reversing sub nom. Sawyer & Massey Co. v. Bennett, 2 S.L.R. 516.

ASSIGNMENT BY PURCHASER TO SUBPURCHASER—RIGHTS OF SUBPURCHASER—DISPUTE AS TO WHETHER WATER LOT INCLUDED IN AGREEMENT—CONSTRUCTION OF AGREEMENT—ESTOPPEL—EVIDENCE—NOTICE TO SUBPURCHASER OF TERMS OF BARGAIN—ACCEPTANCE OF PAYMENTS BY VENDOR — SPECIFIC PERFORMANCE — COSTS.

Allan v. Petrimoulx, 6 O.W.N. 593.

ASSIGNMENT OF VENDOR'S INTEREST—RIGHT OF ASSIGNEE TO SUE FOR PAYMENTS.

If a vendor of land by agreement for sale assigns his interest to a third party, and in the assignment covenants that his purchaser will make his payments, he is bound to pay these moneys to the assignee upon default of his purchaser even though the assignee has obtained an order for foreclosure. [Loosemore v. Radford, 9 M. & W. 656; Hodgson v. Wood, 33 L.J. Ex. 76, applied.]

Urban Investment Co. v. Marshall, 7 W.W.R. 766.

ACTION BY ASSIGNEE OF PURCHASER FOR SPECIFIC PERFORMANCE — AGREEMENT FORFEITED BY VENDORS AND LAND RESOLD BEFORE ASSIGNMENT — ASSIGNEE (BY ERROR) ASSURED BY VENDORS THAT AGREEMENT IN FORCE—ACCEPTANCE OF PAYMENT ON ACCOUNT OF PURCHASE-MONEY — AGREEMENT NOT CAPABLE OF PERFORMANCE BY REASON OF INTERVENTION OF RIGHT OF THIRD PERSON—DAMAGES—MEASURE OF — RECOVERY ONLY OF MONEY BY ASSIGNEE TO ASSIGNOR AND MONEY PAID TO VENDORS BY ASSIGNEE—SET-OFF—COSTS.

Lee v. Gundy & Gundy, 15 O.W.N. 292.

TITLE TO LAND—NAME OF TRANSFEREE LEFT BLANK IN TRANSFER — TRANSFER AND DUPLICATE CERTIFICATE OF TITLE ENTRUSTED TO AGENT FOR REGISTRATION—FRAUDULENT USE BY AGENT—INNOCENT PURCHASER ACQUIRING DOCUMENTS AND GETTING TITLE — ESTOPPEL AGAINST ORIGINAL PURCHASER.

If a purchaser of land takes a transfer thereof with the name of the transferee left blank and delivers the transfer together with the duplicate certificate of title, to an agent with instructions to effect registration of the transfer to said purchaser, and the agent fraudulently uses the documents for his own purposes so that they come into the hands of an innocent purchaser for value without notice of any fraud, whose name is filled in as transferee and who becomes the registered owner and who receives no notice of the original purchaser's claim for years, the original purchaser is estopped from denying the last purchaser's title.

Mauch v. National Securities, [1919] 2 W.W.R. 740.

ASSIGNMENT OF AGREEMENT—FORECLOSURE—PARTIES—PLEADING.

The plaintiff, having sold certain lands to the defendant under agreement of sale by which the purchase price was payable in certain instalments, assigned the said agreement to M. as security for a loan. Subsequently she assigned the agreement to S. as security for a second loan. Notice of such assignments was duly given to the defendant. The defendant having made default the plaintiff commenced an action against M., S. and the defendant for foreclosure. Held, that M. and S. should not be joined as defendants without an offer to redeem them. The plaintiff had at the best merely an equity of redemption in the agreement for sale, that the titles of both M. and S. were prima facie absolute as against the plaintiff and he has no locus standi to ask for foreclosure of the defendant. It is not necessary in pleading an assignment to allege that the assignment contains "apt words" in that behalf if in fact it does contain words sufficient in law to vest the chose in action in the assignee.

Holloway v. Miner, 34 W.L.R. 837, 10 W.W.R. 995.

ASSIGNMENT—SIGNERS — REPUDIATION FOR FRAUD.

The mere fact that a purchaser of lands, under agreement named as a party to an assignment of the agreement, has not signed it, has not the result of making it ineffective as between the assignor and assignee named in it. A purchaser of lands who wishes to repudiate his agreement upon the ground of misrepresentation must do so promptly when knowledge of misrepresentation comes to him.

Fanco-Belgian Invest. Co. v. Small, 34 W.L.R. 857, 10 W.W.R. 924.

(§ III—36)—BALANCE OF SALE PRICE—NEW PURCHASER—INTEREST—EXTENSION OF TIME—DELEGATION—ACCEPTANCE—QUE. C.C. 1173, 1174.

The fact that a vendor has accepted from a subsequent purchaser payments on the capital and interest of the sale price, the said subsequent purchaser having assumed towards the first purchaser the payment thereof, does not correspond to an acceptance of the delegation of payment, and does not release the first purchaser. Such would be the case even if the vendor had granted time to the subsequent purchaser for the payment of what might be due him; but, in the latter case, although the vendor would not be released, yet he would be right in complaining if, as a result, he suffered damages.

Reeves v. Piché, 46 Que. S.C. 315.

(§ III—38)—RIGHTS OF PARTIES—TITLE—NOTICE OF DEFECTS.

A purchaser of real estate with notice that his grantor though holding a registered conveyance absolute in form holds it in fact only as security, takes by the conveyance only the rights of a mortgagee in possession and is subject, on the death of the grantor, to be redeemed within the statutory period by the latter's heirs who have not concurred in the sale.

Nelson v. Charleson, 15 D.L.R. 660, 19 B.C.R. 100, 26 W.L.R. 865, 5 W.W.R. 995.

NOTICE OR FACTS PUTTING ON INQUIRY.

Where the plaintiff purchases the equitable interest of his vendor in a tract of land, with notice that such vendor had previously agreed to sell an undivided fractional interest in such tract of land to the defendant, the plaintiff thereby becomes bound prima facie to carry out his vendor's bargain so made with the defendant.

Strathy v. Stephens, 15 D.L.R. 125, 29 O.L.R. 383.

SUBSEQUENT MORTGAGEE WITH NOTICE.

A mortgage given back for part of the purchase price but not registered until after the registration of a subsequent mortgage on the same property, may be decreed to have priority over the subsequent mortgage where the latter was taken with notice of the unregistered mortgage for purchase money.

Kirk v. Harvey, 15 D.L.R. 488, 18 B.C.R. 645, 26 W.L.R. 747, 5 W.W.R. 980.

PURCHASE OF LANDS FROM AGENT—TRUSTS—KNOWLEDGE.

Where title to land is taken in the name of an agent, although purchased with the funds of the principal and held by the latter for a period sufficient to give him a title by possession independent of the agent's fiduciary relationship, a purchaser of the agent with knowledge of such circumstances does not stand in the position of a bona fide purchaser as to acquire a title to the land superior to the principal.

Miller v. Halifax Power Co., 24 D.L.R. 29, 48 N.S.R. 370.

Where a purchaser enters into and signs an agreement for the purchase of land with prior notice of an outstanding mortgage, he ordinarily will be presumed to know that the mortgage may be in terms which do not permit of prepayment of the mortgage money before maturity.

Cushing v. Knight, 6 D.L.R. 820, 46 Can. S.C.R. 555, 2 W.W.R. 704.

A purchaser of land is bound by notice of an adverse claim at any time before he has completed his purchase by actual payment, and, if part payment only has been made, his right to hold as a bona fide purchaser without notice will be limited to payments made before notice of the adverse claim. [Rose v. Peterkin, 13 Can. S.C.R. 677, applied.]

Wallace v. Smart, 1 D.L.R. 70, 22 Man. L.R. 68, 19 W.L.R. 787.

NOTICE OR FACTS PUTTING ON INQUIRY.

Agreement—Assignment—Default. —Notice of cancellation.

Prudhomme v. Labelle, 4 O.W.N. 388, 23 O.W.R. 388.

(§ III—39)—ASSIGNEE OF PURCHASER.

The assignee of a purchaser under a contract for the sale of land is not personally liable for the unpaid instalments of the purchase price provided for in the contract, either to his assignor or to the original vendor, in the absence of a promise on his part to pay the same, though he took the assignment with knowledge that the purchase price had not been paid.

Coté v. Olson, 2 D.L.R. 392, 20 W.L.R. 690, 2 W.W.R. 54.

RIGHTS OF VENDOR—TIME AS ESSENCE—ASSIGNMENT BY PURCHASER.

Where time is made the essence of an agreement for the sale of land, and the purchaser has made a default, the vendor exercising his right of repossession of the land under the terms of the contract is entitled to the rents and profits as against an assignee of the purchaser. [Brickles v. Snell, 30 D.L.R. 31, [1916] 2 A.C. 599, applied.]

C.P.R. Co. v. Fuller, 36 D.L.R. 404, 12 A.L.R. 190, [1917] 3 W.W.R. 90.

Where an agreement for the sale of land provides for the payment of the purchase price by instalments, with interest on the unpaid portion thereof at a specified rate, which is also the rate payable by the vendor under a mortgage of the land made by

him, and the land is resold by the purchaser under a similar agreement calling for the same rate of interest, which is then assigned by him to the original vendor as security for the purchase price remaining unpaid upon the original agreement of sale, the fact that the original vendor is subsequently compelled to pay a higher rate of interest to his mortgagee does not enable him to exact such higher rate from the ultimate purchaser whose agreement has been assigned to him.

Great West Land Co. v. Stewart, 3 D.L.R. 805, 3 O.W.N. 1141.

If, upon the failure of the vendee to pay the amount due on a contract for the sale of land, within the time limited by the court therefor, payment is made by one to whom the vendee assigned his interest in the contract, and who paid to the vendee or his agent all payments under the contract as they came due, the assignee will be given judgment against the vendee therefor, together with interest thereon, and the costs he is compelled to pay.

Southwell v. Williams, 4 D.L.R. 1, 17 B.C.R. 209, 21 W.L.R. 771, 2 W.W.R. 697.

Where the defendant, who owned 200 city lots, sold 119 of them, together with others, subject to the payment of the remainder of the purchase money due on all the 200 lots, it being understood that those retained by the defendant should be deemed fully paid for, and the purchaser sold a number of his lots to persons who made payments to him thereon, and afterwards, upon the defendant's default, under the agreement by which he acquired title, his vendor foreclosed, and, after his claim had been satisfied from the proceeds of the sale of nearly all of the lots, the surplus was paid into court, the defendant is entitled to priority in payment therefrom, if the amount due him from the purchaser should exceed such surplus, and, in that event, neither the purchaser nor those who made payments on the lots purchased by them, are entitled to any part of the surplus.

Those who purchased lots from the vendor are entitled, in priority to all other claims, to reimbursement from such fund for the amount of their several payments to him.

Magrath v. Ranney, 4 D.L.R. 457, 20 W.L.R. 329.

Where the assignee of a lessee's interest in a lease with option to purchase, exercises such option at a price per foot frontage agreed upon in lieu of being arbitrated, it will be presumed that, in fixing the price, regard was had to the circumstance that a "private lane" forming a part of the demised premises was subject to easements of right-of-way in favour of leaseholders of adjoining property in pursuance of a scheme of subdivision made by the original lessee and referred to in the lease; and such assignee is not entitled to call for a release of such easements nor to an abatement of price as compensation in lieu of a release.

Re Boulton and Garfunkel, 6 D.L.R. 373, 4 O.W.N. 25, 23 O.W.R. 1.

ASSIGNMENT OF AGREEMENT—POSSESSION—CANCELLATION OF ORIGINAL AGREEMENT—LIABILITY TO ORIGINAL OWNER FOR RENT.

Where a party goes into possession of land under an assignment of an agreement for sale, the original agreement through which he claims being subsequently cancelled the property reverting to the original owner, he is liable to the original owner for rent from the time of the termination of the agreement through which he claims. The fact that he was not made a party to the proceedings is immaterial if he had in fact notice of the proceedings and could have intervened if he had seen fit.

Waters v. Currie, 49 D.L.R. 213, [1919] 3 W.W.R. 525.

ASSIGNEE OR PURCHASER—WHAT CONSTITUTES.

Where an agreement for the sale of land on periodical payments stipulates that any assignment of the agreement by the purchaser must be approved by the vendor, the fact that the vendor has written to an assignee of the agreement that he will accept payments from him though he cannot transfer to him without the authority of the original purchaser, is sufficient to satisfy the terms of the agreement and such assignee is entitled to the notice of forfeiture called for by the agreement in case the vendor desires to declare a forfeiture on default of payment.

Constantino v. Dick, 15 D.L.R. 413, 26 W.L.R. 741, 5 W.W.R. 1319.

ASSIGNEE OF BONA FIDE PURCHASER—FRAUD VITIATING SHELTER.

The rule which protects a purchaser with notice taking from a purchaser without notice, and thereby sheltering himself under the latter's title, is never applied (a) to enable a trustee to buy back trust property which he has sold, (b) to enable a man who has acquired property by fraud to plead that he sold it to a bona fide purchaser without notice and has got it back again; and where a partner, holding the legal estate in trust for all the partners, so acts with another partner in a scheme as coadventurers in a transaction amounting to a clear breach of such trust on the trustee-partner's part and to a fraud against the remaining partners on the part of both participants in such scheme, the general rule of protection of bona fide purchaser cannot be invoked by either of the wrongdoers. [Lowther v. Carlton, 2 Atk. 242, reconciled; Re Stapleford Colliery Co., Barrow's Case, 14 Ch.D. 432, 445; Lewin on Trusts, 12th ed., pp. 1102, 1103; West London Commercial Bank v. Reliance Permanent Building Society, 29 Ch.D. 954, 962, 963, applied.]

Gordon v. Holland, Holland v. Gordon, 10 D.L.R. 734, 49 C.L.J. 382, 23 W.L.R. 738, 4 W.W.R. 419, varying 2 D.L.R. 327, 20 W.L.R. 887, 2 W.W.R. 158.

ASSIGNEE OF PURCHASER—ASSENT OF VENDOR — CANCELLATION OF CONTRACT FOR VENDEE'S DEFAULT.

Where, without obtaining the consent of his vendor as the contract of sale, required, a vendee sold land to the plaintiff, and subsequently the vendee's contract was cancelled for default in payment, the plaintiff acquired no enforceable rights in the land.

Bayda v. Canada North Dakota Land Co., 13 D.L.R. 1, 25 W.L.R. 159, 4 W.W.R. 1333.

PURCHASER'S DIRECTION TO CONVEY TO THIRD PARTY.

A company has no right to sue on an agreement for the purchase of land where the offer was made to and accepted by someone else, though the offeree, previous to the acceptance of the offer, had requested that the deed be made out in the company's name.

McInnis Farms v. McKenzie, 12 D.L.R. 100, 23 Man. L.R. 120, 23 W.L.R. 863, 4 W.W.R. 205.

DEFAULT IN PAYMENTS — ASSIGNMENT BY PURCHASER—RIGHTS OF PARTIES.

Fidelity Trust Co. v. Hall, 40 D.L.R. 752, 11 S.L.R. 177, [1918] 2 W.W.R. 439.

ACTION FOR PURCHASE PRICE—NOVATION.

In an action by a vendor to recover the balance of the purchase price due under an agreement for the sale of land, held that the evidence established a novation by the acceptance of one M. as the plaintiff's debtor in place of the defendant.

Hoag v. Kloepfer, [1918] 3 W.W.R. 633, 26 B.C.R. 181.

SUBSEQUENT PURCHASER—RELEASE OF ORIGINAL PURCHASER—NOTICE—ENTRIES IN BOOKS — COMMENCEMENT OF PROOF IN WRITING—PROOF BY WITNESSES.

A vendor, owning a number of lots of land and who admits that, when one who purchased from him transferred his property, his custom was to hold the new purchaser liable for the price of the sale, and that, if the latter did not make his payments regularly, the sale was cancelled and the money paid confiscated as liquidated damages, he thereby released the original purchaser.

When it appears from the vendor's books that the purchaser's account is closed by a balance which is carried to the debit of the subsequent purchaser, there is a commencement of proof in writing which allows verbal evidence.

Gardener v. Charlebois, 55 Que. S.C. 75.

ACCEPTING PAYMENTS OF ASSIGNEE OF PURCHASER—EFFECT.

A vendor of real estate who accepts the payment of interest on the purchase money from a person to whom his purchaser has resold with instructions that payments are to be made, to this person, and who grants him an extension of time to pay one of the instalments does not accept the delegate and does not discharge or liberate the delegator in such a way as to effect novation.

Reeves v. Piche, 46 Que. S.C. 189.

CONTRACT FOR SALE—RESALE OF SAME LAND BY PURCHASER — SUBSEQUENT RESALES OF PORTION OF SAME LAND TO VARIOUS SUBPURCHASERS—ASSIGNMENT OF SUBPURCHASERS' AGREEMENTS TO THE ORIGINAL VENDOR — PAYMENT OF BONUSES MADE BY SUBPURCHASERS.

Rankin v. Wadleigh, 2 A.L.R. 469.

AGREEMENT BY HUSBAND TO CONVEY WIFE'S LAND — CONVEYANCE BY HUSBAND — WIFE JOINING TO BAR DOWER — MISTAKE.

Lacroix v. Longtin, 22 O.L.R. 506, 17 O. W.R. 877.

SHARE IN LAND—DEVISE — PART PAYMENT RECEIVED ON CONTRACT OF SALE.

Re Hunter, 24 O.L.R. 5, 19 O.W.R. 338.

PURCHASE-MONEY PAYABLE BY INSTALMENTS — ASSIGNMENT OF CONTRACT — LIABILITY OF ASSIGNEE TO PAY INSTALMENTS.

Cote v. Olson, 19 W.L.R. 156, 4 S.L.R. 219.

SUBPURCHASERS OF SEPARATE PARCELS—PAYMENTS FROM ONE ACCEPTED BY VENDORS — EFFECT AS TO RIGHTS OF OTHERS—CONTRIBUTION.

Kesner v. Lang, 17 W.L.R. 721.

ACTION BY SUBPURCHASER AGAINST PURCHASER AND VENDOR—EQUITABLE RIGHT —PRIVITY OF CONTRACT.

Sveinson v. Jenkins, 21 Man. L.R. 746, 19 W.L.R. 569.

RESCISSION FOR MISREPRESENTATION — RETURN OF MONEYS PAID AND OF VALUE OF LAND TRANSFERRED IN PART PAYMENT—LAND CONVEYED TO INNOCENT PURCHASERS.

Kamp v. Albrecht, 19 W.L.R. 153.

VENUE.

I. IN GENERAL.
II. CHANGE.

See also Courts.

I. In general.

(§ I—1)—IN GENERAL.

When an order in writing by an intending buyer requires an answer from the seller to complete the contract it is such reply, or consent, which makes the contract complete, and the action based upon it can be brought in the province or the district in which such reply was given.

Mechanical Equipment Co. v. Butter, 13 Que. P.R. 410.

MARRIAGE CONTRACT — PLACE OF MARRIAGE.

A personal action based upon a marriage contract passed in one district and followed by the celebration of the marriage in another district may be brought before a

court of the place where the contract was made.

Dufresne v. Dufresne, 27 Que. K.B. 297, affirming 19 Que. P.R. 260.

(§ I—6)—CRIMINAL CASES.

An accused person cannot be deprived of his prima facie right to be tried in the district where an offence is supposed to have occurred, unless it plainly appears that a fair and impartial trial cannot there be obtained.

The King v. Stauffer, 19 Can. Cr. Cas. 205, 4 S.L.R. 284.

(§ I—7)—NEGLIGENCE ACTIONS.

An action for injuries alleged to have been received by reason of the negligence of a civilian rifle association, acting in pursuance of the Militia Act, must be laid and tried in the judicial district where the act complained of was committed.

Webster v. Leard, 7 D.L.R. 429, 11 E.L.R. 203.

NEGLIGENCE — DESTRUCTION OF TIMBER — PLACE OF ACTION.

An action for the negligent destruction by a fire of the plaintiff's logs piled in readiness for transportation need not be brought in the province in which the logs were situate, but may be brought in another province in which the defendant company carries on business. [Tytler v. C.P.R. Co., 26 A.R. (Ont.), 467, followed.]

Dutton v. C.N.R. Co., 23 D.L.R. 43, 26 Man. L.R. 493, at 512, 19 Can. Ry. Cas. 72, 31 W.L.R. 367. [Affirmed except as to damages in 30 D.L.R. 250, 26 Man. L.R. 493, 21 Can. Ry. Cas. 294, 34 W.L.R. 881, 10 W.W.R. 1006.]

INDICTMENT OR CHARGE—LOCALITY OF THE CRIME — RIGHT OF ACCUSED TO LOCAL VENUE.

The King v. Lynn, 17 Can. Cr. Cas. 354, 17 W.L.R. 336, 3 S.L.R. 339.

II. Change.

(§ II—10)—APPLICATION TO CHANGE—CONVENIENCE — EXPENSE — WITNESSES — COSTS.

Renfrew Machinery Co. v. Dewar, 7 O.W.N. 320.

EXPENSE—NECESSITY FOR VIEW OF LOCUS—PREPONDERANCE OF CONVENIENCE.

McIntosh v. Stewart, 6 O.W.N. 113.

AGREEMENT AS TO — INEFFECTIVENESS — JUDICATURE ACT, R.S.O. 1914, c. 56, s. 57.

Grass v. Case, 10 O.W.N. 116.

RULE 245 (b)—"RESIDENCE" OF PARTIES—BANK — BRANCH OFFICE — COUNTY COURT ACTION — ORDER OF REGISTRAR (SITTING FOR MASTER IN CHAMBERS) REFUSING TO CHANGE PLACE OF TRIAL —APPEAL—RIGHT OF—RULE 767.

Bank of Toronto v. Pickering, 17 O.W.N. 161.

RULE 245 (b)—PLACE OF RESIDENCE OF PLAINTIFF AT DATE OF DELIVERY OF STATEMENT OF CLAIM—WHAT IS NECESSARY TO EFFECT CHANGE IN PLACE OF RESIDENCE.

Doan v. Emerson, 15 O.W.N. 457.

(§ II—15)—MOTION TO CHANGE—SPEEDING THE TRIAL.

Where a plaintiff has named a venue of his own selection in his statement of claim, a change of venue will not be directed merely to speed the trial on his application; the onus is upon the applicant to shew a preponderance of conveyance.

Chwayka v. Canadian Bridge Co., 10 D.L.R. 800, 4 O.W.N. 1001, 24 O.W.R. 370.

IN CIVIL CASES.

An order changing the venue will not be set aside on appeal on the ground that the affidavit on which it was made was upon information and belief only without disclosing the grounds for the belief, if the court considers that the circumstances of the case justify the order, as notwithstanding the Judicature rules (N.S.), order 36, it is not essential upon such application to disclose the source of information which the practice prior to the Judicature Act (N.S.) did not require.

Buckley v. Fillmore, 8 D.L.R. 526, 46 N.S.R. 510.

The venue of an action will be changed to the locality where the cause of action arose, if the defendant shews that the number of witnesses there far exceed in number those who would be convenienced by the venue stated in the plaintiff's process. [Macdonald v. Park, 2 O.W.R. 972, followed.]

Lafex v. Lafex, 1 D.L.R. 83.

Where it appears from the affidavits read that a strong feeling exists in the county in which the venue is laid which will make it difficult to obtain a jury with no interest in the matters involved, the court will order the venue to be changed to a county in respect to which no such difficulty exists.

Starratt v. Dominion Atlantic R. Co., 5 D.L.R. 641, 46 N.S.R. 272.

While there may be jurisdiction to change the place of trial, after notice of trial has been given, although irregularly, a plaintiff may not correct his own mistake in failing to give notice of trial in due time by a motion to change the venue to another trial sittings for which the time for service had not yet expired.

Taylor v. Toronto Construction Co., 1 D.L.R. 644, 3 O.W.N. 930, 21 O.W.R. 508.

CONVENIENCE—PLACE WHERE PROPERTY IN QUESTION SITUATE — EXPENSE — WITNESSES—BRINGING CASE FROM OUTER COUNTY TO TORONTO.

Rice v. Marine Construction Co., 2 D.L.R. 896, 3 O.W.N. 1080.

COUNTY COURT ACTION—ISSUES FOR TRIAL —EVIDENCE—CONVENIENCE—EXPENSE.

Conkle v. Flanagan, 2 D.L.R. 915.

COUNTY COURT ACTION—WITNESSES—CONVENIENCE.

Lloyd v. Stronach, 3 D.L.R. 880, 3 O.W.N. 1349, 22 O.W.R. 619.

COUNTY COURT ACTION—WITNESSES—CONVENIENCE.

Keenan Woodware Co. v. Foster, 3 D.L.R. 886, 3 O.W.N. 1451, 22 O.W.R. 545.

MOTION TO CHANGE — AFFIDAVITS — WITNESSES—CONVENIENCE.

Harrison v. Knowles, 1 D.L.R. 926, 21 O.W.R. 245.

ACTION FOR DOWER—LOCAL VENUE.

Stauffer v. London & Western Trust Co., 10 D.L.R. 853, 4 O.W.N. 1336, 24 O.W.R. 627.

On an application for an order changing venue by a defendant as against a non-resident plaintiff, under s. 48 of the County Court Act, C.S.N.B. 1903, c. 116, it is necessary to satisfy the judge that the cause can be more conveniently or fairly tried in another county and also to prove by affidavit that the defendant has a good ground of defence, under s. 47. The court refused to interfere with the discretion of the County Court Judge in ordering a change of venue upon such an application, though the affidavit before the judge contained no direct statement that the defendant had a good defence and the grounds of the defence were not set out. Semble, that no appeal lies from the order of a County Court Judge changing venue.

Canadian Fairbanks Co. v. Edgett, 40 N. B.R. 411.

FAIR TRIAL—ALIEN ENEMY.

The object of the proposed appeal was to have the place of trial changed from B. to W. The action—which was for false imprisonment—had been tried at B., but a new trial was ordered, because prejudice had been caused to the plaintiff by evidence having been improperly admitted and counsel for the defendant having improperly referred to the plaintiff's nationality—he being an Austrian: [Gage v. Reid, 34 D.L.R. 46, 38 O.L.R. 514.] It was said, in regard to the second trial, that the plaintiff could not have a fair trial at B., because the counsel referred to had extraordinary influence in the locality, and the remarks made by him would attain great notoriety and so tend to prejudice the community from which the jurors would be drawn. Held, that the affidavit of the plaintiff's solicitor was admissible to shew the grounds for a change of venue, and might be effective. [Cossham v. Leach, 32 L.T.R. 665; Davis v. Murray, 9 P.R. 222; Roche v. Patrick, 5 P.R. 210, followed. Hood v. Cronkite, 4 P.R. 279; Leach v. Brown, 9 O.L.R. 380, distinguished.] But held, that the solicitor's belief that a fair trial could not be had at B., coupled with what was stated by him as to prejudice, did not amount to such strong and clear evidence as would induce the court to hold that there could not be a fair trial by a jury taken from the county of H., of which B. was the county town.

Gage v. Reid, 39 O.L.R. 52.

MOTION TO CHANGE VENUE—PRACTICAL DISPOSITION OF, BY TRIAL JUDGE—COSTS.

Wait v. Finnen, 13 O.W.N. 146.

MOTION TO CHANGE VENUE—CONVENIENCE—RULE 245 (d).

Gordon v. Gordon, 13 O.W.N. 172. [See also 32 D.L.R. 626, 38 O.L.R. 167.]

PRACTICE—TRIAL—CHANGE OF VENUE—PREPONDERANCE OF CONVENIENCE.

Caine v. Surrey, [1919] 1 W.W.R. 12.

IN CIVIL CASES—COUNTY COURT ACTION—TRANSFER TO DISTRICT COURT—APPLICATION OF ONE DEFENDANT.

Martin v. McLeod, 25 O.W.R. 66.

WITNESSES — CONVENIENCE — TERMS — WITHDRAWAL OF JURY NOTICE.

White v. Hobbs, 24 O.W.R. 483.

PREJUDICE—FAIR TRIAL—JURY—TERMS.

Meredith v. Slemin, 24 O.W.R. 315.

COUNTY COURT ACTION — CONVENIENCE — WITNESSES.

Ontario Bank v. Bradley, 23 O.W.R. 747.

IN CIVIL CASES—COUNTY COURT ACTION—CONVENIENCE.

Ferguson v. Anderson, 24 O.W.R. 68.

RECOVERY OF LAND—CON. R. 529 (c)—TITLE TO LAND INVOLVED.

Niagara Navigation Co. v. Niagara-on-the-Lake, 4 O.W.N. 459. [Renewed motion, see 4 O.W.N. 554.]

INFLUENCE OF PLAINTIFF'S COUNSEL—FAIR TRIAL.

Fumerton v. Richardson, 4 O.W.N. 393, 23 O.W.R. 423.

EXPEDITING TRIAL—REFUSAL OF MOTION—TERMS.

Shantz v. Clarkson, 23 O.W.R. 746.

MOTION TO CHANGE—CONVENIENCE—WITNESSES—TERMS—AVOIDANCE OF DELAY.

Blackie v. Seneca Superior Silver Mines, 4 O.W.N. 1039, 24 O.W.R. 371.

CONVENIENCE — WITNESSES — UNDERTAKING TO PAY EXPENSES.

Bickell v. Walkerton Electric Light Co., 4 O.W.N. 1181, 24 O.W.R. 446.

COUNTY COURT ACTION—CONVENIENCE—EXPENSE—WITNESSES.

Baughart v. Miller, 4 O.W.N. 1368, 24 O.W.R. 629.

IRREGULARITY IN NAMING—RULE 245 (B)—WAIVER — APPLICATION TO CHANGE VENUE UNDER R. 245 (D)—BALANCE OF CONVENIENCE.

Hill v. Toronto R. Co., 7 O.W.N. 831.

(§ II—16)—CONDITIONS ON GRANTING.

Where the defendant seeking a change of venue was a railway company the order granting the change should be made conditional upon the defendant affording free transportation for the plaintiff and his witnesses upon their line of railway to and

from the place to which the venue was changed.

Starratt v. Dominion Atlantic R. Co., 5 D.L.R. 641, 46 N.S.R. 272.

CONDITIONS ON GRANTING—MANITOBA PRACTICE.

Where the plaintiff has sued in the judicial district in which the cause of action arose, a sufficient preponderance of convenience is not made out to change the venue to another district by shewing five witnesses to which the latter venue would be more convenient as against the plaintiff's three witnesses located at the city where the venue was originally placed.

Hudson v. Canadian Phœnix, 17 D.L.R. 448, 28 W.L.R. 201.

CONVENIENCE—UNDERTAKING OF PLAINTIFFS TO PAY ADDITIONAL COSTS.

Berlin Lion Brewery Co. v. Mackie, 5 O.W.N. 107, 25 O.W.R. 90.

(§ II—20)—IN CRIMINAL CASES.

The Court of Sessions at Montreal has jurisdiction to try a charge for which the accused was arrested in Montreal and committed for trial there, although upon an information laid in another judicial district of the same province it is not essential that the accused shall, on his arrest, be sent for trial to the local venue at which the information was laid.

R. v. McKeown, 8 D.L.R. 611, 20 Can. Cr. Cas. 492, 19 Rev. Leg. 198.

CRIMINAL PROSECUTIONS — NONINDICTABLE OFFENCES—PROVINCIAL LAW.

The general rule of the common law requiring the venue of trials of indictable offences to be laid in the county where the crime was committed, is to be applied also to trials of purely statutory offences otherwise than on indictment (e.g., offences under a provincial liquor law), unless there is some statutory provision to the contrary.

R. v. Brady, 23 Can. Cr. Cas. 35, 20 B.C. R. 217, 28 W.L.R. 733, 6 W.W.R. 1307.

(§ II—22)—IN CRIMINAL CASE—DISCRETION.

A second order changing the place of trial at the instance of the Crown, after an abortive trial at the venue fixed by the first order on the prisoner's application, is within the discretion of the presiding judge (Cr. Code, s. 884); and where there was not a sufficient panel of jurors for a new jury at the same assize and where the Trial Judge was seized of facts from which it could properly be inferred that it was expedient to the ends of justice to make the second order, his decision becomes one of fact and not one of law, and cannot be interfered with on appeal, although the usual practice of putting the facts forward on affidavit was not adopted.

R. v. Spintlum, 15 D.L.R. 778, 22 Can. Cr. Cas. 483, 18 B.C.R. 606, 26 W.L.R. 849, 5 W.W.R. 977, 1199.

CHANGE OF VENUE—CRIMINAL CASE—PUBLICATION OF THE NAMES OF JURORS IN VIOLATION OF STATUTORY PROHIBITION—NEWSPAPER COMMENTS.

The King v. Graves, 5 D.L.R. 474, 19 Can. Cr. Cas. 402.

FAILURE TO SET CASE DOWN AT PROPER TIME —AVOIDANCE OF DELAY.

Brown v. G.T.R. Co., 6 D.L.R. 854, 4 O. W.N. 113, 23 O.W.R. 74.

INFRINGEMENT OF PATENT OF INVENTION— R.S.C. 1906, c. 69, s. 31—"MAY."

Alsop Process Co. v. Cullen, 6 D.L.R. 859, 4 O.W.N. 114, 23 O.W.R. 81.

CROWN CASE RESERVED — OBJECTION TO RIGHT OF CROWN TO CHARGE ACCUSED IN DISTRICT OTHER THAN THAT IN WHICH OFFENCE COMMITTED—OBJECTION SUSTAINED—CASE RESERVED THEREON — AUTHORITY FOR RESERVING — NO TRIAL—ACCUSED COMMITTED TO GAOL IN DISTRICT IN WHICH CHARGE PREFERRED—COMMITTED FOR TRIAL IN THAT DISTRICT—RIGHT OF CROWN TO PREFER CHARGE IN THAT DISTRICT—RIGHT OF ACCUSED TO BE TRIED IN DISTRICT WHERE OFFENCE COMMITTED—CRIMINAL CODE—"DISTRICT, COUNTY OR PLACE"— APPLICABILITY OF THESE TERMS TO SASKATCHEWAN.

The King v. Lynn, 4 S.L.R. 324.

The place of trial of an accused will not be changed upon unsupported assertions to the effect that the Crown cannot, on account of the favourable sentiment prevailing in favour of the accused, obtain a fair and impartial jury, where all of the facts tend to shew that an impartial jury can be obtained with no more difficulty than is experienced in any criminal trial. An application of the Crown to have the place of trial changed, on the ground that it would be difficult, on account of the favourable sentiment prevailing in favour of the accused, to obtain an impartial jury, will be denied, where, on empanelling a jury which disagreed in a criminal case, the Crown did not make any challenges for cause, nor exhaust the jury panel, and made no attempt to obtain further jurors than those on the panel returned.

The King v. Stauffer, 19 Can. Cr. Cas. 205, 4 S.L.R. 284.

(§ II—30) — CRIMINAL CASE — ORDER CHANGING PLACE OF TRIAL—AUTHENTICATION.

An order for a change of venue in a criminal case in British Columbia is sufficiently authenticated when signed by the clerk of assize and sealed with the seal of the Supreme Court, although not signed by the presiding judge.

R. v. Spintlum, 15 D.L.R. 778, 22 Can. Cr. Cas. 483, 18 B.C.R. 606, 26 W.L.R. 849, 5 W.W.R. 977, 1199.

ABSENCE OF INTERPRETER AT POINT TO WHICH CHANGE IS ASKED FOR.

Alves v. Kearns, 19 O.W.R. 150.

STATEMENT OF CLAIM SHEWED VENUE SHOULD HAVE BEEN LAID AT WELLAND UNDER CON. R. 529 (B).
Pitze v. Cook, 20 O.W.R. 700.

JUDGMENT BY DEFAULT AGAINST ONE DEFENDANT—DENIAL OF SALE BY OTHER TWO DEFENDANTS—TERMS.
Metal Shingle Co. v. Anderson, 19 O.W. R. 71, 2 O.W.N. 1018.

VENUE PREVIOUSLY FIXED BY JUDGE.
Brennan v. Bank of Hamilton, 2 O.W.N. 894, 18 O.W.R. 841.

ALLEGED INCONVENIENCE TO BUSINESS.
Higgins v. Coniagas Reduction Co., 2 O. W.N. 953, 18 O.W.R. 911.

ACTION FOR SPECIFIC PERFORMANCE.
Doret v. Quinlan, 8 E.L.R. 297.

AFFIDAVITS—WITNESSES.
Langley v. Lavers; Langley v. Jodrey, 10 E.L.R. 49.

VERDICT.

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VIADUCT—JURISDICTION OF RAILWAY BOARD APPEAL TO PRIVY COUNCIL—COMPETENCY.
C.P.R. Co. v. Toronto and G.T.R. Co., 27 T.L.R. 448 (P.C.), [1911] A.C. 461.

VIEW.

Annotation.

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Relief Act, see Moratorium; Mortgage, VI E—90; Execution, I—11; Landlord and Tenant, III E—115.

Enlistment, desertion, see Army and Navy; Militia; Desertion.

Enlistment, desertion, see Moratorium; Military Law; Militia.

VOTERS.

See Elections.

(§ I B—12)—VOTERS' LIST.

The addition to the voters' list by a Court of Revision of the name of a registered owner of the necessary amount of land to make him a qualified voter is valid though no notice was given to the former owner as a person interested, it appearing that the latter was on the voters' list in respect to other property and was not opposed to the action taken.
The King ex rel. Angus v. Knox, 1 D.L.R. 843, 4 A.L.R. 54, 19 W.L.R. 769, 1 W.W.R. 341.

WAGES.

See Master and Servant, I.

Liability of directors for, see Companies.

Seamen's wages, see Seamen.

As preferred claim, see Assignment for Creditors; Companies, VI F.

Garnishment of, see Garnishment.

Annotation.

Right to; earned, but not payable, when: 8 D.L.R. 382.

WAIVER.

See Estoppel; Contracts VI.

Waiver and estoppel as applied to insurance, see Insurance.

Of vendor's lien, see Vendor and Purchaser; Sales.

Annotation.

Waiver of forfeiture of lease: 10 D.L.R. 603.

ESTOPPEL AS BASIS OF WAIVER.
An agreement between the parties to an action on a mortgage that the referee should consider and determine all matters in difference between them, and the production of evidence in relation thereto, constitutes a waiver of an objection that, because some of the collateral notes were not due when the writ was issued; the action was prematurely begun.
Union Bank v. Crate, 3 D.L.R. 686, 21 O.W.R. 871, 3 O.W.N. 1018.

PRACTICE—RECEIVER—PRELIMINARY OBJECTIONS—MODE OF PROCEDURE—WAR RELIEF ACT—B.C. STATS. 1916, c. 74.
On motion for the appointment of a receiver of a corespondent's business after judgment in a divorce action, and after an adjournment of the motion at the instance of the corespondent for further material, the corespondent at a further hearing raised the preliminary objection that he was entitled to relief under the War Relief Act. Held, that there had been waiver, and the objection must be overruled.
Shorting v. Shorting, 25 B.C.R. 351.

WAR.

See Military Law.

Prize and capture, see Prize Court.

Effect on aliens, see Aliens.

Postponement of payments because war, see Moratorium.

Treasonable offences, see Sedition; Treason.

War Relief Act, volunteers and reservists, see Moratorium.

War Tax, see Internal Revenue.

Annotations.

Status of aliens during war: 23 D.L.R. 357.

Moratorium; Postponement of Payments Acts, their construction and application: 22 D.L.R. 865.

Sedition—Treason: 51 D.L.R. 35.

(§ I—1)—Requiring citizens to engage in useful occupation—Keeping pool room.

The business of keeping a pool room is properly held to be an occupation which is not "useful" under the terms of the war regulation contained in order-in-council of April 4, 1918 (Can.), requiring all male persons domiciled in Canada to be regularly engaged in some useful occupation in the absence of reasonable cause to the contrary, under penalty of summary conviction for default.

Re Salhani, 31 Can. Cr. Cas. 7, 25 Rev. de Jur. 17.

WAR RELIEF ACT.

See Moratorium; Volunteers and Reservists Relief Act.

WAR REVENUE ACT.

See Internal Revenue; Master and Servant, III A—289.

WAREHOUSEMEN.

Baggage checkroom, liability for negligence, see Carriers, II O—365.

Defective insurance policy — Liability for loss.

Failure on the part of a warehouseman to examine policies of insurance placed by him upon goods bailed with him, to see that they contain a sufficient description of the buildings in which the goods are placed, is gross negligence, and where the insurance company escapes liability for loss occasioned by fire on the ground that the description of the buildings was inaccurate, the warehouseman is liable for the full amount of the loss.

Wright v. Standard Trust, 29 D.L.R. 391, 26 Man. L.R. 339, 34 W.L.R. 654, 10 W.W.R. 763.

Rights and liabilities of—Interest in and title to property stored — General lien.

A warehouseman has a general lien upon the stored goods as against his bailor. [Hill v. London Central, 102 L.T. 715; Somes v. British Empire Shipping Co., 8 H.L.C. 338; Leuckart v. Cooper, 3 Bing. N.C. 99, distinguished.]

Canada Steel & Wire Co. v. Ferguson, 19 D.L.R. 581, 29 W.L.R. 965, 7 W.W.R. 557.

Railway company—Breach of contract Loss of goods—Operation of railway —Railway Act, Can.—Action barred, when.

Where the railway company, in breach of its contract as a warehouseman, used its rolling stock and its employees to put the goods warehoused with it in a place where, under the terms of the contract, they should not have been put, the result and loss is not one occasioned by "the operation of the railway" within s. 242 of the Railway Act, 1906, and is not barred by failure to bring suit within one year. Where it was a part of the contractual obligation between the consignee of a carload of cement and the railway, in respect of its warehousing duties, that the railway should keep the car on the bonded spur line, as in fact it was bound under customs, regulations to do until the customs duties were paid, but the railway, without authority, removed the car to another track, from which its contents were stolen, the railway company is liable for the loss. [Lilly v. Doubleday, 7 Q.B.D. 510, followed.]

Great West Supply Co. v. G.T.R. Co., 20 D.L.R. 774, 30 W.L.R. 322, 7 W.W.R. 780.

Loss of goods — Warehouse receipt — Limitation of liability.

The loss of goods in the hands of the warehouseman acting in violation of his contract by breaking open the original packages without authority is not subject to the conditions in limitation of liability contained in the warehouse receipt. [Harris v. G.W.R. Co., 1 Q.B.D. 534, applied.]

McGale v. Security Storage Co., 22 D.L.R. 57, 25 Man. L.R. 533, 7 W.W.R. 1015, 30 W.L.R. 349.

Interest in, and title to, property stored.

R. had purchased a quantity of furniture from plaintiffs under a hire purchase agreement, which was duly registered, but, before completing her payments, she stored the furniture with defendant, a warehouseman, but without the knowledge of plaintiffs, who some months afterwards, on discovering the fact, demanded delivery up of the furniture under the terms of their agreement. Defendant refused to deliver until his warehouse charges were paid. Held, that the defendant was not entitled to retain the goods until his charges were paid.

Smith v. Campbell, 16 B.C.R. 505, 17 W.L.R. 493.

Storage of wheat.

The contract between the parties, for the storage and delivery of four carloads of wheat, was contained in a storage ticket, and was made under the Manitoba Grain Act, R.S.C. 1906, c. 83:—Held, that the provisions of the Canada Grain Act, 1912, did not apply to the contract; and the right or option of the defendants to deliver storage grain at a terminal elevator was beyond question, having regard to the terms of the contract and s. 58 of the Manitoba Grain Act. The provisions in that Act (ss. 54, 56) for delivery at the country elevator is not effective as against the option of the elevator company or

warehouseman. Although the defendants did not give the plaintiffs notice in writing of the shipment of their grain to a terminal elevator, as required by subs. 2 of s. 58, no damage resulted to the plaintiffs by reason of the omission. The result of the proceedings before the Board of Grain Commissioners was, that the board refused to entertain or consider the complaint of the plaintiffs. The successful defendants in this action were deprived of costs, because they did not give the notice required, and because the question was one of the application and interpretation of statutes.

Wagner v. Western Elevator Co., 25 W.L.R. 328.

WARRANT.

See Arrest; Criminal Law.

Search warrants, see Search and Seizure; Intoxicating Liquors.

WARRANTY.

See Sale; Vendor and Purchaser; Deeds.

Third party—Indorser already defendant.

Molson's Bank v. De Courval, 12 Que. P.R. 439 (Sup. Ct.).

AGREEMENT TO ASSUME ACTION—JUDGMENT IN MAIN ACTION—OPPOSITION TO ANNUL.

There is simple warranty when a defendant calls in warranty the party who, by a private agreement, has assumed the action for salary which has been taken against him. When the judgment says: "orders the defendant in warranty to intervene in the main action to stop it, and orders the defendant in warranty to indemnify the plaintiff in warranty against the judgment rendered against the latter in the main action, capital, interests and costs, both of the demand and of the plea accrued and to accrue, and also to pay the costs of the present action," the principal plaintiff cannot have his judgment in the main action executed against the opposant, the defendant in warranty; his only recourse is against his debtor, the principal defendant.

Lavoie v. Laroche, 46 Que. S.C. 417.

INTERVENTION BY SURETY — DEFENCE AGAINST PRINCIPAL ACTION.

The guarantor made a party to a cause by the secured creditor may intervene and take the latter's fait et cause and in such case he may set up against the principal action not only the ground of defence which he may have, but also those which the creditor himself may rely on.

O'Hara v. Jasmin, 39 Que. S.C. 182.

ACTION IN WARRANTY—DIRECTORS.

The defendant in warranty, sued jointly and severally with his codirectors by a creditor of the company, cannot by exception to the form claim the dismissal of the action as to him on the ground that in the action the condemnation against his codirectors is equally asked for under a written guarantee to which he was not a party.

Barque D'Hochelaga v. Bissonette, 18 Que. P.R. 332.

WARRANTY PLEADING.

A warrantor who takes up the cause of the warrantee represents the latter. This is an exception to the doctrine that one cannot plead through an agent.

Hoy v. Malette, 52 Que. S.C. 258.

WARRANTY—EXCEPTION TO FORM.

An exception to the form will not lie against an action in warranty on the ground that the reasons given by the plaintiff would not be the same for all defendants.

Barque D'Hochelaga v. Bissonette, 18 Que. P.R. 336.

WARRANTY—DÉLIT — APPEAL — RES JUDICATA.

The author of a délit or quasi délit summoned in warranty cannot, without offering to repair the wrong which he admits that he had caused, be discharged from liability for his acts and obtain a dismissal of the main action by pleading that the principal plaintiff should have brought action directly against him and had no right of action against the principal defendant when the warrantor has been summoned, the main action and the action in warranty consolidated and both actions maintained, he cannot, upon an appeal only from the judgment which condemns him to indemnify the principal defendant cause it to be set aside on the ground that the judgment in the main action was wrong. He should also have appealed against this judgment failing which there was chosé jugé as well against the warrantor as against the warrantee since the warrantor was a party to the cause and the judgment bound all the parties. The warrantor to get rid of the warranty by virtue of art. 1520 C.C. (Que.) must prove that there were sufficient grounds to have the main action dismissed. But when the grounds alleged have already been invoked by the principal defendant, and the witnesses are the same, he is liable on his warranty since that of which he complains would then be a mere error in judgment.

Meilleur v. Montreal Light, Heat and Power Company, 52 Que. S.C. 366.

WARRANTY—DISMISSAL OF MAIN ACTION—COSTS.

When in a case of warranty formulated before any defence is offered the defendant contests only the action in warranty and the main action is dismissed for failure to furnish security for costs, the action in warranty properly brought can also be dismissed but with the costs of contestation against the defendant in warranty.

Duteuil v. Bailiffs of Montreal, 52 Que. S.C. 398.

PERSONAL ACTION — REAL WARRANTY — NULLITY OF DEED.

When the principal plaintiff takes a personal action for a sum of money, balance of the price of a sale of an immovable, and

the defendant calls in his warrantors in warranty, the latter cannot sue their remote warrantors in warranty, as by art. 187, C.C.P., this is only permitted in case of real warranty. In a suit of titles creating a successive warranty, if one of the deeds is annulled by the court, no recourse in warranty can be had against any of the subsequent warrantors.

Strachan v. Taylor, 54 Que. S.C. 93.

COMPANY DIRECTORS — SURETIES — DIVIDENDS — INSOLVENCY — JOINDER — CONCLUSIONS.

There may be an incidental demand in warranty, when a principal action is taken against the surety of a joint stock company, and the action in warranty is taken by that surety against one of its directors who has become liable for the company's debts under the Companies Act (Can.), for having declared a dividend when the company was insolvent. In an action in warranty, several cosureties and the principal debtor may be joined provided the conclusions are separated and distinct.

Dupuis v. Bissonnette, 27 Que. K.B. 149.

MOTION TO EXTEND—DEPOSIT.

A motion to extend the delay for calling in warranty, after the delays fixed by art. 164, C.C.P., without being accompanied by the deposit required, is not a dilatory exception and has not the effect of suspending the delays for pleading.

Universal Wardrobe Repair v. Berman Dye Works, 19 Que. P.R. 391.

HYPOTHECARY ACTION—PARTIES.

A defendant, sued jointly and severally with other subsequent owners of a property mortgaged by the hypothecary creditor who, after having had the property sold in an hypothecary action, has not been paid in full of his claim, may, by way of dilatory exception, ask to call in warranty the previous owner, as codefendant in the suit, if the latter has, in his deed of purchase, bound himself to pay the amount of the obligation.

Mousley v. Trudel, 19 Que. P.R. 145.

DECLINATORY EXCEPTION — DOMICILE — PLACE OF CONTRACT.

A defendant in an action in warranty taken against him in the district of Beauce, and based on a contract which he had made in Montreal with the principal defendant, cannot plead declinatory exception, claiming (1) that he is domiciled in the Province of Ontario where the action in warranty was served on him; (2) that the cause of action in warranty arose in the district of Montreal. Under art. 98, C.C.P., a defendant in an action in warranty, wheresoever his domicile may be, should be summoned before the court of the place where the principal action was brought.

Vachon v. Montreal Abattoirs, 20 Que. P.R. 174.

SURETY—DILATORY EXCEPTION.

A surety, jointly and severally liable, may, by dilatory exception, stay the principal action to call the debtor in warranty.

Julien v. Marchand, 20 Que. P.R. 266.

WORK BY ESTIMATE AND CONTRACT—MATERIALS SELECTED BY THE OWNER.

Reid v. Birks, 39 Que. S.C. 133.

WASTE.

See Landlord and Tenant.

Annotation.

Law of tenants to repair: 52 D.L.R. 1.

WATERS.

I. PUBLIC RIGHTS; RIGHTS BETWEEN PUBLIC AND INDIVIDUAL.
- A. What are public or navigable.
- B. Relative rights as between province and Dominion.
- C. Relative rights of public and individuals.

II. WATER RIGHTS AND EASEMENTS AS BETWEEN INDIVIDUALS.
- A. Riparian or littoral rights in general; what are watercourses.
- B. Accretions; alluvion; islands; flats.
- C. Use of water; interference with flow.
- D. Obstructions; overflow; raising dams.
- E. Pollution.
- F. Prior appropriation.
- G. Surface and seepage water.
- H. Subterranean waters; springs; wells.
- I. Irrigation; ditches; water rights.
- J. Contract or grant.
- K. Adverse use; prescription.

III. WATER SUPPLY.

As to drainage, see Drains and Sewers; Municipal Corporations.

Admiralty jurisdiction over, see Admiralty; Shipping; Collision.

Right to fish, see Fisheries.

Annotations.

Natural watercourse; drainage; cost of work; power of referee: 21 D.L.R. 286.

"Harbours" within property clauses of B.N.A. Act: 26 D.L.R. 69.

Public right of fishing in tidal waters; the 3 mile limit: 35 D.L.R. 28.

I. Public rights; rights between public and individual.

A. WHAT ARE PUBLIC OR NAVIGABLE.

(§ I—1)—RESPONSIBILITY—DRAINS—OVERFLOW—SWELLING OF THE ST. LAWRENCE—ACCIDENT—C.C. ART. 17 s. 24.

No one is responsible for damages caused by an overflow arising from the excessive height of the waters of the St. Lawrence during the spring months.

Bouchard v. Montreal, 25 Rev. Leg. 108.

(§ I A—5)—FLOATABLE AND NAVIGABLE—BED—CROWN DOMAIN.

A river navigable from its mouth upwards until obstructions are reached which make the remainder only capable of floating loose timber is subject in its navigable

part to the rules of law applicable to navigable waters.

Leamy v. The King, 33 D.L.R. 237, 54 Can. S.C.R. 143.

RIGHTS OF NAVIGATION—ACCESS TO SHORE—INTERFERENCE WITH—COMPENSATION—FALSE CREEK TERMINALS ACT—NAVIGABLE WATERS PROTECTION ACT.

Any interference with a public right of navigation is a nuisance which the court can order abated, notwithstanding any approval thereof by the governor-in-council under s. 7 of the Navigable Waters Protection Act. The powers given the city of Vancouver by the False Creek Terminals Act, c. 76, 1913 (B.C.), of erecting a seawall, etc., in False Creek, cannot be carried out to the prejudice of rights of access from the creek to private property on the shore thereof, because the Dominion Parliament, which has exclusive legislative authority over navigation, has not authorized the construction of such works.

Champion v. Vancouver, [1918] 1 W.W.R. 216, reversing 31 D.L.R. 22, 23 B.C.R. 221, [1917] 1 W.W.R. 185.

(§ I A—6)—The Gatineau river in the Province of Quebec is not a "navigable and floatable" river within the purview of art. 400, C.C. (Que.)

Maclaren v. Att'y-Gen'l for Quebec, 15 D.L.R. 855, [1914] A.C. 258, 6 W.W.R. 62, 20 Rev. Leg. 248.

TEST OF NAVIGABILITY.

A river is navigable and floatable à trains et radeaux, when, with the assistance of the tide, small craft or rafts of logs can be navigated for transportation purposes in a practical and profitable manner; it, therefore, forms part of the Crown domain.

Bouillon v. The King, 31 D.L.R. 1, 16 Can. Ex. 443.

B. RELATIVE RIGHTS AS BETWEEN PROVINCE AND DOMINION.

Tidal waters as "public lands belonging to province," see Constitutional Law, I G—140.

Three mile limit "coast" island, fishing rights, see International Law, I—3.

(§ I B—10)—NAVIGATION—DOMINION CONTROL—EXTENT OF.

The grant to the federal Parliment of legislative power over the subject-matter of navigation and shipping in no way implies federal ownership of the rivers, lakes, and sea-coast waters upon which ships may ply, or in regard to which there may exist rights of navigation, either on the part of the public or on the part of private owners.

Fort George Lumber Co. v. G.T.P.R. Co. 24 D.L.R. 527, 9 W.W.R. 17, 32 W.L.R. 509.

C. RELATIVE RIGHTS OF PUBLIC AND INDIVIDUALS.

Public waterside property, ownership, Harbour Commissioners, see Expropriation, III C—144.

Ditches and Watercourses Act, see Drains and Sewers, II—10.

(§ I C—15)—NAVIGABLE WATERS—ASHBURTON TREATY—CERTAIN WATER COMMUNICATIONS AND PORTAGES OPEN TO CITIZENS OF BOTH COUNTRIES—LANDOWNERS NOT AFFECTED.

The object of the Ashburton Treaty of 1842 Art. II. which provides that "all the water communications and all the usual portages along the line of Lake Superior to the Pigeon river . . . shall be free and open to the citizens and subjects of both countries;" was for the advantage of those desiring to pass along the waters or the portage; there was no intention to take care of the rights of landowners or others near the route.

Smith v. Ontario & Minnesota Power Co., 45 D.L.R. 266, 44 O.L.R. 43, reversing in part 42 O.L.R. 167.

PUBLIC HARBOUR — NAVIGABLE WATERS — WATER LOTS.

The King v. Bradburn, 49 C.L.J. 695.

(§ I C—18) — MUNICIPAL DRAINAGE DITCHES.

Where a public body is intrusted with the construction of dyking works to prevent damage from the overflow of a river when in flood, it is its duty to avoid causing unnecessary inconvenience to individuals affected by the works; and where local adjustments and variations of the general plan can be made without affecting its suitability for its intended purpose or its compliance de facto with the description of works authorized, the public body is entitled to make such adjustments and variations if they diminish the interference with private rights or property and so lessen the amount of compensation to be paid in respect thereof.

Wilson v. Delta, 8 D.L.R. 881, 22 W.L.R. 931, [1913] A.C. 181, affirming on different grounds, 17 W.L.R. 680.

Where water courses have lost their natural condition and have become part of an artificial drainage system created under the drainage laws, the part of the system which was once a natural watercourse is entitled to no particular immunity under the law, over the parts which are purely artificial, but the whole must operate so as to discharge the waters which it gathers at a proper and sufficient outlet. [Re Elma and Wallace, 2 O.W.R. 198; McGillivray v. Lochiel, 8 O.L.R. 446, distinguished.]

Re Orford and Aldborough, 7 D.L.R. 217, 27 O.L.R. 107, 22 O.W.R. 853.

MUNICIPAL DRAINAGE DITCHES.

Scrimger v. Galt, 16 D.L.R. 867, 6 O.W.N. 75.

A municipality that constructs a drainage ditch and carries the water therefrom into a ravine on the land of the plaintiff,

which was not a natural watercourse, is answerable in damages therefor.

Lamontagne v. Woodlands, 5 D.L.R. 524, 22 Man. L.R. 495, 21 W.L.R. 881.

(§ I C—22) — FLOATAGE RIGHTS — NEGLIGENCE — INJURY TO RIPARIAN PROPRIETOR.

Permitting logs to form a jam in a stream above a mill, which the defendant knew was likely to occur, without taking precautions to prevent it, renders him liable for an injury to a mill as the result of efforts to break the jam. The absolute right to float timber on any stream conferred by R.S.Q. 1909, art. 7298, is limited by art. 7349 so as to make the owner thereof liable for all damages inflicted on riparian owners in the exercise of such right. [Ward v. Grenville, 32 Can. S.C.R. 510; Vezina v. Drummond Lumber Co., 26 Que. S.C. 492, followed; Fraser v. Dumont, 21 Que. K.B. 365, not followed.]

Pepin v. Villeneuve, 12 D.L.R. 327, 22 Que. K.B. 520.

NON-NAVIGABLE STREAM—RIPARIAN RIGHTS —LOGGING—NEGLIGENCE.

Persons using a non-navigable watercourse for floating logs are bound to protect the riparian properties, and must, therefore, place booms for this purpose, where necessary; the omission to do this is such negligence as will entitle the owners of such properties to compensation for damages. [See arts. 7295, 7298 R.S.Q. 1909.]

Alie v. Gilmour; Alie v. Edwards Co., 28 D.L.R. 525, 49 Que. S.C. 425. [See also 24 Rev. Leg. 187.]

RIGHTS OF RIPARIAN OWNERS — DRIVING LOGS—RESERVE ALONG BANK OF STREAM.

A lumber company operating a timber berth under a provincial license cannot conduct its drive in bringing the logs down a stream, so as to deprive a riparian owner of his reasonable and proper means of access to and use of the river, notwithstanding the reserve of one chain in width along the shore of the river, in the original grant from the Crown.

Ireson v. Holt Timber Co., 18 D.L.R. 604, 30 O.L.R. 209, affirming 11 D.L.R. 44, 4 O.W.N. 1106.

STATUTORY RIGHTS—DRIVING LOGS—NEGLIGENCE—"UNNECESSARY DAMAGE."

The reckless exercise of a statutory right (River and Streams Act, Ont.) in driving logs on a navigable river renders the operators liable for "unnecessary damage" to a cofferdam erected under Dominion authority; the rights of lumbermen under pre-Confederation legislation, and of servants of the Dominion Government in matters respecting navigation are equal.

Booth v. Lowery, 35 D.L.R. 303, 54 Can. S.C.R. 421, affirming 31 D.L.R. 451, 37 O. L.R. 17.

TIMBER DRIVING.

The privilege of transmitting timber down watercourses in the Province of Quebec given by art. 7298, R.S.Q., 1909, is not granted in derogation of the obligation imposed upon those making use of watercourses for such purposes to make reparation for damages resulting therefrom by art. 7349 (2). The effect of the articles is that persons who avail themselves of the privilege thereby conferred are obliged to compensate riparian owners for all damages which result from the exercise of that right except in regard to such as cannot be avoided by the exercise of reasonable care and skill and those in respect of which the riparian proprietor himself may have contributed, or which have been occasioned by his own fault.

Dumont v. Fraser, 48 Can. S.C.R. 137.

(§ I C—30)—NAVIGABLE RIVER—SHORE—LICENSE TO CROSS—OBSTRUCTIONS.

The bed of a navigable river not tributary to the sea, whose waters rise or fall according to the season, extends to the line of ordinary high water, without taking count of floods, belongs to the Crown. Accordingly, where a person has obtained from the Dominion Government a license giving him the right to cross a navigable river, the owner of real property abutting on the shore of such river has not the right to prevent such person from exercising his rights, under the pretext that the shore consists only in a certain fall of the river between mean water and the low water of summer.

Cousineau v. Séguin, 54 Que. S.C. 447.

OWNERSHIP — BANKS AND BEACHES — ST. LAWRENCE RIVER — RIGHT TO CUT GRASS—SEAWEED—PRIVILEGE OF THE CROWN—C.C. QUE. ARTS. 400, 591—R. S.Q. 1909, ART. 7308.

The privilege given by art. 7308, R.S.Q. 1909, to riparian owners on the south bank of the St. Lawrence River below Quebec, to use the grass which grows on the bank in front of their land, does not extend to seaweed commonly called barnèche weed, which can only be used for industrial purposes and not for agriculture. The right to use this seaweed has been reserved by the Crown, which can dispose of it by lease or otherwise. A third party cannot question the validity of a lease granted by the Crown to an individual, by contending that the lease has been attained under false pretences.

Leblond v. Morency, 56 Que. S.C. 71, reversing 25 Rev. de Jur. 346, 54 Que. S.C. 97.

BED OF RIVER — TITLE — INTERRUPTIVE ACKNOWLEDGMENT—EVIDENCE.

Cap Rouge Pier, Wharf & Dock Co. v. Duchesnay, 44 Can. S.C.R. 130.

DREDGING SAND OUT OF BED OF NAVIGABLE RIVER CAUSING SUBSIDENCE OF BANKS—RIPARIAN OWNER—OWNERSHIP OF BED OF NONTIDAL NAVIGABLE STREAM.

Patton v. Pioneer Navigation & Sand Co., 21 Man. L.R. 405.

(§ I C—32)—Navigable rivers—Bed of river—Crown property.

The bed of a navigable river, under the laws of Quebec belongs to the Crown and no riparian owner can construct works in the bed of the river without the consent of the Crown.

Cedars Rapids Mfg. & Power Co. v. Lacoste, 16 D.L.R. 168, 110 L.T. 873, 6 W.W.R. 62, 30 T.L.R. 293, [1914] A.C. 569.

(§ I C—35)—High-water mark—Riparian rights—Access—Damages for obstruction.

High-water mark in British Columbia, at a place in respect to which there is no record of tides extending over at least a year, should be determined by the "visible high-water mark," i.e., the point fixed by the signs on the ground, such as the state of vegetation and the accumulation of debris. The owners of land adjoining the sea are entitled to free access to, and ingress from, the sea; this right is a private one, distinct from the public right of fishery or navigation, and there is no distinction between the rights of riparian owners on a tidal river and the sea. The occupant of such land is entitled to damages, even as against the Crown, where such private right of access to the sea has been invaded by an obstruction. [Att'y-Gen'l of Straits Settlement v. Wemyss, 13 App. Cas. 192; North Shore R. Co. v. Pion, 14 App. Cas. 612, followed.]

Nelson v. Pacific Great Eastern R. Co., [1918] 1 W.W.R. 597, 25 B.C.R. 259. [See [1918] 3 W.W.R. 85, 26 B.C.R. 1.]

Description of land—Rights-of-way—Beach—High-water mark—Freshet mark.

Defendants by deed conveyed to the plaintiff all the beach around or on a lot of land measuring back from high-water mark, etc. The land in question was situated on an arm of the St. John River, with a slight rise and fall in tide. In an action for a declaration as to ownership and boundaries. Held, that the waters in question were a tidal arm of the sea, but in view of the slight rise and fall in tide and the fact of the existence of a distinct freshet mark, that the beach described in the deed consisted of the foreshore on the waters of the arm aforesaid from ordinary water mark to freshet mark. The word beach ordinarily means the land lying between the lines of high and low water over which the tide ebbs and flows.

Lee v. Arthurs, 46 N.B.R. 184.

(§ I C—40)—Wharf—Navigable river—Trespass—Nuisance.

A person who constructs a wharf upon the foreshore between high and low water mark in navigable waters, without the authority of the Crown, is a trespasser, and the wharf is a public nuisance.

Arsenault v. The King, 32 D.L.R. 622, 16 Can. Ex. 271.

Easements—Shores of navigable river—Gravel.

The servitude of steps leading to, or a towing path along, the shores of navigable rivers is only open to the public for the purposes of navigation. No one is authorized by this servitude to take away the sand and gravel from a shore granted by the Crown and which has become private property.

Duchaine v. Mercier, 26 Que. K.B. 570.

(§ I C—41)—Right to shore—Unauthorized crib work in stream as wrong to adjoining riparian proprietor.

The owner of land adjoining a navigable stream has a right of action for interference with his riparian rights against a person who without his license, and without any permission from the Crown owning the bed of the stream, places and maintains immediately in front of and abutting plaintiff's land crib work and "made land," which interferes with plaintiff's right of access to the stream. [Lyon v. Fishmongers Co., 1 A.C. 662, applied.]

Haggerty v. Latreille, 14 D.L.R. 532, 29 O.L.R. 300.

(§ I C—45)—Right to river bed—Riparian proprietor—Crown grant.

Where a township was created by letters patent describing it as bounded on one side by a named river, being a river which was neither navigable for ships nor floatable for rafts or cribs of logs, and a subsequent Crown grant of a lot at the river front in such township described such lot as bounded on one side by such river, the township is riparian as is also the lot mentioned in the Crown grant, and the rule of interpretation that the riparian owner is entitled to the bed of the stream ad medium filum applies under Quebec law, in like manner as it would under English law, subject to any rights of public user of the stream.

Maclaren v. Attorney-General for Quebec, 15 D.L.R. 855, [1914] A.C. 258, 6 W.W.R. 62, 20 Rev. Leg. 248, reversing 8 D.L.R. 800, 46 Can. S.C.R. 656.

Canal—Grant of surplus water—Priority — Navigation — Liability of Crown.

Under an order-in-council and grant from the Crown, the suppliant's predecessors in title were given subject to the requirements of the public service, the right to draw off, take and use so much of the surplus water of the Bobcaygeon canal as may be sufficient to drive their grist mill, subject, however, to the Crown being relieved and discharged, under a provision of the grant, from any liability in damages resulting from any loss or damage to the grantees in respect of the erection, construction, maintenance and performance of any works by the Crown:—Held, the surplus water mentioned in the grant is what is not required for navigation, the interest of navigation having a prior claim to any right to surplus water. The paramount

right to all waters flowing in the canal is in the Crown for the purposes of navigation. The Crown is not under the circumstances of the case bound to keep the canal in repair. To so hold would amount to a charge of personal negligence that cannot be imputed to the King, and for which, if it occurred, the law affords no remedy, for the doctrine of the Crown's immunity for personal negligence is in no way altered by the Exchequer Court Act.

Moore v. The King, 16 Can. Ex. 264.

(§ I C—47)—Extent of Crown grant—Railway bridge across river.

The ownership of the Crown in the soil and freehold of the bed of a river and of the islands therein extends usque ad cœlum, and a grant by the Crown of the right to construct and maintain a railway bridge across such river carries with it the ownership of so much of the soil as is occupied by the superstructure as well as by the piers.

Re Ottawa & New York R. Co. and Cornwall, 23 D.L.R. 610, 34 O.L.R. 55, 20 Can. Ry. Cas. 91. [Affirmed, 35 D.L.R. 468, 20 Can. Ry. Cas. 435, [1917] A.C. 399.]

Crown grant—Bed of river.

The Act, 1 Geo. V., c. 6, applies only to presumptions, and not to a case where the bed of the river is granted in express terms.

Bartlet v. Delaney, 11 D.L.R. 584, 27 O.L.R. 594.

(§ I C—51)—B.N.A. Act, s. 91 (10)—Jurisdiction of Dominion over navigation—Work for improvement of navigation — Order-in-council — Validity.

The Dominion under the B.N.A. Act, s. 91 (10) has jurisdiction over navigation and has jurisdiction to cause or allow any act or work within the Dominion for the advantage of navigation, the dam in question being such a work, the Dominion has jurisdiction in the premises. The statute of Canada in force at the time gave the Governor-in-Council authority to approve of the work in question and the order-in-council of Sept. 19, 1905, was perfectly valid.

Smith v. Ontario & Minnesota Power Co., 45 D.L.R. 266, 44 O.L.R. 43, reversing in part 42 O.L.R. 167.

(§ I C—52)—Navigation—Obstructions—Diminution of flow of river—Liability.

Where a dam obstructs the natural flow of the waters of a navigable stream to such an extent as to interfere with the usual operation below the dam of the plaintiff's line of boats the owner of the dam is answerable therefor.

Rainy River Navigation Co. v. Ontario & Minnesota Power Co., etc., 12 D.L.R. 611, 4 O.W.N. 1591, 24 O.W.R. 897. [Varied, 17 D.L.R. 850, 6 O.W.N. 533.]

Obstruction to navigation—Booms and logs—Delaying passage of boats—Liability.

The right to float or drive logs down a navigable river where conducted without negligence or wilful obstruction is equal to the right of navigation; and a boat owner whose boat is detained in its course by a boom of logs is not entitled to demand more than that an opening be made within a reasonable time for the boat to proceed.

Rainy River Navigation Co. v. Watrous Island Boom Co., 12 D.L.R. 580, 24 O.W.R. 905, 4 O.W.N. 1593.

Navigation — Wharf — Trespasser — Nuisance.

A trespasser taking possession of the foreshore of a navigable river and building a wharf thereon cannot maintain an action for damages against the Crown for erecting a retaining wall in the interests of navigation and to protect the shore from erosion.

Noel v. The King, 38 D.L.R. 664, 16 Can. Ex. 259.

Bridge—Actionability.

The construction of a low level bridge across a navigable river, without providing necessary facilities for navigation, does not give rise to an action for wrongful obstruction to navigation, if, in fact, the bridge is not the real cause of nonuser of the river for navigation.

B.C. Express Co. v. G.T.P.R. Co., 44 D.L.R. 1, [1919] 1 W.W.R. 497, affirming 38 D.L.R. 29, 55 Can. S.C.R. 328, [1917] 1 W.W.R. 961, which reversed 27 D.L.R. 497, 34 W.L.R. 361, 459, 10 W.W.R. 477, 583.

Nontidal stream — Railway bridge obstructing navigation—Liability.

The Fraser River in its upper waters, although nontidal, is a common and public highway, which the public has the right to freely use the watercourses thereof for the purpose of navigation, an obstruction of which by the erection of a bridge by a railway company will render the latter liable in damages.

Fort George Lumber Co. v. G.T.P.R. Co., 24 D.L.R. 527, 9 W.W.R. 17, 32 W.L.R. 509.

Negligence — Allowing boulder placed in stream to remain unmarked without warning to navigators—Injury to vessel—Navigable Waters' Protection Act, R.S.C. 1906, c. 115, s. 14 Evidence—Findings of fact of Trial Judge.

Shenango Co. v. Soo Dredging Co., 8 O.W.N. 530, 9 O.W.N. 207.

Obstruction.

Where a railway company, in the professed exercise of its powers as a railway company and without the approval of the route by the Minister and of the location plans and works by the Railway Board, has constructed a solid filling across navigable waters, the Board, under ss. 230,

233, coupled with subss. (h) and (i) of s. 30 of the Railway Act, 1906, has jurisdiction to order the demolition of the works so constructed.

G.T.P.R. Co. v. Rochester, 48 Can. S.C. R. 238.

OBSTRUCTION.

Apart from any statutory regulations as to lights, those who place obstructions across navigable waters, even though lawfully authorized to do so, cannot complain if damage is done to their works by collision, brought about by the fact that a prudent navigator, proceeding with due care, was unable at a crucial moment, because of the absence of lights, to define his exact position in relation to such obstruction. [Bank v. "City of Seattle," 10 B.C. R. 513, distinguished.] Quaere, whether a bridge, not originally built for railway purposes, but over which rails were laid (it was not shewn by whom) and used by a street railway company occasionally for construction purposes, is to be regarded as a "railway bridge" under the order-in-council of June 20, 1910 (Can. 1911, p. 112).

New Westminister v. S.S. Maagen, 14 Can. Ex. 323, 18 B.C.R. 441.

NAVIGABLE RIVER—OBSTRUCTION BY LOGS—PUBLIC NUISANCE—RIGHT OF TRAVELLER TO ABATE—AGGRAVATION OF NUISANCE BY PLAINTIFF—LOSS OCCASIONED TO PLAINTIFF NOT RECOVERABLE — UNLAWFUL OBSTRUCTION — NAVIGABLE WATERS PROTECTION ACT, R.S.C. 1906, C. 115, S. 4—QUESTION NOT RAISED UNTIL ARGUMENT OF APPEAL.

Lapointe v. Abitibi Power & Paper Co., 13 O.W.N. 232, reversing 12 O.W.N. 329.

OBSTRUCTIONS.

A telephone company is liable for injuries resulting from the removal of an obstructive telephone wire strung across a navigable basin or outlet by one who had to proceed out with his sailing vessel to the river.

Telephone Nationale (Cie. de) v. Dion, 18 Rev. de Jur. 421.

(§ I C—53)—WRECK—REMOVAL—LIABILITY OF OWNER—SALE—STATUTORY REQUIREMENTS.

Where a wreck obstructs navigation, the Minister of Marine may proceed to remove the obstruction according to the provisions of the Navigable Waters Protection Act, R.S.C. 1906, c. 115, ss. 16-18; and on complying with the statutory requirements, may recover the costs of such removal from the owner of the wrecked vessel at the time the wreck was occasioned notwithstanding the subsequent sale to a third party.

Anderson v. The King; Ex parte Nickerson, 50 D.L.R. 231, affirming 46 D.L.R. 275, 18 Can. Ex. 401.

(§ I C—55)—POSSESSION OF LANDS INUNDATED.

In a possessory action a court should only examine the facts from the point of view of the possession claimed by the plaintiff, and of the material difficulty of such possession of which he complains. The periodical inundations which result from the use of the waters of a stream, and of navigable or floatable rivers, has not the effect of making fall into the public domain the parts of the inundated lands which belong to owners of the river banks. When such lands again become exposed by the subsidence of the water, even when their surface has suffered changes, if they have not become a new bed for the overflowed river, they continue to belong to the original owner of the river bank, who is deemed to have always retained the possession and ownership.

Traversy v. Bibeau, 24 Rev. de Jur. 238.

PROVINCIAL GRANT TO DOMINION—PROVINCIAL LEGISLATION — WATER RECORDS WITHIN "RAILWAY BELT."

Burrard Power Co. v. The King, [1911] A.C. 87, 27 T.L.R. 57.

RIVER NAVIGABLE AND FLOATABLE—EXCLUSIVE RIGHT OF THE CROWN TO FISHING—LETTERS PATENT IN RESPECT OF LANDS—FISHING RIGHTS—CONSTRUCTION.

Wyatt v. Att'y-Gen'l of Quebec, [1911] A.C. 489.

BLOCKING STREAM BY DAM — RIPARIAN RIGHTS—OBSTRUCTION TO MILL.

Crosby v. Yarmouth Street R. Co., 9 E. L.R. 330.

RIGHT TO LAY BOOM ON RIVER—RIGHT OF THE PUBLIC TO USE RIVER.

Quebec & St. Maurice Industrial Co. v. Daigle, 20 Que. K.B. 471.

II. Water rights and easements as between individuals.

A. RIPARIAN OR LITTORAL RIGHTS IN GENERAL: WHAT ARE WATERCOURSES.

Prescriptive right to use of highway for carrying stream, see Easements, II A—7.

Diversion of water for municipal aqueduct, riparian rights, see Municipal Corporations, II F—175.

(§ II A—60)—NATURAL FLOW—DIVERSION—INJURY.

Every property owner is entitled to the natural flow of water through his property, but no one is entitled by artificial means to send water forward to his neighbour to the detriment of his neighbour.

Colchester North v. Anderdon; Gosfield North v. Anderdon, 21 D.L.R. 277. [Reversed in 24 D.L.R. 143, 34 O.L.R. 437.]

ERECTION OF PIER NOT INTERFERING WITH ACCESS TO LAND.

No right of action accrues to one riparian proprietor against another for the latter's erection and maintenance of a pier in the navigable waters of a lake where the plaintiff's right of access to his lands is

not interfered with and he suffers no damages of a special character in addition to the interference with the public right of navigation, notwithstanding that the pier was not erected in compliance with the lawful requirements and is maintained contrary to law.

Baldwin v. Chaplin, 21 D.L.R. 846, 34 O. L.R. 1.

STATUTORY CURTAILMENT OF COMMON-LAW RIGHTS.

While riparian water rights may be curtailed or suspended by the statutory laws of British Columbia, authorizing the diversion of streams for agricultural and other purposes, such statutes were not intended to wholly abrogate such rights.

Cook v. Vancouver, 10 D.L.R. 529, 17 B.C.R. 477, 22 W.L.R. 557, 23 W.L.R. 186, 3 W.W.R. 318. [Affirmed, 18 D.L.R. 305, [1914] A.C. 1077, 6 W.W.R. 1492, 28 W.L. R. 801.]

AGREEMENT AFFECTING LAND—EASEMENT OR LICENSE — NOTICE — FINDING OF FACT—CONSTRUCTION OF AGREEMENT—DURATION OF RIGHT UNDER—INJUNCTION—COSTS.

Milner v. Brown, 7 O.W.N. 303.

(§ II—65)—RIPARIAN RIGHTS.

The water right of a riparian owner is not a mere privilege, but a right incident to his ownership of the land, parcel of the inheritance.

Cook v. Vancouver, 10 D.L.R. 529, 17 B. C.R. 477, 22 W.L.R. 557, 23 W.L.R. 186, 3 W.W.R. 318. [Affirmed, 18 D.L.R. 305, [1914] A.C. 1077, 6 W.W.R. 1492, 28 W. L.R. 801.]

WATERCOURSES — MARSH LANDS — ASHBRIDGE'S BAY.

No right analogous to a riparian right is acquired by the owner of land abutting upon a bog which could be travelled only as land, and which intervened between the parcel granted to him and his predecessors in title and the navigable waters of Ashbridge's Bay, Toronto, although an outlet had been made by dredging, if the use of the waters for boats by the owners of the land in question was over property granted by the Crown to the city and was permissive only.

Rickey v. Toronto; Schofield-Holden Machine Co. v. Toronto, 19 D.L.R. 146, 30 O. L.R. 523.

LAND BOUNDED BY "SIDE OF CHANNEL" OF STREAM.

Land bounded on and described as following the windings of the "side of the channel" of a navigable river, ordinarily extends only to the bank or shore line of the stream past which the body of water flows, and not to the margin of the deeper channel used for navigation. [Alabama v. Georgia, 23 How. (U.S.) 505, followed.]

Bartlet v. Delaney, 17 D.L.R. 500, 29 O. L.R. 426, reversing 11 D.L.R. 584, 27 O.L. R. 594.

BASIS FOR—PRIVATE AS DISTINCT FROM PUBLIC INJURY.

Volcanic Oil & Gas Co. v. Chaplin, 19 D.L.R. 442, 31 O.L.R. 364, reversing upon the facts, 10 D.L.R. 200.

MUNICIPAL LAW—USES OF A STREAM—HIGH AND LOW GROUND—MUN. CODE, ART. 501.

The Mun. Code (Que.) contains nothing obliging holders of high ground to contribute to the taxes of water users imposed on tenants of lower ground by the single fact of the situation of their lands.

April v. St. Eloi, 25 Rev. de Jur. 201.

RIGHT OF RIVERSIDE OWNERS TO THE PROPERTY OF RIVERS NOT EVEN NAVIGABLE FOR RAFTS — RIGHT OF SERVITUDE IN FAVOUR OF THE PUBLIC FOR THE PURPOSE OF FLOATING LOGS, AND OTHER MEANS OF TRANSPORTATION.

The right of riverside owners to the property of rivers and courses of water which are not even navigable for rafts which skirt or cross their lands has never been in doubt since the decisions of the Seigniorial Courts. They have been controlled by it absolutely and exclusively subject to the servitudes of right . . . such as for the floating logs and other means of transportation but the barriers or booms placed there cannot be raised without the consent of riverside owners or without paying damages to them.

Rioux v. Brown Corp., 25 Rev. de Jur. 458.

RIPARIAN RIGHTS—USING WATER FOR MANUFACTURING PURPOSES—INJUNCTION.

Bras d'Or Lime Co. v. Dominion Iron & Steel Co., 9 E.L.R. 348.

(§ II A—66) — ACCESS TO NAVIGABLE WATER — MARSHY GROUND INTERVENING.

One whose land is separated from navigable water by marshy ground is not a riparian proprietor in respect of the navigable water.

Merritt v. Toronto, 12 D.L.R. 734, 48 Can. S.C.R. 1, affirming 6 D.L.R. 152, 27 O.L.R. 1.

LITTORAL RIGHTS—TIDAL STREAM — NAVIGABILITY.

A riparian owner on that part of a tidal stream which is not navigable has no right of uninterrupted access over the unnavigable part or mud flats to a point where the water is navigable; in the absence of any past or present user by him or his predecessors of such water for navigable purposes, and no other littoral rights being interfered with, he is without recourse for an interference with the flow by the construction of an embankment, or for the possible decrease in the potential value of his land.

McFeeley v. B.C. Electric R. Co., 37 D. L.R. 686, 24 B.C.R. 385, [1918] 1 W.W.R. 339.

TITLE EXTENDING TO RIVER BANK ONLY.

The owner of land fronting on a navigable river, where the river itself forms the boundary of the land as described in the conveyances and in the Crown grant, has a right of access to the river as a riparian proprietor even where the presumption of ownership ad medium filum is rebutted or does not apply.

Haggerty v. Latreille, 14 D.L.R. 532, 29 O.L.R. 300.

FORESHORE—RIGHT OF ACCESS OF RIPARIAN OWNER TO BANK OF RIVER.

Rorison v. Kolosoff, 15 B.C.R. 419, reversing on the facts, 15 B.C.R. 26.

WATER LOTS—STATUS OF LESSEE—RIPARIAN OWNERSHIP—ACCESS TO LOT.

Kerr Co. v. Seely, 44 Can. S.C.R. 629.

WATERCOURSE—DIVERSION—DAMAGES.

Fenerty v. Halifax, 9 E.L.R. 105.

(§ II A—69) — OPPOSITE PROPRIETORS — CATTLE GUARDS.

Under the Mun. Code it is the duty of owners, whose lands are divided by a non-navigable and nonfloatable watercourse, to maintain, at their respective costs, a fenced enclosure at the centre of the stream sufficient to prevent cattle from straying across the lands, and if any of them fail to construct their part, it may be done at their expense by the others.

Letarte v. Turgeon, 26 D.L.R. 25, 24 Que. K.B. 514.

OPPOSITE PROPRIETORS.

The owner of farm lands, adjoining a river, is within his legal rights in protecting his lands against the inroads of the river, by the construction of wingdams, or bank-lining, so far as necessary for that purpose, but is not justified in erecting or maintaining such structures, so as to injure the lands of proprietors on the opposite bank of the river, nor so as to alter the channel of the river to the detriment of the lands of his opposite neighbours.

Lorraine v. Norrie, 6 D.L.R. 122, 46 N.S.R. 177, 9 E.L.R. 278.

(§ II A—70)—EMINENT DOMAIN PROCEEDINGS—RIGHTS OF RIPARIAN OWNERS.

A riparian owner, ex jure naturæ, entitled not only to the use of the water for domestic purposes, but to the right of access to and from the river from his property or wharves erected thereon, and if piers are erected on or about his property and his riparian rights are abridged or taken away, he is entitled to compensation for the injury.

Pickels v. The King, 7 D.L.R. 698, 14 Can. Ex. 379.

B. ACCRETIONS; ALLUVION; ISLANDS; FLATS.

(§ II B—75)—The proprietor of land carried away by reason of a landslide through natural causes if it be considerable and distinguishable, may reclaim it within a year. If it be inconsiderable and indistinguishable, or if it is not reclaimed within a year, it becomes, by right of accession, the property of the owner of the land to which it is united.

Bells' Asbestos Mines v. The Kings' Asbestos Mines, 21 Que. K.B. 234.

(§ II B—76)—MINING RIGHTS—TRESPASS.

Title under a dredging lease of the bed of a river extends only to low water mark. A lessee's rights to a river claim do not change in case of a sudden erosion. There is nothing in the Yukon Placer Mining Act (R.S.C., 1906, c. 64, as amended by 6-7 Edw. VII. c. 54), to shew that sudden erosions from land under lease, caused by the overflow of a river, revert to and become the property of the Crown as against the person whose lands have been eroded or submerged. The lessee may maintain an action for trespass on such eroded or submerged land.

Yukon Gold v. Boyle Concession, 27 D.L.R. 672, 23 B.C.R. 103, 34 W.L.R. 436, 10 W.W.R. 585, affirming 19 D.L.R. 336. [Affirmed, 56 D.L.R. 742.]

C. USE OF WATER; INTERFERENCE WITH FLOW.

As to highways across frozen waters, breaks, municipal liability, see Highways, IV A—154.

(§ II C—80)—RACEWAY — EASEMENT — SERVIENT AND DOMINANT TENEMENTS.

Where the owner of land, over which a raceway carries water for the use of a mill, grants to one person that portion which includes the mill and the inlet and outlet of the raceway, and to another the portion which includes the middle of the raceway, the former portion is the dominant and the latter the servient tenement; the latter has no easement to the use of the water, and the owner of the former may close up the raceway at its inlet and outlet.

St. Mary's Milling Co. v. St. Mary's, 32 D.L.R. 105, 37 O.L.R. 546.

DRAINAGE—DOMINANT AND SERVIENT TENEMENT.

The owner of the dominant tenement may, for agricultural requirements, make alterations in the natural state of the premises by drains or ditches to drain the soil, provided such works do not cause appreciable injury to the servient tenant. But the owners of the dominant tenement cannot, by means of drains and ditches, divert to other ground the water which without such works would not flow over them.

Thiboutot v. St. Pierre, 52 Que. S.C. 247.

Plaintiff alleged damage by wrongful diversion and obstruction of water claimed by her under several water records granted under provincial statutes on lands within the railway belt. The records themselves did not shew under what statutes they were obtained, nor that they were granted in connection with plaintiff's lands, which had been acquired by pre-emption and purchase from the Crown in 1876. Held, that the presumpton was that the water records were obtained under the provisions of the laws

in force at the time they were granted, viz.: 1875 and 1884.

George v. Mitchell; George v. Humphrey, 16 B.C.R. 510, 17 W.L.R. 305.

DRAINING—RIGHTS OF LOWER PROPRIETOR—DAMAGES.

In an action for damages for flooding the plaintiff's land by water from a ditch alleged to have been dug by the defendant, the Trial Judge found that an agreement was made between the defendant company and B., the owner of land from which the water flowed on to plantiff's land, that B. constructed the ditch for the price agreed upon, which was paid by the company, and that the result of the construction of the ditch was to increase the natural flow of water. The Trial Judge awarded the plaintiff damages, but on appeal his judgment was reversed on the ground that the plaintiff had failed to establish responsibility in the defendant for the construction of the ditch in such a way as to cause damage. The plaintiff appealed. Held, that the appeals should be allowed and the Trial Judge's judgment restored.

McCord v. Alberta & Great Waterways R. Co., 49 D.L.R. 696, [1918] 3 W.W.R. 622, reversing 41 D.L.R. 722, 13 A.L.R. 476, [1918] 2 W.W.R. 708.

(§ II C—83)—DIVERSION GENERALLY—NOTICE OF DIVERSION, REQUIREMENTS—RIPARIAN RIGHTS.

Where the defendant, not a riparian owner, proposes to divert the waters of a stream from flowing past the lands of the plaintiff, a riparian owner, the notice of the point of diversion need merely contain an approximate description sufficient for practical purposes of identification the notice having been actually posted at the point of diversion and knowledge brought home to the plaintiff.

Cook v. Vancouver, 18 D.L.R. 305, 6 W.W.R. 1492, 28 W.L.R. 801, [1914] A.C. 1077, affirming 10 D.L.R. 529, 17 B.C.R. 477, 22 W.L.R. 557, 23 W.L.R. 186, 3 W.W.R. 318.

IRRIGATION ACT—DIVERSION OF—WHAT IS—LIABILITY.

The words of s. 60 of the Irrigation Act (R.S.C. 1906, c. 61), "every person who wilfully without authority takes or diverts any water . . . from any works authorized under this Act . . . is guilty of an offence etc.," are applicable to a person who wrongfully diverts water from works which are constructed for the purpose of carrying the water from the main canal to the boundary of the lands of individuals, who desire the water for the irrigation of their lands, such works being works authorized by the Act.

Bokovoy v. Tangye, 44 D.L.R. 181, 14 A.L.R. 202, [1919] 1 W.W.R. 49.

CONSTRUCTION OF ROAD DITCH — SURFACE WATER—FLOODING LANDS—ABSENCE OF NEGLIGENCE.

Baldwin v. Widdifield, 3 D.L.R. 880, 3 O.W.N. 1348, 22 O.W.R. 267.

(§ II C—84)—DRAINAGE—DEFECTIVE CULVERT—LIABILITY FOR FLOODING.

The construction of a culvert by a power company in a negligent manner, whereby it interferes with the flow of a natural watercourse, giving rise to the flooding of the abutting lands, will render the company liable for damages ocasioned thereby. [L'Esperance v. G.W.R. Co., 14 U.C.Q.B. 173, distinguished.]

McCrimmon v. B.C. Electric R. Co., 24 D.L.R. 368, 19 Can. Ry. Cas. 329, 22 B.C.R. 76, 32 W.L.R. 81, 8 W.W.R. 1289, affirming 20 D.L.R. 834, 22 B.C.R. 76, 29 W.L.R. 517, 7 W.W.R. 137.

LOWERING LEVEL OF RIVER.

Where two companies were formed, one in Canada and the other in the Unted States, under the same management and control, to build a dam across an international stream, both are answerable when sued in the courts of Canada, for a diminution of the natural flow of the river so as to interfere with navigation below the dam.

Rainy River Navigation Co. v. Ontario & Minnesota Power Co. etc., 12 D.L.R. 611, 4 O.W.N. 1591, 24 O.W.R. 897. [Varied 17 D.L.R. 850, 6 O.W.N. 533.]

(§ II C—86)—TAKING FOR PUBLIC WATER SUPPLY—STATUTORY AUTHORITY.

The British Columbia Water Privileges Act, 1892, as summed up in the recital of the Water Clauses Consolidation Act, 1897, relating to the control of water and water rights, operates in limitation of the common law right to user of waters of a stream by the riparian owner, and their riparian right at common law to the continuance of the flow undiminished is taken away by this legislation.

Cook v. Vancouver, 18 D.L.R. 305, 111 L.T. 684, 6 W.W.R. 1492, 28 W.L.R. 801, [1914] A.C. 1077, affirming 10 D.L.R. 529, 17 B.C.R. 477, 22 W.L.R. 557, 23 W.L.R. 186, 3 W.W.R. 318.

(§ II C—87)—NAVIGABLE RIVERS—RIPARIAN RIGHTS — MILLOWNERS — LUMBERMEN.

The rights of lumbermen are concurrent with those of riparian owners to the use of the waters of navigable and floatable streams, for the purpose of carrying on their business, and where a dam has been constructed and used by a millowner for a number of years, and no one has ever complained of it as an obstacle to the floating of logs; the lumberman who has built other dams and increased the volume of water and the force of the current so as to enable him to carry on more extensive operations and float down larger logs, will be liable to

the millowner for damages caused by these new operations.

Richardson v. Paradis, 23 D.L.R. 720, 24 Que. K.B. 16.

A municipal corporation may not place a dam at the outlet of a lake for the purpose of raising the level thereof when such action diminishes the enjoyment of the mill owners having rights to the waters flowing from such lake by depriving them of their usual quantity of water at certain seasons.

Marbleton v. Ruel, 1 D.L.R. 624, 21 Que. K.B. 434.

NATURAL STREAM.

The owner of a tenement adjoining a natural stream has no right to divert the water to a place outside the tenement and there consume it for purposes unconnected with the tenement. [McCartney v. Londonderry, etc., Co., [1904] A.C. 301, followed.]

Watson v. Jackson, 19 D.L.R. 733, 31 O.L.R. 481, varying 30 O.L.R. 517.

DAM—INTERFERENCE WITH LOGGING—ONUS.

In an action for deprivation of freshet-water, by placing stop-logs in a dam, the burden is upon the plaintiff to prove the water was lessened to an extent sufficient to interfere with the floating of his logs down stream.

Hunt v. Beck, 29 D.L.R. 309, 36 O.L.R. 533, affirming 27 D.L.R. 777, 34 O.L.R. 609.

Where the proprietors of land on opposite banks of a river enter into an arrangement with respect to the ownership of a dam erected for the purpose of obtaining power, touching both banks and extending across the stream, it is competent for them to do so, and owners further down the stream have nothing to say as to the terms of the arrangement where the quantity of water passing down is not diminished. Were the owners below by means of a dam erected by them cause the water to flow back and to obstruct the operation of a mill above them they will be liable in damages for the obstruction so caused. In the action claiming damages for such obstruction and an injunction to restrain the continuance of the injury, both the owner of the fee and the tenant operating the mill are properly joined although the former will only be entitled to recover nominal damages. And where the amount of damages awarded by the Trial Judge is found to be excessive in view of the evidence and a reduction is ordered and the judgment varied in other respects no order will be made as to costs.

Crosby v. Yarmouth Street R. Co., 45 N. S.R. 330.

BUILDING DAM—NOTICE—INJUNCTION.

The right to have a stream of water flow in its natural state without diminution or alteration, is an incident to the property in the land through which it passes; but this is not an absolute and exclusive right to the flow of all the water, but only subject to the right of other riparian proprietors to the reasonable enjoyment of it; and consequently it is only for an unreasonable and unauthorized use of this common benefit that an action will lie. [Embrey v. Owen, 6 Ex. 353, and Miner v. Gilmour, 12 Moo. P.C. 131, applied.]

Watson v. Jackson, 30 O.L.R. 517. [Varied in 19 D.L.R. 733, 31 O.L.R. 481.]

RAISING DAM AS TO RIGHTS BELOW.

In the absence of consent of the owner, or in the absence of compliance with the requirements of arts. 7295, 7298, 7299 R.S.Q. a person has no right in driving piles in the bed of a navigable river owned by another, for the erection of a boom.

McLean v. Doutre, 18 Rev. de Jur. 473.

INDUSTRIAL IMPROVEMENTS — RAISING HEIGHT OF DAM—NUISANCE.

Gale v. Bureau, 44 Can. S.C.R. 305.

NAVIGABLE RIVER — INTERFERENCE WITH FLOW OF WATER—DAMAGES FOR HAVING TO CLOSE DOWN MILL.

Isherwood v. Ontario & Minnesota Power Co., 2 O.W.N. 651, 18 O.W.R. 459.

DAM ON RIVER — FLOODING PLAINTIFF'S LANDS—ACTION FOR DAMAGES.

Doolittle v. Orillia, 2 O.W.N. 896, 18 O. W.R. 673.

WORKS TO FACILITATE LUMBERING OPERATIONS—DRIVING LOGS—STORAGE DAMS—PENNING BACK WATERS OUT OF TRACK OF TRANSMISSION.

Club de Chasse, Ste. Anne v. Riviere-Ouelle Pulp & Lumber Co., 45 Can. S.C.R. 1.

D. OBSTRUCTIONS; OVERFLOW; RAISING DAMS.

(§ II D—95)—UNEXPECTED OVERFLOW OF MILL-POND—LIABILITY FOR—VIS MAJOR.

The overflowing of a mill-pond to the injury of a lower proprietor, as the result of a heavy rainfall during the night-time under circumstances not sufficient to suggest the need of exceptional precautions to prevent an overflow, does not render the owner of the pond liable for the injury; the injury under such circumstances is attributable to vis major. The owner of a mill-pond upon a stream is not bound at all hazards to prevent injury to others by the escape of the water collected. [Rylands v. Fletcher, L.R. 3 H.L. 330, distinguished; Nichols v. Marsland, 2 Ex. D. 1; Richards v. Lothian, [1913] A.C. 263, applied.]

McDougall v. Snider, 15 D.L.R. 111, 29 O.L.R. 449.

A water power company's rights in a lease to it by the Crown of a water power location on a certain river made pursuant to 61 Vict. c. 8, which lease also conferred the right to flood any Crown lands along the river and its expansions, do not relate back to the time of making its original application so as to make its rights superior to those of the owner of certain mining claims located after the making of the application but before the granting of the lease, and therefore the water power company has no right to flood such mining claims by the raising of the waters of a

river by a dam constructed by it under the alleged authority of the lease.

Bucknall v. British Canadian Power Co., 5 D.L.R. 574, 3 O.W.N. 1138. [Reversed on different points, 7 D.L.R. 62, 4 O.W.N. 155.]

DAM—FLOODING WATERS—OVERFLOW—DAMAGE TO LANDS—PRESCRIPTION—QUEBEC STREAMS COMMISSION—C.C. ARTS. 503, 1053, 2261, R.S.Q. ARTS. 7255, 7296.

The owner of lands damaged by the over flow of water caused by the construction of a dam on a river can claim damages against the owner of the dam, notwithstanding art. 2261 C.C. (Que.) nor does the authority given by Parliament to the Quebec Streams Commission in relation to the damming of the river or the acquisition of workers thereon, interfere with the rights of the owner whose lands are damaged, or his right to claim further damages in the future.

Fuller v. Brompton Pulp Co., 50 D.L.R. 620.

OBSTRUCTION BY WATER POWER COMPANY—DAMS AND BOOMS—ICE JAMS—SCOPE OF CORPORATE POWERS—LIABILITY FOR NEGLIGENCE.

Riverside Lumber Co. v. Calgary Water Power Co., 25 D.L.R. 818, 10 A.L.R. 128, 9 W.W.R. 471, 32 W.L.R. 858. [New trial refused, 28 D.L.R. 565, 34 W.L.R. 859, 10 W.W.R. 980.]

DAM—TIGHTENING—INCREASED FLOODING OF LAND.

Where, for many years, a seven-foot level of water was maintained by a dam only during the spring freshets and late in the fall and winter so as to raise a prescriptive right. The dam cannot be tightened, under such prescriptive right, so as to retain water at such level during all of the year.

Cardwell v. Breckenridge, 11 D.L.R. 461, 24 O.W.R. 569, 4 O.W.N. 1295.

OPENING FLOOD-GATES TO PREVENT BREAKING OF DAM—INJURIA ABSQUE DAMNO.

The opening of the flood-gates of a mill pond during a period of high water in order to prevent the breaking of a dam, will not render a mill-owner liable for injuries caused a lower proprietor, where, had the gates remained closed, his damage would have been much greater as the probable result of the giving away of the dam; the injury in such a case is injuria absque damno. [Thomas v. Birmingham Canal Co., 49 L.J.Q.B. 851, applied.]

McDougall v. Snider, 15 D.L.R. 111, 29 O.L.R. 449.

HIGHWAY IMPROVEMENT—DEFECTIVE PLAN—EMPLOYMENT OF COMPETENT ENGINEER.

The fact that a municipal corporation in making a highway improvement followed plans made by an engineer of competent standing will not relieve it from liability for the flooding of adjacent lands as the result of the defective plan of the work, the engineer being merely an agent of the corporation, where the improvement was not of the class requiring a by-law and the preparation of plans by an engineer as a preliminary thereto. [Williams v. Raleigh, [1893] A.C. 540, distinguished.] It is actionable negligence for a municipal corporation to make a road improvement in such a manner as the result of a defective plan, as to cause the flooding of adjacent lands.

Martin v. Middlesex, 12 D.L.R. 246, 4 O. W.N. 1540, affirming 4 O.W.N. 682.

FLOODING LANDS—OVERFLOW FROM AN INSUFFICIENT DRAINAGE DITCH.

Damages should be awarded for the flooding of agricultural lands by the construction of a municipal drainage ditch of too small capacity, on the basis of the diminished value of the property affected, and should be assessed in one lump sum for all time; the judgment should not be limited to damages for the deprivation of the use of the soil for a limited period with a reservation to the landowner of his remedy for further damages in the event of the municipality not remedying the defect in the meantime.

Keny v. St. Clements, 15 D.L.R. 229, 24 Man. L.R. 51, 26 W.L.R. 432, 5 W.W.R. 1011.

Where a power company builds a dam across a river and thereby causes a rise in the level of the river, resulting in the rapid erosion or eating away of the banks of the river, such company should protect such banks, along which highways run, by means of revetment walls and guard-rails, so as to ensure the safety of pedestrians and vehicles using the highway.

Richelieu v. Montreal & St. Lawrence Light & Power Co., 3 D.L.R. 145.

INJURY TO MILL BY FLOODING—UNPRECEDENTED SPRING FRESHETS—FAILURE TO SHEW FAULT ON PART OF DEFENDANTS—DAMAGES.

Seaman v. Sauble Falls Light & Power Co., 6 D.L.R. 857, 23 O.W.R. 201.

When the work incidental to the building of a bridge over a creek where it is crossed by the highway narrowed its banks so as to cause the plaintiff's lands to be periodically flooded, the cause of action is not the building of the bridge but the damage caused by the floods, and after he has parted with the land he has no right to restrain the municipality from maintaining the bridge, nor can he recover damages from the municipality on the basis of any depreciation in the selling price of the land because of its liability to be flooded. [West Leigh Colliery Co. v. Tunnicliffe, [1908] A. C. 27, at p. 29, followed; McClure v. Brooke, 5 O.L.R. 59, distinguished.]

Wigle v. Gosfield South, 2 D.L.R. 619, 25 O.L.R. 646, 21 O.W.R. 483.

DAM — FLOODING LANDS — DAMAGES—INJUNCTION.

Weber v. Bowman, 1 D.L.R. 902, 21 O. W.R. 242.

LUMBERMEN — RIPARIAN RIGHTS—OBSTRUCTIONS.

Lumbermen and riparian proprietors have concurrent rights in a floatable river. The lumbermen have an undoubted right for passage of their logs down the river, but this right must be exercised subject to the rights of the riparian proprietors, and reasonable means must be used and care and all skill taken to avoid injury to the riparian owners.

Nashwaak Pulp & Paper Co. v. Wade, 43 D.L.R. 141, 46 N.B.R. 11.

The individual defendants, who were contractors with the school board for the excavation of the basement of a new school building, placed some of the earth from this excavation up the street to the northeast of the plaintiff's house in a depression, which, the plaintiff alleged, was a natural watercourse, whereby water, coming from the plaintiff's and surrounding land, which would otherwise have escaped, was gathered and turned back upon the plaintiff's land so as to fill and damage the cellar in his house. The plaintiff sued for damages and the action was dismissed. On appeal:—Held that, although it must be assumed that the Trial Judge had concluded that no such natural watercourse existed, and that finding should not be disturbed, the defendants were, nevertheless, liable under the decision in Hurdman v. North Eastern R. Co., 3 C.P.D. 168, 47 L.J.C.P. 368, 38 L.T. 339. [Ostrom v. Sills, 24 A.R. (Ont.) 526, affirmed 28 Can. S.C.R. 485, distinguished.]

Renwick v. Vermilion Centre School District, 3 A.L.R. 291.

DAM BUILT UNDER STATUTORY AUTHORITY—DESTRUCTION BY MALICIOUS ACT OF STRANGER—LIABILITY OF OWNER FOR CONSEQUENT DAMAGE — FATAL ACCIDENTS ACT — NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—JURY—DAMAGES.

Hudson v. Napanee River Improvement Co., 31 O.L.R. 47.

SPRING — DRAIN INCREASING FLOW — DAMAGES.

Where the natural flow of water across land is increased artificially by an adjoining proprietor the latter is liable for the damage caused his neighbour's land by such increased flow. [McCord v. Alberta & G. W.R. Co., [1918] 3 W.W.R. 622, followed.]

Molden v. Kirkeby and Keehn, [1918] 3 W.W.R. 1014.

FILLING IN OF FORESHORE—OBSTRUCTION TO NAVIGATION.

Neither the Navigable Waters Protection Act, R.S.C. 1906, c. 115, as a whole, nor s. 20 thereof in particular appears to be aimed at preventing the filling in by a riparian owner of the foreshore in front of his property. The filling of False Creek did not create a nuisance or an illegal obstruction to navigation within the meaning of s. 7, the Navigable Waters Protection Act, R. S.C., 1906, c. 115 [interpretation of Duff, J., in Cunard v. The King, 43 Can. S.C.R. 88, followed]. A tenant of a lessee of the C.P.R. is not entitled to question the right of possession claimed by the company and under which the tenant received his lease, unless he can invoke successfully the illegality of the lease to the C.P.R. In this case the burden was held to be upon the tenant of shewing that the land, the subject-matter of the lease, was so tainted with illegality as to preclude the court from directing compliance with any of the terms of the instrument [Gas Light & Coke Co. v. Turner, 6 Bing. N.C. 234, distinguished], and this burden he was held not to have discharged.

Woods v. Opsal, [1918] 1 W.W.R. 985.

DIVERSION—MUNICIPAL POWERS.

When, by a depression of ground, a piece of soil spreads, in a natural way, its surface waters over neighbouring soil, the latter is, for this purpose, inferior soil to the other, and must receive the surface water which runs over it without the need of considering if the ditch which follows the bed of the said depression of ground has been dug or not, or if it runs continuously or only intermittently. The owner of the inferior soil cannot obstruct the course of the water so as to inundate the other soil. Municipal authorities have not the right to change by their by-laws natural servitudes established by law.

Vidal v. Mercier, 53 Que. S.C. 24.

PROCES VERBAL—PUBLIC OFFICER—MUNICIPALITY.

Where a water course, in a proces verbal of which the defendant complained, has existed for 50 years, and the defendant constantly recognized the obligation of its maintenance by contributing to it, and had committed acts of violence towards an officer of a municipal corporation whose duty it was to carry out the provisions of the proces verbal, the defendant was ordered, within a time named, to open and clear the water course by removing an obstruction which he had placed there.

St. David v. Sevigny, 24 Rev. de Jur. 295.

OBSTRUCTION BY SAWLOGS—DELAY IN NAVIGATING VESSEL—INJURY TO BUSINESS—EVIDENCE—FINDINGS OF FACT OF TRIAL JUDGE—APPEAL—DAMAGES.

Rainy River Nav. Co. v. Watrous Island Boom Co., 6 O.W.N. 537.

FLOODING OF PREMISES — OBSTRUCTION OF DRAIN—CAUSE OF OBSTRUCTION—EVIDENCE—FAULT OF ONE DEFENDANT—EXONERATION OF THE OTHER—COSTS OF SUCCESSFUL DEFENDANT TO BE PAID BY DEFENDANT AT FAULT.

Nicholson v. G.T.R. Co., 7 O.W.N. 480.

UNLAWFUL OBSTRUCTION OF STREAM BY DAMS —RIGHT OF LAND OWNERS TO FLOW OF WATER—MANDATORY ORDER FOR REMOVAL OF OBSTRUCTIONS—INJUNCTION—DAMAGES — AGREEMENT — EXPROPRIATION.

McDougall v. New Liskeard, 7 O.W.N. 256.

FLOATABLE STREAM—INTERMIXING OF LOGS OF PLAINTIFFS AND DEFENDANTS—CLAIM AND COUNTERCLAIM FOR SERVICES RENDERED BY EACH PARTY TO THE OTHER—REMEDY UNDER SAW LOGS DRIVING ACT, R.S.C. 1914, C. 131, SS. 9, 10, 11, 16—JURISDICTION OF COURT TAKEN AWAY—CONVERSION OF BOOMS — TOLLS — OBSTRUCTION OF FLOW OF WATER—DAM—REFUSAL TO RELEASE STORED WATER—DISMISSAL OF ACTION—RECOVERY ON PART OF COUNTERCLAIM—COSTS.

Central Contracting Co. v. Russel Timber Co., 15 O.W.N. 415.

OBSTRUCTION OF FLOW OF NATURAL WATERCOURSE BY BUILDING OF TUNNEL — FLOODING OF NEIGHBOUR'S LAND — CAUSE OF — EVIDENCE — EXTRAORDINARY FRESHET.

Elliott v. Hewitson, 16 O.W.N. 364.

DAM ERECTED IN RIVER — INJURY TO LAND BY FLOODING — LIABILITY OF COMPANY CONTROLLING AND OPERATING DAM — DAMAGES — COSTS.

Girton v. Ontario & Minnesota Power Co., 13 O.W.N. 446.

OBSTRUCTION AND DIVERSION — PROOF OF DAMAGE — WATER RECORDS — RIPARIAN RIGHTS.

George v. Mitchell; George v. Humphrey, 16 B.C.R. 510, 17 W.L.R. 305.

E. POLLUTION.

(§ II E—100)—SAWMILL REFUSE — LIABILITY FOR.

In the absence of a grant or prescriptive right the owner of a sawmill is answerable for injuries resulting from the fouling of the waters of a stream by saw-dust and mill refuse cast into it. As against one claiming title from a common grantor, the defendant did not acquire a right to pollute the water of a stream with saw-mill refuse, by virtue of a condition of his purchase of a mill site that he should erect a saw-mill thereon, where he subsequently received a grant of the land free from such condition.

Hunter v. Richards, 12 D.L.R. 503, 28 O.L.R. 267, affirming 5 D.L.R. 116, 26 O. L.R. 458.

(§ II E—101)—BY SEWAGE.

If a riparian owner or other person, not having acquired a prescriptive right to do so as against other riparian owners, prejudicially affects the condition of the water so as sensibly to injure the riparian owner lower down, he becomes liable to the latter in an action for damages and an injunction to restrain further pollution of the stream.

Crowther v. Cobourg, 1 D.L.R. 40, 3 O. W.N. 490, 20 O.W.R. 844.

(§ II E—102)—RIPARIAN RIGHTS — INTERFERENCE BY POLLUTION OF STREAM.

A riparian owner has the right to the full flow of the water in its natural state without any diminution or pollution. [Chasemore v. Richards, 7 H.L.C. 349, applied.]

Nipisiquit Co. v. Canadian Iron Corp., 14 D.L.R. 752, 42 N.B.R. 287, 13 E.L.R. 458.

F. PRIOR APPROPRIATION.

(§ II F—105) — IRRIGATION RIGHTS — PRIORITIES.

A pre-emptor having as such acquired a water record for a specific purpose, namely, the irrigation of certain lands, cannot apply that record to after-acquired lands without a new application and record, and any other person acquiring a record in the interim would have priority of rights as against user on the after-acquired lands.

Morens v. Board of Investigation, 22 D. L.R. 419, 31 W.L.R. 468.

G. SURFACE AND SEEPAGE WATER.

(§ II G—125)—SLOUGH — OBSTRUCTION—BEAVER DAM.

An obstruction to the natural flow of a slough or surface water, by a beaver dam, may be rightfully removed by anyone interested, in order to restore the land to its original and natural conformation, unless another party, relying on the continuance of the obstruction, had dealt with his land in such way that he would be injured by the removal of the obstruction. [Makowecki v. Yachimyc, 34 D.L.R. 130, 10 A.L. R. 366, applied.]

Farnell v. Parks, 38 D.L.R. 17, 13 A.L.R. 7, [1917] 3 W.W.R. 882.

NATURAL DRAINAGE — RIGHTS OF UPPER AND LOWER PROPRIETORS.

Surface water flowing intermittently through a depression in land, pursuing a course of natural drainage, does not confer riparian rights on the owners of land through which it flows, and any owner may retain the water or divert it, and owners of lower levels have no right of action for such retention or diversion, but no owner may change the course of the water so as to throw it upon land over which it was not wont to flow, without consent of the owner of such land, or so as to increase the flow upon a lower owner.

Makowecki v. Yachimyc, 34 D.L.R. 130, 10 A.L.R. 366, [1917] 1 W.W.R. 1279.

FLOW OF SURFACE WATER FROM NEIGHBORING LAND — INJURY TO PREMISES — EVIDENCE — ONUS — FAILURE TO SATISFY.

Hanley v. Ottawa Public School Board, 11 O.W.N. 354.

NEGLIGENCE — WATER RUNNING ON COULEE — DAMMING OF WATER BY DEFENDANT — FLOODING OF PLAINTIFF'S MINE BELOW BY SUDDEN RISE IN WATER — WHETHER DAM CAUSE OF DAMAGE — RIGHTS AND LIABILITIES OF PARTIES.

Plaintiff's mine was flooded by water coming down a coulee on the side of which the entrance to the mine was situated. Defendant had a dam across the coulee a distance above the mine, constructed for the purpose of conserving the surface water for use on defendant's farm and plaintiff claimed that it was by the accumulation of the water by the dam and its sudden release that the damage was caused. Judgment of Ives, J., dismissing the action was sustained. Negligence in such case is the gist of the action. The defendant had a right to utilize the surface waters. In view of the conditions of the locality and the extraordinary freshet which occurred the plaintiff had failed to show negligence on the part of defendant, or, even if there were negligence, that, on the evidence, it occasioned the plaintiff's loss. The conclusion of the Trial Judge that the same volume of water would have gone down the coulee if the dam had not been there is justified upon the evidence. The case is indistinguishable from McCord v. Alberta and Great Waterways R. Co., 41 D.L.R. 722. In such a case the storing of the water created no liability in defendant. [Rylands v. Fletcher, L.R. 3 H.L. 330, distinguished.]

Oliver v. Francis, [1919] 2 W.W.R. 497, 14 A.L.R. 509.

(§ II G—128) — DEFLECTING AND DIVERTING — INJURY TO ADJOINING LANDS.

A defendant railway company is liable for damage caused to the plaintiff, an adjoining owner, by deflecting and diverting the course of the surface water so as to make it flow over the plaintiff's land, and for bringing water on the defendant's own lands and then discharging it on to the plaintiff's land, to his injury; and the statutory powers, in furtherance of the objects for which the defendant company was incorporated, do not, by implication or otherwise, empower it so to carry on its operations as to cause damage to adjoining owners by deflecting or diverting such surface waters to the injury of adjoining lands. [Rylands v. Fletcher, L.R. 3 H.L. 330, applied.]

Niles v. G.T.R. Co., 9 D.L.R. 379, 15 Can. Ry. Cas. 73, 24 O.W.R. 73.

MUNICIPAL NEGLECT TO EMPLOY ENGINEER.

Where a statutory protection is prescribed in favour of municipalities constructing their highways under the supervision of duly appointed engineers, a municipality dispensing with such supervision loses the prescribed protection in regard to actions for resulting damages. [Geddis v. Bann Reservoir, 3 A.C. 430, distinguished.]

Stott v. North Norfolk, 16 D.L.R. 48, 24 Man. L.R. 9, 26 W.L.R. 774.

DIVERSION OF SURFACE WATER BY ADJOINING OWNER — TRESPASS — INJUNCTION — DAMAGES — COSTS.

Walker v. Westington, 6 D.L.R. 858, 4 O.W.N. 136, 23 O.W.R. 110.

(§ II G—132) — "WATERCOURSE" DEFINED —DEFLECTING AND DIVERTING—MUNICIPAL DEFENCE, HOW LIMITED.

Where a municipality in constructing highways, digs ditches and thereby diverts the surface waters from their natural channel so as to overflow and damage the lands of adjacent owners, the municipality must respond in damages although the road building itself may have been necessary.

Stott v. North Norfolk, 16 D.L.R. 48, 24 Man. L.R. 9, 26 W.L.R. 774.

"WATERCOURSE" DEFINED — SOURCE OF — "SLOUGHS."

A so-called "slough" will constitute a water-course if it has well-defined banks, channel, and bed, and its source of supply is permanent and does not depend upon the rains and melting snows in its vicinity for its water supply although they add to its volume.

Yukon Gold Co. v. Boyle Concessions, 19 D.L.R. 336. [Affirmed in 27 D.L.R. 672, 23 B.C.R. 103, 34 W.L.R. 436, 10 W.W.R. 585, 50 D.L.R. 742.]

I. IRRIGATION; DITCHES; WATER RIGHTS.

(§ II I—156)—EXTENT OF USE — PRESCRIPTIVE RIGHTS — PRE-EMPTION.

The prescriptive right which, under the Water Act Amendment Act, 1913, (B.C.) c. 82, s. 13, may accrue from the actual enjoyment without interruption for the full period of 20 years for "some other purpose" than that for which a water record existed but for which water might have been recorded, cannot be set up so as to support a claim for use of the water on other premises than that in respect of which it was recorded by the pre-emptor of lands; the "other purpose" in that statute has reference to the various purposes for which a water record might be granted, e. g., for irrigation or for mining in respect of the same lands.

Morens v. Board of Investigation, 22 D. L.R. 419, 31 W.L.R. 468.

IRRIGATION — RIGHTS OF OWNER OF LAND — PRE-EMPTION.

Where by the "terms of union" the province of British Columbia relinquished to the Dominion its right to administer lands up till then held by the Crown in right of the province, and these lands were to be ascertained when the route of the C.P.R. was fixed, and were subsequently defined and accepted by an Act of the Dominion Parliament, and by the terms of union, the province agreed not to sell "in any other way than under right of pre-emption requiring actual residence of the pre-emptor on the lands claimed by him;" the granting of water or the right to divert it for the purpose of irrigating lands already pre-empted was, notwithstanding the "terms

of union," within the powers of the province until the lands relinquished to the Dominion were defined and accepted by the Act of the Dominion Parliament.

George v. Michell; George v. Humphreys, 9 D.L.R. 862, 17 B.C.R. 531, 22 W.L.R. 576, 3 W.W.R. 162 & 170.

(§ II I—158)—Drainage—Improper construction of drainage works.

Cullerton v. Logan, 25 O.W.R. 254.

J. Contract or grant.

(§ II J—160)—As to distribution — Operation of mills.

An agreement between mill owners as to the distribution of lake water for the operation of their mills makes it necessary to hold the lake level at a proper elevation in order to ensure the proportionate distribution under the contract.

Chicoutimi Pulp Co. v. Jonquière Pulp Co., 33 D.L.R. 429.

(§ II J—162)—Grant of placer mining claim — Water rights.

In construing special privileges, under private statutes and grants from the Crown, the rule is, that nothing passes except what is included by necessary and unavoidable construction of the terms used, and a placer mining lease, silent as to the right to the water necessary to work the lease, does not carry with it such right.

Lightning Creek v. Hopp, 17 D.L.R. 641, 19 B.C.R. 586, 28 W.L.R. 110.

K. Adverse use; prescription.

See Adverse Possession.

(§ II K—165)—Easements — Water Act — Board of investigation.

The Board of Investigation acting under the Water Act R.S.B.C. 1911, c. 239, is without jurisdiction, upon an application for a license in lieu of a record, to adjudicate upon the existence and extent of a common law easement in water rights.

Evans v. McLay, 13 D.L.R. 211, 18 B.C.R. 191, 24 W.L.R. 821, 4 W.W.R. 1070.

(§ II K—166) — Unnavigable stream—Riparian rights — Access — Title by possession — Limitation.

Twin City Ice Co. v. Ottawa, 24 D.L.R. 873, 34 O.L.R. 358.

Compensation for damage by water overflowing on lands — Defence — Agreement with previous owner.

McLaughlan v. Plumpton, 18 O.W.R. 417.

III. Water supply.

See Municipal Corporations, II.

(§ III—185)—Duties and liabilities of water company.

Where a municipal corporation is the owner of a water system connected with other systems, whose owner has agreed to supply the municipal system with the necessary water, the corporation is not responsible for damages resulting from a break in its system, which diminishes the pressure in the remaining systems, when it has used reasonable diligence to find and repair the break.

Warren v. Malbaie, 5 D.L.R. 89, 41 Que. S.C. 487.

(§ III—190)—Quantity and quality.

A company or other person obtaining a franchise from a municipality to supply it with electric lighting and all the water "necessary for the needs of the town," undertakes a supply of what is necessary for the ordinary needs of the ratepapers, and not the water required to put out any fire breaking out in the municipality; and hence is not liable in damages for fire losses occurring as the result of an insufficient water supply.

Quesnel v. Emard; Cote v. Emard, 8 D. L.R. 537.

(§ III—197) — Municipal franchise — Negligence — Liability of company to ratepayer.

A municipal corporation, with assent of the ratepayers, entered into a contract by which it gave the defendant company the exclusive privilege for 25 years of maintaining a system of water supply to the municipality. The company was authorized to fix rates for water supplied for domestic purposes and was obliged, for protection against fire, to have hydrants at certain places and at all times, in case of fire, except when the plant was undergoing necessary repairs, to maintain a specified capacity and pressure of water. The property of B., a ratepayer, was destroyed by a fire which attained serious dimensions owing to the pressure being at the outset much less than that required by the contract:—Held, affirming the judgment of the King's Bench 22 Que. K.B. 487, which affirmed the Court of Review (41 Que. S.C. 348), that there was no contractual relation between B. and the company; that the contract did not evidence any intention by the parties to it to give a right of action against the company to each ratepayer in case of violation of the provisions for fire protection; and that B., therefore, could not maintain an action for the value of his property so destroyed:—Held also, B. could not maintain an action for damages on the ground that the failure to maintain the pressure stipulated for in the contract constituted a délit or quasi-délit under the law of Quebec.

Belanger v. Montreal Water & Power Co., 50 Can. S.C.R. 356, affirming 8 D.L.R. 601, sub nom. Belanger v. St. Louis.

(§ III—206)—Enforcing payment — Municipal corporations — Water works — Board of Water Commissioners — Action against — Arrears of water rates before constitution of board — Parties — Leave to add — Terms — Costs.

Norfolk v. Roberts 4 O.W.N. 419, 23 O. W.R. 638.

CONTRACT — WATER TAKEN FROM GOVERNMENT CANAL — PAYMENT FOR — LEASE — PENALTY.

R. v. Thorold Pulp Co., 17 O.W.N. 159. [Affirmed, 17 O.W.N. 263.]

(§ III—210)—METERS.

Where the consumer continued to use water through a concealed pipe knowing that the supply so obtained was not going through the meter after a change made from a flat rate to a meter rate and the placing of a meter on another and visible supply pipe, he is liable to pay on the basis of the capacity of such concealed pipe for the entire time for the water so wrongfully taken through it unless he can prove the quantity actually used, and he must pay at the general fixed rate without regard to any reduced rate applicable to the metered service. [Lamb v. Kincaid, 38 Can. S.C.R. 516; Armory v. Delamirie, 1 Strange 505, applied.]

Brandon Electric Light Co. v. Brandon, 1 D.L.R. 793, 22 Man. L.R. 500, 20 W.L.R. 658, 2 W.W.R. 22.

Water may be the subject of a larceny at common law. [The Queen v. White, 32 L.J.M.C. 123; Ferens v. O'Brien, 11 Q.B.D. 21, followed.] The water was supplied to the defendant's neighbour at a flat rate, and not according to the quantity used as shewn by a meter, whereas the water taken by the defendant was the property of the corporation.

R. v. Hutton, 19 W.L.R. 907.

PROCEEDINGS BY MUNICIPALITY TO ESTABLISH A WATERWORKS SYSTEM — RECORDS UNDER WATER ACT, 1909.

A municipality, having obtained water records under the Water Act, 1909, must proceed under the expropriation clauses of that Act in acquiring lands for the purposes of a waterworks system, and not under the provisions of the Municipal Clauses Act.

Lewis v. Delta, 16 B.C.R. 228.

WATER FOR DOMESTIC, FIRE AND OTHER PURPOSES — MOTIVE POWER — DISCRETION OF MUNICIPAL COUNCIL.

Crockett v. Campbellton, 44 Can. S.C.R. 606.

WATER SUPPLY — AFFIXING METERS — WORDS "SERVICE PIPE."

Dennis v. Halifax, 45 N.S.R. 74, 9 E.L.R. 189, 360.

CONTROL OR MANAGEMENT OF WATERWORKS SYSTEM OR ELECTRIC LIGHT — INJUNCTION PREVENTING INTERFERENCE — SUBSTANTIAL COMPLIANCE OF LAW.

Brown v. Weir, 20 O.W.R. 665.

RATE FIXED BY BY-LAW — SYSTEM PLACED UNDER BOARD OF WATER COMMISSIONERS — ALTERATION OF RATE BY RESOLUTION.

Norfolk v. Roberts, 20 O.W.R. 487.

WEEDS.

NOXIOUS WEEDS ACT (ALTA.) — CIVIL ACTION TO INJURED PARTY.

Under the Noxious Weeds Act, 7 Edw. VII. (Alta.) c. 15, s. 4, making it an offence for an owner to fail to destroy all noxious weeds on his land, the owner is liable in damages for injuries resulting to his neighbour's crops by reason of the spreading of such noxious weeds on to the neighbour's land.

Flitton v. Stange, 12 D.L.R. 266, 6 A.L.R. 87, 24 W.L.R. 275, 4 W.W.R. 686.

POWERS OF INSPECTOR—NOTICE.

The Noxious Weeds Act should be construed strictly, and ambiguous expressions in the taxing clauses thereof should be construed in favour of the subject. An inspector of weeds has no power under s. 6 of the Act to fix the date by which the summer fallowing directed by him is to be done. A notice, not in writing, but intended to be given under s. 6 acted upon, stops the Weed Inspector from acting under the provisions of s. 8.

Re Fertile Belt, 9 W.W.R. 103, 32 W.L.R. 265.

WEIGHTS AND MEASURES.

BREAD SALES ACT (ONT.), 1910 — SALE OF "SMALL BREAD" — WEIGHT OF LOAF — POWERS OF PROVINCIAL LEGISLATURE.

Re Bread Sales Act, 23 O.L.R. 238.

PENAL LAW — INSPECTION — REFUSAL TO SUBMIT — JUDGMENT ULTRA PETITA — SECOND OFFENCE — INSUFFICIENT ALLEGATIONS — S. REV. [1906], C. 52, ARTS. 73, 74.

In a penal action when the plaintiff claims a penalty different from that laid down by the Act for the alleged infraction, the court cannot condemn the defendant to pay the penalty which he has incurred but which has not been asked for. Only the persons who use weight and measures "for the ends of commerce" are obliged to submit these weights and measures to the verification of the official inspector, on a requisition from him. To constitute a second offence, it is not sufficient that two infractions have been successively committed; it is necessary that the first be followed by a prosecution, and that after the prosecution a new infraction has taken place, and that such prosecution be pleaded in the action.

Lessard v. Baribeau, 56 Que. S.C. 232.

WHARVES.

As trespass or nuisance, see Crown, II—20; Waters; I C—40.

DEFECTIVE SUPPORTING PILES — COLLAPSE — DAMAGE TO CARGO — LIABILITY.

A warehouseman is a bailee for hire of goods stored in his warehouse, and as such must use reasonable care to keep his premises in a safe condition. The collapse of a wharf due to the supporting piles becoming worm-eaten and unable to support the superstructure, when reasonable care would have discovered the defects, renders the owner liable for resulting damage.

Furness v. Ahlin, 42 D.L.R. 97, 56 Can. S.C.R. 553, affirming 35 D.L.R. 150, 51 N. S.R. 291.

WILLS.

I. THE INSTRUMENT; FORM; REQUISITES; VALIDITY.
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- B. Execution; attestation.
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- D. Who may make; capacity; undue influence.
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III. DEVISE AND LEGACY.
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Ambiguous or inaccurate description of beneficiary: 8 D.L.R. 96.

Substitutional legacies; variation of original distributive scheme by codicil: 1 D.L.R. 472.

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I. The instrument; form; requisites; validity.

A. In general.

Gift causa mortis as legacy, abatement, see Gift, II—10.

Will as "writing" designating beneficiaries to policy, see Insurance, IV A—161.

Parol evidence as to person and amount intended by will, see Evidence, VI J—570.

Description of policies, see Insurance, IV B—170.

(§ I A—5)—WILLS ACT — BEQUEST OF "CERTAIN AMOUNT" TO A "CERTAIN PERSON" SECRETLY CONFIDED TO EXECUTOR — VALIDITY.

Provision 4 of the Wills Act (C.S.N.B. 1903, c. 160), which enacts that "no will shall be valid unless it be in writing . . ." and executed in a certain formal way, does not mean that every bequest contained in or under a testament must be reduced to writing in order to have validity; a bequest, if otherwise valid, may be made to "a certain person" of "a certain sum," the testator confiding the name of the beneficiary and the amount of the bequest secretly to the executor, who, upon accepting the executorship, becomes trustee for the unnamed beneficiary.

Lemon v. Charlton, 45 D.L.R. 604, 46 N.B.R. 228, affirming 34 D.L.R. 234.

EFFECT OF PARTIAL INVALIDITY.

A woman who makes her will in favour of a man whose mistress she had been (who, at the same moment, executes his will in her favour) is deemed not to "make a free gift" and the will in her favour is an "intervention of the person benefited" within the meaning of art. 756 C.C. (Que.). The woman's will is void as a contravention of this article.

Pouliot v. Leclerc, 43 Que. S.C. 512.

LIBERTY TO MAKE ONE'S WILL — AGREEMENT NOT TO CHANGE—C.C. QUE. ARTS. 898, 1061.

The following agreement is not immoral nor contrary to the liberty to make one's will. It only constitutes the fixing of wages which the testator will pay to his son for his services, if he does not bequeath to him the goods which he has promised. "Whereas the said W.T. and his family have decided to go to live and work with the parties of the first part, and that they, in order to assist and encourage their son have made their will by which they have appointed the said W.T. their sole legatee, dated this day; it is now agreed that if one or the other of the said A.T. or his wife changes his or her said will and appoints one or more other legatees, or if the said A.T. or his wife, no longer wishing to keep with them their said son and his family, order him to leave their residence, then the said W.T. shall have the right to claim by way of wages, a sum of $100 for each year that he lives and works with and for his father and mother, and after such pay-

ment the parties will be discharged from all reciprocal obligations.

Tessier v. Tessier, 56 Que. S.C. 266.

(§ I A—6)—WILLS—RESTRAINT OF MARRIAGE.

A testator devised and bequeathed his real and personal property to his wife and children in equal shares, "provided however, that if my wife shall remarry the share hereby bequeathed to her shall revert to my estate and be divided among my said children." The widow remarried. Held, that as the proviso was in restraint of a second marriage it was valid as it did not fall within the general rule respecting a conditional gift in general restraint of marriage. [Re Tucker, deceased, 3 S.L.R. 473, and Re Caswell, 5 S.L.R. 213, dissented from.]

Re Muirhead Estate, 12 S.L.R. 123, [1919] 2 W.W.R. 454.

(§ I A—7)—EFFECT OF PARTIAL INVALIDITY.

A clause in a will is invalid which forfeits altogether a beneficiary's interest in the testator's estate if he should alienate any benefit to which he may be entitled under the will. [McFarlane v. Henderson, 16 O.L.R. 172, followed.]

Re McKinnon, 3 D.L.R. 124, 3 O.W.N. 890.

(§ I A—10)—TESTAMENTARY CAPACITY — DELUSIONS — EXECUTION BY MARK.

Momberg v. Jones, 25 D.L.R. 766, 9 W.W.R. 246, 32 W.L.R. 513. [See also 21 D.L.R. 863, 25 Man. L.R. 504, 31 W.L.R. 633, 8 W.W.R. 1059.]

TESTAMENTARY CHARACTER.

Where a document purporting to be an appointment of a beneficiary by the assured under a life insurance policy declares that the policy shall continue payable to the assured, his executors, administrators and assigns, and shall continue to be subject to his disposal as he may see fit in his lifetime and further declares that if the insurance is subsisting at his death, and has not been sold, surrendered, assigned or otherwise disposed of, then upon his death it shall be for the benefit of his wife if she survives him the effect is to make it a testamentary document and not a statutory appointment under the Manitoba Life Insurance Act, R.S.M. 1902, c. 83, s. 7 (similar to R.S.O. 1897, c. 203, s. 159). [Foundling Hospital v. Crane, [1911] 2 K.B. 367, 80 L.J.K.B. 853, applied.]

Green v. Standard Trusts Co., 1 D.L.R. 609, 22 Man. L.R. 397, 20 W.L.R. 488, 1 W.W.R. 993.

(§ I A—15)—EXECUTION — REFERENCE IN CODICIL TO PRIOR WILL — INCORPORATING EXTRINSIC DOCUMENT.

Where there is a distinct reference in a duly proved codicil to a prior testamentary paper therein referred to as the "last will" of the testator and only one document of the kind is known, probate may be granted of both, although the due execution of the prior will is not shewn, if the parol evidence satisfactorily proves that there is no doubt that it is the instrument referred to. [Allen v. Maddock, 11 Moore P.C. 427, 14 Eng. R. 757, followed.]

Lafond v. Lafond, 16 D.L.R. 457, 19 B.C.R. 287, 6 W.W.R. 318, 27 W.L.R. 687.

EVIDENCE — CODICIL.

The rule that a will must be in writing does not so require merely for the purpose of proof but makes the writing essential to its validity, and no evidence is admissible to supplement or explain what is written. Therefore, though a marginal note on a holograph will, dated and signed by the testator and incorporated with the rest, may operate as a codicil it is not so with respect to a writing on a distinct and separate sheet, though folded up with the will and having a sign or mark apparently referring to a like sign on the will; no evidence of such relation is admissible to establish that the sheet forms part of the will or is a codicil modifying its tenor.

Dion v. Dion, 44 Que. S.C. 462.

TWO TESTAMENTARY DOCUMENTS EXECUTED BY TESTATRIX IN EXISTENCE AT DEATH —ALTERATIONS MADE IN EARLIER DOCUMENT AFTER EXECUTION WITHOUT RE-EXECUTION — REFERENCE IN LATER DOCUMENT TO EARLIER ONE—"IF THE STROKED ONE STANDS TAKE IT"—LATER DOCUMENT ALONE ADMITTED TO PROBATE.

In 1910 the testatrix made a will disposing of all her property. Afterwards, she made many alterations in the document by striking out words and interlining others; but did not re-execute as a will the document as altered. In 1916, she duly executed a new will, written by her own hand, beginning: "This is the last will of E. G. if the one stroked over will not stand. If the stroked one stands take it." This will also disposed of all her property, but it differed materially from the will of 1910, both as first written and as subsequently altered:—Held, that the two documents could not stand together. Re Hay, Kerr v. Stinnear, [1904] 1 Ch. 317, distinguished, there not being in this case, as there was in that, an express confirmation of the earlier writing. In its natural signification the expression "the stroked one" in the sentence "If the stroked one stands take it," described the original will as "stroked," and not the original will without the alterations; and the testatrix must be taken to have used the expression in this natural sense. Thus the will of 1916 must be admitted to probate; for the earlier will was not valid as altered, and the condition upon which the second will was to come into operation was fulfilled—"the one stroked over will not stand." An instrument which is to take effect as a will only on the happening of a contingency named in it may be valid as a will.

Grant v. Grant, 44 O.L.R. 143.

B. EXECUTION; ATTESTATION.

(§ I B—20)—AUTHENTIC FORM—READING OF WILL—NOTARY.

A will in authentic form, in which it is not declared that the will was read "by the notary," is void. Proof by testimony is illegal for proving that it was read to him by the notary.

Beauchamp v. Patenaude, 53 Que. S.C. 276, 24 Rev. de Jur. 143.

A will in authentic form before two notaries under Quebec law is not invalid because, by inadvertence, it was certified on its face to have been executed in the afternoon of a certain day, while in fact it was executed in the forenoon of that day.

Riley v. McGrory, 8 D.L.R. 784.

FORM OF WILL—QUEBEC.

In Quebec, a will made according to the form derived from the law of England, as to execution and attestation, is void.

Vondette v. Vondette, 47 Que. S.C. 534.

PROOF OF DUE EXECUTION—JUDGMENT OF SURROGATE COURT — APPEAL — NEW TRIAL—RIGHT OF APPEAL—VALUE OF PROPERTY AFFECTED—APPOINTMENT OF ADMINISTRATOR WITH WILL ANNEXED—COSTS.

Egan v. McArthur, 9 O.W.N. 253.

AUTHENTIC WILL—INCOMPETENCY OF WITNESSES—PROOF.

Raby v. Arbic, 13 Que. P.R. 85.

(§ I B—21)—SIGNATURE OF TESTATOR.

Under a statute (Wills Act, R.S.B.C. 1911, c. 241, s. 6), which provides that "no will shall be valid unless it is signed by the testator or by some other person in his presence and by his direction, and such signature shall be made or acknowledged by the testator in the presence of two witnesses," the will, although signed by one holding testator's hand, and acknowledged by two witnesses in the testator's presence, but when the testator was in such physical condition that he could neither object, consent, nor even see the witnesses, such will was not executed according to the provisions of the statute.

Peden v. Abraham, 8 D.L.R. 403, 3 W.W.R. 265.

IMPRESS OF SEAL OF TESTATOR'S SIGNATURE—SUFFICIENCY AS BASIS FOR "COMMON FORM" PROOF.

The impress of the testator's notarial seal upon his will may be a sufficient signature upon which to grant proof in common form.

Re Wilson Estate, 19 D.L.R. 698.

SIGNATURE OF TESTATOR.

A holograph will signed "mother" (of which the handwriting is identified) is valid.

Walker v. Swan, 15 Que. P.R. 15.

ILLNESS PREVENTING.

A writing read to the testator, who declares before witnesses that he accepts it as the expression of his last wishes but is unable to sign it owing to injuries received, cannot be treated as a will made according to the form derived from the law of England nor be proved as such.

Ex parte Samson, 18 Que. P.R. 368.

(§ I B—23)—SIGNATURE OF WITNESSES—STATEMENTS OF TESTATOR.

Statements made by a testator some time before the making of his will cannot prevail against the express terms of the document containing his last will. Witnesses to a will, made in English form, may witness and sign the will in a room adjoining that where the testator is, provided the latter can see them through the open door.

Langlois v. Morin, 24 Rev. Leg. 362.

(§ I B—24)—VOID—AUTHENTIC FORM—SECOND NOTARY — ENGLISH FORM — EVIDENCE — EXECUTOR — INTEREST IN WILL—C.C. (QUE.) ARTS. 846, 851, 855.

A will is void and contrary to law when an executor acts at the same time as second notary to the deed. A will made under the form derived from the law of England, is invalid by reason of art. 851, 855 C.C. (Que.) since an executor can no more be a witness to a will under this form than he could be a second notary under the authentic form. Art. 845, which says "Legacies made to notaries or to witnesses are void but do not annul the other provisions of the will" cannot be invoked in case in discussion seeing that the benefit conferred upon the executor is found to affect practically the whole will.

Papineau v. Papineau, 28 Que. K.B. 240.

ATTESTATION BY BENEFICIARIES—APPLICATION FOR PROBATE.

Re Jones, 18 W.L.R. 633.

(§ I B—26)—PRESENCE OF PARTIES.

Where a will was drawn according to the suggestions of a testator, who was mentally competent and not unduly influenced in making it, and was signed by him in the presence of two witnesses, and by them signed in the presence of the testator, and in the presence of each other, it was legally executed under Ontario law.

Toal v. Ryan, 4 D.L.R. 25, 3 O.W.N. 1267, 22 O.W.R. 127.

C. REVOCATION; REVIVING.

(§ I C—30)—LOST WILL—PRESUMPTION OF REVOCATION—HOW REBUTTED.

A will was admittedly made in proper form by the plaintiff's deceased husband, whereby he gave all his property to her. The will had been placed in her custody, and, when her husband died, she supposed it was still where she had left it, but diligent search for the will did not produce it, nor her own will, which had been placed in the same envelope. The contents of the will were well proved, in an action brought to establish it, and oral evidence was given which was held sufficient to rebut the presumption that the husband had destroyed the document animo revocandi; and the will, as established by the evidence was ad-

mitted to probate. Held, that, in arriving at a conclusion, the court was entitled to consider the relationship existing between the husband and wife, also his words and action subsequent to the execution of the will, and any circumstances which may tend to support or rebut the presumption of revocation. The strength of the presumption is weakened if the testator did not have the custody of the document.

Unwin v. Unwin, 29 W.L.R. 279, 20 B.C.R. 77, 6 W.W.R. 1186.

WILL OF SOLDIER IN MILITARY FORM.

A subsequent testamentary paper does not necessarily revoke one prior in date, even though the second instrument contains a general revocatory clause. The intention of the testator is the sole guide in the matter, and the intention to be discovered is that relating to the disposition of the testator's property, and not to the form of the will. Moreover, a will is not necessarily confined to one document, but may be contained in several documents. [Lemage v. Goodban (1865), L.R. 1 P. 57, at p. 62; Gladstone v. Tempest (1840), 2 Curteis, 650; Dempsey v. Lawson (1877), 2 P.D. 98 at p. 107, followed.] A will executed by a soldier after it had been prepared by his solicitor held not to have been revoked by a will made three days later, on a form supplied by the military authorities, which contained a clause revoking generally all former wills. The disposition of the property was the same in both wills and both documents were admitted to probate.

Re Erskine Estate, [1918] 1 W.W.R. 249.

Application for probate of a will refused, and letters of administration with will annexed granted of a will, made on a form prescribed by the military authorities and while the testator was on active service, which purported to revoke all former wills and to be the testator's last will, but made no mention of an executor, there being no blank therefor. [Lemage v. Goodban, L.R. 1 P. 57, followed.]

Re Daigle Estate, [1918] 2 W.W.R. 910.

CODICIL.

If a will be simply revoked in order to make a gift in favour of another person, and it is clear that there is no intention to revoke unless for such purpose, then the doctrine of Onion v. Tyrer, 1 P.Wms. 343, applies. The revocation by a codicil of an appointment by a will held, not to be operative in any event, but to have been made only for the purpose of providing what the appointor considered a better provision for the benefit of the appointee and his family, and since, because of the appointor's inability under the will to vest an interest in her grandchildren, the appointment under the codicil failed to that extent, the original appointment stood. [Re Bernard's Settlement, Bernard v. Jones, [1916] 1 Ch. 552, applied.]

Pemberton Estate v. Lewis, 25 B.C.R. 118, [1917] 3 W.W.R. 701.

CODICIL—REVOCATION OF BEQUEST TO CHILDREN OF TESTATRIX—DOUBT AS TO EXTENT OF APPLICATION OF REVOKING CLAUSE.

Re Schreiber, 11 O.W.N. 349.

(§ I C—31)—Where a will which gave a woman all of the property of a testator, was executed in consideration of her agreement to keep house for him during his lifetime, was, without her knowledge, subsequently revoked, she may, upon the death of the testator, recover from his estate the total value thereof, less the amount of his debts and the expense of administration.

Legeas v. Trusts & Guarantee Co., 5 D.L.R. 389, 4 A.L.R. 190, 20 W.L.R. 172, 1 W.W.R. 802.

SUBSEQUENT WILL.

A testator may dispose of part of his estate by a will and of the remainder by one or more other wills. When in an action for a legacy a third party intervenes and asks that the will on which the action is based be set aside he cannot, by the same intervention, demand the setting aside of a prior will which has not been revoked; he should proceed for that purpose by action.

Pascal v. Bank of Montreal, 14 Que. P.R. 54.

(§ I C—32)—ERASURE—INTERLINEATION—DESTRUCTION—MUTILATION.

A will made under Quebec law in authentic form before two notaries must certify the number and nullity of words erased, otherwise the erasure will not be effective and the words through which a line had been drawn will be read in the will. [Notarial Code, R.S.Q. 1909, s. 4618, considered.]

Riley v. McGrory, 8 D.L.R. 784.

Where the decedent is proved to have had his will in his own custody but after due search it cannot be found or otherwise accounted for at his death, it will be presumed that the decedent destroyed the will with the intention of revoking it. [Sugden v. St. Leonards, L.R. 1 P.D. 154, applied.]

Re Nan Sing, 1 D.L.R. 45, 19 W.L.R. 858, 1 W.W.R. 472.

ATTEMPTED REVOCATION — CROSSING OUT SIGNATURE—NAME LEGIBLE.

Running a pen through the signature of a will by a testator, but leaving his name plainly legible, with a writing below "I hereby revoke this will" subscribed with the testator's initials, dated, and attested by his wife in his presence, does not constitute an effectual revocation of the will under ss. 22, 23 of the Wills Act, R.S.O. 1897, c. 128, and will not affect the title to land by the admittance of such will to probate. [Re Goods of Godfrey, 69 L.T.R. 22, followed.]

Re Mulholland and Van den Berg, 24 D.L.R. 785, 34 O.L.R. 242.

(§ I C—34)—BY CODICIL.

A will revoked by another will properly executed is impliedly revived by the making

of codicils to the original will though no mention of the second will is made in the codicils.

Findlay v. Pae, 31 D.L.R. 281, 37 O.L.R. 318.

TESTAMENTARY CAPACITY — UNDUE INFLUENCE — ONUS PROBANDI — WILL PREPARED BY ONE BENEFITTING THEREUNDER.

In an action to set aside a will on the ground that the testator was not of sound and disposing mind and memory, the appellate division directed a new trial as it did not appear that due regard was had to the rule that the onus probandi lies upon the party propounding the will and to the rule that generally the court's suspicion should be aroused when the will was prepared by one taking a benefit thereunder and such suspicion should be satisfactorily removed before allowing the will to be effective.

Deremore, v. Trusts & Guarantee Co. [1919] 1 W.W.R. 681, 14 A.L.R. 322.

D. WHO MAY MAKE; CAPACITY; UNDUE INFLUENCE.

(§ I D—35)—COMPETENCY TO MAKE.

Wildman v. Wildman, 12 D.L.R. 837, 25 W.L.R. 41.

BURDEN OF PROVING GENUINENESS.

If it be shewn that a party taking a benefit under a will, himself wrote that will, or participated in the preparation of it, or in the procuring of its execution, the law casts upon such beneficiary, in proving the will, the additional burden of proving that the testator knew and approved of the contents of the will; the rule of law being that, under such circumstances, a suspicion is cast on the will which must be removed by testimony which leaves no reasonable doubt of the genuineness of the will as the last free act of the testator. Each case must be decided upon its own peculiar circumstances, and it is for the jury to consider all the surrounding facts and circumstances, and decide whether or not they are such as to justify the conclusion that the testator had been influenced to such an extent as to have lost the power of free agency.

Farnell v. Conway, 41 D.L.R. 649, 45 N.B.R. 343.

UNDUE INFLUENCE — CONSPIRACY — ATTESTING WITNESSES—APPEAL—COSTS.

Newcombe v. Evans, 43 O.L.R. 1. [See 37 O.L.R. 354, 31 D.L.R. 315.]

The rule followed that where the donee is in a position of confidence or in a position to exercise influence over the donor, it is not necessary to the setting aside of the gift, on the ground of undue influence, that there should be proof of its exercise; undue influence is presumed, and it is for the donee to rebut the presumption. [Delong v. Mumford, 25 Gr. 586; Vanzant v. Coates, 37 D.L.R. 471, 39 D.L.R. 485, followed.] As to the will, that, although (1) mental capacity and (2) due execution were shewn, it was not shewn (3) that the document propounded was understood and appreciated by the testatrix, and was in truth and fact the expression of her desire; and these three things must be shewn before the rule laid down in Baudains v. Richardson, [1906] A.C. 169, 185, that those attacking the will must shew coercion or fraud, can be applied. Where the defendants were in the position of influence; and the will was prepared on their instructions, in their presence, and for their benefit; and the solicitor who prepared the will—the only independent witness called to support it—did not satisfy himself thoroughly as to the volition and capacity of the testatrix; the circumstances in which the will was prepared and signed were such as to cause grave suspicion, and the evidence of undue influence being overwhelming, the defendants failed to establish the will.

Wannamaker v. Livingston, 43 O.L.R. 243.

DEVISE OF LAND—CONVEYANCE BY DEED—ACTION TO SET ASIDE—MENTAL INCAPACITY OF TESTATOR AND GRANTOR—EVIDENCE—TITLE BY POSSESSION TO PORTION OF LANDS OF TESTATOR ACQUIRED BY SON — EVIDENCE — LIMITATION ACT—ADVERSE ENTRY—FINDINGS OF TRIAL JUDGE—APPEAL.

Goodchild v. Wilcox, 14 O.W.N. 125, affirming 12 O.W.N. 55.

ACTION TO SET ASIDE LETTERS PROBATE—EVIDENCE—ONUS—TESTAMENTARY CAPACITY—FINDING OF TRIAL JUDGE—REVERSAL ON APPEAL.

The testator, by a will made 5 days before his death, and when he was very ill, drawn from his instructions by his medical attendant, left $1,000 to his (the testator's) only relative, a sister, who lived a long distance from him, and the remainder of his estate, the whole value of which was about $4,000, to the defendant, a neighbour and close friend, who had been his adviser and assistant in business matters, and had, with others, taken care of him in his last illness. The defendant was present when the instructions were given and while the document was being prepared, and his son was one of the attesting witnesses. The will was admitted to probate; and the plaintiff sought in this action to set it aside and revoke the letters probate, on the grounds that the defendant occupied a position of confidence towards the testator and had procured the making of the will by undue influence, when the testator was dying and was without independent advice, and that the document admitted to probate was not the will of the deceased. The Trial Judge found that the will was really not the will of the deceased:—Held, reversing that finding, that, the testamentary capacity of the testator not being disputed, if the onus was upon the defendant to adduce

evidence to remove the suspicion raised by the circumstances in which the will was prepared and executed, the defendant had satisfied the onus, and had established that the will was that of a free and capable testator—in reality, there was no evidence that the defendant procured the will to be made, or that it was other than the voluntary act of the testator.

Gallagher v. Woodman, 44 O.L.R. 98.

ACTION TO ESTABLISH—EVIDENCE—ONUS—TESTAMENTARY CAPACITY — FAILING MEMORY AND SENILE DECAY—PROCUREMENT OF WILL BY OTHERS — STEALTH, HASTE, AND CONTRIVANCE — DUTY OF SOLICITOR CALLED IN TO PREPARE WILL—REVOCATION OF FORMER WILLS—EXECUTORS PROPOUNDING WILL—COSTS.

Murphy v. Lamphier, 31 O.L.R. 287.

ACTION TO SET ASIDE — ONUS — WANT OF TESTAMENTARY CAPACITY—COSTS.

Larocque v. Landry, 11 O.W.N. 449.

ACTION TO SET ASIDE WILL AND DEED—MENTAL CAPACITY OF TESTATRIX—EVIDENCE.

Gross v. Smith, 13 O.W.N. 170.

INVALIDITY — INCOMPETENCE OF TESTATRIX —EVIDENCE — ONUS — TESTIMONY OF PHYSICIAN-WITNESS — DECLARATION OF INTESTACY — INJUNCTION — EXECUTOR —COSTS.

Dougan v. Allan, 6 O.W.N. 712.

TESTAMENTARY CAPACITY—INSANITY.

Importunity upon a testatrix by those to whom she has bequeathed the largest part of her estate, any more than threats to have her interdicted, are not sufficient to establish caption when it is proved that, at the time of the will, she enjoyed all her faculties and especially a great will power. Incapacity to make a will on account of insanity cannot be inferred from the temporary loss, by the testatrix, of her mental lucidity during a disease, or from her habit of complaining, without reason, of being poor, or of her indifference towards one of her daughters-in-law (the plaintiff), when it is established by the testimony of those who knew her best, and especially by her correspondence, that at the time of her will, she enjoyed the full use of her intelligence.

Bruneau v. Genereux, 23 Que. K.B. 113.

TESTAMENTARY CAPACITY—DEAF AND DUMB PERSONS.

Article 847, C.C. (Que.) applies only to deaf and dumb persons and to those completely deprived of hearing. One who still can hear, although very little, and however deaf he may be, may make an authentic will in the ordinary way, and evidence tending to shew that the declaration in the will that it has been read to the testator is false, must be made by the one attacking the will. Such proof can be made only by disproving the evidence, the proof must be conclusive and leave no doubt in the judge's mind, the presumption being in favour of the authenticity.

Roy v. Hebert, 23 Que. K.B. 225.

(§ 1 D—36)—DEGREE OF MENTAL CAPACITY —PERSON SUFFERING FROM GENERAL PARESIS—LUCID INTERVALS.

Notwithstanding the fact that a testator at the time of executing his will was suffering from general paresis, the instrument will be upheld, where it appears that persons so afflicted frequently have lucid intervals; and that the testator was able to frequently transact business, and was capable of understanding the nature of the instrument executed by him, which was a simple one. [Banks v. Goodfellow, L.R. 5 Q.B. 549, applied.]

Badenach v. Inglis, 14 D.L.R. 109, 29 O. L.R. 165, affirming 10 D.L.R. 294.

CAPACITY OF TESTATOR — EXECUTION OF DOCUMENTS THREE DAYS AFTER INSTRUCTIONS GIVEN—EVIDENCE.

A will may be established when the testator, at the time of dictating the will, has sufficient discretion for that purpose, and on execution of the same remembers that instructions had been given, and accepts the document to be signed as containing such instructions. [Murphy v. Lamphier, 31 O. L.R. 287, distinguished; Parker v. Tilgate, 8 P.D. 171, approved in Perera v. Perera, [1901] A.C. 354, followed.]

Faulkner v. Faulkner, 49 D.L.R. 504, 46 O.L.R. 69, reversing 44 O.L.R. 634.

The fact of a testator suffering from paresis at the time of making his will is not sufficient ground for setting it aside where the court is satisfied that at the actual time of the making of the will the testator could and did fully appreciate what he was doing and was in fact "a free and capable testator."

Bartlett v. Bull, 16 D.L.R. 82, 5 W.W. R. 1207, 26 W.L.R. 831.

A greater scope of general mental capacity is requisite where a testator by will disposes of all his property, than where he deals with a single or separate part thereof. In order that a testamentary disposition of property may be sustained the testator must be of reasonably sound mind, memory and understanding.

Thamer v. Jundt, 4 D.L.R. 753, 3 O.W. N. 1307, 22 O.W.R. 206.

Soundness of intellect required of a person making a will at the time of the making thereof consists in having sufficient understanding to appreciate the charcter and the effects of the document to be made and in having sufficient will power to manifest such understanding.

Madore v. Martin, 3 D.L.R. 731, 18 Rev. de Jur. 480.

One who knew and appreciated that he was making a will, the effect thereof, the property possessed by him, and how he disposed of it, as well as those who had claims upon him, was competent to make a testimentary disposition thereof.

Toal v. Ryan, 4 D.L.R. 25, 3 O.W.N. 1267.

Where the evidence does not shew that

the testator when making his will was under any insane delusion nor that he had such weakness of intellect and mental decay as to destroy testamentary capacity, the will should not be refused probate on the ground of incapacity, because it appears that the testator was a feeble old man, 79 years of age who was found a few months later to be suffering from senile dementia and was declared incompetent in lunacy proceedings taken for the purpose of placing some one in authority to provide necessary care and nursing for him.

Forman v. Ryan, 4 D.L.R. 27, 17 B.C.R. 130, 20 W.L.R. 797, 1 W.W.R. 1222.

MENTAL SANITY—CASUAL AND TEMPORARY DERANGEMENT.

Jeanotte v. Jeanotte, 10 D.L.R. 831, 22 Que. K.B. 41, 19 Rev. Leg. 93.

(§ I D—37)—DELUSIONS.

Whether the general faculties of a person's mind are so affected by insane delusions as to render him incompetent to make a testamentary disposition of his property as a whole or of that part in respect to which a delusion exists, is a question of fact to be determined from all the evidence.

Thamer v. Jundt, 4 D.L.R. 753, 3 O.W.N. 1307, 22 O.W.R. 206.

DELUSIONS—BURDEN OF PROOF.

Where the provisions of the will itself prove that it was not affected by insane delusions, it must be found that it was not so affected; and after the court is sufficiently satisfied of the due execution of a will as required by law by an apparently competent testator, the onus of proving that the will was affected by insane delusions is shifted upon the party opposing the will on that ground. [Skinner v. Farquharson, 32 Can. S.C.R. 58, applied.]

Beament v. Foster, 26 D.L.R. 474, 35 O.L.R. 365.

DELUSIONS — AS TO FAMILY — PARANOIA — MONOMANIA.

Where the testator was afflicted with the form of insanity known as monomania or paranoia and his insane suspicion and aversion towards his own family took the place of natural affection and perverted the sense of right of the testator, his will depriving his wife and any benefit in his estate and making inadequate provision for his infant children while the bulk of the estate was given for religious purposes, will be set aside.

Re McDonald Estate, 15 D.L.R. 558, 14 E.L.R. 109.

A testator has sufficient capacity to make a will whose mind and memory are sufficiently sound to enable him to understand its nature and effect, who has a comprehension of the extent of the property he was possessed of and the objects of his proposed bounty, and this notwithstanding that he periodically suffered from melancholia and incidental delusions, brought about by the deaths of relatives or by domestic trouble and that on the date of the execution of the will he was about to go voluntarily for treatment to an institution for mentally weak persons at the request of a friend. [Banks v. Goodfellow, L.R. 5 Q.B. 549, and Skinner v. Farquharson, 32 Can. S.C.R. 58, applied.]

McInnes v. McInnes, 1 D.L.R. 522, 10 E.L.R. 399.

ACTION TO SET ASIDE AFTER PROBATE—SUSPICIOUS CIRCUMSTANCES — SENILITY — REASONABLENESS OF DISPOSITION — ONUS OF PROOF—STARE DECISIS—FINDING OF FACTS—ADJUDICATION —BINDING EFFECT ON BENEFICIARIES NOT PARTIES—COSTS.

Lloyd v. Robertson, 27 D.L.R. 745, 36 O.L.R. 264. [Reversed in 28 D.L.R. 192, 37 O.L.R. 498.]

DELUSIONS.

To be capable of making a valid will, a testator must have the normal exercise of his thoughts, possess all his intellectual and moral faculties, have entire freedom of his affections, and a will free from all influence and capable of making a choice of his heirs. Where one for a long time lived in constant fear of being poisoned, and had hallucinations about it, he is incapable of disposing of his property by will. A party proceeding to attack an instrument may ask, by exception, not only for the nullity of a deed opposed to him, but also the nullity of a deed invoked against him as proof of a right.

Robert v. Robert, 24 Rev. Leg. 136.

A person who is instrumental in framing a will and who obtains a bounty from that will is bound to establish that the will was made willingly and deliberately and without pressure or influence. [Fulton v. Andrew, L.R. 7 H.L. 448; Donaldson v. Donaldson, 12 Gr. 431, followed.] In an action to set aside a will which disposes of the greater portion of the estate as a residue unascertained as to value, it is a fact of importance that the testator thought the estate of but one-half the value it really was. [Harwood v. Baker, 3 Moore P.C. 282, followed.]

Aldritt v. Toronto General Trusts Corp., [1917] 1 W.W.R. 178.

CODICIL—PROOF OF EXECUTION—EXPERT IN HANDWRITING—WANT OF INDEPENDENT ADVICE—CONVEYANCES OF LAND BY TESTATOR TO SONS—ACTIONS TO SET ASIDE —WANT OF UNDERSTANDING BY TESTATOR—IMPROVEMENTS TO LAND IN EXPECTATION OF DEVISE.

Palmer v. Palmer, 10 O.W.N. 70.

DUE EXECUTION—ABSENCE OF UNDUE INFLUENCE.

McAlpine v. McKay, 10 O.W.N. 122.

CAPACITY—EVIDENCE.

Menzies v. McLeod, 11 O.W.N. 14.

(§ I D—38)—Estate bequeathed to husband — Alleged undue influence — Burden of proof—Onus on party alleging.

When it is proved that a will has been properly executed by a person of competent understanding, and apparently a free agent, the burden of proving undue influence rests on the party alleging this. It must be shewn that a person having the power to overbear the will of the testator duly exercised such power, and by means of the same, obtained the will. [Baudains v. Richardson, [1906] A.C. 169, followed.]

Craig v. Lamoureux, 50 D.L.R. 10, [1919] 3 W.W.R. 1101, reversing 17 D.L.R. 422, 49 Can. S.C.R. 305, which reversed 14 D.L.R. 399, 22 Que. K.B. 252.

Undue influence — Competency — Free and capable—Onus, when shifted.

The onus probandi lies upon the party propounding a will to satisfy the court that it is the last will of a free and capable testator, and this being fulfilled the onus is shifted. If a party writes or prepares a will under which he takes a substantial benefit, that is a circumstance creating suspicion which he must displace when he propounds the will for probate if contested. [Barry v. Butlin, 1 Curt. 637 Tyrell v. Painton, [1894] P. 151; Connell v. Connell, 37 Can. S.C.R. 404, applied.]

Loftus v. Harris, 19 D.L.R. 670, 30 O.L.R. 479.

Will—Testamentary capacity—Due execution — Evidence — Undue influence—Burden of proof.

Stotts v. Stotts, 16 O.W.N. 332.

Evidence—Allegations of testamentary incapacity and undue influence—Failure to prove—Agreement made by testator—Promise to convey land in consideration of maintenance for life—Agreement and will upheld on evidence—Costs of issues.

Re McRae, 16 O.W.N. 378.

Proof of undue influence (captation) is established by the actions of the legatee charged therewith prior to its execution, his proposal to a third person to take steps to have the natural heirs disinherited by a partition of testator's property, his statement to the testator that his grandson (the natural heir) had stolen property from him and his conduct after the will was made, which shewed that, his work accomplished, he took no further interest in the testator to whom he had previously been most attentive.

Ouimet v. Laberge, 43 Que. S.C. 221.

Action for declaration that will is void — Undue influence restraint against mortgaging until 35 years of age—Conditions.

Continuance of Martin v. Martin, 8 O.L.R. 462.

Cheff v. Martin, 20 O.W.R. 839.

Execution — Mental capacity — Suspicious circumstances — Knowledge and approval of contents of will—Onus probandi.

Re Margaret T. Murphy's will, 9 E.L.R. 410.

Fraud—Clause introduced by mistake of solicitor.

Re Williams Davis Estate, 40 N.B.R. 23.

Conspiracy—Presumption.

Quickfall v. Quickfall, 19 O.W.R. 113.

Action to set aside will and codicil—Fraud—No evidence of.

McGarrity v. Thompson, 20 O.W.R. 409.

Drunkenness—Captation.

Hoffman v. Baynes, 39 Que. S.C. 74.

D.D. What may be disposed of.

(§ I D D—39)—What may be disposed of.

Universal legatees under Quebec law take and may transmit a fisheries right which their testator acquired under c. 62 Con. Stat. Canada (1859), by s. 35 of which certain persons were to be "deemed the owners" of fishing stations held in peaceable possession by them in the public waters of Canada.

Robertson v. Grant, 3 D.L.R. 201, 21 Que. K.B. 279.

Interest passing on a devise—Testator can only dispose, by will of property which is his own, i.e., the net balance due him on an accounting.

Muir v. Currie, 19 O.W.R. 513.

E. Probate; contest; foreign wills.

(§ I E—40)—Foreign will—Validity.

A will executed in Quebec before a notary and filed with him as a notarial instrument under Quebec law may be proved on the trial of an action in New Brunswick as to real estate there by a copy produced on the evidence taken in Quebec under commission and certified by the commissioner from the original produced by the notary as a witness before him and by the evidence of its attestation in conformity with the New Brunswick law it is not essential that the will should have theretofore been proved in solemn form in New Brunswick.

Sweeney v. De Grace, 21 D.L.R. 626.

Admission to probate—Subsequent discovery of pretended codicils — Rejection by executors as not genuine—Duty of executors.

Re Bilton, 8 O.W.N. 553, 9 O.W.N. 104.

Proof in solemn form—Due execution—Testamentary capacity—Costs.

Lamphier v. Brown, 9 O.W.N. 200.

Persons interested—Nonappearance.

Persons interested in a will having been cited to appear and shew cause why a previous will should not be admitted to probate, and having failed to appear, the court is at liberty to grant probate, or administration with will annexed, of such previous will.

Re Robinson, 40 D.L.R. 664, 11 S.L.R. 188, [1918] 2 W.W.R. 391.

APPLICATION FOR PROBATE — DELEGATION BY EXECUTOR TO ATTORNEY — AFFIDAVIT OF ATTORNEY — SUFFICIENCY — EXECUTION OF TRUSTS (WAR FACILITIES) ACT, c. 68, 1916.

Re Benson, 25 B.C.R. 458, [1918] 3 W.W.R. 583.

ACTION TO SET ASIDE — PARTIES — HUSBAND AND WIFE.

An exception to form presupposes some defect and not an absence of interest, which goes to the merits. An heir has an interest on asking to set aside a will which disinherits him, even if there is another will which also disinherits him, particularly if the latter is to the benefit of another legatee. An action to set aside a will should be directed against the husband and wife common as to goods, if the estate under the will is partly of movables and partly of immovables. If such an action has only been directed against the wife authorized by her husband, the plaintiff may obtain a delay to add the husband personally.

Lapierre v. Lapierre, 20 Que. P.R. 137.

APPOINTMENT OF SEQUESTRATOR.

There is litigation of a decedent's estate when the will of the latter is attacked before the court; under such circumstances a sequestrator may be appointed.

Evans v. Slayton, 54 Que. S.C. 518.

LAW OF DOMICILE—ADMINISTRATION.

The testatrix died in 1915; she then was resident in the State of New Jersey. She left a will made in Ontario in 1880; she was then a British subject. At her death she owned real and personal property in Ontario and also in New Jersey. Upon an application to a Surrogate Court in Ontario by a trust company for a grant of letters of administration with the will annexed, a contestation arose, and the Judge of the Surrogate Court found that the will had been duly made and executed according to the law of Ontario, and that at the date of the execution of the will the testatrix was a British subject within Ontario. Letters of administration were accordingly granted to the trust company, and there was no appeal from the decision of the Surrogate Court:—Held, upon an application by the administrators for advice, that the Surrogate Court Judge had power to grant letters of administration or letters probate, irrespective of the question of domicile. Wills Act, R.S.O. 1914, c. 120, s. 20 (3). History of the legislation and review of the authorities. Held, however, that the will, though duly executed and free from defect in form, might be open to attack, either because the testatrix was, according to the law of the domicile, incapable of making a will, or because the will contravened the law of the domicile. The letters granted in this jurisdiction should be regarded by the court of another jurisdiction as conclusive, quoad form. If the testatrix had, at the time of her death, acquired a domicile in New Jersey, the estate, real and personal, vested in the applicants as trustees, was to be administered having regard to the rules of succession in New Jersey.

Re Dartnell, 37 O.L.R. 483.

DOCUMENT PROPOUNDED AS LAST WILL OF TESTATOR—ONUS OF PROOF—SUSPICIOUS CIRCUMSTANCES SURROUNDING PREPARATION AND EXECUTION OF DOCUMENT — EVIDENCE — FINDING OF TRIAL JUDGE IN FAVOUR OF WILL—NO FINDING UPON QUESTION OF DISCHARGE OF ONUS —APPEAL—AFFIDAVITS DISCREDITING IMPORTANT WITNESS AT TRIAL—NEW TRIAL.

The onus probandi lies upon the party propounding a will; and he must satisfy the conscience of the court that the instrument propounded is the last will of a free and capable testator. Wherever circumstances exist which excite the suspicion of the court, it is for those who propound the will to remove such suspicion, and to prove affirmatively that the testator knew and approved of the contents of the document, and it is only where this is done that the onus is thrown on those who oppose the will to prove fraud or undue influence, or whatever else they rely on to displace the case made for proving the will. [Tyrrell v. Painton, [1894] P. 151, 157, 158, followed.]

Sellers v. Sullivan, 43 O.L.R. 528.

ACTION TO ESTABLISH—PROOF IN SOLEMN FORM—COSTS.

Hannah v. Robson, 13 O.W.N. 215.

ACTION TO ANNUL — PARTIES — PLAINTIFF SUING ON BEHALF OF HERSELF AND ALL OTHER HEIRS AND NEXT OF KIN—RULE 75—JOINDER OF HEIRS AND NEXT OF KIN.

Carroll v. Patterson, 10 O.W.N. 100.

ACTION TO ESTABLISH — JURISDICTION — DECLARATORY JUDGMENT.

Mutrie v. Alexander, 23 O.L.R. 396, 18 O.W.R. 836.

SURROGATE COURT, TRANSFER FROM, TO KING'S BENCH.

Re Jickling, 20 Man. L.R. 436, 17 W.L.R. 400.

(§ I E—42)—CONTEST BY LEGATEE WHO ACCEPTED UNDER WILL—INSUFFICIENT EXECUTION.

A special legatee, who, after the death of the de cujus, accepted without reserve his legacy, does not, on account of a partial execution of the will, lose his right to invoke the nullity of the legacy made to his colegatee.

Vondette v. Vondette, 47 Que. S.C. 534.

PHYSICIAN DRAWING WILL ON DAY OF DEATH —OBVIOUS HURRY—ERROR IN NAME OF BENEFICIARY—LARGE AMOUNT—STRICT INVESTIGATION.

Re Jones, 21 D.L.R. 863, 25 Man. L.R. 504, 31 W.L.R. 663, 8 W.W.R. 1059. [See also 25 D.L.R. 766.]

MISTAKE—NAME — EVIDENCE — ADMISSIBILITY.

Re McLaurin Legacy, 9 E.L.R. 326.

(§ I E—51)—Issues.

Where, in an action to set aside the probate of a will, the defendant does not plead as res judicata an order of the Surrogate Court admitting the will to probate as "proved in solemn form of law" after hearing evidence in support of a caveat filed on the ground of the testator's mental incompetency, nor has he asked that the action be stayed on that ground, the High Court may treat the question of mental capacity as if it were before it in the first instance.

Mosier v. Rigney, 4 D.L.R. 621, 3 O.W.N. 1564, 22 O.W.R. 857.

(§ I E—53)—Refusal of grant—Review.

Section 155 of the Probate Act, N.S., excepts from the right of appeal "a grant of probate," but the right to appeal remains from a refusal of the grant.

Re Wilson Estate, 19 D.L.R. 698.

Settlement of accounts — Contest — Finding of Surrogate Judge—Reference to registrar to complete — Appeal — Notice to dismiss—Bonds for costs—Sureties—Approval of by registrar.

Re Estate of Craig, 43 D.L.R. 762, 52 N.S.R. 368.

F. Codicil.

(§ I F—60)—Revoking effect of, how limited.

A will is revoked by a codicil only in so far as an intention to revoke is expressed in clear and unambiguous terms by the testator. [Hearle v. Hicks, 1 Cl. & F. 20, applied.]

Smith v. Smith, 19 D.L.R. 192, affirming 15 D.L.R. 44.

Revocation of bequest.

A codicil setting out the testator's life insurance policies and providing that "one-quarter of these policies go direct to my wife, but all my other property now goes, with my last son dead, to my three daughters under the terms of my said last will" revokes a bequest in the will to the testator's wife of half the residue of his estate.

Brodie v. Chipman, 43 D.L.R. 593, 57 Can. S.C.R. 321, reversing 41 O.L.R. 281, sub nom. Re Spink.

Effect on terms of will—Limitation as to distribution.

A clause in a will, directing the payment to each of the testator's sons who shall reach the age of thirty years, a sum equal to half that portion of the estate to which he may become entitled under the will upon the death or remarriage of his mother, modified by a codicil that the real property of the testator shall not be divided among the beneficiaries until after the lapse of ten years from the testator's death, does not thereby postpone the division to be made upon the death or marriage of the widow, but merely has the effect of suspending the payment to which any son may become entitled in so far as it may necessitate the sale or conversion of any real estate for that purpose.

Singer v. Singer, 27 D.L.R. 220, 52 Can. S.C.R. 447, affirming 22 D.L.R. 717, 33 O. L.R. 602.

General and specific gifts—Substitution—Abatement.

A codicil and the will must be read together as one instrument and expressing the one final will of the testator; the words "residue of my estate" and "not thereby otherwise disposed of" refer also to dispositions made in the codicil. A specific gift by a codicil of "all my interest in a mortgage," in addition to a general pecuniary legacy by the will, is not substitutional of the latter, and not affected by an abatement provision in the will; the words "all my interest" are intended in the ordinary meaning that the principal as well as the interest be given.

Re Aldridge Will, 28 D.L.R. 531, 9 A.L. R. 512, 34 W.L.R. 546, 10 W.W.R. 701. [See also 28 D.L.R. 527, 9 A.L.R. 422, 33 W.L.R. 910, 9 W.W.R. 1517.]

Codicil.

Where a testator leaves a will and several codicils it is the net result of the testamentary writings that is to be construed as his last will. [Douglas-Menzies v. Umphelby, [1908] A.C. 224, followed.] Where a codicil directs that a stated pecuniary legacy is bequeathed in the "place and stead" of a stated pecuniary legacy in the will, the effect is as if the amount specified in the codicil were inserted in the will for all purposes, even to the change of the mode of division of the residuary estate which by the original will was to be divided amongst the testator's children "in proportion to the personal property herein bequeathed to my said children."

Re Hunter, 1 D.L.R. 456, 25 O.L.R. 400, 21 O.W.R. 5.

As a general principle a codicil to a will forms part of the will or testamentary instrument, but not necessarily to all intents and purpose. [Fuller v. Hooper, 2 Ves. Sr. 242, followed.]

Adams v. Gourlay, 4 D.L.R. 731, 26 O.L. R. 87, 21 O.W.R. 772.

Construction—Effect of codicil—Revocation of gifts made by will—Substituted residuary clause—Devise—Estate of devisee—Fee simple—Gift of income for limited period.

Re Robb, 15 O.W.N. 287.

Change in disposition of residuary estate—Gift of residue made subject to legacies and other benefits.

Re Temple, 16 O.W.N. 159.

Codicils—Annuities, whether payable out of income or corpus.

Re Mitchell, 6 O.W.N. 315.

DISTRIBUTION OF ESTATE POSTPONED FOR "15 YEARS FROM THIS DATE"—REPUBLICATION OF WILL BY CODICIL THREE YEARS AFTER EXECUTION OF WILL—EFFECT OF, AS TO DATE OF DISTRIBUTION.

Re Ryan, 16 O.W.N. 331.

II. Nuncupative; holographic.

(§ II—65) — REVOCATION BY MARRIAGE—CHANGE OF DOMICILE.

A holograph will executed in the Province of Quebec becomes revoked as regards its effect in Ontario by the testator's marriage in Ontario after changing his domicile to that province.

Seifert v. Seifert, 23 D.L.R. 440, 32 O.L.R. 433.

BY SOLDIER ON ACTIVE SERVICE.

Letters of a soldier on active service, containing (inter alia) the following: "I have also made out a will for which I am leaving all and everything to you, but I will send it on to you from England as it has got to go through the proper channels at the War Office in England" held to be a nuncupative will, and not a mere expression of intention.

Smith v. Hubbard, [1917] 1 W.W.R. 1237.

HOLOGRAPHIC—SIGNATURE.

A holographic will is valid even if the signature is not at the end of the will, and the law is fulfilled if the testator's name comes after the constitutive clauses of the will.

Ex parte Cunningham, 20 Que. P.R. 236.

III. Devise and legacy.

A. CONSTRUCTION GENERALLY; IMPLIED GIFT.

(§ III A—70)—DEVISE AND LEGACY.

Where a testator bequeaths $10,000 to the "Old People's Home" as a charitable institution at or near Winnipeg, and where there is no such institution bearing that identical name but there is "The Old Folks' Home" and until recently there was "La Maison des Vieux" (Roman Catholic) now called "Hospice Youville;" upon the question as to which, if either, of these is the legatee, a test of the probabilities may properly be based upon any relative facts.

Re Thomas D. Smith, 8 D.L.R. 93, 22 Man. L.R. 756, 22 W.L.R. 630, 3 W.W.R. 399.

"DISCRETION" OF NAMED TRUSTEES—POSSIBLE EXERCISE BY SUCCESSORS.

While a testator may so express a "discretion" with respect to trust property as to make it exercisable by the named trustees only, yet, where the exercise of the discretion has not been clearly limited by the terms of the will, the broader construction is to be given so as to authorize the exercise of the discretionary powers by the holders for the time being of the office of trustee. [Re Smith; Eastick v. Smith, [1904] 1 Ch. 139, applied.]

Kennedy v. Kennedy, 13 D.L.R. 707, 24 O.W.R. 943, affirming 11 D.L.R. 328.

DIRECTION TO EXECUTORS TO "PAY OFF THE MORTGAGE UPON MY REAL ESTATE" OUT OF SPECIFIED PART OF ESTATE—MORTGAGE EXISTING WHEN WILL MADE PAID OFF BY TESTATOR AND NEW MORTGAGE FOR LESSOR AMOUNT AND TO A DIFFERENT PERSON SUBSTITUTED—WILL SPEAKING FROM IMMEDIATELY BEFORE DEATH — "CONTRARY INTENTION" — WILLS ACT, R.S.O. 1914, c. 120, s. 27 (1)—DIVISION OF ESTATE INTO PARTS—ONE PART TO BE "$5,000 LESS THAN THE OTHER THREE PARTS"—MEANING OF.

Re Thompson, 48 D.L.R. 757, 45 O.L.R. 520.

VAGUENESS—LAPSING—RESIDUE.

A bequest of $50,000 to be "held as a fund towards helping to supply such institutions as may in the near future be demonstrated to shew that God's people are willing to help others to see the light that is so real, near and universal for all who will receive. These institutions may take the place of what are at present called hospitals, poor houses, gaols and penitentiaries, or any place that is maintained for the uplifting of humanity," is so vague and impracticable, and indefinite, that it raises no trust which could be carried out and such sum must fall into the residue of the estate.

Re Orr; Cameron v. Church of Christ, Scientist, 43 D.L.R. 668, 57 Can. S.C.R. 298, reversing 40 O.L.R. 567. [Leave to appeal to Privy Council refused. See memoranda, 57 Can. S.C.R. VII.]

MILITARY WILL REVOKED BY LETTERS.

In arriving at a conclusion as to a will of a deceased person to be gathered from various documents admitted, the court must have in view the real intention of the testator and must gather it from the documents presented. If in the series of testamentary documents the court finds one which has been wholly and completely revoked by the provisions of a succeeding will, the one so revoked will not be admitted to probate because it has no part to play in the devolution of the estate. Letters written by a soldier on active service, which furnish conclusive evidence that he considered a prior will in force, and shewing that he considered a subsequent military will which is inconsistent with it as repudiated, are sufficient to revoke such military will.

Re McNeil, 42 D.L.R. 449, 45 N.B.R. 479.

LIFE ESTATE—IMPLIED POWER OF EXECUTOR.

A will whereby the testator left to his widow all his real and personal property for the term of her natural life or while she remained a widow, held to entitle the widow to a life interest only in the estate, both real and personal, with an implied power in the executor to draw on the capital should the needs of the widow require it.

Re Mika Estate, [1918] 1 W.W.R. 888.

DEVISE TO SON—DIRECTION TO SON TO GIVE WIDOW AND FAMILY HOME WITH HIM—PERSONAL OBLIGATION, NOT ESTATE IN LAND DEVISED.

Re Killorin, 14 O.W.N. 6.

PROVISION FOR WIDOW, WHETHER IN LIEU OF DOWER—ELECTION BETWEEN DOWER AND BENEFIT UNDER WILL — ALLOWANCE TO WIDOW FOR BOARD AND LODGING—AMOUNT OF—DEVISE SUBJECT TO CHARGE ON LAND—DUTY OF EXECUTOR WHERE DEVISEE FAILS TO ACCEPT OR REJECT DEVISE.

Re McCallum, 14 O.W.N. 111.

ANNUITY TO WIDOW—FIRST CHARGE ON WHOLE ESTATE—PAYMENT OUT OF CORPUS IF INCOME OF ESTATE INSUFFICIENT—OTHER ANNUITIES—ORDER OF PAYMENT—SPECIFIC LEGACY OF LUMP SUM PAYABLE AT DEATH OF WIDOW—INTEREST—DISTRIBUTION OF RESIDUE—ANNUITIES PAYABLE TO HEIRS ON DEATH OF ANNUITANTS IN LIFETIME OF WIDOW.

Re McLean, 14 O.W.N. 137.

DIVISION OF ESTATE—LEGACIES—INTEREST—ISSUE OF LEGATEES—"ACCUMULATION."

Re Hancock, 14 O.W.N. 171.

PAROL EVIDENCE—DOCUMENT LOST OR DESTROYED—SUCCESSION DUTY.

When a document is lost or destroyed, or is in the possession of a third party so that it cannot be produced, without the faults or collusion of the one who invokes it, its contents may be established by parol evidence. A universal legatee in usufruct who is in possession of property bequeathed is personally responsible to the creditors for the payment of succession duties.

Rolland v. Ball, 27 Que. K.B. 67.

SUCCESSION — PARTNERSHIP — UNIVERSAL LEGATEE — ACCEPTATION — BENEFIT OF INVENTORY—CONSERVATORY PROCESS—DEMAND OF ABANDONMENT OF PROPERTY—C.C. QUE. ARTS. 642, 1892—C.C. P ART. 1405.

A demand of judicial abandonment of property cannot be made to a universal legatee of one of the partners of a commercial firm, if such universal legatee has accepted the estate under the benefit of inventory only, while the delay to make inventory has not yet elapsed. The taking of possession of the property of the succession by means of a "saisie-conservatoire" by the universal legatee does not submit him to a demand of abandonment of property.

Lemesurier v. Mahoney, 47 Que. S.C. 94.

LAND DEVISED SUBJECT TO MORTGAGE—LIFE INSURANCE POLICY ASSIGNED AS COLLATERAL—WILLS ACT, R.S.S. 1909, C. 44, SS. 37, 38—NO INDICATION OF INTENTION THAT MORTGAGE BE PAID FROM INSURANCE.

By assigning a life insurance policy as collateral security for payment of a mortgage, a testator has not signified any "contrary intention" under ss. 37, 38 of the Wills Act so as to entitle the devises of the mortgaged land to have the mortgage debt satisfied out of the insurance or other personal property. And where the mortgagee applies the insurance moneys to the payment of the mortgage the land should stand charged with the amount for the benefit of those beneficiaries thus deprived of it.

Re Trustee Act; Re Rules of Court; Re Timmons Estate, [1919] 2 W.W.R. 932.

LEGACIES—ANNUITY—ORDER OF PAYMENT—"FIRST CHARGE."

Re McLean, 16 O.W.N. 81.

BEQUEST TO "ANY DAUGHTER UNMARRIED"—APPLICATION TO WIDOWED DAUGHTER.

Re Ranton, 17 O.W.N. 82.

TRUST-DEED—POWER OF APPOINTMENT—EXECUTION BY WILL—DEFECTIVE EXECUTION AIDED BY COURT—"PERSONAL ESTATE"—INCLUSION OF REAL ESTATE ACCORDING TO LANGUAGE USED BY TESTATOR — LEGACIES — ANNUITIES — REPUGNANCY — PRIORITY—PROVISION IN TRUST-DEED FOR LIFE-ANNUITY—PROVISION IN WILL FOR TEN-YEAR ANNUITY TO SAME PERSON—CUMULATIVE PROVISIONS.

Re Carss, 16 O.W.N. 156.

DEVISE OF FARM SUBJECT TO CHARGES IN FAVOUR OF LEGATEES—DISCLAIMER BY LEGATEES — INTESTACY — REALIZATION OF CHARGES—DUTY OF EXECUTOR — REGISTRATION OF CAUTION UNDER DEVOLUTION OF ESTATES ACT—ALLOWANCE TO WIDOW IN LIEU OF BOARD AND LODGING—AMOUNT FIXED BY COURT—MOTION UPON ORIGINATING NOTICE—COSTS.

Re McCallum, 16 O.W.N. 111.

(§ III A—75)—CONDITIONS—SUBSTANTIVE GIFT—TRUST OR CHARGE.

No precise form of words is necessary in order to create conditions in wills; any expression disclosing the intention will have that effect. A provision in a will expressed in the form of a condition may operate as a substantive gift by creating a trust or charge.

Re Cleghorn, 48 D.L.R. 511, 45 O.L.R. 540.

Where a will provided that certain bank stocks and bank deposits should be held by the executors in trust for the widow of testator, with power, if she should request it, to transfer them to her absolutely for her own use, a written request is not essential, and the widow's election or request may be shewn by proof of the transfer to her of the shares and bank deposits.

Fulton v. Dauphinee, 1 D.L.R. 63, 46 N. S.R. 168.

Specific devises of property to a son, in one clause of a will are not modified by a subsequent clause, which, following the provision for the distribution of the residue of the estate declares the intention of the testator in the distribution of his prop-

erty to be that his children should receive equal shares. The direction in a will as to the disposition of the interest of any of the testator's children in his estate, upon the death of any of them or upon the termination of the interest of any therein, occurring in a clause declaring the terms and conditions in the several devises and bequests given in trust, applies only to the property covered by that clause.

Re Jones, 3 D.L.R. 261, 3 O.W.N. 672, 21 O.W.R. 272.

The effect of a confirmatory clause in a codicil not specifically referring to the original will by date or otherwise, but purporting to be a codicil to the testator's last will, is to bring the will down to the date of the codicil and to effect the same disposal of the property as if the testator had at that date made a new will containing the same dispositions as the original will, but with the alterations introduced not only by the last codicil, but by the intermediate codicils, if any, so far as they remain unrevoked. [Re Fraser; Lowther v. Fraser, [1904] 1 Ch. 726; Re Champion, Dudley v. Champion, [1893] 1 Ch. 101, followed.]

Re Hunter, 1 D.L.R. 456, 25 O.L.R. 400, 21 O.W.R. 5.

READING CODICIL WITH WILL.

The intention of the testator with reference to the cutting down of an absolute gift in the original will by the terms of a codicil must be gathered from a consideration of the whole will and the codicil read together as one document.

Re Stanton, 9 D.L.R. 261, 4 O.W.N. 504.

CONSTRUCTION—INTENT—"MY ESTATE."

Under a will whereby the testator gives his widow the family residence during her natural life and a certain sum of money yearly to be paid to her in monthly instalments "so long as my estate will pay the same," and which will makes other bequests and a devise of land to the testator's son, with a direction that at the decease of the widow the proceeds of the residue and remainder of the estate, both real and personal, including the family residence, be divided among certain persons; the words "my estate," in the clause providing for the widow, mean the estate of the testator not otherwise devised or dealt with by the will, and the annuity of the widow is payable only out of that part of the estate which the executors have in hand, exclusive of the family residence and the particular bequests and the land devised to the son, notwithstanding that the will contains a power on the part of the executors to sell the real estate.

Re Erskine, 10 D.L.R. 93, 4 O.W.N. 702, 24 O.W.R. 15.

DIRECTION TO CONTINUE INTEREST IN PARTNERSHIP — VALUATION — INCREASE IN LAND VALUES.

Where a testator declared that at his death his interest in a partnership should be valued and remain in the business for five years, the surviving partner paying interest on such valuation, appreciations in value of partnership real estate belong to the estate on the distribution after the five year term.

Re Paterson, 11 D.L.R. 825, 4 O.W.N. 1435, 24 O.W.R. 752.

INCONSISTENT GIFTS IN A WILL—INTENTION OF TESTATOR.

Where there are inconsistent gifts in a will, the last gift will ordinarily prevail and will operate as a revocation of the first, but it must be reasonably clear that the testator so intends.

Re Freedy Estate, 13 D.L.R. 832, 23 Man. L.R. 763, 25 W.L.R. 378.

WORD PARTLY ERASED—PROBATE.

Upon a question of construction of a will the original will may be looked at, not to vary or cut down the words of which probate has been granted, but simply to enable such words to be interpreted by the court, and the exception is applicable where it appears that a vital word was partly erased by inadvertence in the original will, but was retained intact with its context in the probate standing unrecalled by the Surrogate Court.

Re Cooper, 14 D.L.R. 172, 5 O.W.N. 151, 25 O.W.R. 112, reversing in this respect, 13 D.L.R. 261.

"PERSONAL TERMINABLE ANNUITIES," MEANING OF.

Where the cessation of the "personal terminable annuities" of a will "through the death of the beneficiaries or otherwise," is a condition precedent to the accumulation and vesting in trustees of certain funds of the testator's estate to specific uses, the phrase, "personal terminable annuities" comprises all annuities given for life under the will.

Chisholm v. Journeay, 15 D.L.R. 495, 13 E.L.R. 575.

HOTCHPOT — BRINGING SETTLED PROPERTY INTO—VALUATION.

On a testamentary provision that certain legacies should be set aside for the use of the testator's children on their bringing into hotchpot property received by them under a marriage settlement, and that the residue of the testator's estate should be divided among them in certain proportions, the settled sums so brought into hotchpot are to be deducted from the legacies and not from their residuary shares. The value of the amount settled is to be ascertained, where the trustees have power to change the investments, as of the date of the settlement and not of the testator's death. [Kirkcudbright v. Kirkcudbright, 8 Ves. 51, 32 Eng. R. 369; Re Willoughby, [1911] 2 Ch. 581, applied.] Where, under such provision they acquire the income for life only of the settled fund, the full fund, and not merely the present value of the

life estate at the testator's death, must be brought into hotchpot.

Re Nordheimer, 14 D.L.R. 658, 29 O.L.R. 350.

Such a testamentary provision is a "direction to the contrary" under a marriage settlement of real property to the effect that a child should, in order to share in the testator's estate, bring the settled estate into hotchpot at a fixed valuation unless the testator should by will "direct to the contrary."

Re Nordheimer, 14 D.L.R. 658, 29 O.L.R. 350.

HOTCHPOT—WHAT MUST BE BROUGHT INTO.

A bequest of money and income to a son on condition that he keep up and maintain as a "gentleman's residence" certain property acquired under a marriage settlement, but of a lesser amount if he fails to do so, shews a clear intention on the part of the testator that the value of such property was not to be brought into hotchpot under a further testamentary provision that all money, property or interests received by or to which any of the testator's children were entitled under any marriage settlement should be brought into hotchpot in adjusting the several amounts to be set aside from the testator's estate for their benefit; since to hold otherwise would defeat the purpose of the bequest.

Re Nordheimer, 14 D.L.R. 658, 29 O.L.R. 350.

PRECATORY TRUST.

Re Soulliere and McCracken, 9 D.L.R. 879, 4 O.W.N. 1092, 24 O.W.R. 400.

INCONSISTENT RESIDUARY GIFTS — EFFECT GIVEN TO LATER ONE.

The rule that where two clauses in a will are repugnant and incapable of reconciliation the later must prevail applies to inconsistent residuary clauses. But, if there are two gifts in the same instrument, each sufficient to include the residuary estate, in a case where lapsed shares of the first gift would leave something for the second gift to operate upon, the first of the two gifts is preferred—i.e., the "rule of thumb" is not applicable because a meaning can be attributed to the last clause which removes the apparent repugnancy. After giving many substantial specific legacies, a testator in his will said: "The residue of my estate to go to the deserving poor of F." Then followed this clause: "Balance of my estate divided between those in the will pro rata:"—Held, that the two clauses were hopelessly inconsistent, and effect must be given to the last gift as the last intention of the testator.

Re Nolan, 40 O.L.R. 355.

"CHARGING MY EXECUTOR"—"OUT OF MY ESTATE."

The words "charging my executors to allow my mother . . . 15 shillings per week" denote a clear intention to create an annuity in favour of the testator's mother and should be given effect to by implying that the words "out of my estate" followed the word "executors."

Turner v. Kerr, [1917] 2 W.W.R. 1189.

RESIDUARY LEGATEES—VESTED ESTATES — DISCRETION OF EXECUTORS—PERIOD OF DISTRIBUTION—IMMEDIATE PAYMENT—SHARES OF INFANTS—COSTS.

Re Kean, 12 O.W.N. 15.

JOINT BEQUEST OF FARM IMPLEMENTS AND STOCK—DEVISE—EFFECT OF CODICIL—JOINT DEVISE TO TWO INFANTS—PROPERTY NOT SPECIFICALLY DISPOSED OF—INTESTACY.

Re Kelly, 12 O.W.N. 246.

CODICIL — AMBIGUITY — "ALL MY OTHER PROPERTY"—"ALL MY OTHER INSURANCE"—EVIDENCE AS TO STATE OF MIND OF TESTATOR—TESTAMENTARY CAPACITY.

Re Spink, 12 O.W.N. 308. [Affirmed in 41 O.L.R. 281.]

GIFT OF INCOME—INVESTMENT OF CORPUS — ABSOLUTE ESTATE — MENTAL INCAPACITY OF LEGATEE—PAYMENT OF CORPUS TO TRUST COMPANY.

Re Sheard, 7 O.W.N. 103.

GIFT OF WHOLE ESTATE TO WIFE SUBJECT TO THREE GIFTS FOLLOWING IT—LEGACIES PAYABLE OUT OF REAL ESTATE AFTER WIFE'S DEATH—GIFT OF PERSONAL ESTATE UNEXPENDED AT WIFE'S DEATH TO CHARITIES—REFERENCE TO ASCERTAIN AMOUNT "UNEXPENDED" — JUDGMENT FOR ADMINISTRATION OF ESTATE — RIGHTS OF HEIRS AT LAW AFTER PAYMENT OF LEGACIES.

British & Foreign Bible Society v. Shapton, 7 O.W.N. 658.

DEVISE TO WIDOW FOR LIFE FOR SUPPORT OF HERSELF AND CHILDREN — PROVISION FOR MAINTENANCE OF MINOR CHILDREN IN EVENT OF DEATH OF WIDOW—ABSOLUTE DEVISE TO CHILDREN ON DEATH OF WIDOW—ESTATES VESTED IN INDIVIDUALS AND NOT AS MEMBERS OF CLASS.

Re James, 16 O.W.N. 89.

ABSOLUTE GIFT—SUBSEQUENT WORDS CUTTING DOWN—EFFECT OF—GIFT OVER—FAILURE.

Re Miller, 6 O.W.N. 665.

CREATION OF TRUST FUND FOR PURPOSE OF PLACING MEMORIAL WINDOW IN DESIGNATED CHURCH—IMPOSSIBILITY OF CARRYING OUT PURPOSE—DISPOSITION OF TRUST FUND—APPLICATION OF PART FOR INSCRIPTION ON FAMILY MONUMENT—BALANCE AFTER PAYMENT OF COSTS FALLING INTO RESIDUE.

Re Grenier, 12 O.W.N. 362.

PRINTED FORM—MEANINGLESS PROVISIONS—DUTY OF COURT TO IGNORE—GIFTS FREE FROM TRUST—RESIDUARY ESTATE—INTESTACY.

Re Charlton, 13 O.W.N. 308.

DIFFICULTY IN ASCERTAINING MEANING OF TESTATOR—WORKABLE SOLUTION.

Re Williams, 13 O.W.N. 434.

DEVISE OF FARM TO ELDEST SON—PROVISION FOR USE OF FARM BY TWO OTHER SONS TILL DEVISEE "COMES TO RESIDE"—DEATH OF ONE SON—SURVIVOR CONTINUING IN POSSESSION—ACCEPTANCE OF LEASES FROM ELDEST SON IN IGNORANCE OF RIGHT—ESTOPPEL—INOPERATIVE RESTRICTION ON SALE OF FARM—RIGHT OF DEVISEE TO PUT AN END TO OCCUPATION BY "COMING TO RESIDE" OR BY SALE.

Greenlees v. Greenlees, 7 O.W.N. 432.

DEVISE TO WIDOW IN TRUST FOR SALE—BENEFICIAL ESTATE OF WIDOW—REMARRIAGE—USE OF CORPUS OF ESTATE FOR MAINTENANCE—ENCROACHMENT UPON CAPITAL.

Re Harrison, 5 O.W.N. 232, 25 O.W.R. 195.

DIVISION AMONGST "BROTHERS AND SISTERS AND THEIR CHILDREN"—RIGHT OF CHILDREN OF BROTHER AND SISTER DYING BEFORE DATE OF WILL—INTENTION.

Re Acheson, 5 O.W.N. 361.

BEQUEST OF INTEREST ON SPECIFIC SUM FOR LIVES OF THREE LEGATEES—INTEREST AFTER DEATH OF TWO FALLING INTO RESIDUE—PERIOD OF DISTRIBUTION OF ESTATE.

Re Campbell, 25 O.W.R. 110.

"STATUTORY RESERVATION"—WILL OF GOVERNMENT OFFICER—RETIREMENT FUND—FUNERAL EXPENSE.

A provision in the will of a Dominion Government officer, who is included under R.S.C. c. 17, s. 2, that the amount at his credit in the retirement fund, which he designates by the words "statutory reservation:" shall be employed to defray the cost of his funeral, is void, this amount not being included in the estate he left. And where the amount had been assigned to his wife by the treasury board in virtue of c. 17, s. 30, a particular legacy which he left to her is not affected.

Carrier v. Roy, 46 Que. S.C. 122.

SUBSTITUTION—PARTITION—RATIFICATION—EXPENSES TO OBTAIN IT—ACTION IN REM VERSO—CONSENT—C.C., ARTS. 689, 748, 960.

Where in a substitution the institute and the substitutes have made a partition, and one of the latter having sold a property allotted to him, is called in warranty by the buyer, on the ground that the partition is illegal, the vendor, if he incurs considerable expense in obtaining the ratification of the deed by all the heirs, cannot sue each of them for his share unless he proves that he was authorized to act for them. The action known as de in rem verso implies the tacit or implied consent of the person whose business has been managed. If it is proved that this consent did not exist, the action cannot be maintained.

Adams v. Adams, 28 Que. K.B. 278.

LONG LEASE—ESTATE IN ENTAIL—LESSEE—C.C. QUE. ART. 569.

Fraser v. Riviere-du-Loup Pulp Co., 25 Rev. de Jur. 271.

CONSTRUCTION—NO INTESTACY—INTERESTS OF RESIDUARY LEGATEES WERE VESTED.

Re Estate of John Sanfield Macdonald, 19 O.W.R. 385.

DEVISE OF REAL ESTATE—WHEN DEVISEE ATTAINS MAJORITY—FEE SIMPLE—INTENTION OF TESTATOR.

Re Jebb, 19 O.W.R. 348, 2 O.W.N. 1163.

CONSTRUCTION—SETTLED ESTATES ACT—POWER OF SALE OF EXECUTORS—REPRESENTATION OF UNBORN ISSUE.

Macdonald v. Peters, 19 O.W.R. 404.

LIFE ESTATE—REMAINDER—PERIOD OF DISTRIBUTION.

Re Miller, 2 O.W.N. 782, 18 O.W.R. 646.

CONSTRUCTION—SETTLED ESTATES ACT—TRUST FOR SALE—REPRESENTATION.

Re Phipps, 19 O.W.R. 149.

CONSTRUCTION—DEVISE TO TAKE EFFECT AFTER DEATH OF THE WIFE OF TESTATOR—VESTED INTEREST.

Re Cook Estate, 19 O.W.R. 70.

DEATH OF LEGATEE—REGARDING INCOME OF LEGACY.

Re Leitch, 2 O.W.N. 714, 18 O.W.R. 528.

RESIDUARY CLAUSE—INSURANCE MONEYS—DEDUCTION FROM SHARES OF LEGATEES.

Re Lenz, 2 O.W.N. 721, 18 O.W.R. 556.

DEVISE TO HUSBAND—LIFE ESTATE AND REMAINDER—ESTATE IN FEE.

Re Mulgrew, 18 O.W.R. 559.

DEVISE TO WIFE—INTENTION—LIFE ESTATE.

Re Cotterill, 18 O.W.R. 560.

CONSTRUCTION—DEPOSITION OF THE INCOME—INTENTION OF TESTATOR.

Toronto General Trusts Corp. v. Goad, 19 O.W.R. 450, 2 O.W.N. 1244.

PRIMARY SCHEME OF THE WILL—ALTERNATIVE SCHEME.

Re Salter, 2 O.W.N. 858, 18 O.W.R. 815.

CONSTRUCTION—MOTION FOR BY EXECUTORS AND TRUSTEES—DIVISION AT DEATH OR UPON REMARRIAGE OF WIDOW—CLASS IS THEN DETERMINED.

Re McLaren, 3 O.W.N. 84, 20 O.W.R. 35.

DEVISE TO WIDOW OF A SPECIFIED ANNUITY—CONSTRUCTION—PAYMENT NOT LIMITED TO PARTICULAR FUND—MEANING OF "THE WHOLE."

Re John Plaetzer Estate, 19 O.W.R. 294, 2 O.W.N. 1143.

DEVISE TO EXECUTORS TO BE DIVIDED AMONGST CREDITORS—TRUST—DUTY OF COURT—STATUTE-BARRED CREDITORS.

Re Alice Kerr, 19 O.W.R. 642.

CONSTRUCTION—LEGACY TO EXECUTOR—REVOKED BY CODICIL.

Re Bassett, 19 O.W.R. 420, 2 O.W.N. 1219.

CONSTRUCTION—LEGATEE PREDECEASING TESTATRIX—LEFT ISSUE WHO CLAIMED LEGACY—PROVISION IN WILL IF LEGATEES DIED WITHOUT ISSUE, THEIR LEGACIES SHOULD FORM PART OF RESIDUARY ESTATE.

Re McNeill, 20 O.W.R. 203.

CONSTRUCTION—MONEY DEPOSITED IN TRUST COMPANY BY TESTATOR—SUBJECT TO TRUST—BALANCE AFTER WIDOW'S DEATH TO GO TO DAUGHTER—WIDOW DID NOT MAKE REGULAR WITHDRAWALS.

Re Sherwood, 20 O.W.R. 488.

CONSTRUCTION — NAME OF LEGATEE — ASSUMED MOTHER'S MAIDEN NAME—NOT KNOWN TO SOLICITOR WHO DREW WILL—IDENTITY OF PERSON WELL KNOWN.

Re Catherine Gordon, 20 O.W.R. 528.

PRECATORY TRUST—PROCEEDS OF SALE OF RIGHT TO SUBSCRIBE FOR NEW SHARE.

Re Walton Estate, 20 Man. L.R. 686, 16 W.L.R. 679.

CONSTRUCTION—DIVIDING FORM—NATURAL CONSTRUCTION—TESTATOR'S INTENTION—LEAVE TO MORTGAGE.

Shepard v. Shepard, 19 O.W.R. 497, reversing 19 O.W.R. 25, 2 O.W.N. 1012.

RELEASES BY LEGATEES—EVIDENCE OF HUSBAND AND WIFE AS CORROBORATION—CONSTRUCTION OF RELEASE.

Garland v. Emery, 19 O.W.R. 467.

CONSTRUCTION—MOTHER GAVE SON BOND FOR $4,000 FOR SERVICES PERFORMED—BOND NEVER FULLY PAID—BONDHOLDER SIGNED QUITCLAIM DEED TO ADMINISTRATOR—RECITAL THAT ALL DEBTS AGAINST MOTHER WERE PAID.

Re Dale, 3 O.W.N. 329, 20 O.W.R. 546.

(§ III A—76)—IMPLIED GIFT.

An absolute gift by bequest of the proceeds of an investment will constitute a gift by implication of the corpus, where the will clearly shews that such was the testator's intention.

Re Ley, 5 D.L.R. 1, 17 B.C.R. 385, 21 W.L.R. 757, 2 W.W.R. 790.

(§ III A—77)—BLANK WILL FORM—CONTEXT.

Where a testator drew his own will upon a "blank will form" and left blank the space where ordinarily would be found the name of residuary devisee but filled in his wife's name in the blank next following for the appointment of executors, so that read together the wording was, "All the residue (etc.) I give (etc.) unto . . . . . And I nominate and appoint Mrs. Isabella Dorward to be executrix," both clauses may be read together as disclosing an intention to give his property to his wife so named as well as to appoint her executrix, where otherwise there would be an intestacy.

Re Dorward, 10 D.L.R. 615, 4 O.W.N. 1248, 24 O.W.R. 545.

LEGACY IN TRUST—VAGUE OR INDEFINITE AMOUNT.

Where the testator requires a fund to be set aside and declares the trusts thereof, but the amount is not specifically mentioned other than that a loan up to a specified sum is authorized to be made out of same, the court may construe the will as constituting a trust to the extent of the sum specified, subject to proportionate abatement of legacies if a deficiency exists.

Re Campbell, 10 D.L.R. 311, 4 O.W.N. 760, 24 O.W.R. 30.

GIFT OF PROPERTY TO TRUSTEE AND EXECUTRIX—FAILURE TO NAME BENEFICIARY—BLANK LEFT IN WILL—WILLS ACT, S. 58—TRUST AS IN CASE OF INTESTACY.

Re Leblond, 7 O.W.N. 398.

(§ III A—78)—WILL WRITTEN BY SEAMAN—ON ENVELOPE UNDER STAMP—PROBATE—CONSTRUCTION—VALIDITY.

A will, written by a seaman on an envelope, addressed to the young lady to whom he was shortly to be married; in the following words: "If I never return my will for you is two thousand five hundred $2000, 500, my share land shares vessels remainder for mother," held to be properly interpreted as giving the fiancée the shares of the vessels owned by the deceased. The will having been admitted to probate by the Judge of Probate after proof in solemn form there was no appeal from his decree.

Re Wentzell, 46 D.L.R. 83.

MISSING WORD, WHEN SUPPLIED.

In construing a will, the court has power in a proper case to supply a missing word, and where the contents shew that a word has been undesignedly omitted and demonstrate what addition by construction will fulfill the intention with which the document was written, the addition will by construction be made, especially where the provision at issue would be absolutely meaningless, unless the missing word were supplied.

Re Cooper, 14 D.L.R. 172, 5 O.W.N. 151, 25 O.W.R. 112, reversing in this respect 13 D.L.R. 261.

B. DESCRIPTION OF BENEFICIARIES; WHO MAY TAKE.

(§ III B—80)—DESCRIPTION OF BENEFICIARIES—WHO MAY TAKE.

Where a legacy is left by will to persons not named but who are so described by reference to some extrinsic fact that they could be ascertained by extrinsic evidence at the time when the legacy is to take effect, the bequest will be sustained; hence, a bequest in the following words:—"to the party at whose house I die" is not void on the ground of uncertainty.

Re Woeffle, 1 D.L.R. 105, 20 O.W.R. 896.

CLASS—UNCERTAINTY—ERROR IN ENUMERATING.

A bequest to a class will not be held void for uncertainty for a mistake in enumerating the numbers thereof. [Re Stephenson; Donaldson v. Bamber, [1897] 1 Ch. 75.]

Re Cooper, 13 D.L.R. 261, 24 O.W.R. 665, 4 O.W.N. 1360. [See 14 D.L.R. 172, 5 O.W.N. 151, 25 O.W.R. 112.]

A misnomer of a church society will not defeat a devise or bequest to it, if its identity is otherwise sufficiently certain.

Re Swayzie, 3 D.L.R. 631, 21 O.W.R. 95.

A bequest to an incorporated religious body is not void for uncertainty as to the devisee or legatee, if the persons intended to be benefited can be ascertained with reasonable certainty. [Adams v. Jones, 9 Hare 485; Jones v. St. Stephen's Church, 4 N.B. Eq. 316, followed.]

Van Wart v. Synod of Fredericton, 5 D.L.R. 776, 42 N.B.R. 1.

The words "the recipients of this will" may be construed as "the beneficiaries under the will." For the purpose of ascertaining the persons intended to be benefited by a will, evidence of the names by which the testator habitually called certain persons is admissible.

Re Seaton, 8 D.L.R. 204, 4 O.W.N. 266.

Where a will provided that on a given event the legatees under "this my will" should share a certain fund proportionately, legatees under a codicil to that will do not share with the legatees named by the will in that fund, where the codicil is not, by its terms, made part of the will. [Henwood v. Overend, 1 Mer. 23; Hall v. Severne, 9 Sim. 515, followed.]

Adams v. Gourlay, 4 D.L.R. 731, 26 O.L.R. 87, 21 O.W.R. 772.

WHEN ANNUITANT IS A "PECUNIARY LEGATEE."

A mere annuitant under a will may be a "pecuniary legatee," within the meaning of that term in the residuary clause, where no contrary intention appears in the will, and where in aid of such construction it appears that the will contains other bequests to which the term "pecuniary" could not apply.

Kennedy v. Kennedy, 11 D.L.R. 329, 4 O.W.N. 607, 28 O.L.R. 1. [Affirmed, 13 D.L.R. 707, 24 O.W.R. 943.]

CLASS—UNCERTAINTY—ERROR IN ENUMERATING.

Re Cooper, 14 D.L.R. 172, 5 O.W.N. 151, reversing 13 D.L.R. 261.

RESIDUARY ESTATE—PROVISION FOR ANNUITIES—GIFT TO "ALL LIVING CHILDREN"—GIFT TO CHILDREN ATTAINING 21 YEARS — PERIOD OF DISTRIBUTION — CLASS—GIFT TO CHILDREN OF TWO FAMILIES—GIFT PER CAPITA—CODICIL CONSTRUED TO CHANGE GIFT PER CAPITA TO GIFT PER STIRPES.

A gift to "all living children" of a person comprehends those living at the testator's death and those who are at that time en ventre sa mere. It is an immediate gift to them on the testator's death, notwithstanding that it is gift of the residuary estate and part of the estate has been set aside to provide annuities, which part will not fall into the residuary estate until the death of the annuitants. When a gift is made to children attaining the age of 21, the period of distribution is the date upon which the eldest child attains that age. All children coming into existence before that period has arrived are entitled to participate in equal degree with the other children who attain 21 years. Upon the eldest child attaining 21, the class will be closed and no child born after that time will be entitled to participate. By his will a testator directed that the residue of his estate should be paid "share and share alike to all living children" of his brother G.R. Charlton and his sister, L.J. Miller. By a codicil he directed that "should any of the children of my sister L.J. Miller one of the beneficiaries named in my said will die before attaining the age of 21 years the share to which she, he or they would otherwise be entitled shall go to those children of my sister who do attain the age of 21 years to be equally divided between them." It was held that, although without the codicil the will should be construed as a gift to the Charlton and Miller children per capita, the codicil indicated an intention that the distribution should be per stirpes. Although the postponement of the period of distribution as to some of the beneficiaries might not in itself be sufficient to show an intention that the distribution should not be per capita, yet such intention is shown where the share of a child dying is given, not to the other member of the class, but to the brothers and sisters of such child. The gift in question should therefore be divided into as many parts as there were living children of G.R. Charlton and L.J. Miller at the time of the testator's death and apportioned in proportion to the number of children in each family. As, at the testator's death, there were four Miller children and eight Charlton children, one-third of the gift should be set aside for the Miller children and when the eldest Miller child should attain 21 it would be entitled to a share of that one-third in proportion to the number of Miller children then living.

Re Charlton Estate, [1919] 1 W.W.R. 134.

DIVISION OF ESTATE AMONG NAMED BROTHERS AND SISTERS BY ONE BROTHER "ACCORDING TO HIS BEST JUDGMENT"—TRUST — IMPERATIVE DIRECTION — DISCRETION — LIMITED POWER — DIVISION BASED UPON EQUALITY — EXERCISE OF JUDGMENT AS TO ATTAINING EQUALITY —TENANCY IN COMMON—ONE SISTER NAMED IN WILL PREDECEASING TESTATOR —INTESTACY AS TO HER SHARE—ASCERTAINMENT OF NEXT OF KIN OF TESTATOR AT HIS DEATH—SISTER SURVIVING TESTATOR BUT DYING BEFORE DIVISION—VESTED SHARE PASSING TO REPRESENTATIVES.

Re Hislop, 7 O.W.N. 614.

TRUST "WHATEVER BELONGS TO ME"—INCLUSION OF REALTY—AVOIDANCE OF—INTESTACY—DEVISE TO WIFE "FOR HER OWN USE AND FOR THE BRINGING UP OF MY CHILDREN"—DISCRETION OF WIFE—INTEREST OF CHILDREN.

Re Culbert, 9 O.W.N. 312.

LEGACY TO DAUGHTER — SETTLEMENT IN TRUST.

Re Dixon, 8 O.W.N. 294, 405.

BEQUEST TO DAUGHTERS—POWER TO RECEIVE INTEREST AND DISPOSE OF PRINCIPAL BY WILL—ABSOLUTE RIGHT TO MONEYS BEQUEATHED — RESIDUARY CLAUSE — EXCLUSION OF CHILDREN FROM SPECIFIC BEQUEST—EFFECT AS TO RESIDUE.

Re Tanner, 10 O.W.N. 179.

DIVISION OF FUND AMONG CHILDREN OF TWO NAMED PERSONS — DISTRIBUTION PER CAPITA OR PER STIRPES—PERIOD OF DISTRIBUTION—UNBORN CHILDREN.

Re Walmsley, 11 O.W.N. 124.

BROTHERS AND SISTERS AND CHILDREN OF DECEASED BROTHERS AND SISTERS—PERIOD OF ASCERTAINMENT—DEATH OF TESTATOR—VESTED SHARES—PER CAPITA DISTRIBUTION — CHILDREN OF DECEASED CHILDREN.

Re Bauman, 11 O.W.N. 55.

PROVISION FOR DAUGHTER—"HOME WITH HER MOTHER" WHILE UNMARRIED — DEATH OF MOTHER—TERMINATION OF LIFE ESTATE.

Re Fairchild, 6 O.W.N. 35.

LEGACY PAYABLE ON CONDITIONS—DUTY OF EXECUTORS—BEQUEST OF INCOME TO DAUGHTER—DEATH OF DAUGHTER BEFORE DEATH OF TESTATOR—RESIDUARY DEVISE TO DAUGHTER—LAPSE BY REASON OF PREDECEASE—GIFT OVER—HEIRS OF WOMAN STILL LIVING BUT WITHOUT ISSUE—INVESTMENT OF FUNDS OF ESTATE —LIMITATIONS OF SECURITIES BY WILL —EXECUTORS PERMITTED TO INVEST IN SECURITIES AUTHORIZED BY TRUSTEE ACT.

Re Heal, 13 O.W.N. 285.

DIRECTION TO SELL LAND AND DIVIDE PROCEEDS AMONG UNCLES AND AUNTS AND THEIR HEIRS AND ASSIGNS—SHARE OF UNCLE SURVIVING TESTATOR, BUT DYING BEFORE TIME FOR SALE AND DIVISION—SHARE TAKEN AS PERSONALTY—DEVOLUTION AS UPON INTESTACY, WILL OF UNCLE NOT DISPOSING OF PERSONALTY.

Re Konkle, 13 O.W.N. 404.

BEQUEST TO WIDOW—"REST"—"RESIDUE"—ENCROACHMENT FOR MAINTENANCE.

Re Achterberg, 5 O.W.N. 755.

RESIDUARY BEQUEST TO "RELATIONS WHO ARE NEEDY" — DISCRETION OF EXECUTORS AS TO PERSONS AND AMOUNTS—LIMITATION TO BLOOD RELATIONS, BUT NOT TO NEXT OF KIN UNDER STATUTE OF DISTRIBUTIONS—DISCRETION TO BE EXERCISED IN GOOD FAITH AND WITHIN REASONABLE TIME—EXECUTORS THEMSELVES INCLUDED IN "NEEDY RELATIONS."

Re Cawthrope, 6 O.W.N. 716.

DEFINITENESS.

A will should dispose of the property bequeathed in such a manner that the testamentary executor can be compelled to carry out the provisions of the will if he refuses to do so voluntarily.

Hastings v. MacNaughton, 51 Que. S.C. 174.

"FAMILY."

In a will the word "family" must be construed to refer solely to the children of the testator.

Ex parte Allison, 51 Que. S.C. 188.

LEGACY—JOINT OR SEVERAL.

When husband and wife each make a will on the same day and before the same notary, each appointing their son the universal legatee subject to payment to the children of his sister of a special legacy, these legacies are not joint but separate, and the universal legatee should pay the legacy of his father and also that of his mother.

Dubuc v. Sautels, 26 Que. K.B. 352.

RESIDUARY CLAUSE—EXECUTORS TO DISPOSE OF RESIDUE "IN SUCH MANNER AS MAY IN THEIR DISCRETION SEEM BEST"—TRUST — BENEFICIAL INTEREST —NEXT OF KIN.

Re Miles, 11 O.W.N. 292.

IDENTITY OF LEGATEE—ORDER DECLARING — PAYMENT OF LEGACY BY EXECUTORS.

Re McFarlane, 11 O.W.N. 319.

DEVISE TO WIFE—"SHOULD MY WIFE CEASE TO BE MY WIDOW"—DEVISE OVER TO CHILDREN—ESTATE OF WIFE TERMINABLE AT DEATH OR REMARRIAGE.

Re Anderson, 11 O.W.N. 415.

DEVISE TO DAUGHTERS—EXECUTORY DEVISE UPON DEATH OF ONE WITHOUT ISSUE—ABSOLUTE ESTATES OF SURVIVORS—COSTS OF MOTION FOR CONSTRUCTION.

Re Fierheller, 11 O.W.N. 417.

DEVISE AND BEQUEST TO DAUGHTER UPON DEATH OF WIFE—DAUGHTER PREDECEASING WIFE—VESTING AT PERIOD OF DEATH OF TESTATOR—ENJOYMENT ONLY POSTPONED TILL DEATH OF WIFE.

Re Rose, 13 O.W.N. 23.

ABSENT LEGATEE — PRESUMPTION OF DEATH BEFORE DEATH OF TESTATRIX—ADVERTISING.

Re Bell, 13 O.W.N. 136.

GIFT TO SON—GIFT OVER TO DAUGHTER IN EVENT OF DEATH OF SON — VALIDITY—GIFT OF CORPUS TO DAUGHTER UPON ATTAINING CERTAIN AGE—NO GIFT OVER—INVALIDITY OF GIFT — TRUST — CONDITIONS — POWER AND DISCRETION OF TRUSTEE—CONTROL BY COURT—BENEFIT OF LUNATIC—RIGHT OF INSPECTOR OF PRISONS AND PUBLIC CHARITIES TO PAYMENT OF FUND — MAINTENANCE OF LUNATIC IN HOSPITAL FOR INSANE — POSSIBLE RIGHT OF "ISSUE" OF LUNATIC..

Dunlop v. Ellis, 41 O.L.R. 303.

DISTRIBUTION OF RESIDUE AMONG MEMBERS OF CLASS OF LEGATEES — "LEGATEES" CONFINED TO PERSONS GIVEN DIRECT PECUNIARY LEGACIES—APPLICATION FOR DETERMINATION OF QUESTION OF CONSTRUCTION — COSTS — EXECUTORS — BENEFICIARIES.

Re Fulton, 15 O.W.N. 220.

DEVISE OF FARM TO SON FOR LIFE SUBJECT TO CHARGE OF LEGACIES AND ANNUITY TO WIDOW—DEATH OF SON BEFORE PAYMENT OF LEGACIES — SURVIVAL OF WIDOW — RESIDUARY GIFT — SALE OF FARM—DISPOSITION OF PROCEEDS.

Re Smith, 15 O.W.N. 45.

FAITH OF BENEFICIARIES—PUBLIC POLICY.

A codicil to a will, which declares that any of the children of the testator who shall be members of any denomination or church, usually known as baptists or anti-pedo baptists, or whose doctrine or practice is opposed to the baptism of infants, shall only be entitled to receive one-half of his share as institute, substitute or legatee of his estate, and to the whole of his share only by a bona fide discontinuation of membership of this denomination or church, is not void as contrary to public order and good morals.

Thorton v. Parker, 54 Que. S.C. 413.

BEQUESTS TO WITNESS—NULLITY—INTESTACY.

A legacy to a witness of a will, in English form, is void, but does not affect the other provisions of the will. If such legatee is also made the testamentary executor, under an arrangement by which he accepts a fixed sum in lieu of his legacy and all his rights, such acceptance is not a ratification of the contested provision of the will, and the legacy made to the witness being void, the property illegally given remains in the ab intestat succession of the testator.

Vandette v. Vandette, 24 Rev. Leg. 220.

UNIVERSAL LEGATEE—STRANGERS.

The universal legatee, who was made a colegatee in undivided ownership by a will, is entitled to take part in the partage or division of the estate of said deceased whenever the same takes place. He has the right to exercise the action in "retrait successoral" against a stranger who has bought, before any partage, from one of the colegatees the universality of the rights and interests of the latter in the said estate. An inscription in law against such action is unfounded.

Laforest v. Aubry, 18 Que. P.R. 82.

The designation of a fiduciary legatee by these words of a will, "the Protestant Corporation of the town (Megantic)" does not apply, either separately or jointly, (a) to the Methodist church of the Town of Megantic; (b) to the Presbyterian church of the Town of Megantic; (c) to the Anglican church of the Town of Megantic.

Latulippe v. Methodist Church of Megantic, 43 Que. S.C. 360.

(§ III B—81)—DESCRIPTION OF BENEFICIARIES AS "HEIRS."

The use of the word "heirs" in a will is not always limited to its technical sense, but may be synonymous with legatees or devisees.

Re Freedy Estate, 13 D.L.R. 832, 23 Man. L.R. 763, 25 W.L.R. 378.

"HEIRS"—LEGAL AND COLLOQUIAL MEANINGS, CONSIDERED.

In a will in which the testator made bequests to a number of persons, some of whom were his nephews and nieces, and were so designated in the will, while the remaining legatees were strangers, and then a subsequent clause provides for a distribution of certain remaining moneys equally "among the aforesaid heirs," the word "heirs" in this connection must be given its strictly technical and legal interpretation instead of its popular signification, and, in the absence of circumstances preventing the court from adopting such strict meaning, the expression will be construed to mean those persons named in the will who would be entitled to the estate if there were an intestacy. [Re Hull, 63 N.Y. Supp. 725, 30 Misc. 281, distinguished.]

Re Phillips, 11 D.L.R. 52, 4 O.W.N. 898, 24 O.W.R. 185.

MEANING OF HEIRS—ESTATE IN FEE SIMPLE IN REMAINDER—ESTATE TAIL.

Re Ley, 5 D.L.R. 1, 17 B.C.R. 385, 2 W.W.R. 790, 21 W.L.R. 757.

Where land is devised to sons of the testators after a prior life estate with the provisions that "should any of the boys marry and have heirs, and should die die before this property is divided"—i.e., at the determination of the life estate—the word "heirs" means "children."

Re Lane and Beacham, 7 D.L.R. 311, 4 O.W.N. 243, 23 O.W.R. 250.

"INTEREST OF STOCK" SUED AS MEANING SHARES IN COMPANY — "ANY MALE HEIRS"—EQUALLY DIVIDED BETWEEN—PERSON IN EXISTENCE AND UNASCERTAINED CLASS OF PERSONS—VESTED INTEREST—COSTS.

Re Challoner, 7 O.W.N. 742.

DEVISE—"HEIRS" — ESTATE TAIL—VENDOR AND PURCHASER.

Re Finlay and Darling, 8 O.W.N. 193.

"NEAREST HEIRS" — ASCERTAINMENT — EVIDENCE—INCOMPLETENESS—NOTICE.

Re Locker, 11 O.W.N. 246.

DEVISE AND BEQUEST TO WIFE FOR LIFE—AT DEATH TO "BE DIVIDED AMONG HER HEIRS AS SHE MAY DIRECT"—GIFT TO CLASS—DEATH OF WIFE WITHOUT DIRECTION—DIVISION AMONG HEIRS IN EQUAL SHARES PER CAPITA — ASCERTAINMENT OF CLASS AT DATE OF WIFE'S DEATH.

Re McKenzie, 12 O.W.N. 159.

DEVISE TO SON AND HIS HEIRS—SUBSEQUENT CLAUSE OF WILL CONTAINING DEVISE OVER IN EVENT OF SON WITHOUT ISSUE — ESTATE TAIL — WILLS ACT, R.S.O. 1914, c. 120, s. 33.

Re McLellan, 12 O.W.N. 233.

CONSTRUCTION — POWER OF EXECUTOR TO SELL LANDS—TRUST FOR SALE — SURVIVING EXECUTOR—TRUSTEE ACT, ss. 2 (q), 44, 49—DEVOLUTION OF ESTATES ACT, ss. 14, 15, 19, 21, 23—SALE FOR PURPOSE OF DISTRIBUTION — PERSONS ENTITLED UNDER WILL—BROTHERS AND SISTERS "OR THEIR HEIRS"—PERIOD OF ASCERTAINMENT — BROTHERS OF HALF BLOOD—HEIRS LIVING AT TIME OF DISTRIBUTION—PER STIRPES DIVISION.

Re Waugh; Re Scott and Scott, 42 O.L.R. 87.

GIFTS OF "BALANCE" OR RESIDUE — "MY HEIRS NAMED IN THIS WILL AS DEVISEES"—INCLUSION OF LEGATEES.

Re Bolton, 14 O.W.N. 87.

CHILDREN "AS HEIRS"—ESTATE TAIL.

Re Priester, 23 O.W.R. 652.

(§ III B—82)—DEVISE TO SONS—SUBSTITUTIONAL DEVISE TO ISSUE OF SON—POSSIBLE INTESTACY IN CERTAIN EVENTS —TITLE TO LAND — VENDORS AND PURCHASERS ACT.

Re Mino and Ellis, 7 O.W.N. 240.

(§ III B—83)—CHILDREN — STEPCHILDREN —GRANDCHILDREN.

Special circumstances must be shewn to warrant the inclusion of a stepchild of a deceased sister of the testator in distributing a bequest made in terms to the children of such deceased sister. The interpretation of the word "children" in a bequest can only be altered from its proper meaning so as to include grandchildren if on a proper construction of the will it is found to have been intended to bear the larger signification. [Re Kirk; Nicholson v. Kirk, 52 L.T. 346, followed.]

Re Morrow, 22 D.L.R. 592, 8 O.W.N. 246.

DEVISE TO CHILDREN ON REMARRIAGE OF WIDOW — ONE CHILD SUBSCRIBING WILL AS WITNESS—WILLS ACT, R.S.O. 1914, c. 120, s. 17—DEVISE TO CLASS—FAILURE OF GIFT TO ONE OF CLASS—PARTITION AMONG REMAINING CHILDREN — COSTS—ALLOWANCE FOR REDUCTION OF MORTGAGE BY WIDOW BEFORE REMARRIAGE.

Depatie v. Bedard, 8 O.W.N. 423.

PARTNERSHIP BETWEEN FATHER AND SON—BEQUEST BY FATHER TO SON OF HALF SHARE IN PROPERTY OF PARTNERSHIP AND DIVISION OF REMAINING HALF AMONG ALL CHILDREN EQUALLY — EFFECT OF—ELECTION — LIABILITY TO ACCOUNT.

Re Wallace, 7 O.W.N. 683.

ADOPTED CHILDREN — DIVISION OF ESTATE AFTER DEATH OF WIDOW "BETWEEN" ADOPTED DAUGHTER AND CHILDREN OF TWO SISTERS — ADOPTED DAUGHTER ENTITLED TO ONE-HALF—CHILDREN OF SISTERS TO SHARE REMAINING HALF PER CAPITA—PERIOD OF VESTING —ABSENCE OF RESIDUARY CLAUSE—ADOPTED DAUGHTER DYING AFTER TESTATOR BUT BEFORE WIDOW — AVOIDANCE OF LAPSE — CHILDREN TAKING SHARE OF PARENT.

Re Puley, 8 O.W.N. 42, 306.

"CHILDREN"—GRANDCHILDREN.

In a gift to "children," "grandchildren" are not included.

Pemberton Estate v. Lewis, 25 B.C.R. 118, [1917] 3 W.W.R. 791.

The word "children" in a legacy "as to the remainder of my property I desire that it be divided in equal parts among my eight children in full ownership," includes "grandchildren."

Plouffe v. La Pierre, 52 Que. S.C. 151.

DISTRIBUTION OF ESTATE AFTER DEATH OF WIFE—STATUTORY NEXT OF KIN — PER CAPITA DISTRIBUTION.

Re Labatt, 11 O.W.N. 250.

GIFTS TO BROTHERS AND SISTERS AFTER DEATH OF WIDOW—ALTERNATIVE GIFTS TO CHILDREN OF DECEASED BROTHERS AND SISTERS AND HEIRS OF THOSE DYING CHILDLESS—TIME OF VESTING—PERIOD OF DISTRIBUTION — ASCERTAINMENT OF PERSONS ENTITLED TO SHARE — DIVESTMENT OF VESTED ESTATES.

Re Dardis, 11 O.W.N. 331, 12 O.W.N. 209.

GIFT TO CHILDREN OF NAMED PERSON—SUM TO BE SET APART AND INVESTED—SUM WITH ACCUMULATIONS TO BE DIVIDED AT MAJORITIES OF CHILDREN RESPECTIVELY —ONLY ONE CHILD IN BEING — VESTED ESTATE—UNBORN CHILDREN.

Re Massey Treble Estate, 12 O.W.N. 20.

ESTATE GIVEN TO CHILDREN IN EQUAL SHARES — ABSENCE OF RESIDUARY CLAUSE—ONE CHILD DYING BEFORE TESTATRIX—LAPSE OF SHARE — INTESTACY —RIGHT OF CHILDLESS WIDOW OF DECEASED CHILD—ASSIGNMENT OF SHARE —EFFECT UPON FURTHER SHARES ACCRUING ON INTESTACY.

Re Eddy, 12 O.W.N. 143.

DISTRIBUTION OF RESIDUE OF ESTATE—PERIOD FOR DISTRIBUTION—WILL SPEAKING FROM DATE—WILLS ACT, R.S.O. 1914, c. 120, s. 27—PERSONS ENTITLED TO SHARE—CHILDREN AND GRANDCHILDREN VESTED GIFTS.

Re Cleaver, 12 O.W.N. 377.

GIFT TO SURVIVING CHILDREN—RELATION TO PERIOD OF DISTRIBUTION.

Re Douglas, 13 O.W.N. 171.

WILL—GIFTS TO CHILDREN—GIFTS OVER IN EVENT OF CHILDREN DYING WITHOUT HAVING RECEIVED THEIR PORTION—CONTEST BETWEEN EXECUTORS AND CHILDREN OF DECEASED CHILD OF TESTATOR—EFFECT OF DIVESTING CLAUSE.

Re Mitchell, 14 O.W.N. 2.

BEQUEST OF BANK-SHARES TO EXECUTORS IN TRUST—INCOME TO BE PAID TO WIDOW FOR LIFE—AFTER DECEASE OF WIDOW SHARES TO BE DIVIDED AMONG CHILDREN "THEN LIVING"—DISTRIBUTION TO BE MADE AT DEATH OF WIDOW AMONG CHILDREN THEN LIVING — EXCLUSION OF REPRESENTATIVES OF CHILDREN PREDECEASING WIDOW.

Re Barnett, 14 O.W.N. 82.

BEQUEST TO INFANT—GIFT OVER IN EVENT OF DONEE SURVIVING TESTATOR AND DYING BEFORE ATTAINING MAJORITY—"AND" — "OR" — VESTED INTEREST NOT SUBJECT TO BE DIVESTED — DONEE SURVIVING TESTATOR AND BEING STILL AN INFANT.

Re Stamp, 14 O.W.N. 80.

EFFECT OF CODICILS — ESTATE — FEE SIMPLE—LIFE-ESTATE — REMAINDER — WILLS ACT, S. 31—DEVOLUTION OF ESTATES ACT, SS. 3 (1), 30, 31 —DEVISE TO "GRANDCHILDREN" OF CHILDREN READ AS DEVISE TO "CHILDREN" OF CHILDREN — CONTEXT — INTENTION OF TESTATRIX—TAKING PER STIRPES.

Re Armstrong, 15 O.W.N. 148, 271.

DEVISE OF LIFE ESTATE TO WIFE FOR BENEFIT OF FAMILY — DIRECTION TO EXECUTORS TO SELL AT DEATH OF WIFE AND DIVIDE PROCEEDS AMONG CHILDREN — VESTED ESTATES OF CHILDREN — SHARE OF DAUGHTER DYING AFTER DEATH OF TESTATOR AND LEAVING ISSUE SINCE DECEASED—RIGHT OF SURVIVING HUSBAND.

Re McLaughlin, 6 O.W.N. 121.

RESIDUARY BEQUEST—DIVISION OF RESIDUE AMONG THREE CHILDREN AND ONE GRANDCHILD — ONE OF THE CHILDREN DEAD AT DATE OF WILL, BUT LEAVING CHILDREN—RIGHT OF CHILDREN TO PARENT'S SHARE—WILLS ACT, 1910, S. 37 —COSTS.

Re Rocque, 6 O.W.N. 36, 313.

DIVISION OF RESIDUE AMONG CHILDREN IN PROPORTION TO LEGACIES—ALTERATIONS IN AMOUNTS BY CODICIL — SECOND CODICIL—REVOCATION OF BEQUEST—GIFT OF INCOME OF FUND FOR LIFE—DEVISE OF INTEREST IN LAND—AGREEMENT FOR SALE.

Re Hunter, 24 O.L.R. 5, 19 O.W.R. 338.

DEVISE OF USUFRUCT—DEVISE TO CHILDREN —EXCLUSION OF ONE.

Douglass v. Fraser, 20 Que. K.B. 144.

GIFT TO "SURVIVING CHILDREN"—PERIOD OF DISTRIBUTION.

Re Elliott, 2 O.W.N. 936, 18 O.W.R. 902.

(§ III B—84)—BEQUESTS TO NEPHEWS AND NIECES LIVING AT DECEASE OF TESTATOR — EXCLUSION OF CHILDREN OF NEPHEWS.

Re Morton, 8 O.W.N. 521.

LEGACY TO NIECE — GENERAL DEVISE OF LANDS IN ONTARIO — LANDS STANDING IN NAME OF TESTATOR IN WHICH NIECE HAS HALF INTEREST—NIECE NOT PUT TO ELECTION—DECLARATION OF NIECE'S RIGHT TO HALF INTEREST — FOREIGN EXECUTOR—LEGACY TO BE SECURED UPON ONTARIO ASSETS—COSTS.

Snider v. Carlton; Central Trust & Safe Deposit Co. v. Snider, 5 O.W.N. 852, 6 O.W.N. 337.

(§ III B—86)—BEQUEST TO NEXT OF KIN OF NAMED PERSON ON HIS DEATH—STRICT INTERPRETATION — PERSONS ENTITLED TO SHARE — SURVIVING SISTERS OF PROPOSITUS — EXCLUSION OF CHILDREN OF DECEASED BROTHERS AND SISTERS.

Re Lally, 12 O.W.N. 242.

(§ III B—87) — BEQUEST OF RESIDUE TO EXECUTOR—WHETHER BENEFICIALLY OR IN TRUST—TRUSTEE ACT, S. 51 (1).

Re Smith, 12 O.W.N. 393.

(§ III B—88)—DECEASED LEGATEE — WHO TAKES BEQUEST TO.

The children of a legatee dying before a life tenant, but after the testator, take a bequest of a sum of money which the will makes payable, together with a share of the residue of the estate, on the death of the life tenant, by virtue of a testamentary provision that the share of a deceased legatee should be divided between his or her children.

Re Vining, 12 D.L.R. 498, 4 O.W.N. 1553, 24 O.W.R. 814.

Under a will directing the testator's estate to be sold upon the death of his wife, certain legacies paid out of the proceeds and the remainder divided equally among all the testator's brothers and sisters, and providing further that, if any such brothers or sisters died before the final division of the estate, leaving lawful issue the share which the deceased brother or sister would have been entitled to, if living, should be equally divided among the children of such brother or sisters so that such child or children should take the portion which his or her, or their parent would have been entitled to, if living, the share of a sister who died after the execution of the will, but before the testator, belongs to her children surviving at the time of the final distribution. [Lamphier v. Buck, 34 L.J. Ch. 650 at p. 656, applied; Ive v. King, 16 Beav. 46, at p. 53, disapproved.]

Re Denton, 4 D.L.R. 626, 26 O.L.R. 294, 21 O.W.R. 954, reversing 25 O.L.R. 505.

(§ III B—89)—TIME OF DETERMINATION.

Where a testator fixes the date of expiry of executorship of his will as "at the age of majority of the eldest of my said children up to which date my property will

remain in the hands and under the administration of my testamentary executor," this clause cannot be interpreted as extending the word "child" to the grandchildren in case the eldest child should be dead. [Amyot v. Dwarris, [1904] A.C. 268, followed.]

Trahan v. Cardinal, 8 D.L.R. 533, 43 Que. S.C.R. 144.

(§ III B—90)—Two persons "jointly."

A devise of a parcel of land to two persons "jointly" with a direction that they are to pay a sum of money to a third person creates a joint tenancy.

Re Anne Campbell, 7 D.L.R. 452, 4 O.W.N. 221, 23 O.W.R. 233.

A bequest to the "Methodist Denomination of Queen's County" is a good gift to the Methodist church incorporated by the Canadian Parliament. Where there was no deaf and dumb society in New Brunswick when a will was executed and, at the death of the testator, the only organization of the kind in that province was on incorporated as the New Brunswick School for the Deaf, such school was entitled to a legacy in the will to the "Deaf and Dumb Society of New Brunswick." A bequest to the "Episcopal Denomination of Queen's County" is a good gift to the Diocesan Synod of Fredericton of the Church of England, where the term "Episcopal Denomination" is commonly applied to designate the Church of England.

Van Wart v. Synod of Fredericton, 5 D.L.R. 776, 42 N.B.R. 1.

Attestation by beneficiary's husband—Effect.

Under a will bequeathing the residue of testatrix's estate in trust, after a life interest, for the benefit of two named sisters equally, and providing that on either dying in testatrix's lifetime, leaving a son or sons who should survive testatrix and attain the age of 21 years, or a daughter or daughters who should attain that age or marry, such child or children should take the share which his, her or their parent would have taken, and providing for maintenance and advancement for the children "entitled in expectancy," there was intestacy as to the share of one of testatrix's sisters whose husband attested the will; his right is excluded, on the ground that the jus mariti only attached to property of which both the legal and beneficial ownership was undisposed of, and there is a resulting trust for the next of kin. [Aplin v. Stone, [1904] 1 Ch. 543, followed.]

Re Fry, 11 D.L.R. 361, 18 B.C.R. 63, 24 W.L.R. 304.

A devise of property to the wife of an attesting witness to a will, is void under s. 12 of the Wills Act (c. 120, R.S.N.S.)

Re De Blois Trusts, 6 D.L.R. 119, 11 E.L.R. 141.

(§ III B—92)—"Eldest child."

The word "eldest child," as used in a devise of land, is not restricted to male child.

Greece v. Greece, 3 D.L.R. 841.

D. Charitable bequest or devise; restrictions.

(§ III D—100)—Vagueness.

Bequests made under the terms of a holograph will, whereby the testator designates as beneficiaries "the Tuberculosis League or other similar work," and "for missionary purposes," are too vague and uncertain to admit of performance, and will be declared as null and void at the suit of the residuary legatees.

Lyman v. Royal Trust Co., 31 D.L.R. 757, 50 Que. S.C. 450.

Restriction on charitable bequest or devise.

Re McKay; Cameron v. McKay, 6 D.L.R. 911, 4 O.W.N. 304.

Gift to specific charity—Charity not in existence—Gift conditional on future event—Remoteness—Uncertainty.

In a will, where there is no general intention to benefit charity but only a particular gift for charity conditional upon a future and uncertain event the gift is subject to the same rules and principles as any other gift dependent upon a condition precedent. If the gift is so remote and indefinite as to transgress the time limits prescribed by the rules against perpetuities it must fail. [Att'y-Gen'l v. Bishop of Chester, 1 Bro. Ch. Rep. 444; Sinnett v. Herbert, 7 Ch. App. 232, distinguished.]

Re Schjaastad Estate, 50 D.L.R. 445, [1920] 1 W.W.R. 327.

The fact that a devise to a charity need not be pro forma conveyed to a charity within the period fixed by the rule against perpetuities, does not operate to void the devise.

Re Mountain, 4 D.L.R. 737, 26 O.L.R. 163, 21 O.W.R. 866.

Provision as for debt or legacy—Conditions of codicil.

A will reciting that "as soon as the obligations on my personal and real estate have been discharged, including the payment of $5,000 to the University at Windsor, N.S., for which I gave my 'note of hand,'" certain disposition should be made of testator's property; and letters acknowledging delivery of such note payable at his death, shews an intention to make the payee a creditor of his estate, and not a mere legatee; thus rendering invalid the terms of a codicil whereby he subsequently attempted to impose a condition on the manner and terms of payment.

Board of Governors of King's College v. Poole, 11 D.L.R. 116, 4 O.W.N. 1293, 24 O.W.R. 601.

Charitable bequest—Religious and sanitary institutions—Punctuation in holograph will—43 Eliz., c. 4.

A bequest for religious purposes is prima

facie a bequest for charitable purposes and is not void for uncertainty. It must be so treated unless the testator's intention to the contrary is clearly shown. A bequest to sanitary institutions is likewise valid as a charitable use. In construing a doubtful clause in a holograph will the punctuation is to be regarded as one of the indicia by which the testator's intention is to be arrived at. Where a testator bequeathed his residuary estate to trustees in trust to use and employ the same and the income therefrom "for the benefit, advantage, assistance, or the founding of such charitable, religious, educational or sanitary institutions," as said trustees might from time to time see fit and deem advisable. Held, that the words "charitable," "religious," "educational" and "sanitary" were to be read disjunctively, that all such classes of institutions were charitable purposes and the bequest not void for uncertainty. The charitable objects enumerated in the statute 43 Eliz., c. 4, are not to be taken as the only objects of charity but are given as examples only.

Re McClellan's Will; Robinson v. McClellan, 46 N.B.R. 161.

BEQUEST TO PROVINCIAL TREASURER—CHARITY—PERPETUITY—LEGAL EFFECT—CORPUS—TRUST.

C., who died in 1913, by his will made in 1910, directed that all his estate, save that specifically dealt with, should be converted by his executors, and the proceeds paid to the Provincial Treasurer, under the provisions of the Ontario statute 9 Edw. VII., c. 26, s. 42, as amended by 10 Edw. VII., c. 26, s. 47, "for the permanent endowment of . . . a charitable object as hereinafter directed" and "shall be so paid for the purpose of being invested by him in Ontario Government stock as by the aforesaid Acts directed and the whole of the interest thereon shall be paid over as it matures in perpetuity to the Hospital for Sick Children:"—Held, that the gift of the income in perpetuity, without any restriction as to the purpose for which it was to be used, was in effect and in law a gift of the corpus. [Mayor, etc. of Beverley v. Attorney-General (1857), 6 H.L.C. 310, 318, followed.] The intention of the testator must always be the guide in the interpretation of wills; but, when once the intention is clear, the legal effect of that intention must follow, even if it could be shewn that the testator did not know the effect in law of what he had directed. The statutes (since repealed and re-enacted in amended form by 5 Geo. V., c. 20, s. 25) merely constituted the Treasurer a trustee—the effect of the trust declared must be ascertained upon the ordinary principles.

Re Carter, 42 O.L.R. 57.

DESCRIPTION — REMUNERATION OF EXECUTORS — TRUST FOR CROWN.

By his will the testator gave the whole of his property to two persons as trustees and executors "for the purposes afternamed." The whole estate was of the value of about $12,000. He then gave seven specific legacies, amounting in aggregate value to $9,300, to different charitable institutions. He made no disposition of the residue. He appointed the executors "for the consideration of 8 per cent of the whole estate as set forth in this my will." The description in the will of the institutions to be benefited was inaccurate, and there was some uncertainty as to what institutions were intended. Upon evidence submitted, an order was made determining the objects of the testator's bounty. The clause above quoted was construed as giving the executors a commission of 8 per cent on the whole estate as remuneration for their care, pains, and trouble. The testator, so far as known, was the last of his family; he was unmarried, and had no relations:—Held, that the provision made for the executors indicated that the testator did not intend them to take the residue beneficially; and, by virtue of s. 58 of the Trustee Act, R.S.O. 1914, c. 121, they held the residue in trust for the next of kin, who would take upon an intestacy, if there were next of kin; and there beng no next of kin, the executors held for the Crown. [Middleton v. Spicer (1783), 1 Bro. C.C. 201, followed.] Held, also, that the gifts of named amounts to named charities could not be construed as carrying with them a gift of the residue or surplus, for distribution among the named charities; nor could a general gift for charitable purposes be implied; also, that there should not be a reference for the purpose of an inquiry as to claimants; any meritorious claim would, no doubt, be recognized by the Crown.

Re Aspel, 42 O.L.R. 191.

PERPETUAL TRUST FOR CARE OF GRAVE — LEGISLATIVE SANCTION — CEMETERY ACT.

A direction in a will to the executors to deposit a sum in a bank or invest it, "the yearly interest to be devoted to the care of my grave," creates, leaving statutory provisions out of consideration, a perpetual trust; and, as the purpose is not charitable, is void; but legislative sanction is given to this particular form of perpetual trust, by the Cemetery Act, R.S.O. 1914, c. 261, s. 14, especially subs. 4; and, where there was such a direction in a will, it was declared that the executors might pay over the sum mentioned to the "owner," i.e., the person owning, controlling, or managing a cemetery (s. 2(c)), making an agreement with him as contemplated by the statute.

Re Jones, 42 O.L.R. 62.

BEQUEST OF RESIDUE TO CHARITABLE INSTITUTION—INACCURATE BUT SUFFICIENT DESCRIPTION—RESIDUE PAYABLE AFTER PAYMENT OF OTHER LEGACIES IN FULL—ABSENTEE LEGATEES —PRESUMPTION OF DEATH — LAPSED LEGACIES — BENEFIT OF RESIDUARY LEGATEE—DECLARATION — DISTRIBUTION OF ESTATE — COSTS.

Sisters of St. Joseph v. Walsh, 15 O.W.N. 12.

CHARITABLE GIFTS—ESTATE OF TESTATRIX CONSISTING SOLELY OF MORTGAGE ON LAND — MORTGAGE DECLARED TO BE PERSONALTY — MORTMAIN AND CHARITABLE USES ACT, R.S.O. 1914 c. 103, s. 2 (1) (c) — "MONEY SECURED ON LAND" — REPRESENTATION OF ESTATE OF ABSENTEE.

Re St. Amand, 15 O.W.N. 165.

MORTMAIN ACT—UNCERTAINTY.

The Mortmain Act (9 Geo. II., c. 36), is not in force in Saskatchewan. A bequest to a trustee "for Christian work or otherwise as she sees fit" is void for uncertainty.

Re Miller Estate, 11 S.L.R. 76, [1918] 1 W.W.R. 929.

PERPETUITY—MASSES.

A bequest for the saying of masses for the repose of souls is not in this province void as superstitious. [Elmsley v. Madden, 18 Gr. 386, followed.] A bequest of the residue of the testator's estate (consisting of both realty and personalty) to a church, "to be invested and kept invested . . . for ever and the interest . . . to be applied and expended . . . for the saying of Holy Masses . . . for the repose of the soul of the testator and his descendants for ever," was held, ineffective as creating or tending to create a perpetuity, and not a charitable use. [O'Hanlon v. Logue, [1906] 1 I.R. 247, not followed; West v. Shuttleworth, 2 My. & K. 684; Heath v. Chapman, 2 Drew. 254, followed.] In any case the personalty alone would have been applicable to the trust declared. The questions arising upon the will were (in the absence of objection) considered upon an originating notice notwithstanding that the time had not come for realizing the residue. [Re Staples, [1916] 1 Ch. 322, followed.]

Re Zeagman, 37 O.L.R. 536.

BEQUEST TOWARDS ESTABLISHMENT AND MAINTENANCE OF TEMPERANCE HOTEL — CHARITABLE BEQUEST—CONDITIONS OF GIFT—UNCERTAINTY OF FULFILMENT — VAGUENESS—INVALIDITY.

Re Doyle, 5 O.W.N. 911.

RESIDUARY BEQUEST — "RELIGIOUS BENEVOLENT AND CHARITABLE PURPOSES AND USES"—DISCRETION OF EXECUTORS — VAGUENESS OR UNCERTAINTY —"AND" —"OR"—PRIOR DEFINITE BEQUEST FOR RELIGIOUS PURPOSES—MORTMAIN AND CHARITABLE USES ACT, R.S.O. 1914, c. 103.

Re McPherson, 17 O.W.N. 22.

GIFT OF RESIDUE TO EXECUTORS TO BE EXPENDED IN SUPPORT OF CHARITIES OR CHARITABLE INSTITUTIONS—DISCRETION OF EXECUTORS — DEATH OF ONE — MORTMAIN AND CHARITABLE USES ACT, R.S.O. 1914, c. 103, s. 2(c)—"LAND" —MONEY SECURED ON LAND—INDEFINITENESS.

Re Hogan, 10 O.W.N. 118.

DIVISION AMONG BENEFICIARIES — REMUNERATION OF EXECUTORS — ORIGINATING NOTICE — DISPENSING WITH SERVICE ON SUNDAY SCHOOLS AND MISSIONARY SOCIETIES.

Re Holmes, 10 O.W.N. 354.

DEVISE TO TOWN CORPORATION IN TRUST TO PROVIDE HOME FOR AGED WOMEN—INADEQUACY OF PROPERTY DEVISED FOR PURPOSE — DISCRETION OF COUNCIL — APPLICATION IN AID OF ERECTION OF HOUSE OF REFUGE FOR COUNTY — CY PRÈS DOCTRINE — SELECTION OF AGED WOMEN FOR BENEFITS OF HOME.

Re Wright, 12 O.W.N. 184.

CHARITABLE BEQUESTS — MORTMAIN AND CHARITABLE USES ACT, R.S.O. 1914, c. 103, s. 2 (2)—ADVANCEMENT OF RELIGION—CHRISTIAN SCIENCE CHURCH—PUBLIC POLICY—PERPETUITIES—BENEFIT TO COMMUNITY — DISTRIBUTION OF FUND AMONG CHURCHES OF TOWN — "UPLIFT OF NEEDY"—NEXT OF KIN—ASCERTAINMENT—UNCERTAIN BEQUESTS —INVALIDITY—"DESERVING PEOPLE" — RESIDUARY ESTATE—"FOR GOD ONLY"—EVIDENCE — CAPABILITY OF CORPORATE BODIES TO RECEIVE GIFTS—LEAVE TO ADDUCE—COSTS.

Re Orr, 12 O.W.N. 220, 13 O.W.N. 154, 40 O.L.R. 567.

The following bequests in a will: "The remainder of my estate to go to some deserving charity, the selection of which I leave to my executor," is null as too vague and uncertain, and not clearly showing who are the persons whom the testator intended to benefit, the testator having no right to give his executor the power to select and name a legatee or legatees for any part of his estate.

Hastings v. McNaughton, 51 Que. S.C. 174.

The following bequest "and whereas I am desirous of applying part of my trust estate for charitable purposes in the Nicola Valley, British Columbia, now I hereby will and declare that my trustees shall have power in their absolute discretion to pay out any sum or sums of money out of my trust estate, not exceeding in the whole the sum of $100,000 in aid of each or any of such charitable or benevolent institutions situated in the Nicola Valley as my said trustees shall consider to be deserving of support" held to be void as not confined to charity and as otherwise too uncertain for

enforcement. [Re Macduff, [1896] 2 Ch. 451, applied.]

Re Greaves, [1917] 1 W.W.R. 997.

RESIDUE—CHARITABLE BEQUESTS.

Re McGregor, 11 O.W.N. 256.

DIRECTION TO SET APART FUND FOR BUILDING CHURCH PARSONAGE—FAILURE OF PURPOSE INDICATED—ABSENCE OF GENERAL CHARITABLE INTENTION—FUND FALLING INTO RESIDUE.

Re McMillan, 11 O.W.N. 443.

CHARITABLE BEQUEST — DISCRETION OF EXECUTORS—PROPER OBJECTS OF CHARITY —CHILDREN'S AID SOCIETY — COUNTY HOUSE OF REFUGE.

Re Schermehorn, 12 O.W.N. 123.

VAGUENESS.

The following clause in a will: "I will and order that on death of my daughter, the property hereby given in usufruct be distributed among works of charity by my executor above named at his discretion," is void as being vague, uncertain and containing no indication of a beneficiary to whom the property should be given, and who could demand the carrying out of the provisions of this clause.

Cinq-Mars v. Atkinson, 24 Que. K.B. 534.

A bequest does not fail for uncertainty, where the intention of the testator is easily ascertained.

Jones v. Saint Stephen's Church, 4 N.B. Eq. 316, 9 E.L.R. 23.

CONSTRUCTION — BEQUEST OF RESIDUE TO SPECIFIC LEGATEES IN PROPORTION TO THE AMOUNT OR VALUE OF THEIR LEGACIES—INCLUSION OF BENEFICIARIES OF BEQUEST IN TRUST OF SUM OF MONEY TO "PURCHASE A HOME" — EXCLUSION OF "GENERAL FUND" OF CHURCH — BEQUESTS OF MORTGAGES — INTEREST ACCRUED AND UNPAID AT TESTATOR'S DEATH.

Re Colbert, 15 O.W.N. 459.

CONSTRUCTION—CHARITABLE TRUST—FOUND HOME FOR FRIENDLESS WOMEN — TESTATRIX BECAME INSANE—DIED IN ASYLUM—APPLICATION.

Re Trenhaile, 20 O.W.R. 610.

E. WHAT PROPERTY PASSES.

(§ III E—105)—"TO MAINTAIN AND KEEP UP" A FAMILY RESIDENCE.

The discretion in a will "to maintain and keep up" a family residence will not ordinarily be construed to cover the support of any of the inmates of the residence.

Kennedy v. Kennedy, 11 D.L.R. 329, 28 O.L.R. 1, 4 O.W.N. 607. [Affirmed, 13 D. L.R. 707, 24 O.W.R. 943.]

BEQUEST—"CASH IN BANK"—WHAT PASSES UNDER.

Money on deposit with a loan company passes under a bequest of "cash in bank" where such company accepts deposits from the public withdrawable by cheque.

Re Cooper, 13 D.L.R. 261, 24 O.W.R. 665. [See 14 D.L.R. 172, disposing of case on other grounds.]

PROPERTY AS OF DATE OF WILL OR DEATH — "CONTRARY INTENTION" — WILLS ACT.

A testator, dying in 1912, by his will, made in 1907, gave his house and premises on M. Street" to his widow for life, and on her death or remarriage, to his children then living, and the residue of his estate to her absolutely. At the date of the will, the testator owned a house in M. street built on 20 feet of land; the testator afterwards purchased and owned at his death 55 feet to the west:—Held, a contrary intention not appearing by the will (s. 27 of the Wills Act), that the will must be read as if it had been executed immediately before the testator's death, and the whole property in M. street passed under the devise. The established rule of construction is stated in Re Ingram (1918), 42 O.L.R. 95. When the thing given remains and has been added to between the date of the will and the date of the death, the whole property answering the description at the later date passes.

Re Rutherford, 42 O.L.R. 405.

SPECIFIC DEVISES OF DIFFERENT PORTIONS OF ONE FARM — DESCRIPTIONS IN WILL — ORAL EVIDENCE — CONFLICTING CONSTRUCTIONS — RATIONAL AND CONVENIENT DISPOSITION.

Re Mailloux, 14 O.W.N. 85. [Reversed in 15 O.W.N. 211.]

TRUST FOR INVESTMENT — "INTEREST-BEARING SECURITIES" — COMPANY-SHARES — MORTGAGES — INTEREST OF INCOME.

Re Abbott, 8 O.W.N. 562.

RIGHT OF TWO BENEFICIARIES TO OCCUPY DWELLING-HOUSE — PRIVILEGES — MONEY PAYMENT IN LIEU OF — FORFEITURE — ABANDONMENT — DEATH OF ONE BENEFICIARY — "CONTINUES TO DWELL"—JUDGMENT IN ACTION—ORIGINATING NOTICE — RR. 600, 604, 605 — SCOPE OF—COSTS.

Re Murray, 9 O.W.N. 223.

BEQUEST OF MONEY IN BANK — "MY ACCOUNT"—NAME OF BANK NOT CORRECTLY GIVEN.

Re Wauchope, 11 O.W.N. 293.

DEVISE OF FARM—MISTAKE IN NUMBER OF CONCESSION — FALSA DEMONSTRATIO—INFANT DEVISEE—DUTY OF EXECUTORS —LEGACIES CHARGED ON LANDS DEVISED —APPLICATION TO COURT—CONDITIONAL DEVISE—VESTED ESTATE SUBJECT TO DIVESTMENT IN CASE DEVISEE SHOULD NOT RETURN FROM WAR—TEMPORARY RETURN —ENJOYMENT OF LAND SUBJECT TO CONDITION.

Re Hanna, 11 O.W.N. 347.

MONEYS RECEIVED FROM INVESTMENT MADE BY TESTATOR — INCOME OR CAPITAL — EXECUTORY GIFT—SUBSTITUTIONAL GIFT —PERIOD OF DISTRIBUTION.

Re Kohler, 11 O.W.N. 399.

DEVISE OF LOT OF LAND NOT OWNED BY TESTATRIX — ERRONEOUS DESCRIPTION—LEGAL ESTATE AND BENEFICIAL INTEREST OF TESTATRIX AS MORTGAGEE OF ANOTHER LOT HELD TO PASS BY DEVISE.

Re Whitesell, 12 O.W.N. 326.

BEQUEST OF RESIDUE TO DAUGHTER—SMALL RESIDUE WHEN WILL MADE — ESTATE LARGELY INCREASED BEFORE DEATH OF TESTATRIX — WILL SPEAKING FROM DEATH—WILLS ACT, S. 27—"UNLESS A CONTRARY INTENTION APPEARS BY THE WILL"—EVIDENCE TO SHEW INTENTION OF TESTATRIX AFTER INCREASE IN ESTATE—INADMISSIBILITY—CONTRARY INTENTION NOT DEDUCIBLE FROM WILL — RESIDUE OF "MONEY OR SECURITIES FOR MONEY"—RESIDUARY LEGATEE ENTITLED TO BOTH—"OR" READ AS "AND."

Re Ingram, 42 O.L.R. 95.

LEGACY VESTED IN TESTATOR BUT NOT PAID UNTIL AFTER HIS DEATH, NEVERTHELESS PASSING UNDER HIS WILL—"THE WHOLE OF MY MONEY OF WHICH I DIE POSSESSED."

Re Cotter, 42 O.L.R. 99.

(§ III E—106)—REAL PROPERTY, GENERALLY.

Land that a person had, in his lifetime, contracted to sell to one who, without paying all of the purchase money or receiving a conveyance, had entered into possession, does not pass under a devise of "real estate," while the agreement remained in force, since the only interest the testator had, after the execution of such agreement, was to receive the unpaid portion of the purchase money.

Re Snetsinger, 4 D.L.R. 114, 3 O.W.N. 1569, 22 O.W.R. 738.

TAXES ACCRUING PRIOR TO TESTATOR'S DEATH —COUNTERCLAIM.

McKay v. McKay, 6 D.L.R. 898, 4 O.W.N. 300.

"HOMESTEAD PROPERTY" — INCLUSION OF PARCEL SEPARATED BY ROAD.

Re Tanner, 10 O.W.N. 405.

DEVISE OF HOMESTEAD TO SON, SUBJECT TO RIGHT OF OTHER CHILDREN TO USE IT AS A HOME—LIMITATION TO LIFETIME OF SON—WILL OF SON—DEVISE OF HOMESTEAD FREED FROM USE BY OTHER CHILDREN — HOUSEHOLD FURNITURE — CONVERSION—DAMAGES.

Nestor v. Nestor, 11 O.W.N. 220.

IRRECONCILABLE RESIDUARY CLAUSES—RULE OF THUMB — "MONEY" — PROCEEDS OF SALE OF LAND — DISTRIBUTION OF ESTATE.

Re Stocks, 11 O.W.N. 212.

"FARM STOCK AND IMPLEMENTS AND OTHER PERSONAL EFFECTS" — "HOUSEHOLD EFFECTS" — MONEY AND SECURITIES FOR MONEY — RESIDUARY BEQUEST — PERSONS ENTITLED TO SHARE — LEGATEES — INCLUSION OF DEVISEES.

Re Hord, 10 O.W.N. 278.

(§ III E—108)—MISTAKE IN DESCRIPTION.

Where there is nothing answering any part of the description given in the will the devise fails.

Re Carvill, Standard Trusts Co. v. King, 15 D.L.R. 206, 6 S.L.R. 146, 26 W.L.R. 189, 5 W.W.R. 581.

DESCRIPTION—LANDS "NAMED" AS DISTINCT FROM LANDS "REFERRED TO"—WHICH GOVERNS.

The specification in a will of particular lands following immediately in a continuous description upon the general words "the balance of the lands and premises described in the aforesaid deed" will control; it is a qualifying and defining statement substituted for the antecedent generality and a third parcel included in the deed referred to and which was not specifically mentioned in the will does not pass along with the second parcel specifically described. [West v. Lawday, 11 H.L.C. 375; Re Brocket, [1908] 1 Ch. 185, followed; Re Clement, 22 O.L.R. 121, and Smith v. Smith, 22 O.L.R. 127, distinguished.]

Re Fletcher, 19 D.L.R. 624, 31 O.L.R. 633.

Where a testator, at the time of his will, and at his death owns the north half and no part of the south half of a certain township lot, and in his will devises to his son the south half of the north half and to his wife the "north half of the south half," the devise to the wife will be read as the "north half of the north half," where the will shews an intention to dispose of all his lands, and such a reformation of the will fits the testator's exact ownership.

Re Coutts and LeBeouf, 7 D.L.R. 237, 3 O.W.N. 1352, 22 O.W.R. 294.

DEVISE — MISTAKE IN NUMBERS OF LOTS — FALSA DEMONSTRATIO—EVIDENCE—DECLARATION IN FAVOUR OF DEVISEE.

Re Rowan, 16 O.W.N. 218.

(§ III E—109)—AFTER ACQUIRED PROPERTY.

Lands acquired by a testator after the date of his will pass to the residuary legatees under a devise to his nephew and niece of all his residuary estate following which devise in the will is a particular description of the real estate, notwithstanding that the parcel particularly described was subsequently sold and other lands purchased.

Re Thornton, 5 D.L.R. 192, 3 O.W.N. 1371, 22 O.W.R. 619.

"HOUSE" SUBSEQUENTLY ERECTED.

A house erected on a lot purchased by the testator subsequently to the making of a will held to be covered by the words in a will, "the house and my furniture will remain to Albert."

Re Aussant Estate, [1917] 3 W.W.R. 655.

(§ III E—111)—SPECIFIC DEVISE OF LAND —EFFECT OF SUBSEQUENT GIFT OF ALL OF TESTATOR'S REAL ESTATE.

A specific devise of land is not affected by a subsequent clause of a will giving to

another all the real estate to which the testator might be entitled at his death, since the latter clause is to be regarded as a residuary bequest relating only to property not otherwise disposed of by the testator.

Re Dion, 12 D.L.R. 831, 23 Man. L.R. 549, 24 W.L.R. 701, 4 W.W.R. 942.

The title to a strip of a testator's land which had been used for many years by him as a private road and which was reserved by him in his will for a public road by words which standing alone were insufficient to amount by themselves to a dedication of the strip for such purpose, passes to the devisees of the testator's residuary estate, and any one of such devisees is, therefore, entitled to defend such strip of land from trespass.

C.N.R. Co. v. Billings, 5 D.L.R. 455, 3 O.W.N. 1504, 22 O.W.R. 659.

Where a legatee to whom is bequeathed a portion of the insurance upon a testator's life dies before the latter, such bequest will be divided, under R.S.O. 1897, c. 203, s. 159, subs. 8, equally among such designated class of legatees. The surplus income of an estate which is not required for the payment of annuities or arrearages thereof charged thereon will fall into the residue of the estate for distribution.

Re Irwin, 4 D.L.R. 803, 3 O.W.N. 936, 21 O.W.R. 562.

RESIDUARY BEQUEST — INCOME OR CORPUS — "THE SAME" — "BLOOD RELATIVES" — NEXT OF KIN.

Re Murray, 8 O.W.N. 463.

DEVISES TO SONS—MISDESCRIPTION OF LANDS—GENERAL INTENTION—FALSA DEMONSTRATIO—LANDS ACTUALLY OWNED BY TESTATOR PASSING TO DEVISEES—RESIDUARY CLAUSE—ANNUITY TO WIDOW—CHARGE ON LANDS DEVISED—BEQUESTS IN LIEU OF DOWER.

Re Devins, 8 O.W.N. 540.

DEVISE OF SHARES IN COMPANIES—LIABILITY TO PAY CALLS—RESIDUARY CLAUSE.

McDonald v. Eastern Trust Co., 45 N.S.R. 51, 9 E.L.R. 173.

EXECUTORS — POWERS TO SELL RESIDUARY ESTATE—POSTPONEMENT OF DIVISION OF CORPUS.

Carruthers v. Carruthers, 21 Man. L.R. 781, 1 W.W.R. 231, 19 W.L.R. 512.

CON. RULE 693—RESIDUARY CLAUSE—INTENTION—INSURANCE MONEYS.

Re Charles Lenz and J. Bowstead, 19 O.W.R. 769, 2 O.W.N. 1396.

(§ III E—113) — LIFE INSURANCE — BEQUEST OF.

A present gift is created by a bequest to a grandson of a portion of the insurance upon the life of a testator. A bequest of an income from a portion of the insurance upon the life of a testator to his daughters for their lives, and at their deaths of the corpus to their children, constitutes a good declaration under the Insurance Act.

Re Irwin, 4 D.L.R. 803, 3 O.W.N. 936, 21 O.W.R. 562.

A bequest in the will of the assured of all his life insurance is a "disposal" of insurance moneys within the terms of a condition contained in a document by which the assured purported to declare his surviving wife the beneficiary if the policy were not sold, surrendered, assigned, or "otherwise disposed of" by him.

Green v. Standard Trusts Co., 1 D.L.R 609, 22 Man. L.R. 397, 20 W.L.R. 488, 1 W.W.R. 993.

MOTHER OF DECEASED NAMED AS BENEFICIARY IN LIFE INSURANCE POLICY — GIFT — MOTHER AGREEING TO LOAN OBTAINED ON POLICY—WILL BY DECEASED SUBSEQUENT TO DATE OF POLICY—GIFT TO MOTHER IN WILL — ELECTION — WILL PROVIDING THAT LIFE INSURANCE "MONIES" TO FORM PART OF ESTATE — PRESUMED KNOWLEDGE BY TESTATOR OF LEGAL RIGHTS.

An insurance policy taken out by testator on his life named his mother as beneficiary. Held this was presumably a gift to her and the moneys payable under the policy on testator's death belonged to her; the fact that she agreed to a loan being obtained on security of the policy did not operate to release her interest except for the mortgage debt; the testator's will made subsequent to the date of the insurance providing for an annuity for his mother without declaring that such bequest was in lieu of the insurance, did not by implication put her to her election; nor did the expression in the will that all life insurance "monies" should form part of his estate mean that said policy should form part of his estate, the deceased being presumed to know what his legal rights were and to be disposing only of property which he had a right to deal with. [Re MacGregor, 18 Man. L.R. 432, 10 W.L.R. 435, followed.]

Re Monkman Estate, [1919] 2 W.W.R. 492.

INSURANCE MONEY — POLICY PAYABLE TO "HEIRS ACCORDING TO WILL OR SUCH OTHER PERSON AS SAID MEMBER MAY THEREAFTER LEGALLY DESIGNATE"—RESIDUARY DEVISE.

Re Bean, 3 O.W.N. 138, 20 O.W.R. 183.

F. PARTIAL INTESTACY.

(§ III F—115) — LIFE ESTATE — LIMITATION AS TO REMAINDER.

A devise of land to the sons of a testator for life and upon their marriage to their surviving wives and children, with a recital in the habendum of another devise in the same will naming the sons only "to have and to hold to them as aforesaid mentioned," creates a life estate for the sons only, and intestacy as to the remainder.

Stuart v. Taylor, 22 D.L.R. 282, 33 O.L. R. 20.

AFTER ACQUIRED PROPERTY.

Land purchased by a testator with money on hand at the time of making his will cannot on his death be treated as a "security for money," in which he directed his executors to invest in order to create a fund for the payment of an annuity.

Re Mackenzie, 18 D.L.R. 277, 30 O.L.R. 173, affirming 11 D.L.R. 818.

When a testator purports to dispose of the proceeds of a life insurance policy by specific legacies to named persons, and the legacies do not exhaust the face value of the policy, the legacies are not increased, and there is an intestacy as to the balance undisposed of.

Re Seaton, 8 D.L.R. 204, 4 O.W.N. 266.

A legacy bequeathed to ——— of Perrotte, not being identified in any way in the will, is void for uncertainty, and in respect thereof a partial intestacy results. A partial intestacy results where a testator devised and bequeathed the residue of his estate to a daughter whose husband was one of the attesting witnesses to the execution of the will.

Re De Blois Trusts, 6 D.L.R. 119, 11 E. L.R. 141.

On a motion to construe a will the Court cannot speculate on the testator's intention, and no presumption arises that the testator intended to dispose of his whole estate, therefore, where a portion of a general bequest lapses, such lapsed share does not pass as residue but is undisposed of and must be distributed as upon an intestacy and the executors hold the same as trustees for the next of kin.

Re Piper, 2 D.L.R. 132, 3 O.W.N. 1243.

Where a perpetuity is created in the residue of an estate bequeathed for other than charitable purposes, an intestacy as to such portion results.

Kennedy v. Kennedy, 3 D.L.R. 536, 26 O. L.R. 105, 21 O.W.R. 501. [Affirmed in part 11 D.L.R. 329, 28 O.L.R. 1.]

FAILURE OF CHARITABLE BEQUEST.

If a charitable bequest of the residue of an estate is void for uncertainty it results in an intestacy as to the property comprising such bequest.

Lawrence v. Lawrence, 13 D.L.R. 737, 42 N.B.R. 260, 13 E.L.R. 519.

DISTRIBUTION AMONG NEXT OF KIN—ASCERTAINMENT OF PERSONS ENTITLED TO SHARE — DEVOLUTION OF ESTATES ACT, R.S.O. 1914, c. 119, s. 30—BROTHER AND SISTER OF HALF-BLOOD OF MOTHER—EXCLUSION OF CHILDREN OF DECEASED BROTHERS AND SISTERS OF PARENTS — BEQUEST OF FURNITURE AND OTHER ENUMERATED HOUSEHOLD ARTICLES — "AND OTHER ARTICLES OF HOUSEHOLD USE AND ADORNMENT"—EJUSDEM GENERIS RULE—EXCLUSION OF MOTOR CAR—DEVISE OF "ANY FREEHOLD OR LEASEHOLD HOUSE WHICH MAY BELONG TO ME AT DEATH"—INCLUSION OF ALL LEASEHOLDS AND FREEHOLDS OF TESTATRIX.

Re Greenshields, 6 O.W.N. 303.

REFERENCE BY TESTATRIX TO WILL OF HUSBAND—BEQUEST OF "WHAT HE GIVES ME AND FOR MY DISPOSAL"—HUSBAND DYING INTESTATE—WIFE'S BEQUEST INOPERATIVE AS TO SHARE OF HUSBAND'S PROPERTY COMING TO HER UPON HIS INTESTACY—INTESTACY OF WIFE AS TO THAT SHARE.

Re Palmer, 5 O.W.N. 917.

BEQUEST OF RESIDUE OF ESTATE TO NEPHEW WITH LIMITATION TO NAMED SUM—INTESTACY AS TO REMAINDER OF RESIDUE.

Re Browne, 5 O.W.N. 466.

CONSTRUCTION—PARTIAL INTESTACY.

Re Beckingham, 5 O.W.N. 607.

DECLARATION BY COURT OF INTESTACY AS REGARDS A SUM OF MONEY, PART OF THE ESTATE — DISPOSITION OF FUND — LEGACIES, DEBTS, AND SUCCESSION DUTIES NOT PAYABLE THEREOUT—RIGHT OF WIDOW (BENEFICIARY UNDER WILL) TO SHARE IN FUND NOTWITHSTANDING SATISFACTION CLAUSE IN WILL — "CLAIMS AGAINST THE ESTATE."

Re Walmsley, 16 O.W.N. 207.

RESIDUE—LAPSE OF ONE-QUARTER SHARE IN SPECIFIC GIFT—INTESTACY AS TO THAT SHARE—AMOUNT OF SHARE PAID INTO COURT—TRUSTEES' RELIEF ACT.

Re Quimby, 3 O.W.N. 97, 20 O.W.R. 111.

G. NATURE OF ESTATE OR INTEREST CREATED.

(§ III G—120)—IN GENERAL.

An absolute gift is not created by a bequest of money to a legatee with restrictions added whereby the money is to be invested by the executor and the interest only paid to the legatee during her lifetime, with power to the executor if he thought more was required by the legatee because of sickness or distress to make advances out of capital, where the will provides that the remaining part of the principal sum should go to the legatee's children at her death; she has no power to assign the corpus of the fund under such bequest.

Re Mitchell, 8 D.L.R. 346, 4 O.W.N. 465, 23 O.W.R. 616.

ESTATE IN FEE OR FOR LIFE—POWER OF SALE AT COMMON LAW—IMPLIED POWER IN EQUITY—ESTOPPEL—TORTIOUS ENFEOFFMENT — STATUTE OF LIMITATIONS.

A devise to the testator's wife of "all my real and personal estate of which I shall die seised and possessed or to which I shall be entitled and all debts which may be due to me at the time of my decease with full power and authority for her to dispose of the same at her discretion by absolute deed or deeds of conveyance executed by her or by her last will and testament among my children or any one of them and should she die without executing such deed or deeds or

last will and testament then the same to be divided among my children surviving . . . " Held, that the widow took a life estate only with power of appointment to the children or to some of them and a gift over to the children if the power were not exercised. The widow having purported to convey the fee, the court further held, that the mode of conveyance adopted by her amounted to a bargain and sale, taking effect under the Statute of Uses, and was not a tortious feoffment which under the law would work a forfeiture under the Statute of Limitations (R.S.N.S. 1900, c. 167).

Mills v. Biden, 48 D.L.R. 662. [Affirmed in 50 D.L.R. 241.]

A gift by will of the "right to remain in a dwelling house free from rent" made in favour of a person named and of his family, is to be construed as a restriction upon a prior devise of a life estate in these and other lands to another; it does not confer any estate in reversion but a continuing right of possession during the life of the life-tenant and possibly until the closing of the estate by the division directed to take place after the death of the life-tenant.

Farquharson v. Farquharson, 6 D.L.R. 818, 11 E.L.R. 201.

A devise of the testator's "real estate at 62 Muir avenue" has a wider meaning than a devise of "his house at, etc.," and will include a shop built on part of a garden adjoining and formerly used with the house known as No. 62, the shop being erected close against the house and requiring the house for its support.

Re Seaton, 8 D.L.R. 204, 4 O.W.N. 266.

NATURE OF ESTATE OR INTEREST CREATED — SETTLEMENT NECESSARY TO CARRY OUT DIRECTIONS.

Where a will contains a direction that the "shares of my daughters shall be deemed separate estates free from the control of their husbands respectively and shall not be anticipated and in the event of the marriage of any of my daughters I direct that proper settlements shall be made to carry out this intention," the intention is that the property shall be held for the life of the daughter, she receiving the income and holding a separate estate free from the control of her husband and without power of anticipation and requires a settlement to be made to carry out the intention of the testator. [See Re Nordheimer, 14 D.L.R. 658, construing same will and settlements.]

Re Nordheimer, 18 D.L.R. 591, 30 O.L.R. 327.

DEVISE OF LIFE—INTERESTS—GIFT OVER—CERTAIN CONTINGENCIES — PERPETUITY.

A gift over of property, in which life interests have already been devised, contingent on the death of the parties having such life interests and failure of, or death of children during one of the life interests does not transgress any of the rules against perpetuities.

Re Brown Estate, 50 D.L.R. 550, [1920] 1 W.W.R. 264.

REAL PROPERTY—ABSOLUTE DEVISE TO TWO PERSONS EQUALLY—SUBSEQUENT CLAUSE RESTRICTING — INTERPRETATION — ABSOLUTE ESTATE — REGISTRATION OF TITLE.

In construing a will, its entire contents and the circumstances existing at the time of its execution must be considered, and an endeavour made to carry out the intention of the testator. A clause "to have full use of the house and land, to reside in or let as he thinks fit until the year 1917, when the property must be sold at latest, or earlier if the amount of not less than $8,000 can be realized," following an absolute disposition previously made to the same party in equal shares with another, held not to affect the absolute disposition previously made, and that the parties were entitled to be registered as absolute owners without any limitation.

Re Land Registry Act; Re Blanchard and Morgan, 44 D.L.R. 728, [1919] 1 W.W.R. 311.

DEVISE OF HOMESTEAD TO SON, SUBJECT TO RIGHT OF OTHER CHILDREN TO USE IT AS A HOME—RIGHT TO ENDURE BEYOND LIFETIME OF DEVISEE.

Nestor v. Nestor, 11 O.W.N. 438, reversing 11 O.W.N. 220.

BEQUEST TO WIDOW—"FULL DOWER RIGHTS IN ALL MY PROPERTY"—NONTECHNICAL USE OF "DOWER"—ABSOLUTE GIFT OF ONE-THIRD OF WHOLE ESTATE.

Re Johnston, 12 O.W.N. 53.

LIFE-TENANT OF LANDS DEVISED — EXECUTORS AND TRUSTEES—CONTROL AND MANAGEMENT OF LANDS—LEGAL ESTATE — EQUITABLE ESTATE — DISCRETION — MUNICIPAL TAXES — REPAIRS — DILAPIDATIONS — INSURANCE PREMIUMS — REMAINDERMEN.

Re Cunningham, 12 O.W.N. 268.

DEVISE OF LAND—TRUST—LIFE-TENANT——REMAINDERMEN—PROPOSED SALE BY EXECUTORS—REFUSAL OF ONE REMAINDERMAN TO JOIN IN CONVEYANCE—OBJECTION TO TITLE—VENDOR AND PURCHASER.

Re Smith and King, 13 O.W.N. 54.

PERPETUAL TRUST FOR CARE OF GRAVE — LEGISLATIVE SANCTION — CEMETERY ACT, R.S.O. 1914, c. 261, ss. 8 (c), 14.

Re Jones, 13 O.W.N. 405.

VALIDITY OF DEVISE AND BEQUEST — PERPETUAL TRUST FOR CARE OF GRAVES — VALIDATION BY CEMETERY ACT, S. 14—DEVISE OF FARM — RESTRAINT ON ALIENATION—INVALIDITY OF—DEVISE TO CHURCH—LICENSE IN MORTMAIN—GIFT OF INTEREST ON MONEY "FOREVER"—ABSOLUTE GIFT OF FUND.

Re Hagerman, 13 O.W.N. 406.

DEVISE TO WIFE FOR LIFE WITH REMAINDER TO SON—LEGACIES CHARGED ON LAND —WHEN PAYABLE.

Re McClean, 7 O.W.N. 696.

BEQUEST OF MORTGAGE TO DAUGHTER "FOR HER SOLE USE DURING HER LIFETIME"—BEQUEST TO OTHERS AFTER HER DECEASE —RIGHT OF DAUGHTER TO EXPEND CORPUS AS WELL AS INTEREST—PARTIES—COSTS.

Matte v. Matte, 8 O.W.N. 605.

BEQUEST OF PERSONAL PROPERTY—ABSOLUTE USE DURING LIFETIME OF LEGATEE — DISPOSITION OF REMAINDER (IF ANY) —"ISSUE."

Re McLaughlin, 8 O.W.N. 277.

DEVISE TO GRANDCHILDREN — ABSOLUTE ESTATE IN FEE—SALE OF LAND BY ORDER OF COURT—DIVISION OF PROCEEDS — INFANTS' SHARES—MAINTENANCE.

Re Moisse, 9 O.W.N. 67.

DEVISE—DESCRIPTION OF LAND BY LOT AND CONCESSION WITHOUT MENTIONING TOWNSHIP — PROOF BY AFFIDAVIT TO SUPPLEMENT DESCRIPTION — DEVISE TO WIFE — SUBSEQUENT CLAUSE IN WILL DISPOSING OF LAND IN EVENT OF WIFE DYING WITHOUT A WILL—ESTATE OF WIFE—POWER TO CONVEY IN FEE SIMPLE —WILL MADE BY WIFE—DECLARATION AS TO.

Re McIntyre, 16 O.W.N. 260.

(§ III G—125)—DEVISE—ESTATE CREATED FOR LIFE OR IN FEE.

Under a devise of land to two sisters and in the event of the death of either without issue to the survivor or her heirs, on one of the sisters conveying her interest to the other and dying without issue, the words "to the surviving daughter or her heirs" do not limit the estate of the survivor, she taking a good title in fee which she could convey.

Re Edgerley and Hotrum, 11 D.L.R. 783, 4 O.W.N. 1434, 24 O.W.R. 800.

LIFE OR FEE—REDUCING ABSOLUTE GIFT TO LIFE ESTATE — EXPRESSION OF TESTATOR'S WISH.

An absolute gift under a will is not to be cut down to a life interest merely by an expression of the testator's wish that the donee shall, by will or otherwise, dispose of all the property possessed by her in favour of individuals or families indicated by the testator: since a wish or desire so expressed is no more than a suggestion to be accepted or not by the donee, and does not amount to a mandate or obligatory trust.

Johnson v. Farney, 14 D.L.R. 134, 29 O.L.R. 223, affirming 9 D.L.R. 782, 29 O. L.R. 223.

DEVISE AND BEQUEST TO WIDOW — "FREE USE" OF ESTATE FOR LIFE—REMAINDER IF ANY TO CHILDREN—APPLICATION TO REALTY AND PERSONALTY.

A devise and bequest of the testator's realty and personalty to his widow who is to have the "free use" of the same for life with what remains "unspent" to the children has the effect of giving the widow a life estate only in the realty with remainder to the children in fee and whatever remains of the personalty on the widow's death will go to the children. [Re Johnston, 27 O.L.R. 472, approved.]

Re Richer, 50 D.L.R. 614, 46 O.L.R. 367.

DWELLING HOUSE OF THE TESTATOR DEVISED TO WIDOW FOR LIFE OR UNTIL SOLD AT DISCRETION OF EXECUTOR—LIFE ESTATE —WIDOW LIABLE FOR TAXES—LEGACY—INTEREST PAID BY EXECUTOR FOR ONE YEAR AFTER TESTATOR'S DEATH — EXECUTOR'S RIGHTS TO RECOVER SAME OR APPLY IT ON PRINCIPAL.

A life estate terminable at the option of the executor is held, as long as it exists, subject to the incidents of a life estate, and the holder is liable for taxes. A legatee is not entitled to interest on a legacy until after the expiry of one year from the death of the testator, and the executor who pays this interest, may recover the same or apply it on account of principal. [Bartels v. Bartels, 42 U.C.R. 22, followed.]

Re McDonald, 50 D.L.R. 658, 46 O.L.R. 358.

LIFE OR FEE.

Where property is devised to the widow for life, with remainder to the only son of the testator, subject to the condition that in the event of the widow remarrying the property shall go absolutely to the son on his attaining the age of 21, and with a further proviso that should the son die during his minority the property should go over as directed by the will, and where the widow never remarries and the son predeceased her without having made a will but after attaining the age of 21, then on the death intestate of the widow, who became the sole heir of the son, her heirs and not the heirs of the testator are entitled to the property.

Re Crowe, 2 D.L.R. 103, 3 O.W.N. 906.

Where a devise gave the use of real estate to the husband of the testator for life, and at his death the income from a $6,000 interest to a daughter, and further provided that upon the death of the latter the property should be sold and the proceeds divided among her children, the devisees or heirs of the husband, upon his death, will take a fee simple estate in his interest in the property, which by the death of the daughter will be divested in favour of her children.

Re Ley, 5 D.L.R. 1, 17 B.C.R. 385, 21 W. L.R. 757, 2 W.W.R. 790.

TITLE TO LAND—APPLICATION UNDER VENDORS AND PURCHASERS ACT—DOUBTFUL QUESTION OF CONSTRUCTION OF WILL.

Re Cameron and Hull, 1 D.L.R. 917, 3 O. W.N. 807.

A life estate only, and not an absolute gift of the corpus, in money, notes and mortgages, was created by a bequest to a widow in her deceased husband's will, of

all of his money, notes and mortgages, and real and personal property, for the term of her natural life, or widowhood, with remainder to his children in the event of her death or remarriage.

Re Johnson, 7 D.L.R. 375, 23 O.W.R. 132.

LIFE ESTATE—REMAINDER—"REVERT."

Where a testator leaves all the residue of his estate to a named person, and then says that on the decease of such person "the unused or unexpended balance shall revert," an apparently absolute gift is cut down to a life estate; if the life tenant be one for whose maintenance the testator was evidently providing, the whole residue may be employed for that purpose, in specie, and if necessary the capital may be encroached upon.

Re Cutter, 31 D.L.R. 382, 37 O.L.R. 42.

PRECATORY WORDS.

Mere precatory words in a will are insufficient to restrict a gift absolute, unless the intention to do so is clear.

Perry v. Perry, 40 D.L.R. 628, 29 Man. L.R. 23 at 45, [1918] 2 W.W.R. 485, affirming 37 D.L.R. 89, 29 Man. L.R. 23, [1917] 3 W.W.R. 315.

"HEIRS AND ASSIGNS"—FEE SIMPLE—INTEREST IN PERSONALTY—COSTS.

Where an estate is devised to the heirs of a person to whom a prior estate of freehold has been given, the heirs take by descent and not by purchase, and an estate in fee simple is created in the ancestor. [Van Grutten v. Foxwell, [1897] A.C. 658, followed.] The testator devised and bequeathed "two stores" and half of his other property to his granddaughter "to be held by her during her life and at her death to her heirs and assigns forever:"—Held, that the granddaughter took an estate in fee simple in the land devised. And held, that the chattel property bequeathed to the granddaughter became hers absolutely by the terms of the bequest: The testator meant that the land and goods should go in the same manner; and, as the land, by force of the rule of law, became the granddaughter's absolutely, so did the goods. [Comfort v. Brown (1878), 10 Ch. D. 113; De Beauvoir v. De Beauvoir (1852), 3 H. L.C. 524, applied.] In the peculiar circumstances of the case, no order was made as to the costs of a summary application for the determination by the court of the questions arising as to the construction of the will.

Re Kendrew, 43 O.L.R. 185.

GIFT OF RESIDUARY ESTATE—LIFE-ESTATE—ENJOYMENT IN SPECIE — RIGHT TO ENCROACH UPON CORPUS — GIFT OVER ON TERMINATION OF LIFE-ESTATE.

Re Hodgkins, 14 O.W.N. 105.

A will expressing a "desire" by the testator, that the residuary legatee, who is given the property forever, "shall exercise and carry out the request and directions which I may give him respecting the same by a document under my hand and seal," does not thereby impress the residue with a trust, and, in the event of failure to give direction, the next of kin do not take, but gives the donee an absolute estate subject to any trust which may be declared as provided.

Casey v. McHugh, 37 D.L.R. 266.

LIFE ESTATE.

A will in one clause of which the testator left all his real and personal property to his wife and in a subsequent clause whereof he provided that after the death of his wife "all the said property, its increase and its substituted property, is to go to and become the property of my son" (naming him) "and his heirs absolutely" held to entitle the widow to a life interest only.

Re Salter Estate and Royal Trust Co., [1917] 2 W.W.R. 1013.

LIFE TENANT—POSSESSION—COSTS.

Re Jones, 12 O.W.N. 29.

"ANNUITY"—EQUITY OF REDEMPTION IN LANDS — LIFE ESTATE — REMAINDER — LIFE INSURANCE — BENEFICIARY — CHANGE—RESIDUARY ESTATE.

Re Prior, 12 O.W.N. 408.

EXTENT OF ESTATE GIVEN WIDOW—WHETHER WIDOW ENTITLED TO GIVE 21-YEAR LEASE OF PROPERTY—THE SETTLED ESTATES ACT.

A testator bequeathed to his wife "all my real and personal property as long as she remains my widow. At her death she can divide it as she thinks proper among my children." Held, the testator's widow was entitled to a life interest subject to same being divested should she remarry; not having remarried she had such an estate as entitled her under the Settled Estates Act to give a 21-year lease of certain ranch property which was part of the estate.

Palmer v. Palmer, [1919] 3 W.W.R. 1028.

LIFE OR FEE TAIL—INTERPRETATION—LEGACY OF USUFRUCT—C.C. (QUE.) ARTS. 620, 900, 901, 928, 946, 957, 980.

The following clauses of a will:—"As to the residue of all the goods, real and personal, which I shall leave, and which will belong to me at the day and hour of my death, I give and bequeath the enjoyment and use to my said wife, G. M., to be enjoyed by her from the time of my decease. I exempt my said wife from making an inventory or from giving security for them. Upon the death of my wife I give the ownership of my said goods in equal parts to my children, and to their representatives if necessary" do not create an entail, but is only a legacy of usufruct in favour of the testator's wife, the ownership of the goods passing afterwards to the children. [Douglass v. Fraser, 20 B.R. 148; Re Almour, v. Ramsay, 26 Jurist 228, followed.]

Lacasse v. Lamarche, 46 Que. S.C. 222.

LIFE ESTATE — ENCROACHMENT ON CORPUS —MAINTENANCE.

A testator provided as follows:—"I

give, devise and bequeath all my real and personal estate to my wife, the whole of my real and personal estate for her use and benefit during her lifetime and at her decease anything remaining to be divided share and share alike among my children whose names are here written; all the residue of my estate not hereinbefore disposed of I give and bequeath unto [blank]." His widow was not named as an executrix. On application by the executors for the construction of the above provision: Held, that the widow was entitled only to a life interest in the estate, but that there was an implied power to encroach on the capital for her maintenance, and that the executors should not transfer the property to her, but that she was entitled to occupy and use it or to receive the rents and profits thereof as she might elect.

Hodges v. Goodnough, 9 S.L.R. 124.

DEVISE—LIFE ESTATE WITH POWER OF SALE AND RIGHT TO ENCROACH UPON CORPUS—VENDOR AND PURCHASER—RIGHT OF LIFE TENANT TO CONVEY.

Re Gouinlock, 8 O.W.N. 561.

DEVISE—GIFT OVER—REPUGNANCY—ESTATE IN FEE SIMPLE.

Re Cathcart, 8 O.W.N. 572.

DEVISE IN FEE SIMPLE — RESTRAINT ON ALIENATION—INVALIDITY.

Re Buchanan and Barnes, 5 O.W.N. 524, 25 O.W.R. 421.

DEVISE AND BEQUEST TO WIDOW—LIMITATION TO "NATURAL LIFE"—APPLICATION TO DEVISE—LIFE ESTATE IN LAND.

Re Nelson, 7 O.W.N. 250, 425.

BEQUEST OF FARM STOCK, IMPLEMENTS, AND HOUSEHOLD FURNITURE FOR LIFE—NOT ARTICLES QUAE IPSO USU CONSUMUNTUR—LIFE ESTATE—PROCEEDS OF SALE OF FARM — DIVISION AMONG RELATIVES — RESIDUARY CLAUSE—MONEY DEPOSITED IN BANK—JOINT ACCOUNT—SURVIVORSHIP.

Re Elliott, 10 O.W.N. 378.

DEVISE—LIFE ESTATE—REMAINDER.

Re Robertson, 10 O.W.N. 365.

WHOLE ESTATE GIVEN TO EXECUTORS IN TRUST FOR SUPPORT AND MAINTENANCE OF WIDOW DURING LIFE—RIGHT TO USE ANY PORTION "AS SHE MAY SEE FIT AND DESIRE" — DISCRETION — REDUCTION OF CAPITAL.

Re Clinton, 16 O.W.N. 267.

DEVISE AND BEQUEST TO WIDOW—USE OF ESTATE FOR LIFETIME—DEVISE AND BEQUEST TO CHILDREN OF WHAT "WILL REMAIN UNSPENT" — APPLICATION TO MONEY AND OTHER PERSONAL PROPERTY —INAPPLICABILITY TO LAND.

Re Richer, 17 O.W.N. 195.

DEVISE OF LIFE ESTATE TO SON—REMAINDER IN FEE TO HIS CHILDREN—"ISSUE" SYNONYMOUS WITH "CHILDREN."

Montreuil v. Walker, 20 O.W.R. 259.

DEVISE OF LIFE ESTATE—REMAINDER IN FEE —EXECUTORY DEVISE OVER.

Re Moore, 2 O.W.N. 881, 18 O.W.R. 832.

DEVISE LIFE ESTATE OR FEE SIMPLE—RULE IN SHELLY'S CASE.

Re Anderson, 18 O.W.R. 924.

(§ III G—126)—LIFE ESTATE—UNLIMITED POWER OF DISPOSITION — "OR OTHERWISE."

A devise by a testator of all his estate to his daughters nominatim, upon trust, "to hold for themselves and to make such disposition thereof from time to time among my children or otherwise as my said daughters decide to make, they, my said daughters, in the meantime to have all the rents and profits therefrom," creates a beneficial life interest in the property in favour of the daughters; the words "or otherwise" confer an unlimited power of disposition exercisable in favour of any person, including the appointment to themselves.

Meagher v. Meagher, 30 D.L.R. 303, 53 Can. S.C.R. 393, affirming 22 D.L.R. 733, 34 O.L.R. 33.

POWER OF DISPOSAL.

It is of the very essence of a power of appointment by will that it is revocable and to become operative only upon the death of the donee of the power.

Re Newton, 2 D.L.R. 576, 3 O.W.N. 948.

Where a bequest of moneys and shares was made to the executors in trust for the widow of the testator, with a power containing the words "notwithstanding anything hereinbefore contained" to withdraw the moneys and shares and transfer to her absolutely for her own use, the transfer made under such direction has the effect of vesting the property in the widow as upon an absolute gift and her right thereto is not limited to such part of it as she may actually use, or give away.

Fulton v. Dauphinee, 1 D.L.R. 63, 46 N. S.R. 168.

The words "I leave my property to my wife, to share with the children as she sees fit" in a devise of lands, passes to the widow merely a life estate with a power of appointment among the children; such devise imposes an obligation on the devisee to divide or share the property among the children at her death. [Burrell v. Burrell, 1 Ambl. 660, followed.]

Re Wolfe and Holland, 1 D.L.R. 568, 3 O.W.N. 900.

Under a will devising all the testator's property to his wife "to be disposed of by her as she may deem just and prudent in the interest of my family," the widow takes the property in fee simple unfettered by a trust, and, therefore, an objection to the title of a vendor to whose predecessor the widow had sold the property, based upon the contention that the words quoted above from the will were not sufficient to give the widow a fee simple in the lands

nor any power to convey them in fee, is not well taken.

Re Smith and Patterson, 4 D.L.R. 89, 3 O.W.N. 1324, 22 O.W.R. 224.

DEVISE TO HUSBAND—LIFE ESTATE—TRUSTEES' POWER TO SELL INCOME.

Re Ley, 5 D.L.R. 1, 17 B.C.R. 385, 21 W.L.R. 757, 2 W.W.R. 790.

DEVISE—LIFE ESTATE TO WIDOW—REMAINDER TO DAUGHTER "OR HER HEIRS"—"OR" READ AS "AND"—WORDS OF LIMITATION, NOT SUBSTITUTION—CONVEYANCE OF FEE SIMPLE BY WIDOW AND DAUGHTER.

Re Wright and Fowler, 10 O.W.N. 299.

(§ III G—127)—LIFE ESTATE TO WIDOW IN REALTY AND PERSONALTY—USE AND ENJOYMENT—IMPLIED POWER TO ENCROACH UPON CORPUS—MAINTENANCE.

Re Goodnough Estate, 27 D.L.R. 790, 34 W.L.R. 42.

LIFE ESTATE—IMPLIED POWER TO ENCROACH ON CORPUS.

[Re Dixon, Dixon v. Dixon (1912), 56 Sol. J. 445; Re Holden, Holden v. Smith, 57 L.J. Ch. 648, doubted; Re McDonald (1903), 35 N.S.R. 500, applied.]

Re Johnston, 8 D.L.R. 746, 4 O.W.N. 510, varying 7 D.L.R. 375, 4 O.W.N. 153.

ENLARGING OR REDUCING BY OTHER PROVISION—DEVISE TO WIFE—LATER CLAUSE EMPOWERING EXECUTOR TO SELL.

A widow will take an absolute estate in the property of her husband, including the income therefrom, to the exclusion of the latter's children, under a devise to her of all of the real and personal estate of which he should die possessed notwithstanding a subsequent clause, but which was without words of gift, to the effect that the executors might dispose of the real and personal estate at any time when they should deem it most advantageous, and that they should manage it for the best advantage of the testator's heirs until disposed of; since the latter clause, being without words of gift, must be construed not as cutting down the estate previously granted, but merely as a direction to the executors to handle the estate, until the payment of debts, in the same manner as it woud have been their duty to do in the absence of such clause.

Re Freedy Estate, 13 D.L.R. 832, 23 Man. L.R. 763, 25 W.L.R. 378.

REDUCING ABSOLUTE GIFT — REMAINDER OVER.

Where a testator after devising and bequeathing all his real and personal estate to his widow made a codicil which stated that it was now his desire that such provision be also subject to the condition and proviso that upon her death 60 per cent of his property or estate remaining at the time of her death should be divided between certain named persons, the balance or 40 per cent to be disposed of as his wife should please, and further stated that the codicil was not intended to restrict his wife's reasonable enjoyment of the provision made for her in the will, the widow is entitled to the whole of the property till her death, but if any of it remained at her death, three-fifths would pass as directed in the codicil.

Re Stanton, 9 D.L.R. 261, 4 O.W.N. 504.

POWER OF APPOINTMENT.

Where a general power of appointment is given to a daughter under a will, to be exercised by the daughter either by deed or will, she is substantially the one who is solely and beneficially interested and entitled, and when she transfers or conveys the life estate also given to her under the will and executes a deed of appointment she may demand that the executors shall convey to her appointee in pursuance of the appointment ,and this irrespective of a provision in the will that the executors shall convey at the death of the daughter.

Re Mara and Wolfe, 9 D.L.R. 435, 4 O.W.N. 866, 24 O.W.R. 144.

BEQUEST TO TRUSTEE OF WHOLE ESTATE FOR SOLE USE AND BENEFIT OF DAUGHTER FOR LIFE—GIFT OVER OF TRUST FUNDS "REMAINING UNAPPROPRIATED" — RECEIPT OF WHOLE ESTATE BY DAUGHTER—DISCHARGE OF TRUSTEE—"APPROPRIATION"—ABSOLUTE GIFT.

Re Turner, 10 O.W.N. 155.

LEGAL ESTATE DIVIDED INTO THREE EQUAL SHARES—HEIRS OF LIVING PERSONS TO TAKE EQUITABLE ESTATE OF ONE SHARE—PRESENT LEGATEE TO HAVE RIGHT TO USE INCOME DURING LIFETIME.

Re McAllister, 20 O.W.R. 261.

(§ III G—130)—DEVISE — LIFE ESTATE — GIFT OVER TO "CHILDREN" — ESTATE TAIL—RULE IN SHELLEY'S CASE—VENDOR AND PURCHASER—TITLE TO LAND—NOTICE TO THIRD PERSON—RULE 602.

Re Thompson and Robbins, 11 O.W.N. 344.

DEVISE — LIFE ESTATE — REMAINDER TO HEIRS, EXECUTORS, ADMINISTRATORS, AND ASSIGNS OF LIFE TENANT—RULE IN SHELLEY'S CASE.

Re Hays, 13 O.W.N. 25.

GIFT TO DAUGHTERS — ANNUITY OUT OF RENTS OF LAND OR ESTATE TAIL IN LAND—BEQUEST TO GRANDDAUGHTER—INCREASED RENTAL—"OUT OF THE RENTAL"—"ISSUE"—LIMITATION TO CHILDREN—RESIDUARY CLAUSE—TENANTS IN COMMON.

Re Rebecca Barrett, 5 O.W.N. 807, 6 O.W.N. 270.

DEVISE TO THREE DAUGHTERS JOINTLY AND TO SURVIVOR OR SURVIVORS—IN EVENT OF DEATH OF ALL WITHOUT ISSUE DEVISE OVER — JOINT TENANCY FOR LIFE AND TENANCY IN COMMON IN TAIL WITH CROSS-REMAINDERS IN TAIL AND ULTIMATE REMAINDER OVER—DEATH OF ALL THREE, TWO LEAVING ISSUE—RIGHTS OF ISSUE — ESTATE TAIL IN UNDIVIDED MOIETY TO EACH FAMILY.

Re Harrison, 6 O.W.N. 394.

DEVISE TO ONE FOR LIFE AND TO ISSUE AFTER DECEASED—RULE IN SHELLEY'S CASE.

Watson v. Phillips, 2 O.W.N. 261.

MEANING OF WORDS "DESCENDANTS" AND "ISSUE" — ESTATE TAIL OF PERSONAL ESTATE.

Re Sutherland Estate, 19 O.W.R. 702.

(§ III G—131)—LIFE ESTATE OR FEE TAIL—"ISSUE"—"CHILDREN"—RULE IN SHELLEY'S CASE.

A devise of land to the testators daughters for their lives as tenants in common, with remainder to "their respective issues in fee," so that the "children" of each take their mother's share, manifests an intention to treat the word "issues" as "children," and gives the daughters a life estate and not an estate in fee tail. The words "in fee" are not necessarily the equivalent of "in fee simple." [Van Grutten v. Foxwell, [1897] A.C. 658; King v. Evans, 24 Can. S.C.R. 356, distinguished.]

Re Taylor, 28 D.L.R. 488, 36 O.L.R. 116.

TRUST—REALTY AND PERSONALTY—POWER OF APPOINTMENT—CESTUI QUE TRUST—GIFT OVER, IN DEFAULT OF EXERCISE OF POWER, TO REPRESENTATIVES OF DONEE — ABSOLUTE ESTATE — RULE IN SHELLEY'S CASE — MARRIED WOMAN — SEPARATE ESTATE.

Re Hooper, 7 O.W.N. 104.

TRUST FOR CHILDREN OF TESTATOR—INCOME OF ESTATE PAYABLE TO CHILDREN DURING THEIR LIVES—POWER OF APPOINTMENT BY WILL AS TO PRINCIPAL—IN DEFAULT OF APPOINTMENT PRINCIPAL TO GO TO "RIGHT HEIRS" OF CHILDREN—WHOLE ESTATE VESTED IMMEDIATELY IN CHILDREN.

Re Helliwell, 16 O.W.N. 113.

ESTATE FOR LIFE OR ESTATE TAIL—"ISSUE."

Re Russell, 8 O.W.N. 248.

DEVISE "ISSUE"—"IN FEE"—LIFE ESTATE—REMAINDER.

Re Taylor, 9 O.W.N. 271.

HABENDUM — "LAWFULLY BEGOTTEN HEIRS FOR EVER"—ESTATE TAIL—LANDS INCLUDED IN DEVISE—ROAD ALLOWANCE—MUNICIPAL BY-LAW CLOSING UP—MUNICIPAL ACT, R.S.O. 1877, c. 174, ss. 486–8, 525 — RESIDUARY DEVISEES — BENEFICIARIES — ELECTION — DOWER —ASSIGNMENT OF.

Re Walmsley, 11 O.W.N. 6.

(§ III G—135)—CONDITIONAL OR ABSOLUTE GIFT—SETTING ASIDE INTEREST BEARING SECURITIES—MAINTENANCE OF SISTERS —CONTINUATION OF YEARLY PROVISION.

Re K, 5 D.L.R. 311, 3 O.W.N. 883.

ESTATE UPON CONDITION — "ALL LIVING CHILDREN" — DEPENDENT ON RECOVERY OF HEALTH—PROVISIONS FOR WIDOW.

Re Curtis, 24 D.L.R. 914.

BEQUEST — CONDITION—"IF LIVING"—TIME APPOINTED FOR PAYMENT.

Re Jackson, 9 O.W.N. 29.

TRUST — REMAINDER — LUNATIC — RIGHT TO RECEIVE FUND—STATUTORY COMMITTEE—HOSPITALS FOR INSANE ACT.

Dunlop v. Ellis, 41 O.L.R. 305.

EVENT OF CHILDREN DYING WITHOUT HAVING RECEIVED PORTIONS — INTENTION — PERIOD OF DIVISION.

The testator, dying in 1887, by his will set apart his house as a home for his wife and family, and then gave all his estate to his executors in trust to convert and use for the maintenance of his wife and family, and to pay certain sums to his sons, and, at such time, after the expiration of five years from his decease as might seem advisable to the executors, to divide among all his children share and share alike, all his estate, save such portions as the executors might retain to provide from the interest for the wife and family residing in the homestead, any balance of income being divided yearly among all his children. The will further provided that on the death of the widow the income should be divided until the time for division previously referred to; and "in case any of my children should die without having received his or her portion . . . and leaving issue him or her surviving at the time a division of the estate shall be made among my children the child or children of such of my children so dying shall represent and receive their deceased parent's share but if any of my children should die leaving no issue him or her surviving the share or portion herein given . . . to such child shall revert to and become part of my estate and be equally divided among all my surviving children." The executors kept the estate intact until the widow died (in 1917 or 1918), and after her death paid over to the executors of a son, who had died in 1907, leaving children, a sum representing part of his share in his father's estate:—Held, that the children of the deceased son took under the will of their grandfather, whose executors ought to have paid to those children the sum aforesaid. The gift was to the children of the testator, subject to be divested in favour of the child or children of such of the testator's children as should die before the actual receipt of their shares, leaving children surviving. Where the testator has intended the gift over to take effect, and there has not been actual payment, effect must be given to that intention. [Kirby v. Bangs, 27 A.R. (Ont.) 17, 29; Johnson v. Crook, 12 Ch.D. 639, followed.]

Re Mitchell, 42 O.L.R. 340.

DEVISE OF LAND—RESTRAINT UPON ALIENATION — INVALIDITY — TITLE TO LAND — VENDOR AND PURCHASER.

Re Huron & Erie Mortgage Corp. and Coghill, 13 O.W.N. 442.

DEVISE TO SON — LIMITATION — "DEATH WITHOUT ISSUE"—ISSUE SURVIVING SON — ORIGINATING NOTICE — RULE 604 —WILLS ACT, S. 33—COSTS.

Re Ronson, 15 O.W.N. 1.

BEQUEST OF INCOME TO DAUGHTER—DEATH OF DAUGHTER BEFORE DEATH OF TESTATOR—RESIDUARY DEVISE TO DAUGHTER —DECLARATION AGAINST LAPSE—WILLS ACT, S. 37.

Re Heal, 13 O.W.N. 285, 14 O.W.N. 15.

RESIDUARY DEVISE—TRUST—INTENTION.

A testator devised all his residuary estate to A., to have and to hold the same unto A. forever, coupled with a limitation that A. should execute and carry out any request and directions which the testator might give A. respecting the property devised, by a document under his hand and seal. Held, that the testator, having died without making any request or giving any directions, A. took the property beneficially and not as trustees for the next of kin.

McHugh v. McGuire, 45 N.B.R. 167, reversing McLeod, C.J.

CONDITION IN CODICIL—"DIE BEFORE HAVING CHILDREN"—ABSOLUTE DEVISE, SUBJECT TO DEVISE OVER IN EVENT WHICH COULD NOT HAPPEN—GOOD TITLE TO LAND.

Re Breault and Grimshaw, 13 O.W.N. 387.

DEVISE TO SON—DEVISE OVER IN EVENT OF DEATH OF SON "LEAVING NO ISSUE"—DEVISE TO SON OF LIFE ESTATE ONLY—APPLICATION UNDER VENDORS AND PURCHASERS ACT.

Re Toll and Mills, 16 O.W.N. 215.

(§ III G—136)—APPLICATION OF GIFT OVER —CHILDREN DYING WITHOUT ISSUE SURVIVING—INTERPRETATION OF WILLS ACT, S. 33—SALE AND DISPOSITION OF ESTATE BY EXECUTORS—DEVOLUTION OF ESTATES ACT, SS. 14, 19.

Where there is a gift over to other beneficiaries contingent on the death of the children leaving no issue living at their death, the children take an absolute interest in the real and personal estate subject to the proviso. In the Wills Act, R.S.O. 1914, c. 120, s. 33, the words "dying without issue," mean a lack of issue in the lifetime or at the death of the child or children. Held, also that power of sale according to the Devolution of Estates Act (R.S.O. 1914, c. 119, s. 14), may be exercised, subject to consent of official guardian or order of judge of the Supreme Court.

Re Coté, 49 D.L.R. 381, 46 O.L.R. 4, reversing 15 O.W.N. 419.

CY-PRES DOCTRINE.

Where literal compliance with a secret condition attached to a gift becomes impossible from unavoidable circumstances, and without any fault of the party, it is sufficient that it is complied with as nearly as it practically can be, or as it is technically called cy-pres. Ignorance by the beneficiary of a condition annexed to a gift does not protect the devisee from the consequences of not complying with it, but where compliance with the condition is contra bonos mores, the devisee might well be absolved from compulsory compliance with the condition.

Adams v. Gourlay, 4 D.L.R. 731, 26 O.L.R. 87, 21 O.W.R. 772.

The use of the word "I wish" by a testator may carry an obligatory import and suffice to create a trust.

Re Hamilton, 8 D.L.R. 529, 23 O.W.R. 549, 27 O.L.R. 445. [Affirmed, 12 D.L.R. 861, 28 O.L.R. 534.]

(§ III G—137)—BEQUEST—CONDITION FORFEITING IF MINOR LEGATEE ELECTS TO LIVE WITH PARENT—DURATION.

A condition that a gift to a testator's grandchildren should be forfeited if, at the death of the grandmother, with whom they were living at the execution of the will, they should elect to reside with their father, is limited to the period of minority of such legatee.

Eastern Trust Co. v. Fraser, 12 D.L.R. 584, 13 E.L.R. 137.

CONDITION SUBSEQUENT, GENERALLY.

Where a sum is bequeathed to trustees to invest, paying the interest to a granddaughter "so long as she lives and is unmarried, and if she dies without having married or if married without issue" then the principal is specifically bequeathed over to another "at the granddaughter's death" and if the granddaughter "marries and has a child or children then the principal shall be paid to the granddaughter at such time thereafter as the trustees shall deem best in the interests of the granddaughter and her child or children," but the testator has not otherwise (either specifically or by residuary bequest or necessary implication) disposed of the corpus or its income during the childless period of the granddaughter's married life, the interest of the fund will be paid to the granddaughter during that period. [Bird v. Hunsdon (1818), 2 Swans. 343, 1 Wils. Ch. 456, followed.]

Re Steele, 7 D.L.R. 169, 23 O.W.R. 52.

DUTY OF EXECUTOR TO ASCERTAIN WHETHER COMPLIED WITH.

Before paying income to a legatee to whom it was given on condition of his keeping up and maintaining certain property as a gentleman's residence in a specified manner, it is the duty of the executor to ascertain from time to time whether such condition is being fulfilled by the legatee.

Re Nordheimer, 14 D.L.R. 658, 29 O.L.R. 350.

(§ III G—138)—GIFT OVER ON WIDOW'S REMARRIAGE.

Where there is a provision in a will whereby the entire estate is given to the widow during her natural life but subject to a direction that if she remarries "everything shall be divided between the children," and this is followed by a residuary clause in favour of the widow alone the elect is

that she takes the whole of the property and estate absolutely, subject to her being divested of it should she marry again. [Burgess v. Burrows, 21 U.C.C.P. 426, applied.]

Re Lacasse, 9 D.L.R. 831, 4 O.W.N. 86, 24 O.W.R. 309.

Under a will giving certain property to the testator's wife during life and widowhood and upon her death to such one or more of the testator's children as she may appoint by will and if she remarry, to such one or more of the children as the executors may appoint, a child's share of the proceeds of the land when sold under the Ontario Settled Estates Act cannot be paid out of court to him on his attaining his majority even with the consent of the widow and of such of the other children as are of age.

Re Newton, 2 D.L.R. 576, 3 O.W.N. 948.

DEVISE AND LEGACY — CONSTRUCTION RESTRAINT ON ENJOYMENT OF LEGACY DURING COVERTURE — LEGACY TO MARRIED WOMAN WITH RESTRAINT ON ANTICIPATION DURING COVERTURE—"PAID TO HER" —"SETTLED UPON HER."

Re Hamilton, 8 D.L.R. 529, 27 O.L.R. 445, 23 O.W.R. 549. [Affirmed in 12 D.L.R. 861, 28 O.L.R. 534.]

A devise and bequest of all the testator's real and personal estate of every nature and kind to his wife for her own use and benefit for her natural life or so long as she does not remarry, gives her the absolute right to dispose of the personalty. Under a devise of all the testator's real estate to his widow for her life or durante viduitate, the widow is put to her election between the devise and her rights under the Devolution of Estates Act (Ont.) or as doweress.

Re Allen, 7 D.L.R. 494, 4 O.W.N. 240.

CONDITION IN RESTRAINT OF MARRIAGE—MIXED ESTATE.

A provision that "in the event of the marriage of my sister all the residue bequeathed to her shall go to the Odd Fellows Home," is a condition in general restraint of marriage and void; the rule applies to mixed funds and to real and personal estate given together.

Re Cutter, 31 D.L.R. 382, 37 O.L.R. 42.

CONDITIONAL LIMITATION—CONDITION IN RESTRAINT OF MARRIAGE.

The testator by his last will provided, inter alia, as follows:—"I devise and bequeath all my real and personal property to my wife Jane Taylor as long as she remains unmarried. In the event of my said wife marrying at any time after my death, I devise and bequeath all my said real and personal property unto my daughter:—Held, that, as to the real estate, these provisions constituted a conditional limitation, conferring on the wife a fee determinable on her marrying again; and, as to the personal estate, these provisions conferred an absolute interest subject to an executory bequest in favour of the daughter, contingent on the wife's remarriage.

Re Taylor, 28 W.L.R. 630.

DEVISE OF FARM TO DAUGHTERS—PROVISION IN EVENT OF MARRIAGE—DEVISE IN FEE SUBJECT TO CONDITIONS SUBSEQUENT — TRUSTEES—POWER TO SELL AND CONVEY LAND.

Re McBain, 8 O.W.N. 330.

BEQUEST OF SHARE OF ESTATE TO WIDOW ABSOLUTELY AND FURTHER SHARE IF SHE SHOULD REMAIN UNMARRIED—CONVERSION OF ESTATE INTO MONEY AND INVESTMENT IN ONTARIO—PAYMENT OF SMALLER SHARE TO WIDOW — FURTHER SHARE RETAINED BY EXECUTORS AND INCOME PAID TO WIDOW — REMOVAL OF WIDOW FROM ONTARIO—CORPUS TO REMAIN IN ONTARIO.

Re Fischer, 9 O.W.N. 68.

PROVISION FOR MAINTENANCE OF WIDOW AND CHILDREN — INCOME — CORPUS—EXECUTORS—POWER OF SALE—DISCRETION —PROVISION FOR WIDOW IN EVENT OF REMARRIAGE — "POSSESSION" — OWNERSHIP — ABSOLUTE GIFT OF PART OF ESTATE.

Re Tessier, 15 O.W.N. 458.

DEVISE TO EXECUTORS IN TRUST FOR WIFE AND CHILDREN — CONDITION IN RESTRAINT OF MARRIAGE.

Re Tucker, 3 S.L.R. 473, 16 W.L.R. 172.

(§ III G—139)—RESTRAINTS UPON ALIENATION—PERPETUITIES.

A bequest is void, as tending to create a perpetuity, by which the residue of an estate was given to executors or trustees to be used by them in their discretion in maintaining and keeping up, until sold, the testator's residence, as a home for his son, his son's family and descendants, or for whomsoever it should by the son be given by will or otherwise, the trust not being to keep up the home for specific persons but to keep up and maintain a dwelling-house as kept up and maintained before the testator's death, and ending only on a sale being made which might not take place within the perpetuity period.

Kennedy v. Kennedy, 13 D.L.R. 707, 24 O.W.R. 943, affirming 11 D.L.R. 328, 28 O.L.R. 1, varying 3 D.L.R. 536, 26 O.L.R. 105, 21 O.W.R. 501.

"RESTRAINT ON ALIENATION"—FEE.

A devise in fee simple stated to be "upon the express condition" that the devisee shall not sell or dispose of the land during her lifetime, but only by will or deed to take effect after her death, will pass the fee with its incident power of alienation, and the attempted restraint on alienation is inoperative and void. [Blackburn v. McCallum, 32 Can. S.C.R. 65; Re Rosher, 26 Ch.D. 801, followed; Re Macleay, L.R. 20 Eq. 186, criticized.]

Re Carr; Carr v. Carr, 20 D.L.R. 74, 20 B.C.R. 82.

Where the terms of a will creating sub-

stitution prohibits the usufructuary legatees or the institutes from alienating, such prohibition will not be extended by inference to the substitutes themselves.

Laurier v. Nelson, 7 D.L.R. 403.

Where a testator's lands are to be equally divided amongst his children after the death or remarriage of his widow but the lands are not to be sold "only to the testator's own heirs—they may buy or sell to each other," the restraint does not apply where all the parties entitled are desirous of selling to a stranger.

Re Lane and Beacham, 7 D.L.R. 311, 4 O. W.N. 243, 23 O.W.R. 250.

RESTRAINTS DURING COVERTURE—PROPER AND PRACTICAL FORM OF SETTLEMENT.

[Loch v. Bagley, L.R. 4 Eq. 122, applied.]

Re Hamilton, 8 D.L.R. 529, 27 O.L.R. 445, 23 O.W.R. 549. [Affirmed, 12 D.L.R. 861, 28 O.L.R. 534.]

CONDITION AGAINST CONTEST — RESIDUARY BENEFICIARIES — FORFEITURE FOR "INSTITUTING PROCEEDINGS TO SET ASIDE WILL"—LODGING OF CAVEAT IN SURROGATE COURT — FURTHER PROCEEDINGS NOT TAKEN.

Re McDevitt, 25 O.W.R. 309.

INEFFECTIVE DEVISE — MISTAKE IN DESCRIPTION OF LAND — RESIDUARY DEVISEE — PARTIAL RESTRAINT ON ALIENATION—VALIDITY — TITLE — CONVEYANCE — NEXT OF KIN — PERIOD OF ASCERTAINMENT.

Re Oliver, 9 O.W.N. 190.

(§ III G—140)—BEQUEST TO SURVIVING CHILDREN—CHILD DYING BEFORE EXECUTION OF WILL.

Issue of a daughter who died before the execution of her father's will, take nothing under a bequest of the residue of his estate to his children, with a provision that, should any of them be dead, the share should be divided between his or her children. [Re Musther, 43 Ch.D. 569; Re Webster's Estate, 23 Ch.D. 737; Butter v. Ommaney, 4 Russ. 73, and Christopherson v. Naylor, 1 Mer. 320, followed.]

Re Vining, 12 D.L.R. 498, 24 O.W.R. 814.

REMAINDERS.

Where, upon the death of a life tenant, the income of a fund was payable to a child of a testator for life, with remainder of the corpus to her children, the latter take as purchasers.

Re Ley, 5 D.L.R. 1, 17 B.C.R. 385, 21 W. L.R. 757, 2 W.W.R. 790.

VESTED REMAINDER — TRUST — BEQUEST TO WIFE.

A will directed the trustees thereunder to set aside a sufficient portion of the trust premises to produce a certain income for the testator's parents and next directed that, after such portion had been set aside, one-fourth of the remainder of the trust premises should be paid to each of his two daughters and that, after the foregoing gifts had been set aside, the remainder of the trust premises should be paid to the wife and, in the event of his wife dying before his decease or "before receiving this bequest," then said remainder should be paid to the daughters. The wife died before receiving the bequest and before the property to supply the fund for the benefit of the father and mother had been set aside by the trustees. Held, that the bequest to the wife had not become vested in her.

Re Gardner Estate, 25 B.C.R. 553, [1918] 3 W.W.R. 65.

Where following a gift by will of all the testator's property absolutely to his wife with a direction that their children should be suitably maintained and educated by her, the will provided that should the wife die leaving any of said property or rights, "in her possession or not disposed of" then upon her decease the same should be divided "among our said children" in a specified manner, such provision does not empower the wife to dispose of the residue at the time of her death by will but has the effect of creating a substitution de residuo in favour of the children.

Shearer v. Hogg, 6 D.L.R. 255, 46 Can. S.C.R. 492, affirming 40 Que. S.C. 139.

TRUST—CONTINGENT—GIFT—PERPETUITIES.

A bequest of a fund in trust for a daughter for life, and thenceforth in trust for "the child or children who being a son or sons attain the age of 21 years, or being a daughter or daughters attain the age of 25 years," is a contingent gift, and void for remoteness, as to the daughters, under the rule against perpetuities.

Hewson v. Black, 36 D.L.R. 185, 51 N.S. R. 81, affirming 33 D.L.R. 317.

EXECUTORS — ESTATE PUR AUTRE VIE — EQUITABLE VESTED REMAINDER IN FEE —TRUSTEES — REMAINDERMEN — TITLE TO LAND—VENDOR AND PURCHASER.

Re Brown and McMaster, 17 O.W.N. 209.

LIFE ESTATE — REMAINDER — CONDITION — FULFILMENT—BIRTH OF ISSUE—ESTATE IN FEE SIMPLE.

Re McDonald, 25 O.W.R. 147.

DEVISE—LIFE ESTATE—BROTHERS AND SISTERS LIVING AT DEATH OF TESTATORS—BROTHERS AND SISTERS BORN AFTERWARDS.

Re Van Every, 9 O.W.N. 69.

(§ III G—141)—INTERPRETATION—SUBSTITUTION—LEGACY OF USUFRUCT—QUE. C. C. 928.

A testator who bequeaths to his wife the enjoyment and usufruct of his property, and, after the extinction of this enjoyment and usufruct gives the property in the goods to his children, but who, by a subsequent clause, declares that if he dies without children he bequeathes the property of all the goods of his estate to his nephews, adding that his wife must fulfil all the charges imposed by law on those receiving the usufruct, does not create a substitution, but a legacy of usufruct.

Masson v. Masson, 23 Que. K.B. 550.

CONSTRUCTION OF WILL—NO DIRECT AND COLLATERAL SUBSTITUTION—QUEBEC CASE—TRUST—DEATH OF GREVÉ—ACCRETION—PARTITION—APPORTIONMENT IN ALIQUOT SHARES—DISTRIBUTION OF ESTATE—PARTIAL INTESTACY—DEVOLUTION.

Masson v. Masson, Harwood mis-en-cause, 47 Can. S.C.R. 42, reversing 20 Que. K.B. 1.

(§ III G—145)—EXECUTORY DEVISE—LIMITATION OVER IF AGE NOT ATTAINED—ABSOLUTE ESTATE.

Upon a devise of land in trust for a grandchild until he attains the age of 26, followed by a gift over to persons who are to share in the residue in the event that he does not live to that age, there is an implication, that the devisee, on attaining the stated age, should become entitled to the whole interest in the property absolutely. [Corpton v. Davis, L.R. 4 C.P. 159; Wilkes v. Williams, 2 J. & H. 125, followed.]

Re Cotter, 24 D.L.R. 289, 34 O.L.R. 24.

Where by will securities were bequeathed to an executor with an absolute discretion to apply as he thought fit for the benefit of a named beneficiary, there is no power of disposition by will in such beneficiary of what remains in the hands of the executor on the death of the beneficiary; but it passes to the next of kin of the testator as at the time of his death. [Gude v. Worthington (1849), 3 De G. & Sm. 389, distinguished.]

Re Rispin, 2 D.L.R. 644, 25 O.L.R. 633, 21 O.W.R. 380. [Affirmed, 8 D.L.R. 756, 46 Can. S.C.R. 649, 23 O.W.R. 308.]

EXECUTORY DEVISES—CONDITIONAL LIMITATIONS—DEVISE TO EXECUTORS TO SELL—FICTITIOUS SALE AT UNDERVALUE—ATTACKING PARTIES, JOINING IN CONVEYANCE—UNDUE INFLUENCE—BREACH OF TRUST—ONUS—DISCHARGE OF MORTGAGE.

Blaisdell v. Rayeroft; Rayeroft v. Cook, 6 D.L.R. 907, 4 O.W.N. 297. [Affirmed, 12 D.L.R. 846, 24 O.W.R. 867.]

A condition in a will that should the devisee refuse to comply with provisions of the will to provide maintenance for certain other beneficiaries during minority, then the property shall vest in and belong to another person subject to the same stipulations constitutes a conditional limitation of the estate of the first named devisee so as to immediately vest the subsequent estate in the second named devisee without any claim, entry or act to be done by the latter. A court of equity has jurisdiction to determine whether the contingency of a conditional limitation of lands has happened and, in the event of forfeiture, to declare to whom the property has passed. [Craven v. Brady, L.R. 4 Eq. 209, applied.]

Durant v. Huestis, 1 D.L.R. 786, 10 E.L.R. 423.

CONDITIONAL LIMITATION—"DURING THEIR LIVES RESPECTIVELY"—MARRIAGE—COTENANCY—SURVIVORSHIP.

Re Conn, 28 D.L.R. 805, 9 O.W.N. 5.

CONDITIONAL LIMITATION — ADVANCES TO LEGATEE—CHARGES IN "FAMILY BOOKS"—DEDUCTION FROM SHARE.

Re Boehmer, 3 D.L.R. 857, 22 O.W.R. 287, 3 O.W.N. 1353.

EXECUTORY DEVISES—DEVISE WITH DISCRETION—DEATH OF BENEFICIARY.

Re Collins, 6 D.L.R. 893, 23 O.W.R. 225.

EXECUTORY DEVISES—CONDITIONAL LIMITATIONS.

The devise to testator's housekeeper of the right to occupy his house and use the furniture therein common with his natural son to whom this property was bequeathed on condition that she takes care of the child and looks after his maintenance until he becomes of age is valid, and if the house and furniture are destroyed by fire she has a right of action against the executors to procure from the estate a dwelling with the requisite furnishing for herself and the child.

Hart v. Plante, 21 Que. K.B. 72.

TRUST—BEQUEST OF INCOME TO WIDOW FOR LIFE—ESTATE TO BE DIVIDED BETWEEN DAUGHTERS AT DEATH OF WIDOW—PROVISION IN CASE OF DEATH OF DAUGHTER LEAVING ISSUE—ISSUE TO TAKE PARENT'S SHARE—EXECUTORY GIFT—ABSOLUTE TITLE NOT IN DAUGHTER SURVIVING.

Re Kinnehan, 11 O.W.N. 208.

CONDITIONAL BEQUEST—WAIVER BY GOVERNMENT OF SUCCESSION DUTIES—REFUSAL TO WAIVE—SUBSTITUTED BEQUEST—CONTINGENCY.

Re Reeves, 10 O.W.N. 427.

(§ III G—150)—INCOME OR SUPPORT—EDUCATION.

Where a testator directed that upon the sale of land by his testamentary trustees they should invest the proceeds, and that the "proceeds" of the investment should be paid to designated persons, the word "proceeds" will be construed as meaning income, since such was obviously the intent of the testator.

Re Ley, 5 D.L.R. 1, 17 B.C.R. 385, 21 W.L.R. 757, 2 W.W.R. 790.

INCOME—DISCRETION AS TO—CHILDREN.

A will providing the payment to a widow during the term of her natural life and as long as she shall remain a widow, the net annual income from the estate for the maintenance of herself and children, the annuity to cease upon her remarriage, entitles the widow to such income during her widowhood for her own use absolutely, and vests in her the discretion, nonreviewable if exercised in good faith, as to the extent and manner of providing for each child, and does not obligate her to take into consideration the

need of children who are married or otherwise forisfamiliated.

Singer v. Singer, 27 D.L.R. 220, 52 Can. S.C.R. 447, affirming 22 D.L.R. 717, 33 O. L.R. 602.

Where from a will the testator's intention appears to be that annuities thereby created should be a charge only upon the income of his estate, the corpus cannot be charged therewith. [Carmichael v. Gee, 5 App. Cas. 588, distinguished.]

Re Irwin, 4 D.L.R. 803, 3 O.W.N. 936, 21 O.W.R. 562.

CONSTRUCTION OF DEVISE OF INCOME FROM FUND FOR LIFE—INTEREST FROM DEATH OF TESTATOR.

[Cook v. Meeker, 36 N.Y. 15, followed; Re Crane, 1 Ch. 379, distinguished.]

Re K, 5 D.L.R. 311, 3 O.W.N. 883.

BEQUEST OF INCOME—FUND TO BE INVESTED IN REALTY FOR HOME FOR DONEE ON MARRIAGE.

An absolute estate was vested in the testator's son by a bequest, without a gift over, to executors of a sum of money to be invested in their names for the payment of the income to such son, with a further provision that on the marriage of the son such fund should be invested in real estate so as to give him a home for his absolute use and benefit for life.

Re Sheard, 11 D.L.R. 576, 24 O.W.R. 716, 4 O.W.N. 1395.

INCOME—PROCEEDS OF UNAUTHORIZED INVESTMENT BY EXECUTORS—SECURITIES RETAINED FOR REALIZATION.

The entire income received by executors, who are empowered to hold certain investments upon a nontrustee security, or those retained for profitable realization, does not go to the life tenant since everything beyond the legal rate of interest will be regarded as an accretion to the corpus to compensate for the risk incident to the particular investment. Accretions to shares of stock received by executors on the exercise of an option incident to such shares, are not to be treated as income but as belonging to capital.

Re Fulford, 14 D.L.R. 844, 29 O.L.R. 375.

INCOME OR SUPPORT—LEGACY FOR INVESTMENT FOR BENEFIT OF LEGATEE.

Under a testamentary direction that the residue of a testator's estate should be divided among his children in certain proportions and to vest immediately on the testator's death, one-third to be paid each child and the remainder invested by the executors for their benefit; and that the share of each daughter should be deemed her separate estate free from the control of her husband, but not to be anticipated; and, on the marriage of any daughter, that a proper marriage settlement be made to carry out the testator's intention, one-third only of the portion of each daughter in the residue vests absolutely, the remainder being held by the executors and the income only paid them for life. The daughters do not, on becoming of age, take the corpus of the fund, notwithstanding that the age of twenty-one was fixed as the period of distribution, but it is the duty of the executors to hold the settled sums and to pay the income only to the daughters for life.

Re Nordheimer, 14 D.L.R. 658, 29 O.L.R. 350.

ROYALTIES—APPORTIONMENT.

Where a widow by her will, acting under a general power of appointment conferred upon her in her deceased husband's will, directed the executors of her husband to transfer the residue of the said estate to trustees upon trust "to set apart and invest the residue of the said estate and to pay the income and interest thereof to" her two sisters, and royalties were payable to the husband's estate from time to time upon sales made of books written by him, such royalties are partly capital and partly income, and should be apportioned between capital and income in the proportion that capital would bear to an assumed income at 5 per cent with yearly rests, from the husband's death. [Rule in Re Earl of Chesterfield's Trusts (1883), 24 Ch. D. 643, followed.]

Re Kirkland, 32 D.L.R. 83, 37 O.L.R. 569.

MAINTENANCE—LIABILITY FOR—REQUEST.

A devise charging an estate with the maintenance of the testator's widow living thereon does not render the executor liable for support furnished her without his request when she was living elsewhere.

Westhaver v. Fleet, 36 D.L.R. 251, 51 N. S.R. 235.

BEQUEST OF INCOME FOR MAINTENANCE AND EDUCATION OF CHILDREN — DISCRETION OF EXECUTORS—ABILITY OF CHILDREN TO SUPPORT THEMSELVES.

Re Blahout, 11 O.W.N. 312.

ANNUITIES—"NET INCOME OR PROCEEDS"—RIGHT TO RESORT TO CORPUS.

A bequest of annuities out of "the net income or proceeds" of property directed to be converted into money, renders the corpus subject to the payment of the annuities, if the income therefrom is insufficient to pay them, since the word "proceeds" includes corpus unless it is clear that a more restricted meaning is intended.

Beal v. Eastern Trust Co., 43 N.B.R. 23.

"PROCEEDS OF THE SAID PROPERTY"—RENTS OR PROFITS FROM WORKING FARM—MAINTENANCE OF INFANT DEVISEE—SALE OF FARM—EXECUTORS—GUARDIAN.

Re Wemp, 9 O.W.N. 34.

An Act which gives to the executors and administrators of a succession power to make advances to certain heirs for their maintenance to be taken from the surplus of the revenues and payable as an annuity in quarterly payments the amount of which is increased by two other acts, does not oblige them to pay these instalments in ad-

vance and even when, under the terms of the original Act and its first amendment, they have done so they are not obliged to continue it pursuant to the provisions of the third Act for an increase as above stated.

Pratt v. Gravel, 41 Que. S.C. 324.

ADVICE AND DIRECTION OF COURT—EXECUTORS — DISCRETION — ANNUITIES — INSUFFICIENCY OF INCOME—RESORT TO CORPUS—SHARES OF INFANTS—VESTED ESTATES — PERIOD OF DISTRIBUTION — COSTS.

Re Wood, 6 O.W.N. 611.

DEVISE AND BEQUEST TO SON, SUBJECT TO CHARGE FOR MAINTENANCE OF WIDOW—"COMFORTS SHE HAS BEEN USED TO"—ASCERTAINMENT OF PROPER SUM FOR MAINTENANCE — POWERS OF COURT — ORIGINATING NOTICE—RULE 600—ADDITIONAL BEQUEST TO WIDOW OF LIFE INCOME FROM INSURANCE MONEYS.

Re Leishman, 6 O.W.N. 653.

GIFT TO WIDOW FOR LIFE OF RENTS OF REAL ESTATE—SALE AND DIVISION OF PROCEEDS BETWEEN CHILDREN AT DEATH OF WIDOW—LIFE TENANCY—LANDS SUBJECT TO MORTGAGE—DEDUCTION FROM RENTS OF INTEREST AND TAXES—POWER OF EXECUTORS TO SELL—OUTGOINGS OF ONE PROPERTY EXCEEDING INCOME—PAYMENT OF EXCESS BY WIDOW—CLAIM FOR REPAYMENT TO HER.

Re May, 6 O.W.N. 29.

DEVISE OF FARM TO TRUSTEES—TRUST FOR PAYMENT OF INCOME OR PORTION THEREOF FOR MAINTENANCE AND EDUCATION OF DAUGHTER DURING MINORITY AND AFTER MAJORITY TO PAY WHOLE INCOME TO DAUGHTER DURING LIFETIME—RIGHT OF DAUGHTER TO ACCUMULATIONS OF RENTALS DURING MINORITY—INTEREST ON ACCUMULATIONS.

Re Carr, 6 O.W.N. 327.

INFANT LEGATEE—EDUCATION—APPLICATION OF INCOME—TIME FOR PAYMENT—INVESTMENT.

Re Clooney, 5 O.W.N. 513, 25 O.W.R. 458.

TRUST FUND CREATED BY WILL—INCOME OR PART THEREOF TO BE APPLIED BY TRUSTEES IN THEIR DISCRETION TO MAINTENANCE OF DAUGHTER DURING LIFE—DIVISION OF FUND AMONG OTHER CHILDREN OF TESTATRIX ON DEATH OF DAUGHTER NAMED—RIGHT OF DAUGHTER TO ENTIRE INCOME—DISCRETION OF TRUSTEES UNCONTROLLED BY COURT UNLESS DISHONESTY SHEWN.

Re Black, 15 O.W.N. 290. [Affirmed 16 O.W.N. 75.]

(§ III G—151)—EDUCATION AND SUPPORT—PAYMENT OF CORPUS.

The cestui que trust for whose education and support a fund is bequeathed to another in trust, is entitled on coming of age to receive the unexpended portion of the fund absolutely, where the gift is not entirely dependent on the discretion of the trustee and there is no gift over. [Re Hamilton, 8 D.L.R. 529, 27 O.L.R. 447, and Re Johnston, [1894] 3 Ch. 204, applied.]

Re McKeon, 14 D.L.R. 370, 25 O.W.R. 146, 5 O.W.N. 190.

POSTPONEMENT OF INCOME AFTER BENEFICIARY'S MAJORITY.

A direction in a will that a bequest of the income from a sum of money to the sons of the testator shall be paid to them when they attain the age of 27, is ineffective to prevent payment to them of the accrued income at their respective majorities.

Re McKay, 6 D.L.R. 787, 22 O.W.R. 666.

(§ III G—155)—ABSOLUTE INTEREST NOT SUBJECT TO TRUST—INQUIRY AS TO PERSONS NAMED IN WILL.

Re Lucas, 7 O.W.N. 474.

BEQUEST TO WIFE FOR "SOLE USE OF HERSELF AND MY CHILDREN" — "DISPOSING OF PROPERTY AMONG CHILDREN"—WIFE AND CHILDREN TAKING AS TENANTS IN COMMON.

Re Gartland, 17 O.W.N. 147.

(§ III G—156)—PER STIRPES OR PER CAPITA.

The grandchildren of a testator take per capita under a testamentary provision that, after the expiration of the period fixed for the payment of certain charges upon a designated amount of money, such sum should become the residue of the testator's estate and be divided among his surviving grandchildren. Grandchildren of a testator will take per stirpes under a will directing that a certain portion of the testator's estate should be divided into as many parts as he had children surviving him, which were to be invested by his trustees and the interest paid to his children, which sums so set apart to them were given to the issue, if any, of such surviving children, and in the event of any child dying without issue, that the amount of the portion that would have gone to such issue, if any, should be divided among the other children of the testator, share and share alike.

Re McKay, 6 D.L.R. 87, 22 O.W.R. 666.

(§ III G—157)—ANNUITIES — JOINT ESTATE—SURVIVORSHIP.

On a bequest directing the payment of an annuity during the joint life of the legatees and upon the death of either or the last survivor, the like sums to be paid to the children of a certain legatee, the legacy will not cease or revert to the residue upon the death of either of the children, but will go to the survivor of them for life. [Grant v. Winbolt, 23 L.J. Ch. 282, distinguished.]

Re Mott; Payzant v. Forrest, 24 D.L.R. 156, 49 N.S.R. 78.

A devise of property to the mother and sister of a testator, "or the survivor of them," makes them tenants in common, since the survivorship mentioned was referable to the death of the testator, and not

to that of the devisees. [Peebles v. Kyle, 4 Gr. 334, and Smith v. Coleman, 22 Gr. 507, distinguished.]

Re Johnson, 5 D.L.R. 314, 22 O.W.R. 741.

DEVISE TO A CLASS—CHILDREN—SURVIVORSHIP.

Re Forbes Estate, 28 D.L.R. 787, 26 Man. L.R. 230, 33 W.L.R. 605, 9 W.W.R. 1159.

DISPOSITION OF TRUST FUND — INCOME — PRINCIPAL—DEATH OF ONE BENEFICIARY —SHARE DIVIDED BETWEEN SURVIVING BENEFICIARIES — VESTED INTERESTS — IMMEDIATE PAYMENT.

Re Farrell, 15 O.W.N. 447.

(§ III G—158)—TO PARENT AND CHILDREN —PER CAPITA.

Where there is a gift by will to a parent and her children share and share alike, the parent and children take per capita.

Re Davies, 10 D.L.R. 164, 24 O.W.R. 321.

DEVISE—DIVISION OF RESIDUE SO AS TO MAKE SHARES OF EACH CHILD EQUAL—TESTATOR'S INTENTION — APPORTIONMENT BY TRUSTEES TO EQUALIZE VALUE OF CHILDREN'S SHARES.

Re Drummond, 5 D.L.R. 516, 3 O.W.N. 1459, 22 O.W.R. 554.

(§ III G—159)—DIVISION "BETWEEN," MEANING OF.

The word "between" in a will does not necessarily import a division into two parts, but may express a division between two or more partakers.

Re Davies, 10 D.L.R. 164, 24 O.W.R. 321.

(§ III G—160)—PROPERTY DIRECTED TO BE SET ASIDE FOR ANNUITY—CONDITIONS NOT CARRIED OUT—BEQUEST OF REMAINDER—TIME OF VESTING.

A testator directed his trustees to set aside sufficient of his property to produce a certain annuity, after which they were to pay one-quarter to his daughters and one-half to his wife, and in the event of the wife dying before receiving the bequest, it was to go to the daughters. The court held that the wife's share became vested although not actually received when the property required to be set aside to produce the annuity should have been set aside and that this should have been done at least within a year of the testator's death; and upon her subsequent death intestate, went to her personal representative.

Re Hamilton and Royal Trust, 47 D.L.R. 231, [1919] 2 W.W.R. 164.

VESTED OR CONTINGENT INTERESTS.

Where there is an immediate gift to charitable uses, delayed as to actual conveyance till the secured debts are paid out of income from the security, the gift vests at the testator's death, and it makes no difference that a twenty-five year period is allowed a specific charity to effectuate the object of the gift, in default of which the gift is to pass ipso facto to another charity named in the will. [Chamberlayne v. Brockett, L.R. 8 Ch. 206; Re Swain, [1905] 1 Ch. 669; Christ's Hospital v. Grainger, 16 Sim. 83, affirmed, 1 Macn. & G. 460, followed; Re Lord Strathedan and Campbell, [1894] 3 Ch. 265, distinguished.]

Re Mountain, 4 D.L.R. 737, 26 O.L.R. 163, 21 O.W.R. 866.

To free the personal estate of a testator from the charge of legacies given by his will, there must be clearly expressed an intention not only to burden the realty but to exonerate the personalty. A clause in a will making certain bequests which began with the words: "I give, devise and bequeath all real and personal estate," charges the legacies upon the personalty as well as upon the realty, where followed by a direction that such bequests shall be made a charge upon lands therein specifically described.

Re Craig, 3 D.L.R. 59, 3 O.W.N. 870.

ENJOYMENT POSTPONED PENDING AUTHORITY TO SELL.

A clause in a will provided that the residue of the testator's property "be sold at such a time and in such manner as may seem to my trustees best for my estate, it being left to their absolute discretion at what time and on what terms they shall sell any of my said property, and on realizing the same or any portion thereof to divide the proceeds among my wife and . . . children." The widow died before any of the residue of the property had been sold:—Held, that the share of the widow was vested, although the enjoyment was postponed, the postponement being for the benefit of the estate. [Packham v. Gregory, 4 Hare 396, followed.]

Re Ward, 33 O.L.R. 262.

DIVISION OF ESTATE AMONG CHILDREN—SHARE OF ABSENTEE—PRESUMPTION OF DEATH INTESTATE—VESTED INTEREST.

Re Sanderson, 9 O.W.N. 204.

The last will of D. provided that the rest and residue of his estate should be held by his executors and trustees in trust for the joint benefit of his widow and his son during the period of their natural lives, and that, in the son predeceasing his mother, without leaving lawful issue, upon the death of the widow, the estate so left should be converted into cash and divided among the legatees so named. Held, that on the death of the son without leaving lawful issue, prior to the death of his mother, the contingent interest of the legatees named became a vested one, the legatees then having a present right to the future enjoyment of the remainder, which vested in possession upon the widow.

Chipman v. Ross; Re Estate of Dunlap, 52 N.S.R. 129.

LIFE ESTATE—REMAINDER—INTERPRETATION OF—VESTED INTEREST.

Where property is left by will to trustees and the income is to go to the widow during her life and upon her death to a daughter, the latter upon the death of the testator takes a vested and transmissible

interest notwithstanding that she dies before the widow.

Fewster v. Clements, 7 W.W.R. 843.

ESTATES FOR LIFE AND IN REMAINDER—CONTINGENT REMAINDER UPON CONTINGENT REMAINDER — RULE AGAINST "DOUBLE POSSIBILITIES"—INTESTACY AS TO SECOND REMAINDER—RIGHT OF HEIRS OF TESTATOR, ASCERTAINED AT HIS DEATH—IMPROVEMENTS UNDER MISTAKE OF TITLE—LIEN FOR—ALTERNATIVE RETENTION OF LANDS ON PAYMENT OF VALUE—POSSESSION OF LAND—TITLE—LIMITATIONS ACT—PARTITION.

Stuart v. Taylor, 6 O.W.N. 217.

DEVISE OF LIFE ESTATE IN FARM TO SON—SALE OF FARM AFTER DEATH OF LIFE TENANT—DIVISION OF PROCEEDS AMONG CHILDREN—INCLUSION OF LIFE TENANT BY NAME—VESTED ESTATE—RIGHT OF PERSONAL REPRESENTATIVES TO RECEIVE SHARE OF LIFE TENANT — SHARE OF OTHER DECEASED CHILD OF TESTATOR PASSING TO ISSUE.

Re Parkin, 16 O.W.N. 26.

BEQUEST TO CHILDREN WHO SHALL ATTAIN MAJORITY — PROVISION FOR WIDOW — DEATH OF CHILDREN IN INFANCY—VESTED ESTATES—INTESTACY—COSTS.

Re McCallum, 17 O.W.N. 12.

DEVISE—VESTED ESTATE IN INTEREST—RESTRAINT ON ALIENATION FOR LIFETIME OF ANOTHER.

Hutt v. Hutt, 24 O.L.R. 574.

"TRUSTEE OF HIS HEIRS"—HEIRS OF LIVING PERSON—LEGAL ESTATE FOR LIFE—CONTINGENT REMAINDER.

Re McAllister, 25 O.L.R. 17, 20 O.W.R. 261, affirming 24 O.L.R. 1, 18 O.W.R. 554.

SUBSTITUTION—UNIVERSAL LEGACY BY HUSBAND TO WIFE—CLAUSE AS TO WHAT IS LEFT AT HER DEATH.

Shearer v. Forman, 40 Que. S.C. 139.

(§ III G—162)—FUND SET APART.

Where a testator directed his trustee to "set apart" a sum of money, and the investments representing the same, and to "pay over" the same to the testator's son a portion thereof within two years, and the remainder within four years after the testator's death, and in the meantime to pay to the son, quarterly, the net profits on the unpaid portion of the legacy, a gift accompanied by a direction is created in the son's favour and the vesting of the legacy is not dependent upon the son surviving either the two or four year periods, after the death of the testator. [Hanson v. Graham, 6 Ves. 239, applied.]

Re Hay, 2 D.L.R. 152, 3 O.W.N. 735, 21 O.W.R. 546.

LEGACY OF SPECIFIC SUM IN HANDS OF THIRD PERSON—DEBT OWING TO TESTATRIX—PAYMENT BEFORE DEATH.

Re Rally, 25 O.L.R. 112, 20 O.W.R. 482.

UNIVERSAL LEGACY TO WIFE AS TO USUFRUCT AND TO CHILDREN AS TO OWNERSHIP—POWER TO WIFE TO CONTINUE THE BUSINESS.

Sewell v. Peters, 20 Que. K.B. 255.

(§ III G—165)—DEVISE TO WIFE FOR LIFE—REMAINDER TO CHILDREN OF TESTATOR—TIME OF VESTING.

Under a bequest of personalty to a testator's wife for life with remainder to his children, the interest of the latter became vested at the testator's death, so as to determine the right of distribution at the termination of the life estate.

Re Brown, 11 D.L.R. 615, 24 O.W.R. 701.

Under a devise in a will in the following terms—"I give to my wife all my real and personal estate as long as she remains my widow. In case of my wife's death or marrying again, I wish my lands to be sold and also my personal property and the proceeds to be equally divided between my younger sons"—the sons took an interest which became vested on the death of the testator, and consequently the interest of one son who died in the lifetime of the widow passed by his will to his executors. [Packham v. Gregory, 4 Hare 396; Town v. Borden, 1 O.R. 327; Webster v. Leys, 28 Gr. 475, followed; Baird v. Baird, 26 Gr. 367, distinguished.]

Re Shattuck, 1 D.L.R. 258, 3 O.W.N. 593, 21 O.W.R. 90.

(§ III G—166)—BEQUEST TO SURVIVORS OF CLASS—VESTING.

Under a bequest of a remainder to a class providing that, if any of the class shall die, his or her share shall be divided among the survivors, the right of survivorship becomes fixed at the termination of the life estate.

Eastern Trust Co. v. Fraser, 12 D.L.R. 584, 13 E.L.R. 137.

H. ENJOYMENT; PAYMENT.

(§ III H—170)—LEGACY—CORPUS—PAYMENT TO UNMARRIED WOMAN—BEQUEST FREE FROM CONTROL OF HUSBAND.

A woman, if unmarried at the termination of a life estate, is entitled to the corpus of a fund bequeathed her free from the control of her husband if married, although, if at the time of payment she was about to be married, a different question would arise. The corpus of a legacy that was given a woman free from the control of her husband, if married, cannot be paid her during coverture, where the testator directed that the fund out of which the legacy was payable should be placed in bank for the benefit of the several legatees.

Eastern Trust Co. v. Fraser, 12 D.L.R. 584, 13 E.L.R. 137.

ENCUMBERED REAL ESTATE—MANAGEMENT CLAUSE.

A widow, under a devise to her of all her husband's real and personal estate, is entitled, to the exclusion of his children, on the payment by the executor of the debts,

to receive the personal property and to have a conveyance of the real estate, even though encumbered, on her making arrangements with the mortgagee to look to the land for the payment of his debt, notwithstanding such devise was followed by a subsequent clause, but which was without words of gift, authorizing the executors to dispose of the real and personal estate at any time they should deem it to be most advantageous; and that until its disposal that they should manage the estate for the best interest of the testator's heirs; since the executors were empowered by the latter clause only to handle the estate until the payment of debts.

Re Freedy Estate, 13 D.L.R. 832, 23 Man. L.R. 763, 25 W.L.R. 378.

LEGACY—TIME FOR PAYMENT OF CORPUS.

A direction in a will that the executors "shall exercise control over the bequest in favour of my said daughter and shall invest the same as to them seems best and pay the income thereof to my said daughter until such time as they consider that she can control the corpus of the said bequest providentially and well" is inoperative to restrict the right of the legatee to payment of the corpus of the bequest, especially where she is also the residuary legatee. [Re Rispin, 2 D.L.R. 644, 25 O.L.R. 633, affirmed sub nom. Re Rispin, Canada Trust Co. v. Davis, 46 Can. S.C.R. 649, applied; Re Hamilton, 8 D.L.R. 529, 4 O.W.N. 441, applied.]

Re McGill, 9 D.L.R. 7, 23 O.W.R. 713.

PAYMENT IN INSTALMENTS.

Under a clause in a will directing the executors to give to the testator's son "the sum of $25,000 as follows, namely, $6,000 within three months after my decease and $600 every six months thereafter for fifteen years; and should he marry, he shall receive $5,000 of above $25,000, and the balance at the end of fifteen years after my decease," the semi-annual payments will cease on payment of the $5,000 specially payable after the marriage of the beneficiary.

Re Quay, 9 D.L.R. 776, 23 O.W.R. 981.

LIFE ANNUITIES — INVESTMENT—DISTRIBUTION.

A direction in a will creating a number of pecuniary legacies and life annuities, to convert all the estate into money and to invest the "residue of the estate, being not less than a clear 75 per cent of the residue" in trust for the testator's infant son, gives the annuitants a life interest in the income of sufficient of the corpus to produce the annuities, and entitles the legatees to insist upon having sufficient of the corpus invested to produce the annual income given to the annuitants, merely postponing distribution and enjoyment of the corpus until the death of the annuitants.

Re Aldridge Will, 28 D.L.R. 531, 9 A.L.R. 512, 34 W.L.R. 546, 10 W.W.R. 701. [See also 28 D.L.R. 527, 9 A.L.R. 422, 33 W.L.R. 910, 9 W.W.R. 1517.

Where a will contains a provision to pay the gifts in futuro, such provision will merely postpone the possession and will not defer the vesting of the gift, if the payment is postponed merely for the convenience of the fund.

Re Wishart, 8 D.L.R. 255, 4 O.W.N. 519.

Substitutes may, before the opening of the substitution to which they will be called, dispose of the property of which they will eventually become absolute owners, subject only to such alienation lapsing should the substitution itself lapse.

Laurier v. Nelson, 7 D.L.R. 403.

LEGACY VESTING ON ATTAINING TWENTY-ONE, IGNORING TRUSTEES' DISCRETION—PAYMENT.

Re Hamilton, 12 D.L.R. 861, 28 O.L.R. 534, affirming 8 D.L.R. 529.

PECUNIARY LEGACIES — PAYMENT OUT OF LAND.

A testatrix, who had practically no personal estate but considerable land, made a will without a residuary bequest or devise by which she purported to bequeath certain sums of money to various legatees but made no mention of her real estate. This will revoked another to the same effect, but containing a residuary devise of real and personal estate. Held, that in view of the surrounding circumstances and bearing in mind the terms of the first will, it was clearly the intention of the testatrix to dispose of all she possessed in the manner stated, and the legacies should be held payable out of the estate of the deceased and the land resorted to for that purpose.

Re Miller Estate, 22 B.C.R. 531, 34 W.L.R. 620, 10 W.W.R. 645.

INSURANCE POLICY.

Where one bequeaths the revenue from an insurance policy to his wife and the property in it to his child, the mother will be permitted to abondon the usufruct and employ the whole amount of the policy for the maintenance of her child.

Dusablon v. Martel, 18 Que. P.R. 36.

PECUNIARY LEGACIES — MIXED FUNDS — REALTY AND PERSONALTY.

The general rule of law as to pecuniary legacies in the absence of sufficient indication of a contrary intention, is that they are payable by the legal personal representatives of the testator out of the personal estate not specifically bequeathed. Unless charged upon it by the will they are not payable out of the real estate: [Robertson v. Broadbent, 8 App. Cas. 812.] Where a testator is minded to make his real estate, in addition to his personal estate, assets for the payment of debts and legacies, or either of them, the presumption is that the real estate is made an auxiliary fund, only secondarily liable to the personal estate, which still retains its primary liability. It is absolutely necessary, therefore, not only to have an expression of oneration of the real estate, but also a sufficient exoneration of the personal estate, either wholly or par-

tially, before there can be any interference with the ordinary rule for the application of assets. This expression of oneration and exoneration may be found if the court, after looking at the whole will, is convinced that there was an intention on the part of the testator that not only the real estate should be onerated, but that personal estate should be exonerated.

Re Lord Strathcona's Estate, 28 Man. L. R. 579, [1918] 2 W.W.R. 499.

PAYMENT IN PARTICULAR MANNER.

If there appear to be an intention on the part of the testator that money is to be paid to a legatee at all events, a direction in the will that the money is to be raised in a particular way or out of particular lands or funds will not, in the event of the particular security failing, defeat the legacy.

Cudmore v. Cudmore, 12 E.L.R. 77.

PAYMENT OF QUARTER OF ANNUAL INCOME OF ESTATE TO WIDOW QUARTERLY — MEANING OF "QUARTERLY."

Re Short, 8 O.W.N. 190.

ANNUITIES—PAYMENT OUT OF INCOME OR CAPITAL — ACCUMULATED SURPLUS INCOME—PRIORITIES.

Re Mackay, 8 O.W.N. 263.

BEQUESTS TO INDIVIDUALS — SUCCESSION DUTY TO BE PAID BY "ESTATE"—INSUFFICIENCY OF ESTATE—BEQUEST OF RENTALS OF REAL ESTATE — PAYMENT OF DEBTS, TESTAMENTARY EXPENSES, AND COSTS OF ADMINISTRATION—CHARGE ON REALTY AND PERSONALTY PRO RATA—PAYMENT OF SUCCESSION DUTY BY LEGATEE.

Re Bilton, 8 O.W.N. 323.

PROVISION FOR SON IN CASE OF NEED—APPLICATION FOR PAYMENT OF ALLOWANCE —JURISDICTION OF COURT—RULES 600–607 — ORDER DIRECTING INQUIRY INTO CIRCUMSTANCES OF APPLICANT.

Re O'Meara, 8 O.W.N. 441.

LEGACY—POSTPONEMENT OF PAYMENT—ACCUMULATIONS OF INCOME.

Re Smith, 8 O.W.N. 543.

ANNUITIES—PAYMENT OUT OF PARTICULAR FUNDS—TERMINATION OF ANNUITIES AT DEATHS OF ANNUITANTS — REPUGNANT CLAUSE—RESIDUARY DEVISE—RENTS.

Re Palmer, 9 O.W.N. 474.

DEVISE TO WIDOW FOR LIFE—RIGHT TO ENCROACH ON CAPITAL OF PERSONALTY FOR MAINTENANCE — RIGHT TO INCOME OF REALTY.

Re Green, 10 O.W.N. 146.

DEVISE TO WIDOW FOR LIFE—REPAIRS—LIABILITY OF LIFE TENANT—PAYMENT FOR, OUT OF ESTATE—MONTHLY PAYMENTS TO SON—DEATH OF SON—CONTINUANCE OF PAYMENTS TO ESTATE OF SON DURING LIFETIME OF WIDOW.

Re Sykes, 10 O.W.N. 306.

PROVISIONS FOR BENEFIT OF WIDOW AND CHILDREN OF TESTATOR—USE OF "RESIDENCE" AND HOUSEHOLD EFFECTS — ALTERNATIVE PROVISIONS — MAINTENANCE—ANNUITY PAYABLE OUT OF INCOME ONLY—PERIOD OF DISTRIBUTION OF ESTATE—COSTS.

Re Goodwin, 17 O.W.N. 198.

LEGACIES TO MARRIED WOMEN, TO BE SETTLED UPON THEM FOR THEIR SEPARATE USE—PAYMENT TO LEGATEES DIRECTLY.

Re Winn, 15 O.W.N. 289.

BEQUEST TO WIDOW OF RIGHT OF OCCUPANCY OF DWELLING-HOUSE FOR LIFE OR UNTIL HOUSE SOLD—LIABILITY OF WIDOW FOR TAXES — LEGACY OF LUMP-SUM TO WIDOW—PAYMENT MADE BY EXECUTOR IN INSTALMENTS—PAYMENT OF INTEREST FROM DEATH OF TESTATOR—RIGHT OF EXECUTOR TO RECOVER OR SET OFF INTEREST PAID FOR FIRST YEAR—MISTAKE.

Re McDonald, 17 O.W.N. 193.

(§ III H—171) — PAYMENT OF DEBTS — MIXED ESTATE—MORTGAGE DEBT.

Where a testator creates out of both real and personal estate a fund for the payment of debts and charges, he is presumed to have intended that the burden of the charges should be contributed to ratably by the personalty and realty from which the fund is derived. His direction to pay his debts "and any charge by way of mortgage that may be against the property" signifies a clear intention that the mortgage debt was to be paid out of that particular fund; otherwise by the Wills Act (R.S.O. 1914, c. 120, s. 38), the mortgaged real estate would be primarily liable for the mortgage debt.

Re Le Brun, 28 D.L.R. 386, 36 O.L.R. 135.

DIRECTION TO EXECUTORS TO SELL FARM AND DIVIDE PROCEEDS — SALE OF FARM BY TESTATOR AFTER EXECUTION OF WILL—EFFECT OF CODICIL—MORTGAGE STANDING IN PLACE OF FARM—ACQUISITION OF OTHER REAL ESTATE NOT MENTIONED IN WILL—INTESTACY.

Re Graham, 8 O.W.N. 497.

ANNUITY — ARREARS — DOWER — MONEY LENT—FUNERAL EXPENSES—ADMINISTRATION.

Wigle v. Huffman, 10 O.W.N. 431, 11 O.W.N. 110.

(§ III H—172)—PAYMENT OF MEDICAL EXPENSES OF BENEFICIARIES.

Where trustees are empowered by a will to pay such medical expenses of a beneficiary as they "deem proper" they are the final authority and the court will not order recoupment in favour of such beneficiary of a claim for medical expenses for which only the beneficiary or her husband is directly liable, and which the trustees have rejected in good faith.

Re McKay, 6 D.L.R. 787, 22 O.W.R. 666.

1. Election—Acceptance.

(§ III I—175)—Election—Maintenance—Mortgage.

Where a testator devises property in trust for the maintenance of his son, a lunatic, and also a specific sum to the son absolutely, and by the same will he devises to another person a mortgage which he had assigned to the son, the latter, or his committee, by virtue of the equitable doctrine of election, are bound to elect between the mortgage on one hand and the benefits under the will on the other.

Rosborough v. Trustees of St. Andrew's Church, 38 D.L.R. 119, 55 Can. S.C.R. 360, affirming 30 D.L.R. 391, 44 N.B.R. 153.

As to conversion—Infants.

Although the testator by his will directs his executors to sell and convert into cash all his lands within a limited time, the persons entitled to such proceeds, if sui juris, may elect to take the lands unconverted; and, if such persons are infants and it is shown clearly that it would be for their benefit that the lands should not be sold within the time limited, on account of the impossibility of selling except at a great sacrifice, an order shold be made, on the application of the executors for advice under ss. 42-47 of the Manitoba Trustee Act, R.S.M. 1913, c. 200, that an election be made on behalf of the infants to take the lands instead of having them sold. [Brown v. Brown, L.R. 2 Eq. 381, applied.]

Re Alfred Cann, 26 Man. L.R. 285, 34 W.L.R. 296, 10 W.W.R. 447.

Devise of property not owned by testatrix — Benefits of true owner under will—Compensation of disappointed devisees — Equitable interest in land—Subrogation.

Re Pherrill, 11 O.W.N. 185.

Payment of debt—Appointments of trust fund—Benefit of widow—Dower—Election—Direction to sell—Blended fund—Rights of creditors—Priorities.

Re Williamson, 11 O.W.N. 142.

Devise and bequest to widow — Use of both real and personal property during natural life—Absolute powers of disposition and appropriation—Property which at death of wife shall "remain unused" — Distribution among children — Rights of children after death of widow — Election of widow — Questions raised by action instead of originating notice—Costs.

Creighton v. Creighton, 17 O.W.N. 278.

Benefits to widow under will—Exclusion from or substitution for dower — Power given to executors to "lease, let, and manage" lands — Election of widow—Lands sold by executors — Lands sold by testator—Moneys realised from sales of lands—Apportionment between income and capital—Payments of income to legatees—Year immediately succeeding death of testator.

Re Webb, 17 O.W.N. 74.

(§ III I—176)—Acceptance—By widow—Codicils—Absolute gift—Restrictions as to mode of enjoyment—"Reliance on sense of justice and kindliness of heart" — Precatory trust—Dower—Election.

Re Stanton, 4 O.W.N. 504, 23 O.W.R. 849.

Insufficiency of estate to pay debts and legacies—Abatement of legacies—Legacy to widow in lieu of dower—Election to take—Legacy of specific chattels—Abatement of other legacies.

Re Lambertus, 6 O.W.N. 300.

Provision for widow—Dower—Election between.

Re Ouderkirk, 25 O.W.R. 185.

Devise to widow — Dower — Election—When widow compelled to elect.

Sabine v. Wood, 9 E.L.R. 169.

J. Equitable conversion.

(§ III J—180)—Equitable conversion—Sale of land — Order authorizing terms — Disposition of purchase money—Payment into court—Maintenance of beneficiary.

Re Krueger, 3 D.L.R. 865, 3 O.W.N. 1285.

Sale of lands devised between date of will and death of testator—Mortgage taken for part of purchase-money—Claim of devisees to mortgage denied—Conversion—Bequest of unascertained fund for specific purpose—Trust—Surplus not required for purpose, resulting to estate—Debt due by testator—Charge by will on real estate—Liability of whole estate.

Re R.G. Barrett, 5 O.W.N. 805.

Life estate—Vested remainder—Death of remainderman—Direction for conversion—Right of heirs to take in specie.

Re Doran, 6 O.W.N. 37.

Direction to sell lands—Conversion into money—Intestacy as to part proceeds—Provision for widow in lieu of dower—Election.

Re McEwen; McEwen v. Gray, 23 O.L.R. 414, 18 O.W.R. 888.

K. Charge upon donee or land devised.

(§ III K—185)—Annuities—Trust.

On a bequest of an annuity out of the rents and profits of land in Alberta devised to another, the succession which under Alberta laws goes to the personal representative effects a trusteeship for the beneficiaries, and the executor must consider the annuity a charge upon the land,

although it is not expressly stated so to be in the will. [See also 18 D.L.R. 647.]

Re Cust, 19 D.L.R. 190, 7 W.W.R. 614.

BEQUESTS—CHARGE ON.

Where a will gave the proceeds of an insurance policy on the life of the testator in equal shares to his children, and a later clause declared that, if money enough to pay certain legacies, which were a charge on real estate devised to one of his children, was not realized from the sale of property specifically designated, other than that on which the legacies were chargeable, the difference should be paid from the insurance money, the latter provisions of the will are not in derogation of the earlier bequest of the insurance money, and the two will be construed so as to give the money to the children of the testator subject to the payment of any deficiency in such legacies. [Re Wrighton, 8 O.L.R. 630, followed.]

Re Fillingham, 11 D.L.R. 678, 4 O.W.N. 1391, 24 O.W.R. 682.

POWER OF EXECUTOR TO SELL—TRUSTEE ACT.

An executor held to have been vested with an implied power to sell certain of his testator's real property, and a proposed sale thereof approved. A codicil to a will contained the following clauses: "I bequest income of the property of the G.V. Hotel, to Mrs. D., after her death property or money to go to A. I bequest Mrs. D. to pay Mrs. I. $5,000 on the sale of G.V. Hotel property or until that time $20 a month." The court approved of a sale of the hotel. Held, that the gift to Mrs. D. must remain untouched so far as Mrs. I. was concerned, that is, that the request or bequest in favour of Mrs. I. failed.

Re Boisseau Estate, [1918] 3 W.W.R. 668.

MAINTENANCE — BREACH OF DUTY — FORFEITURE—REMOVAL.

A legatee who does not fulfil the duties obligations to which he is bound by the will may have his legacy declared forfeited or reduced. When a legatee is charged to house, feed, clothe and furnish the other things necessary to a minor, on condition that the latter works for him until of age, all the charges on the legatee may be converted into money if the legatee refuses or neglects to fulfil the obligations, or if it becomes impossible for the minor to live with the legatee. A universal legatee charged with a particular legacy to a minor, with an obligation to house, feed and maintain him, and who is at the same time appointed testamentary executor, is not subject to be removed from that position, and, as he has not complied with the provisions of the particular legacy, the court converts into money the obligations he had to fulfil to the minor.

Houde v. Mainville, 24 Rev. Leg. 153.

SPECIFIC DEVISE OF MORTGAGED LAND — WILLS ACT, R.S.O. 1914, c. 120, s. 38 —DEVISEE TAKING SUBJECT TO MORTGAGE-DEBTS EXISTING AT DATE OF DEATH OF TESTATRIX—MUNICIPAL TAXES IN ARREAR AT DATE OF DEATH PAYABLE OUT OF GENERAL ESTATE.

Re Semple, 13 O.W.N. 101.

GIFT OF LAND AND PERSONALTY TO SON SUBJECT TO PAYMENT TO DAUGHTER OF SUM OF MONEY AND GIVING HER A HOME WHILE UNMARRIED — DEATH OF SON SHORTLY AFTER DEATH OF TESTATRIX—PROVISION FOR DAUGHTER CHARGED ON BOTH REALITY AND PERSONALTY—CONDITION — FORFEITURE — IMPOSSIBLE OF LITERAL PERFORMANCE.

Re Latimer, 15 O.W.N. 432.

BEQUEST TO SISTER "ABSOLUTELY"—EXPRESSION OF WISH THAT SISTER SHALL GIVE PART TO BROTHER—NO DEFINITE BENEFIT GIVEN TO BROTHER—ABSOLUTE BEQUEST FREE FROM TRUST IN FAVOUR OF BROTHER —"PRECATORY TRUST."

Re Clark, 17 O.W.N. 88.

(§ III K—187)—CHARGE UPON REALTY.

Where wide powers as to the disposal of property are vested in trustees they may make a title free from a charge of an annuity, but the proceeds of the sale will be charged with the payment thereof.

Kennedy v. Kennedy, 3 D.L.R. 536, 26 O.L.R. 105, 21 O.W.R. 501. [Affirmed in part 11 D.L.R. 329, 28 O.L.R. 1.

Where land, subject to an annual charge for maintenance created by will is sold in partition proceedings, the court will set apart a sufficient sum to answer the annuity claim as it falls due from time to time, and will retain the whole purchase money in court for that purpose where the capitalization of the annuity would amount to more than the purchase money. [Harbin v. Masterman, [1896] 1 Ch. 351, followed.] Where land subject to a charge for maintenance created by will is sold, the court has no power to order the commutation of the charge for a lump sum, without the consent of all who are entitled to the purchase money.

Lee v. Chipman, 3 D.L.R. 297, 3 O.W.N. 1043, 21 O.W.R. 895.

Where it was not known whether a legatee was living at the time of the sale of land upon which the payment of his legacy was charged, and the sale was made subject thereto, upon the amount of the legacy, together with interest thereon to the date of the sale, being paid into court for the benefit of the legatee, a decree will pass discharging the land from such charge.

Re Gallagher, 3 D.L.R. 729, 3 O.W.N. 1302, 22 O.W.R. 226.

One to whom land encumbered with a mortgage was devised, is primarily liable for the payment thereof.

Re Materi Estate, 4 D.L.R. 6, 21 W.L.R. 283

AGREEMENT — DURATION — PAYMENT OF CLAIMS — DISCHARGE OF LAND — PAYMENT INTO COURT.

Clark v. Robinet, 5 O.W.N. 143, 25 O.W. R. 76.

LEGACIES CHARGED ON LAND—DEVISE—LIFE ESTATE — REMAINDER TO CHILDREN OR ISSUE—TENANTS IN COMMON PER STIRPES—RULE IN SHELLEY'S CASE.

Re Ames, 5 O.W.N. 95, 25 O.W.R. 90.

LACHES—STATUTE OF LIMITATIONS.

Brown v. Thompson, 5 O.W.N. 19, 351.

PROVISIONS FOR MAINTENANCE OF WIDOW—CHARGE ON LAND DEVISED TO SON.

Honsinger v. Honsinger, 24 O.W.R. 218.

CODICIL—FAMILY SETTLEMENT—CHARGE ON LAND DEVISED.

Re Greenwood, 10 O.W.N. 343.

SPECIFIC BEQUEST OF CHATTEL—DIRECTION BY CODICIL THAT CHATTEL BE BURIED WITH TESTATRIX—INVALIDITY—PECUNIARY LEGACIES — FAILURE OF ASSETS — ADMINISTRATION OF ESTATE—PAYMENT OF DEBTS—LEGACIES CHARGED ON REALTY—PRIMARY RESORT TO RESIDUE OF PERSONALTY—COSTS.

Re Durrell, 9 O.W.N. 11.

TRANSFER BY FATHER TO SON—COVENANT BY SON TO PAY ANNUITY TO DAUGHTER—TRUST.

Dawson v. Dawson, 23 O.L.R. 1, 18 O.W. R. 6.

L. LAPSING; ADEMPTION; DEDUCTION; REVOCATION; RENUNCIATION.

(§ III L—190)—INSUFFICIENCY OF PERSONAL ESTATE TO PAY DEBTS—SALE OF LAND—PECUNIARY LEGATEES—MARSHALLING OF ASSETS.

General pecuniary legatees have no right to marshal as against specific devisees. A devisee is as much an object of the testator's bounty and as much to be favoured as a legatee and, where the testator has manifested no intention to prefer the legatee to the devisee, the usual order of administration, according to the practice of the court, ought to be followed. The order in which assets are liable for payment of debts remains as heretofore: Devolution of Estates Act, s. 15. The testator by his will directed, first, that all his debts and funeral and testamentary expenses should be paid by his executors as soon as convenient after his decease. He then devised and bequeathed all his real and personal estate in the manner which followed, i.e., he devised all his land to his son, and made certain pecuniary bequests. The son died, leaving his widow and infant children entitled to the land specifically devised to him. The personal property of the testator proved insufficient to meet his debts; after exhausting it, the executors sold the real estate, and paid the remaining debts out of the proceeds. There remained a balance in their hands:—Held, that the legacies were not payable out of this fund. (2) That no case had arisen for the marshalling of the assets of the deceased so as to entitle the legatees to payment. (3) That the widow and children of the son were entitled to the fund. [Rickard v. Barrett (1857), 3 K. & J. 289; Re Tanqueray-Williaume and Landau (1882), 20 Ch.D. 465, followed.

Re Steacy, 39 O.L.R. 548.

SPECIFIC BEQUEST—SEPARATION DEED.

Where by a separation deed made subsequently to the husband's will he covenanted that by his last will he would specifically bequeath to his wife and charge upon his land $30,000, and this same sum was bequeathed to her and charged his lands by the then existing will which remained unrevoked at the time of his death, it was held, that the covenant in the separation deed had been performed or satisfied by the will and that the widow was entitled only to the one sum of $30,000 and to that sum only as a creditor under the deed.

Rissmuller v. Balcom, 24 B.C.R. 353, [1917] 3 W.W.R. 535.

PREFERENCE OF LEGACIES.

In case of preference in the matter of particular legacies when the property of the succession is insufficient, art. 885 C.C. (Que.) contrary to the French law, recognizes that the implied wish of the testator governs the provisions of the will, and that it is for the court to determine which legacy the testator intended as a preference. This preference may result from the order in which the legacies are set out in the will. But the fact that the testator has declared a legacy inalienable, while he has not given the same character to the others, implies that he has given it a preference. The following circumstances indicate that a testator has not wished to subject a legacy to the payment of other special legacies: (a) when the testator especially determines the conditions and charges of the first legacy without subjecting it to payment of the others; (b) when the testator leaves other property, especially hypothecary obligations, and it appears by the whole of the will that his intention was that the particular legacies should be paid in the same manner as these latter obligations.

Beaupré v. Gravel, 52 Que. S.C. 427.

WIDOW'S ANNUITY DECLARED FIRST CHARGE ON NET INCOME OF RESIDUARY ESTATE—DEFICIENCY — RESORT TO CORPUS — ABATEMENT OF LEGACIES.

Re Daly, 15 O.W.N. 32, 97.

BEQUEST FOR BENEFIT OF SON AND SON'S WIDOW—DEATH OF SON IN LIFETIME OF TESTATOR — RIGHT OF WIDOW — PROVISION FOR ABATEMENT.

Re Hickey, 7 O.W.N. 142.

DEVISE OF LIFE ESTATE TO HUSBAND—HUSBAND PREDECEASING TESTATRIX—CONVERSION INTO CASH AND MORTGAGE—ADEMPTION.

Re Tracy, 5 O.W.N. 530, 25 O.W.R. 413.

PROVISION FOR DAUGHTER—GIFT MADE TO HER UPON HER MARRIAGE IN LIFETIME OF TESTATOR—HOUSE PROPERTY CONVEYED SUBJECT TO MORTGAGE—ADVANCEMENT—ADEMPTION — PRESUMPTION — OBLIGATION OF ESTATE TO EXONERATE PROPERTY FROM MORTGAGE—COMPANY-SHARES HELD BY TESTATOR — NEW SHARES ISSUED IN LIEU OF DIVIDENDS—WHETHER INCOME OR CAPITAL—QUESTION OF FACT.

Re Bicknell, 17 O.W.N. 275.

(§ III L—191)—LAPSED LEGACY—DEATH OF LEGATEE WITHOUT ISSUE.

A bequest to a legatee who died without issue before life tenant, will lapse under a testamentary provision that the legacy, together with a share of the residue of an estate, should be payable to such legatee at the death of the life tenant, or if not surviving, that it should be divided among the former's children.

Re Vining, 12 D.L.R. 498, 4 O.W.N. 1553, 24 O.W.R. 814.

TRUSTS—DEATH OF TRUSTEE—CLASS BENEFICIARIES—GRANDCHILDREN.

The death of a trustee named in a will before the testatrix has the effect, if the trustee is not of a class with the other beneficiaries, of lapsing the gift to the trustee's share in the estate, but will not affect residuary interests of grandchildren intended by the terms of the trust, and in carrying out its object, the court will divide the subject of the gift equally between the grandchildren.

Re Cotter, 24 D.L.R. 289, 34 O.L.R. 24.

LAPSED LEGACIES—PREDECEASE OF LEGATEES—RESIDUARY CLAUSE—TRUSTS—WILLS ACT, s. 37.

Re Stewart, 8 O.W.N. 16.

LEGACIES — INSUFFICIENCY OF PERSONAL ESTATE TO PAY—DIRECTION THAT REAL ESTATE NOT TO BE ENCROACHED UPON—PROPORTIONATE ABATEMENT OF PECUNIARY LEGACIES—UNNECESSARY MOTION—COSTS.

Re Robins, 8 O.W.N. 18.

LEGACY TO CHURCH COMMITTEE—CONTRIBUTION TO "BUILDING FUND"—ULTERIOR DISPOSITION—APPLICATION TO PURPOSE INTENDED—LAPSE OF DEVISE—ARTICLE 964, C.C. QUE.

At a time when the congregation of a church was heavily encumbered with a debt incurred in building the church, a committee was formed to collect contributions to be applied in liquidating the debt by means of a "building fund," and the testatrix made her will by which she bequeathed certain real property to that committee. Several years later the committee were relieved of their duty and the building fund ceased to exist, and during the year previous to the death of the testatrix the original debt in respect of which the building fund had been established was fully paid. There remained, however, at the time of her death balances of debt still due for expenses incurred for other building purposes. In an action to have the bequest declared to have lapsed on account of failure in its ulterior disposition:—Held, that the bequest must be construed as a bounty to the trustees of the church for the purposes of building expenses, including debts incurred for such purposes subsequent to the construction of the church; that the motive of the testatrix was not to make a contribution to any particular fund, but to benefit the congregation in respect to its building liabilities generally, and that the legacy did not lapse in consequence of the "building fund" having ceased to exist and the extinction of the debt in regard to which contributions to that fund were to be applied.

Pringle v. Anderson, 50 Can. S.C.R. 451, affirming 46 Que. S.C. 97.

(§ III L—192)—ADEMPTION.

The doctrine of ademption by subsequent portion will not be applied in favour of a stranger against a child taking a share of residue as well as legacy. [Re Heather, [1906] 2 Ch. 230.] Where a testatrix being in loco parentis to her legatee makes provision by will by way of "portion," either by legacy or by share in residue to such legatee, and afterwards makes an advance in the nature of a portion to such legatee, it will be presumed that the subsequent advance by the testatrix in her lifetime is meant to satisfy the legacy in whole or in part, and will be held an ademption of it.

O'Callaghan v. Coady, 8 D.L.R. 316, 11 E.L.R. 63.

(§ III L—193)—DEDUCTION.

Where a will declares that annuities thereby created shall be paid, some as a first charge, others as a second charge, etc., on the income of an estate, any abatement incident to a deficiency of income must be borne in the order of priority stated in the will and not pro rata as between the various annuitants. Where the income of an estate varies from year to year, each year is to be considered separately; and annuities will be paid therefore in the order of priority established by will; and an annuitant who does not in any one year receive the full amount of his annuity cannot charge the arrearage upon the income of subsequent years in priority to those annuities payable in that year.

Re Irwin, 4 D.L.R. 803, 3 O.W.N. 936, 21 O.W.R. 562.

MOTION BY EXECUTORS FOR ADVICE—DEDUCTION OF AMOUNT DUE BY LEGATEE TO TESTATOR—PENDING ACTION.

Baechler v. Baechler, 6 D.L.R. 894, 4 O.W.N. 226, 23 O.W.R. 235.

(§ III L—194)—INTERPRETATION—REVOCATION CLAUSES.

Gifts by will given in plain and explicit language are not to be held revoked by uncertain language of a codicil, particularly where the same testamentary writings contained as to other bequests revocations clearly expressed.

Farrell v. National Trust Co., 17 D.L.R. 382, affirming 7 D.L.R. 419, 4 O.W.N. 335.

(§ III L—196)—Legacy in lieu of debt—Abatement—Insufficient assets.

The principle that a legacy given in satisfaction of dower does not abate upon a deficiency of assets is inapplicable to the case of a legacy given to a creditor in satisfaction of an ascertained debt, as to a physician in full settlement for his services; nor is the physician entitled in such event to claim the full amount of his bill and to share pro rata for the balance of the legacy. [Re Wetmore, [1907] 2 Ch. 277, followed.]

Re Rispin, 27 D.L.R. 574, 35 O.L.R. 385.

Under the Wills Act, R.S.O. 1897, c. 128, s. 26 (1) providing that every will shall be construed with reference to the real and personal estate comprised in it, to speak and to take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appears in the will, where one clause of a will bequeathed money in a certain bank to specified legatees and another clause did the same with money in another bank to other specified legatees and before his death the testator withdrew the account in the one bank and deposited it in the other, the fund so increased is to be divided among the legatees to whom was bequeathed the account in the bank to which the transfer was made and not among the legatees of the money in the bank from which the account was drawn, there being nothing in the will to indicate a contrary intention on the part of the testator.

Re Atkins, 3 D.L.R. 180, 21 O.W.R. 238.

Specific legacy — Subsequent devise in trust—Construction.

The language of a general clause was limited by the introductory words that is it applies to those devises and bequests specifically given, by the will, in trust, and does not apply to the first clause, and, therefore, a devise to the son by the first clause is absolute.

Re Jones, 3 D.L.R. 261, 21 O.W.R. 272.

General of specific legacies — Abatement—Direction to solicitor to deliver chattels — Donatio mortis causa.

By his will the testator directed that the whole of his assets be converted into money and the proceeds distributed in pecuniary legacies. These legacies were made subject to a proviso for abatement. One of the legacies was to M. Subsequently, he executed a codicil containing the following clause: "I wish to leave to M. all my interest in the mortgage on . . . (certain lands)." None of the principal of said mortgage had been paid at this date. Held, that the legacy of the mortgage was a specific legacy, the mortgage was withdrawn from the effect of the clause in the will directing all the assets to be converted into money, and that the legacy was in substitution of that given by the will and not subject to the proviso in the will for abatement. [Burroughs v. Cottrell, 3 Sim. 375; Scott v. John, 4 O.R. 457, followed.] Held, that on the facts the provisions for abatement set out in the will did not apply. The deceased left a letter directed to his solicitor, asking that certain chattels be given to the parties designated and that a cheque he had drawn be given to the payee. Held, that these dispositions could only be supported as donatio mortis causa, and as there was neither actual nor constructive delivery, they must fail.

Re H. Aldridge, 32 W.L.R. 748.

Description of property — Charge on land.

The estate of the testator, who died in England, consisted of two small sums of money in England, a considerable sum in a bank in Ontario, and valuable real estate in Ontario. By his will he appointed an executor, and gave him $1,000. He gave his cousin in England (who predeceased him) an annuity of $600, to be provided from the rents of the real estate in Ontario—"my nephews to whom . . . I bequeath that property contributing this charge in such proportion as they shall mutually agree or . . . as my executor shall deem just." He then gave to the same cousin all his property in England. Then followed a legacy of $5,000 to his niece; and then—"Subject to the above-mentioned charges, I give . . . to my nephews . . . my real property" in Ontario. There were two nephews; to one three-fifths of the property was given and to the other two-fifths. Lastly, he directed that "all other property than the above-mentioned which I possess in Canada" should be divided equally between three named persons:—Held, that, though the annuity was made a charge upon the real estate, the legacies of $1,000 and $5,000, notwithstanding the use of the plural in the words "subject to the above-mentioned charges," were not so made a charge. The bequest of the property in England was a specific legacy. The residuary bequests were not specific, and had not priority over the pecuniary legacies of $1,000 and $5,000. A gift of "my property at A," is specific. The words "in Canada" at the end of the residuary bequest were not added with the view of making the gift specific, but because all in England had already been given.

Re Newcombe, 42 O.L.R. 590.

Estate insufficient to pay in full—Cesser of life interest in fund set apart—Application of fund to supplement abated legacies.

Re Perrie, 11 O.W.N. 160.

Specific bequests followed by general bequest—Modification or revocation Lapsed legacy—Residuary bequest—Real estate subject to legacies—Sale of land—Public auction.

Re Chambers, 11 O.W.N. 184.

IDENTIFICATION OF CHARITABLE INSTITUTION —DEFICIENCY OF ASSETS—PAYMENT IN FULL OF SPECIFIC LEGACIES — ABATEMENT OF LEGACIES PAYABLE OUT OF RESIDUE — ENLARGEMENT OF FUND TO PRODUCE ANNUITY—CHARITABLE GIFT—PERPETUAL TRUST.

Re Fitzgibbon, 11 O.W.N. 71.

SPECIFIC GIFTS OF COMPANY-SHARES—ABSORPTION OF COMPANY BY NEW COMPANY AFTER DATE OF WILL BUT BEFORE DEATH OF TESTATOR—SUBSTITUTION OF SHARES IN NEW COMPANY—VALIDITY OF GIFTS.

Re Murray, 11 O.W.N. 23. [See also 8 O.W.N. 463.]

(§ III L–198)—DIVISION OF RESIDUE.

When a testator devises parcels of real property respectively to his children for life, with remainder to their issue, and provides that upon the distribution of the residue of his estate, if, in the opinion of his trustees, the fee simple of the several estate should not then be of equal value, they should apportion to each a sum equal to the difference between the life estates and the value of the most valuable, the sum necessary to equalize such values, or the amount charged, as the will directed, upon the most valuable property for such purpose, will be treated as an increment to the less valuable shares, and be held in the same way as the respective parcels.

Re Drummond, 5 D.L.R. 516, 3 O.W.N. 1459, 22 O. W. R. 554.

DISTRIBUTION OF RESIDUE — INCOME FROM —SUPPORT OF MINOR LEGATEES.

Re Richardson, 5 D.L.R. 449, 3 O.W.N. 1473, 22 O.W.R. 605.

Under a will which provides that three-quarters of the amount a legatee received by specific bequests should be deducted from the amount to which he was entitled as a residuary legatee, and that the difference should be divided among a designated class of legatees, where the amount of such specific bequests exceeded the former's residuary share of the estate the latter share will be divided among such designated class of legatees.

Re Irwin, 4 D.L.R. 893, 3 O.W.N. 936, 21 O.W.R. 562.

An absolute gift to the several persons named and not one to the executor in trust, is created by a devise of the residue of the testator's estate to such executor, subject to certain payments to persons named, which was followed by a clause making the executor residuary legatee "after all of the above bequests" have been faithfully carried out.

Re De Blois Trusts, 6 D.L.R. 119, 11 E. L.R. 141. [See also 22 D.L.R. 731.]

Where the scheme of a will apart from specific devises and bequests is to give pecuniary legacies of fixed sums to different legatees and then to divide the residue amongst some of them in proportion to the pecuniary bequests which each is to receive, a substitution by codicil of a different sum to one of them, will take effect so as to cause a distribution of the residue in different proportions conforming to the amended legacies unless a contrary intention appears from the will.

Re Hunter, 1 D.L.R. 456, 25 O.L.R. 400, 21 O.W.R. 5.

DIVISION OF RESIDUE—REVOCATION OF ONE BEQUEST TO ONE LEGATEE.

Re Corkett, 4 D.L.R. 561, 21 O.W.R. 468, varying 3 O.W.N. 761. [See also 9 D.L.R. 135.]

M. DIVISION OF RESIDUE; INCONSISTENT CLAUSES.

(§ III M—199)—INCONSISTENT CLAUSES.

Where a testamentary gift is modified by a subsequent clause of a will, or is in conflict therewith, the latter clause controls.

Re Ley, 5 D.L.R. 1, 17 B.C.R. 385, 21 W. L.R. 757, 2 W.W.R. 790.

IV. Suit to construe or reform.

(§ IV—200)—INTENTION OF TESTATOR — DETERMINATION OF.

The only safe method of determining what was the real intention of a testator is to give a fair and literal meaning to the actual language of the will.

Auger v. Beaudry, 48 D.L.R. 356, [1919] 3 W.W.R. 559. [See 43 D.L.R. 65.]

CONSTRUCTION OF —"FARM PROCEEDS"— GIFT OF INCOME.

A testator devised "my farm proceeds the S. W. ¼-22-34-9-3d" to G. At the date of the will and also at the date of death G. was a tenant of the land from the testator holding under a share of crop lease. Held, That G. took the fee simple estate in the land.

Re Churchill, 12 S.L.R. 396, [1919] 3 W.W.R. 557.

WILL OF HUSBAND—APPLICATION BY WIDOW FOR RELIEF—TO WHOM MADE.

The application by a widow for relief against the terms of the will of her late husband should be made to the court presided over by a single judge, and not to a Judge in Chambers nor to the court en banc. In such a case, the proceedings should not be amended by making the notice of motion read "in the court" instead of a "Judge in Chambers."

Re Ostrander Estate, 7 W.W.R. 384.

ACTION TO CONSTRUE — ADMINISTRATION — FUND LIABLE.

Testator made several bequests to his wife and daughters to be paid out of his farm known as the "Boisner" farm. Testator had conveyed to his son John a farm called the "Hall" farm, and had conveyed to his son James the homestead. There was a mortgage of $850 upon the "Boisner" farm and upon 47 acres of the homestead. There was also a subsequent judgment of $450 binding all testator's lands. After the conveyance to John he undertook to pay the judgment; James, after getting his conveyance, undertook to pay the mortgage:—Held, that the bequests should be paid out

of the proceeds of the sale of the "Boisner" farm.

Stockman v. Stockman, 13 E.L.R. 391.

"PROPERTY SITUATED IN ONTARIO"—TESTATOR DOMICILED IN ONTARIO—SHARES OF DOMINION RAILWAY COMPANY STOCK—HEAD OFFICE OF COMPANY IN ANOTHER PROVINCE—CERTIFICATES KEPT IN ONTARIO—REAL PROPERTY IN SASKATCHEWAN AND ALBERTA—INTENTION OF TESTATOR—DIVISION OF PROPERTY AMONG CHILDREN — EQUAL DIVISION — "REAL PROPERTY"—SITUS OF PERSONAL PROPERTY.

Re Lunness, 17 O.W.N. 186.

EXECUTORS—DIRECTION IN WILL TO CREATE TRUST FUND OF SPECIFIED AMOUNT — AGREEMENT MADE BETWEEN EXECUTORS AND BENEFICIARIES OF FUND—BENEFICIARIES ENTITLED TO INCOME ON FULL AMOUNT FROM DATE OF AGREEMENT BUT NOT BEFORE—EXPENSE OF ADMINISTERING FUND — SALE OF BANK-SHARES — DUTY OF EXECUTORS.

Re Elliott, 16 O.W.N. 377.

BEQUEST OF MONEY TO MARRIED DAUGHTER—DIRECTION FOR SETTLEMENT OF FUND — DUTY OF EXECUTORS—INTENTION OF TESTATOR.

Re Pratt, 16 O.W.N. 268.

SUMMARY APPLICATION — PARTIES — HEIRS AT LAW AND NEXT OF KIN.

Re Page, 9 O.W.N. 280.

ORIGINATING NOTICE — PARTIES — SERVICE.

Re Green, 9 O.W.N. 429.

DETERMINATION OF QUESTION ARISING UPON —DIRECTION FOR TRIAL UPON ORAL EVIDENCE—RULE 606 (1).

Re Mailloux, 11 O.W.N. 355.

SUBSTITUTION—AMBIGUITY.

The appellé of the sustitution and the owner under suspensive condition, as under resolutory condition, may dispose of their property rights; this right is immediate and actual and if its existence or extent is contested an action will lie to have it recognized and determined. When a provision in a will is ambiguous recourse may be had for its interpretation not only to other parts of the will, but to any evidence outside of it, to get at the intention of the testator.

Germain v. Clavel, 51 Que. S.C. 165. [Reversed sub nom. Berger v. Clavel, 42 D.L.R. 771, 55 Can. S.C.R. 633.]

PETITION TO CONSTRUE — ORIGINATING NOTICE.

Re Rally, 25 O.L.R. 112, 20 O.W.R. 482.

CONSTRUCTION—MOTION FOR BY EXECUTORS —INTENTION OF TESTATRIX—GRANDCHILDREN TAKE SHARE OF DECEASED MOTHER.

Re Rueber, 3 O.W.N. 102, 20 O.W.R. 91.

WINDING-UP.

See Companies, VI.

Annotation.

The Canadian Bankruptcy Act, 1920: 53 D.L.R. —.

WITNESSES.

I. COMPETENCY.
A. In general.
B. Husband or wife.
C. Effect of death.
II. EXAMINATION.
A. In general.
B. Cross-examination.
C. Privilege.
III. IMPEACHING; DISCREDITING; CORROBORATING.
IV. CREDIBILITY.
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Annotations.

Competency of wife in crime committed by husband against her; criminal nonsupport; Cr. Code, s. 242a: 17 D.L.R. 721.

Medical expert witnesses: 38 D.L.R. 453.

Proof of handwriting and questioned documents: 44 D.L.R. 170.

I. Competency.

A. IN GENERAL.

Of evidence, see Evidence.

Witness fees, see Costs.

(§ I A—1) — DISQUALIFICATION — COMPETENCY OF ONE NOT ONTARIO LAND SURVEYOR.

Sections 3, 25 of 1 Geo. V., c. 41 (Ont.), respecting land surveyors, do not prohibit a surveyor who is not an "Ontario land surveyor" from testifying as to surveys made by him, although the weight of this testimony may be measured in some degree by s. 25.

Cardwell v. Breckenridge, 11 D.L.R. 461, 24 O.W.R. 569, 4 O.W.N. 1295.

(§ I A—2)—TESTIMONY OF PURCHASER AS TO VALUE OF SHIPMENT LOST BY CARRIER.

In an action against the defendant company to recover the value of two black fox pups and one cross pup, part of a lot of nine shipped at Dryden in Ontario, to be delivered to the plaintiffs at Sackville, N.B., on the ground that the three foxes died of suffocation on the journey through the negligence of the employees of the defendant company. Held, that a part owner who had purchased the foxes and who stated in his evidence that there were several fox ranches where he lived, that he knew the market value of foxes from what people said and from what he had read, and that he had been engaged in the fox business to a considerable extent since making the purchase, was a competent witness to prove their value.

Trenholm v. Dominion Express, 43 N.B.R. 98.

(§ I A—4)—RELIGIOUS BELIEF.

A witness in a criminal case is not entitled to affirm in lieu of being sworn unless he states that he objects to the oath on conscientious scruples; a mere statement of his preference to affirm and that he considered it optional is insufficient to make legal his testimony given on affirma-

tion, although no objection was taken until cross-examination.

The King v. Deakin, 19 Can. Cr. Cas. 62, 16 B.C.R. 271, 19 W.L.R. 43.

(§ I A—8)—Competency notwithstanding death sentence.

A person under sentence of death is competent as a witness on the trial of another for a criminal offence. [R. v. Hach, 16 Can. Cr. Cas. 196, followed; R. v. Webb, 11 Cox C.C. 133, distinguished.] Section 1064, Cr. Code, giving special directions for the safe custody of a convict sentenced to death does not interfere with the powers conferred by s. 977 upon courts of criminal jurisdiction to order the convict to be produced as a witness on the trial of an indictable offence.

R. v. Kuzin, 21 D.L.R. 378, 24 Can. Cr. Cas. 66, 25 Man. L.R. 218, 8 W.W.R. 166, 30 W.L.R. 803.

(§ I A—9)—Persons jointly charged—Accomplices.

Where two persons were jointly charged with theft and one pleaded guilty and the other not guilty, the former may be called as a witness against the latter although sentence had not yet been passed upon the plea of guilt; in such a matter it must be left to the discretion of the presiding judge to decide what is the fairest and most convenient course to pursue in the particular case, and whether there should be an adjournment of the trial or an immediate sentence of the accomplice; and where he is holding the trial without a jury, it is not error for the judge to take cognizance of the accomplice's evidence before sentencing him, although in receiving the testimony the judge expressed a view favouring a different course had there been a jury.

R. v. McClain, 23 D.L.R. 312, 23 Can. Cr. Cas. 488, 8 A.L.R. 73, 7 W.W.R. 1134, 30 W.L.R. 388.

(§ I A—10)—Competency of counsel as witness.

Counsel may in strictness testify for the party whose case he is conducting, although the practice is highly undesirable. [Cobbett v. Hudson, 1 El. & Bl. 11, followed.]

Robert Bell Engine v. Gagne, 20 D.L.R. 235, 7 S.L.R. 154, 7 W.W.R. 62, 29 W.L.R. 322.

(§ I A—14)—Compelling attendance—Criminal law—Subpoena for Attorney-General.

The magistrate, under s. 671, Cr. Code, is vested with some discretion in issuing subpœnas to witnesses, because of the words of that section "if it appears to the justice that any person is likely to give material evidence," and may refuse to issue a subpœna if the reasons advanced by the applicant do not shew that the witness sought to be examined is likely to give material evidence. A magistrate is justified in refusing to issue a subpœna for the attendance of the Attorney-General before him as a witness if it appears that the Attorney-General could not give material evidence. [R. v. Baines, [1909] 1 K.B. 258, 21 Cox C.C. 756 applied.]

R. v. Allerton, 17 D.L.R. 294, 22 Can. Cr. Cas. 273, 19 B.C.R. 493, 27 W.L.R. 894, 6 W.W.R. 522.

B. Husband and Wife.

(§ I B—15)—Husband or wife—Criminal trial.

In criminal cases of the class in which the wife is not competent as a witness against her husband, if she is called by the Crown and gives evidence although stating that she came to court voluntarily and was willing to testify, the conviction cannot stand unless it clearly appears that the evidence she gave did not affect, and could not have affected, the result. [Makin v. Attorney-General of N.S.W. [1894] A.C. 57; Allen v. The King, 44 Can. S.C.R. 331, applied.]

R. v. Allen, 14 D.L.R. 825, 22 Can. Cr. Cas. 124, 41 N.B.R. 516.

(§ I B—16)—Wife as witness against husband — Criminal law — Nonsupport triable under summary conviction procedure.

The evidence of the wife is not admissible against her husband on the hearing before a magistrate of a charge under Cr. Code, s. 242a (amendment of 1913), whereby it was made an offence punishable on summary conviction for a husband to neglect without lawful excuse to provide for his wife and children when destitute, as no corresponding amendment was made to the Canada Evidence Act when s. 242a was added to the Code.

R. v. Allen, 17 D.L.R. 719, 23 Can. Cr. Cas. 67, 50 C.L.J. 543.

II. Examination.

See also Discovery.

A. In general.

(§ II A—30) — Expert witness — Hypothetical question.

It is not necessary to embody in a question put to an expert as a hypothetical question all the facts relating to the subject upon which the opinion of the witness is asked. It is sufficient that one fact which has been proven, or more than one, be stated to the witness, and he is told to assume the truth of the fact stated, and his opinion is asked upon it.

Wilson v. Bell, 45 N.B.R. 442.

(§ II A—32)—Refreshing memory—Consistency of statements.

For the purpose of rehabilitating a witness, and shewing that he is consistent with himself, evidence may be given to shew that the witness had made the same or substantially the same statement as that given in his testimony, prior to the inconsistent statement. [See R. v. Anderson, 16 D.L.R. 203, and annotation following.]

R. v. Neigel, 39 D.L.R. 154, 13 A.L.R. 137, 29 Can. Cr. Cas. 232, [1918] 1 W.W.R. 477.

REFRESHING MEMORY—FROM PLEADINGS.

Where the original memoranda from which a declaration is copied has been destroyed, a witness may be permitted to look at the declaration for the purpose of refreshing his memory.

Matheson v. C.P.R. Co., 35 D.L.R. 514, 10 S.L.R. 265, [1917] 3 W.W.R. 456.

REFERENCE TO NOTES MADE AT TIME OF TRANSACTION.

A witness may properly be asked to refresh his memory by looking at a copy of his notes which he was prepared to verify, as having been made by himself from the original which was a transcript of his stenographic report of the interview between the parties; and refusal to permit that course is ground for a new trial where it is impossible for the Appellate Court to say that its rejection did not materially affect the issue.

Daynes v. B.C. Elec. R. Co., 19 D.L.R. 266, 18 Can. Ry. Cas. 146, 49 Can. S.C.R. 518, reversing 7 D.L.R 767, 17 B.C.R. 498, 14 Can. Ry. Cas. 309, 22 W.L.R. 549, 3 W. W.R. 193.

(§ II A—33) — EXAMINATION — LEADING QUESTIONS.

In examining one's own witness, leading questions must not be put to the witness on material points, but are proper on points that are merely introductory and form no part of the substance of the inquiry. The rule against leading one's own witness will be relaxed where nonleading questions fail to bring the mind of the witness to the precise point on which his evidence is desired, and where it may fairly be supposed that this failure arises from a temporary inability of the witness to remember.

Maves v. G.T.P.R. Co., 14 D.L.R. 70, 6 A.L.R. 396, 16 Can. Ry. Cas. 9, 25 W.L.R. 503, 5 W.W.R. 212.

EXAMINATION—LEADING QUESTIONS.

It is not leading a witness to ask him whether something took place before or after a certain event.

Oliphant v. Alexander, 15 D.L.R. 618, 27 W.L.R. 56.

B. CROSS-EXAMINATION.

(§ II B—35)—CROSS-EXAMINATION.

A convicting magistrate called as a witness in an action for malicious prosecution to prove certain documents, who has been sworn and examined on other matters, is liable to general cross-examination.

Lyone v. Long, 36 D.L.R. 76, 10 S.L.R. 343, [1917] 3 W.W.R. 139.

IN MATTERS OF MOTION.

The law does not permit a cross-examination of witnesses in support of a motion to dismiss an opposition made under the provision of art. 651, C.C.P.

Chevalier v. Montreal, 50 Que. S.C. 418.

(§ II B—36)—TO DISCREDIT WITNESS.

Where a party to a proceeding puts forward a witness who makes certain statements under oath, and where it is desired to shew by his own books or those of the person who puts him forward that his statements are not true, the production of such books may be compelled so as to test his accuracy; and when the witness is under cross-examination, the books may be used for that purpose, and to prove that his evidence is not to be relied upon.

Re Baynes Carriage Co., 8 D.L.R. 309, 27 O.L.R. 244.

(§ II B—37)—CROSS-EXAMINATION OF ACCUSED—QUESTION AFFECTING CREDIBILITY.

When the accused becomes a witness on his own behalf he may be cross-examined as to whether he has been convicted of any offence, even though the conviction is altogether irrelevant to the matter in issue, the inquiry being relevant as affecting the credibility of the accused.

R. v. Mulvihill, 18 D.L.R. 189, 22 Can. Cr. Cas. 354, 19 B.C.R. 197, 26 W.L.R. 955, 5 W.W.R. 1229. [Affirmed in 18 D.L.R. 217.]

(§ II B—43) — CROSS-EXAMINATION — STATEMENT OF ACCUSED IN PRIOR PROCEEDING—ABSENCE OF RECORD.

An accused person on a murder trial giving testimony on his own behalf may be asked whether or not he made a certain statement at the inquest although the original depositions are not available in court; and he has no right to demand before answering that he be informed of what was taken down in the depositions; but if use is to be made of the latter to contradict him the original deposition should be produced.

R. v. Mulvihill, 18 D.L.R. 189, 22 Can. Cr. Cas. 354, 19 B.C.R. 197, 26 W.L.R. 955, 5 W.W.R. 1229. [Affirmed in 18 D.L.R. 217.]

IN CRIMINAL CASES.

A statement by a female witness on a trial for rape, in response to a question of the counsel for the accused, that she would like to see the prisoner go to prison for life, will not permit the Crown prosecutor to question her as to the commission of a similar offence by the accused against the witness. A cross-examination by counsel for the accused on a trial for rape as to acts of cruelty committed by the accused against the witness and the complaining witness, to which in addition to answering the question fully, she volunteered the further reply that the accused was also guilty of a similar offence towards her, will not permit the Crown prosecutor to question her as to the details of such assault.

R. v. Paul, 5 D.L.R. 347, 19 Can. Cr. Cas. 339, 4 A.L.R. 377, 21 W.L.R. 699.

CROSS-EXAMINATION IN CRIMINAL CASES—DIRECTION OF COURT TO CALL ALLEGED ASSOCIATE IN THE OFFENCE.

Where, on charges of assisting a prisoner to escape and of conspiring with the prisoner for that purpose, the indictment is laid without calling before the grand jury

the prisoner, who had been recaptured, the Trial Judge is not bound to give a direction asked by the accused that the prisoner be called as a witness for general cross-examination without making such witness a witness for the accused, nor a direction that the Crown make the prisoner its witness, if the Crown is prepared to permit counsel for the accused to interview such prisoner as to the evidence he can give and offers to facilitate his being called as a witness for the defence if desired. [R. v. Holden, 8 C. & P. 606; R. v. Stroner, 1 C. & K. 650, distinguished.]

R. v. Hagel, 16 D.L.R. 378, 23 Can. Cr. Cas. 151, 24 Man. L.R. 19, 6 W.W.R. 164, 27 W.L.R. 271.

C. Privilege.

(§ II C—45) — Criminating evidence — Governmental investigation.

The powers conferred on an Investigation Commission to compel the attendance of witnesses and production of documents for the purpose of enabling the government to proceed in civil and criminal prosecutions, is no abridgment of the immunity of giving criminating evidence recognized by the Dominion and Provincial Evidence Acts.

Kelly v. Mathers, 23 D.L.R. 225, 25 Man. L.R. 580, 8 W.W.R. 1208, 31 W.L.R. 931, 32 W.L.R. 33.

Self-incrimination.

The right of a witness to refuse to answer questions put to him, on the ground that his answer might tend to criminate him is a civil right which has been taken away from him by the Ontario Evidence Act, R. S.O. 1914, c. 76, s. 7, in respect of civil matters.

Re Ginsberg, 38 D.L.R. 261, 40 O.L.R. 136, reversing 27 Can. Cr. Cas. 447.

To divulge secrets of state—Military Service Act.

A court cannot compel a witness, who is a subordinate of the Minister of Justice, to answer questions put to him, when he has received instructions from the Minister to state only the number of men actually on active service under the Military Service Act, 1917, and amendments, is under 100,000, and to refuse to reply to any other questions tending to divulge administrative acts of the state, with regard to the military service of Canada.

Rheault v. Landry, 20 Que. P.R. 187.

Apprehension of criminal prosecution—Disobedience of judgment.

The plaintiffs launched a motion to commit G., the chairman of the defendant board, for breach of the injunction granted by the judgment of Lennox, J., in this action (32 O.L.R. 245, 261, 18 D.L.R. 456). As witnesses for the plaintiffs upon the pending motion, G. and certain other persons were examined before a special examiner; and the plaintiffs now moved for an order compelling G. and the other witnesses to attend for re-examination and to answer questions which they had refused to answer and to produce books, papers, and documents relating to the payment of salaries of teachers in the employment of the defendant board, and, in default, for the committal to gaol of G. and the others:—Held, that this motion was properly made in the action: it was not necessary to begin an independent proceeding by originating notice, making G. and the others parties; the notice of motion was directed to the persons individually affected, and that was sufficient. Held, also, that there could be no reasonable apprehension on the part of G. or other witnesses that by answering the questions which they refused to answer they would make themselves or the board liable to a criminal prosecution: the witnesses themselves were fully protected under s. 7 of the Evidence Act, R.S.O. 1914, c. 76; the defendant board could not be proceeded against criminally; and the statement of one member of the board, made upon an examination in a civil action, could not be used against another in a criminal proceeding. Held, also, that three members of a religious teaching fraternity, who were employed by the defendant board as teachers, and were among the witnesses examined whose re-examination was sought, and who admitted that they had been teaching without legal qualification, were not excused from answering questions, as to salaries paid to them, on the ground stated by them, viz., that they had made perpetual vows to devote themselves to the welfare of children and their own sanctification, and that the interests of the school children might be prejudiced if they answered the questions.

Mackell v. Ottawa Separate School Trustees, 40 O.L.R. 272. [See also 32 D.L.R. 1, [1917] A.C. 62.]

Secrets of confessional.

Although by Quebec law, as in the old law of France, a confessor cannot be compelled to divulge the secrets of the confessional, the penitent has the right, if he wishes, to testify as to what the priest said to him in the confessional. The incapacity of a penitent to be witness of what passed at the time of his confession to a priest cannot be raised by an inscription en droit; it is an objection to the evidence which should be decided by the judge presiding at the hearing.

Lefebrev v. Jobin, 52 Que. S.C. 492.

(§ II C—47)—Privilege—Authorization of Solicitor's Act.

The authorization or direction to a solicitor to send a letter on behalf of the client is not within the privilege between solicitor and client, and the latter, called as a witness in a criminal case in which he was the complainant, cannot on that ground decline to answer a question put by counsel for the accused whether he, the witness, had not authorized his solicitor, at or about the time the accused brought civil proceedings against the complainant, to write a particu-

lar letter which the solicitor had sent to the solicitor for the accused.

R. v. Prentice, 20 D.L.R. 791, 7 W.W.R. 271, 23 Can. Cr. Cas. 436, 7 A.L.R. 479, 29 W.L.R. 665.

WHO MAY CLAIM PRIVILEGE.

The exception rules of law which permit a witness to refuse to answer question on the ground of professional privilege or reasons of state, are to be strictly applied, and have no operation when the refusal conceals a guilty knowledge or the discovery of acts or omissions having for their object the commission of an offence. In the cause of public order the Minister of a department can invoke this privilege on the ground of reasons of state, but a subordinate cannot. Therefore, s. 13 of c. 30, R.S.C. 1906, does not protect a clerk in a post office savings bank who may be compelled to disclose the amount to a depositor's credit.

Hebert v. Latour, 15 Que. P.R. 5.

REFUSAL TO ANSWER—COMMITTAL FOR CONTEMPT—PERSON CHARGED WITH AN OFFENCE—WHEN A COMPELLABLE WITNESS.

Ex parte Ferguson, 17 Can. S.C.R. 437.

INCORPORATED COMPANY—MEMBER MAY BE REQUIRED TO GIVE EVIDENCE.

A member of an incorporated company may be compelled to give evidence against the company on a prosecution for a violation of the Liquor License Act.

The King v. Mayflower Bottling Co., 44 N.S.R. 417.

APPLICATION FOR SUMMONS OR WARRANT—WITNESSES FOR COMPLAINANT.

The King v. Johnston, 44 N.S.R. 468.

WITNESS REFUSING TO BE SWORN AND ELECTING TO AFFIRM—NECESSITY FOR ALLEGING CONSCIENTIOUS SCRUPLES.

R. v. Deakin, 19 W.L.R. 43, 16 B.C.R. 271, 19 Can. Cr. Cas. 62.

PRIVILEGE—PENAL ACTION—EVIDENCE OF DEFENDANT.

Bourque v. Bellegarde, 40 Que. S.C. 379.

EXAMINATION OF DEFENDANT—REFUSAL TO ANSWER—PRIVILEGE.

Section 5 of the Canada Evidence Act does not apply to a witness under examination in the Superior Court upon a proceeding to quash a saisie conservatoire issued in virtue of the provisions of C.C.P. Said witness may refuse to answer questions tending to incriminate him.

Robinson v. Casey, 12 Que. P.R. 94.

III. Impeaching; discrediting; corroborating.

(§ III—50)—IMPEACHING—DISCREDITING—CORROBORATING.

The denial by the defendant of a conversation which the Trial Judge finds took place is not sufficient to set aside the defendant's evidence in favour of the plaintiffs in an action for commission on the sale of land, where such denial does not appear to have been made with intent wilfully to pervert the facts and might be attributable to the infirmities of age.

Gullivan v. Strevel, 1 D.L.R. 44, 19 W. L.R. 778, 1 W.W.R. 450.

(§ III—51)—PRIOR STATEMENT TO CONTRARY.

Where a person under conviction for arson is called by the Crown on the trial of another person on the charge of wilfully setting the same fire, to prove that the latter had instigated him to commit the offence, the testimony of the convict that he had caused the fire at the instance and direction of accused may be rebutted by the testimony of other prisoners that the convict had admitted to them that the accused had had nothing to do with the fire, on the convict denying having made such admissions.

R. v. Webb, 16 D.L.R. 317, 24 Man. L.R. 437, 22 Can. Cr. Cas. 424, 27 W.L.R. 313, 6 W.W.R. 358.

(§ III—53)—RIGHT TO CONTRADICT OWN WITNESS.

Section 23 of The Alberta Evidence Act (1910, 2nd sess., c. 3), expressly provides that, although a party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, he may contradict him by other evidence, and there is no rule of evidence by which a party cannot contradict by other evidence the statements of any witness called on his own behalf.

Maruzeczka v. Charlesworth, 26 D.L.R. 553, 9 A.L.R. 310, 33 W.L.R. 823, 9 W.W.R. 1313.

If a witness disappoints the party calling him, another witness may be called to give a different account of the transaction. A petitioner, in an action contesting the validity of an election on account of bribery, is not bound by the testimony of a witness he called, which was adverse to the interest of the party calling him. [Melhuish v. Collier, 15 Q.B. 878, 19 L.J.Q.B. 493, followed.]

Hamm v. Bashford, 26 D.L.R. 573, 9 S. L.R. 68, 33 W.L.R. 473, 9 W.W.R. 1044, reversing 8 W.W.R. 793.

CONTRADICTION BY WRITTEN STATEMENT—LETTER.

A proposal to contradict a witness by means of a letter previously written by him was properly rejected where the witness' attention had not been directed to those parts of the letter which were to be used for the purpose of contradicting.

Robinson v. Haley, 42 N.B.R. 657.

(§ III—54)—CONTRADICTION ON IMMATERIAL MATTER.

Where the accused giving evidence on his own behalf in a criminal trial is asked, in the course of his cross-examination as to some previous offence about some irrelevant fact, the Crown is bound by his answer and cannot tender testimony in contradiction thereof. [R. v. Muma, 17 Can. Cr. Cas. 285, 22 O.L.R. 227, approved.]

R. v. Mulvihill, 18 D.L.R. 189, 22 Can. Cr. Cas. 354, 19 B.C.R. 197, 26 W.L.R.

955, 5 W.W.R. 1229. [Affirmed in 18 D.L.R. 217, 23 Can. Cr. Cas. 194, 49 Can. S.C.R. 587, 6 W.W.R. 462.]

(§ III—55) — UNRELIABLE WITNESS — EFFECT ON JURY.

If a jury believes that a witness cannot be relied upon, the only result should be the rejection of his testimony by them in considering their verdict; it should not affect the other legal evidence in the case.

Alexe v. Canadian Western Lumber Co., 8 D.L.R. 1, 22 W.L.R. 559, 3 W.W.R. 267.

(§ III—57)—DISCREDITING OWN WITNESS—USE OF PRIOR STATEMENTS.

The right, affirmed by s. 9 of the Canada Evidence Act, R.S.C. 1906, c. 145, of shewing that one's own witness, if found by the court to be hostile, had made a previous statement inconsistent with his present testimony, does not enable the party calling the witness to use the latter's previous statement as evidence of the facts contained therein the previous statement is admissible only for the purpose of impeaching the credit of the adverse witness who has denied that he had made it, and the jury should be so instructed.

R. v. Duckworth, 31 D.L.R. 570, 26 Can. Cr. Cas. 314, 37 O.L.R. 197.

Where an adverse witness, whether a party to the action or not, is called to prove a case, but his evidence disproves it, the party calling him may yet establish his case by other witnesses, called not to discredit him but to contradict him on facts material to the issue. A party at a trial is not concluded by a statement of one of his witnesses brought out on cross-examination, where it appears that the witness, who was opposed in interest to the party calling him, was called merely to establish certain material facts necessary to enable the party calling him to make out a case.

Spenard v. Rutledge, 10 D.L.R. 682, 23 Man. L.R. 47, 23 W.L.R. 623, 3 W.W.R. 1088, reversing 5 D.L.R. 649, 22 W.L.R. 12, 2 W.W.R. 900.

ADVERSE WITNESS.

It is ground for ordering a new trial that evidence of a statement made by a Crown witness to the police, and taken down in writing on their inquiry into the crime, was improperly admitted for the Crown on the witness' failure to identify at the trial as belonging to the accused certain clothing which in his statement to the police he had identified as such, when there had been no finding by the Trial Judge, under s. 9 of the Canada Evidence Act, that the witness was adverse, and that such statement was read by the Crown counsel to the jury and referred to by the Trial Judge as being in evidence, although the latter, in his charge, advised the jury not to base a finding on the statement so admitted. [Allen v. The King, 18 Can. Cr. Cas. 1, 44 Can. S.C.R. 331, and Ibrahim v. The King, [1914] A.C. 616, 83 L.J.P.C. 185, applied.]

R. v. May, 21 D.L.R. 728, 23 Can. Cr. Cas. 469, 21 B.C.R. 23, 7 W.W.R. 1261, 30 W.L.R. 488.

(§ III—58)—CORROBORATION—CHARGE OF FORGERY—CR. CODE, 1906, S. 1002.

The corroboration required by s. 1002 Cr. Code, on a charge of forgery, is additional evidence that will fortify and strengthen the credibility of the main witness and justify the evidence being accepted and acted upon if it is believed and is otherwise sufficient.

R. v. Scheller, 16 D.L.R. 462, 23 Can. Cr. Cas. 1, 7 S.L.R. 239, 6 W.W.R. 261, 27 W.L.R. 621.

RELEVANCY.

Facts which tend to render more probable the truth of a witness' testimony on any material point are admissible in corroboration thereof although otherwise irrelevant to the issue, and although happening before the date of the fact to be corroborated. [Wilcox v. Gotfrey, 26 L.T.N.S. 481, applied.]

R. v. Rabinovitch, 21 D.L.R. 600, 23 Can. Cr. Cas. 496, 25 Man. L.R. 341, 30 W.L.R. 609.

CORROBORATION—ORAL TESTIMONY.

The "evidence" of the claimant which requires corroboration under s. 12 of the Alberta Evidence Act, 1910, 2nd sess. c. 3, in order to recover against the estate of a deceased person means the oral testimony of the claimant.

Brocklebank v. Barter, 22 D.L.R. 209, 8 A.L.R. 262, 30 W.L.R. 159.

PRISONER'S TESTIMONY ON PERJURY CHARGE—INCONSISTENCIES WITH FORMER TESTIMONY.

Where the accused gives evidence on his own behalf in defence of a charge of perjury, material variances in such testimony from that in respect of which the charge is brought may in themselves supply the statutory corroboration which Cr. Code, s. 1002, requires, namely, that the accused shall not be convicted "upon the evidence of one witness, unless such witness is corroborated in some material particular by evidence implicating the accused."

R. v. Nash, 17 D.L.R. 725, 23 Can. Cr. Cas. 38, 7 A.L.R. 449, 28 W.L.R. 960, 6 W.W.R. 1390.

CRIMINAL TRIAL—CR. CODE, S. 1002.

The evidence of witnesses called for the defence may be looked at for the purpose of finding the corroboration required by statute (Cr. Code, s. 1002) for conviction of certain offences. [R. v. Girvin, 45 Can. S.C.R. 167; R. v. Fraser, 7 Cr. App. R. 99, followed.]

R. v. Wakelyn, 10 D.L.R. 455, 21 Can. Cr. Cas. 111, 5 A.L.R. 464, 23 W.L.R. 807, 4 W.W.R. 170.

Evidence which is consistent with two views is not corroborative of either, but if the accused has denied under oath the correctness of one of such views, the evidence becomes corroborative as to the other.

R. v. Peterson, 32 D.L.R. 295, 27 Can. Cr.

Cas. 3, 9 S.L.R. 432, [1917] 1 W.W.R. 600.

CORROBORATION — CRIMINAL CHARGE—INDECENT ASSAULT.

R. v. Fontaine, 18 D.L.R. 275, 23 Can. Cr. Cas. 159.

CORROBORATION.

On a charge of conspiracy to defraud, the evidence of the accomplice may be sufficiently corroborated by entries found in a memorandum book found upon the prisoner.

The King v. St. Pierre, 19 Can. Cr. Cas. 82.

GOVERNMENT INSPECTOR ENTRAPPING SUSPECT INTO OFFENCE—WAR REVENUE ACT (CAN.), 1915.

The effect of the Act, 8-9 Geo. V., Can., c. 46, s. 2, amending the Special War Revenue Act, 1915, is to make a government inspector who buys an unstamped bottle of perfume a competent witness although he does this to entrap the seller and to convict him of an infringement of the law. Such purpose is legalized by the amending Act and its execution does not place the inspector in the position of an accomplice so as to throw doubt on his testimony.

Sifton v. Brunet, 31 Can. Cr. Cas. 1.

CORROBORATION—DENIAL.

Evidence which is consistent with two views is not corroborative of either, but if the accused has denied under oath the correctness of one of such views, the evidence becomes corroborative as to the other.

Peterson v. The King, 28 Can. Cr. Cas. 332, 55 Can. S.C.R. 115, [1917] 3 W.W.R. 345, affirming 32 D.L.R. 295, 27 Can. Cr. Cas. 3, [1917] 1 W.W.R. 600.

(§ III—59)—DISSUASION FROM GIVING EVIDENCE.

The provision in Cr. Code, s. 180, to the effect that every one is guilty of an indictable offence and liable to two years' imprisonment who dissuades or attempts to dissuade any person by threats, bribes, or other corrupt means from giving evidence "in any cause or matter, civil or criminal," contemplates that the person to be dissuaded must be one who is required to give evidence; it was not intended to apply where the dissuasion was from giving evidence before a person having no proper authority to take it.

R. v. Rosen, 33 D.L.R. 715, 27 Can. Cr. Cas. 259, 9 S.L.R. 401, [1917] 1 W.W.R. 382.

TAMPERING WITH WITNESS.

Tampering with a witness on any prosecution under a Provincial Liquor License Act (R.S.O. 1914, c. 215, s. 78 and R.S.C. 1906, c. 152, s. 150), does not include tampering with a possible witness before the commencement of the prosecution.

R. v. Armstrong, 31 D.L.R. 82, 26 Can. Cr. Cas. 151, 36 O.L.R. 2.

INDICTMENT FOR RAPE—CROSS-EXAMINATION OF COMPLAINANT AS TO PREVIOUS IMMORAL CONDUCT—DENIAL—COLLATERAL MATTER.

The King v. Muma, 17 Can. Cr. Cas. 285, 22 O.L.R. 227.

IV. Credibility.

(§ IV—60)—UNCONTRADICTED TESTIMONY—DEMEANOUR.

A judge or magistrate cannot legally refuse to give credit to testimony if the following conditions are fulfilled: (1) That the statements of the witness are not in themselves improbable or unreasonable; (2) that there is no contradiction of them; (3) that the credibility of the witness has not been attacked by evidence against his character (4) that nothing appears in the course of his evidence or of the evidence of any other witness tending to throw discredit upon him and (5) that there is nothing in his demeanour while in court during the trial to suggest untruthfulness.

R. v. Covert, 34 D.L.R. 662, 28 Can. Cr. Cas. 25, 10 A.L.R. 349, [1917] 1 W.W.R. 919.

CREDIBILITY—CORROBORATION.

Bank of Montreal v. Italian Merchants' Exchange, 16 D.L.R. 851.

Upon a reference to the Master in Ordinary, the Ontario practice, which tends to give him final discretion as to the credibility of the witnesses appearing before him on the reference, is tempered by the circumstances, including such tests as whether there be some unmistakable document or something of the kind which shews the contrary or which the Master has failed to take into consideration and in the absence of any such circumstances the rule of practice will be given effect.

Nassar v. Equity Fire Ins. Co., 8 D.L.R. 645, 4 O.W.N. 340, 23 O.W.R. 340.

The Master or other officer who hears the evidence of the witnesses is the final judge of their credibility.

Re Sanderson and Saville, 6 D.L.R. 319, 26 O.L.R. 616, 22 O.W.R. 672.

(§ IV—62)—AFFIRMATIVE AND NEGATIVE TESTIMONY.

A witness who testifies to an affirmative is ordinarily to be credited in preference to one who testifies to a negative. [Lefeunteum v. Beaudoin, 28 Can. S.C.R. 89, applied.]

Charlton v. The King, 8 D.L.R. 911, 14 Can. Ex. 41.

AFFIRMATIVE AND NEGATIVE TESTIMONY.

In estimating the value of evidence, the testimony of a person who swears positively that a certain conversation took place is of more value than that of one who says that it did not, because the person who denies the conversation may have forgotten the circumstances. [Chowdry Deby Perod v. Chowry Damlot Sign, 3 Moo. Ind. App.

347; Lang v. Jackson, 20 Beav. 535, adopted.]

Dunphy v. Cariboo Trading Co., 7 W.W.R. 326.

(§ IV—63) —INFORMER — CREDIBILITY — MOTIVE.

Upon a prosecution of a physician for issuing a certificate for the purchase of intoxicating liquor for nonmedical purposes contrary to the provisions of the Canada Temperance Act, the credibility of an informer will be adversely affected by any of the following circumstances, if present (a) the informer being an unknown adventurer, (b) the informer being an employee of the prosecution at a weekly wage to build up cases, (c) the informer making a false statement to the physician in applying for the certificate.

R. v. McAllister, 14 D.L.R. 430, 22 Can. Cr. Cas. 166.

V. Fees.

See Costs.

(§ V—65)—FEES.

On the dismissal of an appeal from a summary conviction on which there is a rehearing, the practice in Saskatchawan does not require that the witness fees of a witness called on such rehearing shall on taxation be divided because he also attended the sittings on the same day as a witness in another case. [Hamilton v. Beck, 3 Terr. L.R. 405, followed.]

Pahkala v. Hannuksela, 8 D.L.R. 107, 20 Can. Cr. Cas. 260, 2 W.W.R. 921.

CONDUCT MONEY—NONPAYMENT, EFFECT OF.

Parsons v. Francis, 11 D.L.R. 847, 18 B.C.R. 157, 24 W.L.R. 938, 4 W.W.R. 1015.

Witnesses are taxed under the authority of the Trial Judge and the court has no jurisdiction to interfere with the taxation, which is considered part of the final judgment.

Consolidated Gold Mines v. Cadasco, 13 Que. P.R. 333.

WITNESS FEES—RECOVERY UPON DISMISSAL OF ACTION.

If an application is dismissed, owing to the default of the plaintiff in proceeding the defendant is entitled to the hearing fee. The defendant is not entitled to the inquest fee if the only witness heard was examined with a view of trying to justify the postponement of the case.

Beaudin v. Union Abitibi Mining Co., 16 Que. P.R. 228.

(§ V—69)—PROFESSIONALS.

Under a subpœna requiring a solicitor to attend before a special examiner for cross-examination upon an affidavit made as solicitor, where the knowledge basing the affidavit was acquired by the deponent in the course of the rendering of professional services, the witness is entitled to a professional witness fee per diem of $4 in advance, pursuant to Con. rr. 492, 443, and disbursements tariff item 119.

Campbell v. Verral, 7 D.L.R. 321, 4 O.W.N. 177, 23 O.W.R. 175.

WITNESS FEES—TAXATION.

The court cannot review the taxation of witnesses' fees without making them parties.

Lacroix v. Chalbot, 12 Que. P.R. 395.

WOMEN.

See Husband and Wife.

Married Women's Relief Act, see Statutes.

CARNAL KNOWLEDGE — INDUCEMENT BY HOUSEHOLDER—KNOWLEDGE OF AGE NOT ESSENTIAL.

The King v. Sam Sing, 17 Can. Cr. Cas. 361.

WORDS AND PHRASES.

See Index "A" Volume II.

WORKMEN'S COMPENSATION.

See Master and Servant, V—340.

Annotation.

Quebec law on workmen's compensation: 7 D.L.R. 5.

WRIT AND PROCESS.

I. IN GENERAL.

II. SERVICE.

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B. On corporations.

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D. Privilege; exemption.

III. RETURN; PROOF; SETTING ASIDE WRIT OR SERVICE.

I. In general.

Various writs and orders, see Motions and Orders; Execution; Attachment; Garnishment; Injunction; Mandamus, Prohibition; Quo Warranto; Certiorari; Habeas Corpus.

(§ I—1)—WRIT OF SUMMONS—SPECIAL ENDORSEMENT — LIQUIDATED DEMAND — APPEARANCE—AFFIDAVIT.

Williamson v. Playfair, 25 O.W.R. 322.

PRACTICE—WRIT OF SUMMONS — SPECIAL ENDORSEMENT — ACTION FOR RECOVERY OF LAND—FAILURE TO SET OUT PARTICULARS—RULES 33, 772—FORM 5.

Morrow v. Morgan, 17 O.W.N. 280.

(§ I—2)—VALIDITY.

A conviction under the Canada Temperance Act, R.S.C. 1906, c. 152, was set aside where no place of trial was mentioned in the summons and defendant did not appear.

The King v. Wilson; Ex parte Harrington, 40 N.B.R. 383.

SUMMARY CONVICTION MATTERS—SUMMONS.

A summons under the Canada Temperance Act stated that the information upon which it was issued was laid more than three months after the offence. The infor-

mation was in fact laid within three months. The defendant did not appear, and a conviction was entered:—Held, the summons was bad on its face and was not cured by ss. 723, 724, Cr. Code, or s. 146 of the Canada Temperance Act, and the conviction should be quashed.

The King v. Kay; Ex parte LeBlanc, 41 N.B.R. 99.

OMITTING ADDRESS — VALIDITY.

The omission in the writ of summons of the address of a defendant company is fatal, and the writ will be set aside.

Brown v. North American Lumber Co., 21 B.C.R. 258.

WRIT OF SUMMONS — IRREGULARITY — SPECIAL ENDORSEMENT — RULE 33.

Watson v. Morgan, 9 O.W.N. 281.

FORM — SERVICE — ESSENTIALS — VALIDITY.

Bailiffs can only serve writs within the limits of the district for which they have been appointed; it is necessary, therefore, to understand by the words "or in any other district" of art. 121, C.C.P., the exception intended in the said art. 7608, R.S.Q., when it says "and in other districts in the cases provided by law." The authority of the bailiff should appear on the very face of the writ of summons, by stating the district for which he is registered. That part of Form 2 of the appendix to the Rules of Practice, according to which the writ of summons is addressed to the defendant himself instead of to the sheriff or a bailiff of the district where he is to be served, does not agree with the provision of art. 121, C.C.P., and, consequently, it is beyond the power of the judges of the Superior Court to make a similar form. The notice to the defendant, in the writ, that if he does not appear judgment will be given against him by default, appears to have been inserted in the form of summons many years ago, in order to avoid subsequent writs of the English procedure of that period. A notice to the defendant "that in default of his doing so," of appearing, judgment will be given by default, is essential. The mention in the writ of the district in which it must be served, the order given to the sheriff or a bailiff of the district enjoining him to cite the defendant to appear, and the notice to the latter "that on default of his doing so" judgment will be given against him by default, are three elements essential to the validity of the writ of summons, and their omission constitutes a violation of substantial formalities which involve the nullity of the proceedings.

Reford v. The Stadium, 20 Que. P.R. 150.

WRIT OF SUMMONS—ADDRESS OF PLAINTIFF NOT SET OUT — APPLICATION TO SET ASIDE WRIT — CONDITIONAL APPEARANCE ENTERED WITHOUT LEAVE — EFFECT OF.

Buscombe Securities Co. v. Windebank & Quataino Trading Co., [1918] 3 W.W.R. 582, 25 B.C.R. 441.

ORIGINAL SUMMONS — AFFIDAVITS — ENDORSEMENT — WRONG STATEMENT OF CLIENT'S NAME — RULES 264, 417, 747.

The nonfiling of an original summons on the hearing of an application, where the other party is not mislead, is not fatal and leave will be given to file under r. 264, giving general power to amend, and r. 747. As to effect of noncompliance with the rules, the wrong statement of a client's name following the signature of a solicitor, and the omission to endorse a summons, etc., with a notice as to material to be read, may be corrected. Affidavits made by the registrar and one of his clerks and sworn before the deputy registrar may be used in support of an application to cancel a certificate of title. Affidavits used on an application and not endorsed with a note shewing on whose behalf they have been filed (r. 417) may be amended. In chamber applications the court will not usually decide important questions of law or complicated and contested issues of fact, where they can be more properly determined by an action.

Land Titles Act, Re; Registrar v. Toohill, 6 W.W.R. 359, 27 W.L.R. 517.

(§ I—4)—NAME OF PARTY.

Inasmuch as a writ of summons cannot be issued without a statement of claim annexed thereto, a writ expressly referring to the statement of claim as annexed thereto and the statement of claim are to be taken as one, so that one whose name is omitted from the writ is nevertheless a party if his name appears in the statement of claim.

Albertson v. Secord, 1 D.L.R. 804, 4 A.L.R. 90, 20 W.L.R. 64, 1 W.W.R. 657.

SUMMONS—DESCRIPTION OF PARTIES—PARTNERSHIP—EXCEPTION TO FORM —QUE. C.C.P. 154.

The name of the firm under which the defendant does business, as sole member, is not necessary in his description, and an exception to the form, based on this ground, will be refused.

Singleton v. King, 16 Que. P.R. 71.

(§ I—6)—AMENDMENT—FRESH CAUSE OF ACTION—DATE.

An amendment of the date of the writ of summons commencing an action cannot be made for the purpose of including a fresh cause of action arising pendente lite.

Yukon Gold Co. v. Boyle Concessions, 19 D.L.R. 336, 29 W.L.R. 120. [Affirmed, 27 D.L.R. 672, 50 D.L.R. 742.]

AMENDMENT—WRIT ISSUED IN NAME OF DECEASED SOVEREIGN.

A writ of summons in time to prevent the barring of an action by the Statute of Limitations, but in which by error the name of a deceased sovereign and not that of the reigning sovereign was inserted, may, under Con. rr. 310, 312 (Ont. 1897), be amended after service, so as to cure the irregularity, notwithstanding that defendant was there-

by precluded from setting up the statute as a bar.

Bank of Hamilton v. Baldwin, 12 D.L.R. 232, 28 O.L.R. 175, 24 O.W.R. 21.

An application made after service of the writ of summons to amend by correcting the corporate name of the plaintiff company where the name used in the writ was that of another corporation, will only be dealt with on notice to the defendant.

United Motor Co. v. Slinn, 8 D.L.R. 471, 22 W.L.R. 738, 3 W.W.R. 521.

If an action has been wrongly taken under the summary procedure, it may be amended by striking out the words "summary procedure" in the writ.

Arnold v. Canadian Motors, 14 Que. P.R. 394.

(§ I—8)—RENEWAL OF WRIT.

It is an abuse of the process of the court to keep renewed for service, for the sole purpose of preventing the operation of the Statute of Limitations, and without any bonâ fide intention of proceeding in the action, a writ of summons of which service is deliberately withheld to keep the litigation pending for a longer time. A motion to vacate the renewal of a writ not served within twelve months of its issue will be granted where the order for renewal was made on an insufficient affidavit, reserving, however, to the defendants the right to move against the order if there were no adequate grounds for the renewal, and where, on the hearing of the motion to vacate, the plaintiff offers no good excuse for the failure to serve the original writ within the twelve months.

Appleyard v. Mulligan, 3 D.L.R. 288, 3 O.W.N. 943, 21 O.W.R. 557.

RENEWAL—ACTION BARRED.

Where owing to the expiry of a writ of summons, a cause of action has become barred by the Statute of Limitations, leave to renew the writ nunc pro tunc ought not to be granted.

Travato v. Dominion Canners, 26 D.L.R. 507, 35 O.L.R. 295.

ELECTION ACT.

As the Controverted Municipal Elections Act, R.S.N.S. 1900, c. 72 s. 8, provides for service of the petition in the same manner as a writ in a civil case, substituted service may be authorized in like manner, on proof of inability to effect personal service, although the five days allowed for service had not expired, nor had an application been made to extend the time. [Peterborough West Election Case (Stratton v. Burnham), 41 Can. S.C.R. 410, followed.]

McLellan v. McIsaac, 21 D.L.R. 429, 48 N.S.R. 299.

STATEMENT OF CLAIM—RENEWAL.

A statement of claim cannot be renewed after the expiration of six months from its date of issue.

Crown Lumber Co. v. Malcolm, 9 W.W.R. 481.

DELAY IN SERVICE—CERTIFICATE OF LIS PENDENS REGISTERED — MOTION FOR ORDER RENEWING WRIT.

Fair v. Tierney, 18 O.W.R. 639.

AMENDMENT — ACTION BY A WIFE AS TO PROPERTY — AUTHORIZATION OF HER HUSBAND—CLERICAL ERROR.

Rousseau v. Ouimet, 13 Que. P.R. 173.

AMENDMENT OF WRIT AND DECLARATION WITHOUT LEAVE — CHANGE IN THE NAMES OF THE PLAINTIFF.

Erdrich v. Barry, 39 Que. S.C. 326.

SERVICE OF WRIT AND DECLARATION—TIME FOR DEFENCE.

Erdrich v. Barry, 12 Que. S.C. 178.

II. Service.

A. IN GENERAL; ON NONRESIDENT.

(§ II A—10)—MAGISTRATE'S ORDER — MOTION TO QUASH—SERVICE OF NOTICE — SUFFICIENCY OF.

Service of notice of motion to quash a magistrate's order made under the Master and Servants Ordinance, 1904 (Alta.), for payment of wages may be made on the complainant by leaving it with an adult at his place of residence. [R. v. Trottier, 14 D.L.R. 355, 22 Can. Cr. Cas. 102, 6 A.L.R. 451, applied.]

Re Lawler and Edmonton, 20 D.L.R. 710, 7 A.L.R. 376, 29 W.L.R. 661, 7 W.W.R. 291.

ON NONRESIDENT — ORDER FOR — NECESSITY OF OBTAINING BEFORE ISSUANCE OF WRIT.

Under B.C. order 2, r. 4, and order 11, r. 1, an order from the court for the service beyond the jurisdiction of the court of a writ of summons or notice thereof on one of the defendants, must precede the issuance of the writ itself, which can issue only with leave; and a service beyond the jurisdiction based on an order made after the issuance of the writ without leave, is a nullity and not a mere irregularity.

Bloom v. New York Tailoring Co., 13 D.L.R. 789, 18 B.C.R. 395, 25 W.L.R. 427, 5 W.W.R. 80.

SERVICE ON DEFENDANT'S HUSBAND — DEFENDANT'S KNOWLEDGE, EFFECT.

Under the Saskatchewan Practice, where it appears that a writ of summons which was to have been served ex juris was not personally delivered to the defendant, but was delivered to her husband for her, the service of the writ will be set aside on application of the defendant, in the absence of evidence shewing that a copy of the writ ultimately came to the knowledge or possession of the defendant herself. [Rhodes v. Innes, 7 Bing. 329, distinguished.]

O'Neil v. O'Neil, 11 D.L.R. 440, 24 W.L.R. 84, 4 W.W.R. 478.

OF PETITION TO ANNUL DECREE.

The delay for service of a petition to annul a decree is the same as in all other proceedings which commence by way of petition and is one clear day.

James Bay & E.R. Co. v. Bernard, 23 D.L.R. 701, 24 Que. K.B. 6.

OF STATEMENT OF CLAIM — SEVERAL DEFENDANTS—ATTACHING MEMORANDA OF INFORMATION.

The proper course for a plaintiff to pursue who desires to use one original statement of claim for service on a number of defendants whose times for appearance may be different is to endorse upon the statement of claim only the memoranda which are uniform for all, and to use an attached notice where there is any variation in the information to be given to different defendants. If this is done, there is no necessity for a concurrent writ.

London Scottish Can. Investment Syndicate v. Davidson, 9 W.W.R. 731.

REVIEW—ORDER FOR HEARING—SERVICE ON PARTY DISSATISFIED — CERTIORARI — ORDER 62, JUDICATURE ACT 1909 — ORDER UNDER—APPEAL FROM.

The court will not remove by certiorari a judgment on review from the decision of a magistrate on the ground that the order for hearing the parties on review, or notice thereof, was not served on the party dissatisfied with the judgment, when the solicitor who tried the case before the magistrate appeared and argued the case for him on review. Semble: That there is no appeal from an order of a judge refusing a certiorari on an application made under O. 62 of "the Judicature Act, 1909."

Ex parte Mayes Case, 46 N.B.R. 114.

PRACTICE—SUBSTITUTIONAL SERVICE—AFFIDAVITS IN SUPPORT OF APPLICATION TO SHOW THAT NOTICE WILL PROBABLY COME TO NOTICE OF DEFENDANT—O. 9, R. 2, S.C. RULES AND AMENDMENT.

Sun Life Ass'ce Co. v. Tardiff, [1919] 2 W.W.R. 846.

SUFFICIENCY OF SERVICE—SOLICITORS—APPEARANCE.

Where solicitors in proper form and with the authority of the client give an undertaking to accept service of a writ of summons and to enter an appearance thereto, all obligation as to service of the writ is waived or dispensed with, and if the solicitors fail to enter the appearance the plaintiff may proceed to judgment as in default of appearance. [Re Kerly [1901] 1 Ch. 467, followed.]

Sterling Loan & Securities Co. v. Clancy, [1917] 2 W.W.R. 61.

ON LAW FIRM.

When a judicial document is served on a firm of attorneys a member of which has replaced one of the attorneys ad litem, the service is valid, if in result the party is really represented by the attorneys on whom the document is served.

Dougan v. Montreal Tramways Co., 26 Que. K.B. 217.

ON PARTNERSHIP—UNINCORPORATED ASSOCIATION—SERVICE OF PROCESS ON INDIVIDUALS AS PARTNERS — APPEARANCES UNDER PROTEST—DENIAL OF STATUS AS PARTNERS—SEPARATE SERVICE ON ASSOCIATION — STATEMENT OF CLAIM — PARTICULARS.

Wentworth Ranch v. National Live Stock Assn., 13 O.W.N. 363.

LEAVE TO AMEND.

Browne v. Timmins, 24 O.W.R. 290.

STATEMENT OF CLAIM — LATE DELIVERY — IRREGULARITY—VALIDATION.

Youell v. Toronto R. Co., 24 O.W.R. 57.

PLACE OF SERVICE.

Service of the writ upon the president of a board of school commissioners is not a personal one according to art. 94 C.C.P. par. 2, if made in a district where otherwise the court would have no jurisdiction over the board.

School Board of Notre Dame de Granby v. Lessard, 14 Que. P.R. 382.

WHEN CROWN MAY BE SUMMONED—SERVICE ON ATTORNEY-GENERAL.

The sovereign can be summoned before the courts only in the cases and in the manner provided by art. 1011, C.C.P. et seq. Consequently a summons to the Attorney-General (as representing the Crown) in proceedings against a county council to compel it to change the place for holding its sessions in order that he take note of the judgment and without any other conclusion against him, is illegal and will be set aside on exception to form.

Raymond v. Kamouraska, 46 Que. S.C. 117.

EXCEPTION TO THE FORM—QUEBEC PRACTICE.

An exception to the form, based on the fact that the copy of the writ served on the defendant appeared to have been issued in the name of a deceased sovereign though the original was in proper form, was dismissed as the defendant had suffered no prejudice.

Bradley v. Saucier, 14 Que. P.R. 270.

IN GENERAL.

To summon a defendant by service of the writ only without a declaration, or of the declaration only without the writ is an irregularity which makes the proceedings radically null. Therefore, the deposit with the prothonotary, in a case of capias, of a copy of the declaration for the defendant the day after the return of the writ and after the expiration of the three days following the service of the writ is a radical nullity and the capias will be quashed on exception to the form.

Trottier v. Belair, 13 Que. P.R. 400.

SUMMONS TO ANSWER BEFORE A MAGISTRATE —SUMMONS SERVED BY CONSTABLE WHERE HIMSELF THE INFORMANT AND PROSECUTOR—INVALIDITY.

Re Kennedy, 17 Can. Cr. Cas. 342.

(§ II A—13)—PLACE—SALE OF GOODS — PLACE OF PAYMENT.

The fact that it is stipulated in a contract between a manufacturer in Ontario and his customer in Alberta that delivery should be f.o.b. in Alberta does not imply that the locus of the contract is Alberta, nor fix that province as the place of payment where the contract is silent on that point; and the debtor must seek out his creditor, and is liable to be sued in Ontario for the default in payment occurring in Ontario under R. 25 (e) of the Judicature Rules (Ont.). [Blackley v. Elite Costume Co., 9 O.L.R. 382, followed.]

Leonard v. Cushing, 19 D.L.R. 569, 30 O.L.R. 646.

PLACE—SERVICE OUT OF THE JURISDICTION —MOTION TO SET ASIDE — IRREGULARITIES.

Wood v. Worth, 5 O.W.N. 452.

PLACE OF SERVICE.

A copy of a writ of summons cannot be left with a person having no authority to receive it for the defendant, in a building which is neither the domicile nor the residence, nor the business office of the defendant. A motion by the defendant asking for dismissal of the action on this ground will be granted with costs reserving the right to sue again.

De Angelis v. Waters, 18 Que. P.R. 103.

If a defendant has been fraudulently moved from the jurisdiction of his domicile, personal service made upon him does not give jurisdiction to the court of the place where it is made.

Lamalice v. Audette, 17 Que. P.R. 456.

EXCEPTION TO FORM—PETITION TO REVISE JUDGMENT—SERVICE ON PARTNERSHIP—SAMPLE ROOM—QUE. C.C.P. 139.

A summons of a partnership carrying on business under a firm name should be served at its place of business, and, if the partnership has no place of business, on one of the partners. Such service cannot be made in a sample room, and it will be void if the partners have not acted in such a way as to give rise to the belief that they had a place of business there.

Cerat v. Courville, 16 Que. P.R. 69.

(§ II A—16)—SERVICE OUT OF THE JURISDICTION — ASSETS WITHIN THE JURISDICTION—KING'S BENCH ACT (MAN.) R. 291.

Service out of the jurisdiction of a statement of claim should not be allowed, under r. 291 of the King's Bench Act (Man.) upon a mere affidavit by the plaintiff stating that the defendant has assets in Manitoba of the value of at least $200 which may be rendered liable to the judgment in case the plaintiff should recover judgment in the action, without shewing what the assets are, because the rule requires that the possession of such assets must be shewn to the satisfaction of the court or judge, and this implies that the court or judge should have some information furnished from which to be so satisfied.

Gardner v. Eaton, 17 D.L.R. 637, 24 Man. L.R. 209, 28 W.L.R. 97, 6 W.W.R. 758.

NONRESIDENT—EX JURIS.

In an action for specific performance of an agreement for purchase of land the original purchaser is properly joined as a party, although he is living outside of Canada and has transferred all his interest in the contract and in the land to his co-defendant resident within the jurisdiction, and he may be served outside the jurisdiction with a statement of claim in such an action under the Manitoba King's Bench, r. 201, which authorizes service outside of the jurisdiction whenever any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction.

Smith v. Ernst, 1 D.L.R. 547, 22 Man. L.R. 317, 20 W.L.R. 353, 1 W.W.R. 839.

SERVICE ON NONRESIDENT.

On an application for leave to serve a writ of summons out of the jurisdiction, it is essential to prove a prima facie cause of action against the defendant upon whom it is proposed to serve the writ ex juris.

Davis v. Wenatchee Valley Fruit Growers Assn., 9 D.L.R. 402, 23 W.L.R. 326, 3 W.W.R. 922.

JOINING DEFENDANT OUT OF JURISDICTION — FAILURE TO ESTABLISH CLAIM AGAINST RESIDENT DEFENDANT.

Where leave is given to serve a person out of the jurisdiction as a necessary or proper party defendant to an action brought against a codefendant within the jurisdiction, it is not necessary that the order for service ex juris should contain a condition that in case the action be dismissed against the party within the jurisdiction, the plaintiff shall thereupon consent to its dismissal as to the defendant so served out of the jurisdiction; the latter's rights in that respect, where the service is justified only if the action is properly sustainable against the codefendant within the jurisdiction, can be dealt with at the trial if a plea of want of jurisdiction is raised.

The test for applying that part of the rule for service out of the jurisdiction (Man. K. B. r. 201 (g) which permits service ex juris upon any person who is a "necessary and proper party to an action properly brought against some person duly served within the jurisdiction" is whether both would have been proper parties to the action had they both been within the jurisdiction, and this without taking into account what may be the result of the trial. [Massey v. Heynes, 21 Q.B.D. 330, applied.]

Swanson v. McArthur, 12 D.L.R. 487, 23 Man. L.R. 84, 24 W.L.R. 1, 4 W.W.R. 231, varying 7 D.L.R. 680.

In an action against two parties, one of whom is out of the jurisdiction, an order may be made for service of the writ upon

him provided his codefendant is first served, under clause (g) of Consolidated R. 162, whereby the service of a writ out of Ontario may be allowed where the person sought to be served is a necessary or proper party to an action properly brought against another person duly served in Ontario.

Hay v. Sutherland, 2 D.L.R. 391, 3 O.W.N. 584, 21 O.W.R. 200.

SERVICE OUT OF JURISDICTION — CONDITIONAL APPEARANCE.

Bain v. University Estates, 16 D.L.R. 863, 6 O.W.N. 22.

MOTION TO SET ASIDE—GUARANTY EXECUTED IN ANOTHER PROVINCE — CONDITIONAL APPEARANCE.

Farmers Bank v. Security Life Ass'ce Co., 5 D.L.R. 889, 23 O.W.R. 17.

SERVICE—NONRESIDENT—MOTION TO SET ASIDE—IRREGULARITIES.

Edgeworth v. Allen, 3 D.L.R. 880, 3 O.W.N. 1375, 22 O.W.R. 617.

SERVICE OUT OF THE JURISDICTION—CAUSE OF ACTION, WHERE ARISING — CONDITIONAL APPEARANCE.

Farmers Bank v. Heath, 1 D.L.R. 915, 3 O.W.N. 805.

INTERPLEADER ORDER—SERVICE ABROAD.

Upon the application of the plaintiff, an order was made by a judge permitting the applicant to pay into court the amount of two promissory notes, made by him, held by B. in a foreign country, where he lived. The notes were given in Ontario in payment for a block of shares in an incorporated company, and the order purported to rectify the share-register of the company, by substituting the name of the plaintiff for that of the defendant as the owner of the shares. The order also directed the trial of an interpleader issue as to the money in court, and that B. should be plaintiff in the issue. The order was made after a notice of motion had been served on B., in the foreign country where he lived, informing him that a motion would be made for an order authorizing the plaintiff to pay into court the amount owing upon the two notes, and directing the Registrar of the court to execute a transfer to the plaintiff of the shares in the company, "and for such further or other order" as might seem just. No permission was obtained from the court to issue or serve this notice abroad; and, B. not appearing on the return, the order was made in his absence:—Held, upon B.'s application to set aside the order, that, the service of the notice being unauthorized, it was void as process; that, if treated as informal notice, it gave no correct information as to what the court was asked to do, and was, as to the matters complained of, no notice at all; and, therefore, the order was an ex parte order within r. 217, and should be set aside. Under rr. 25 and 3 (b), (j), a notice may be served out of the jurisdiction in interpleader; but the notice is to be in the form settled by the terms of rr. 629, 630; and r. 630 indicates the extent and nature of the relief that can be obtained against a nonappearing claimant. Assuming that there was a foundation for an interpleader order, the order went beyond the relief which the court was competent to grant against an absentee claimant. Order of Latchford, J., reversed.

Willard v. Bloom, 41 O.L.R. 1.

SERVICE OUT OF JURISDICTION—AFFIDAVIT.

A good cause of action must be shewn in support of an application for an order for service of a writ of summons ex juris.

Royal Bank v. Skeans, 24 B.C.R. 190.

DEBT OF RESIDENT.

A debt due from a resident of Manitoba to a person residing elsewhere is an asset within said province within the meaning of r. 291 of the King's Bench Rules and, therefore, a ground for allowing service of a statement of claim to be made upon the creditor outside of Manitoba in an action brought against him in Manitoba. [Brand v. Green, 13 Man. L.R. 101, applied; Love v. Bell Piano Co., 2 A.L.R. 209, 10 W.L.R. 657, not followed.]

Woodward & Co. v. Koeford, 29 Man. L. R. 184, [1918] 3 W.W.R. 945.

SERVICE OF NOTICE OF WRIT OUT OF ONTARIO —ONTARIO COMPANIES ACT, S. 151, SUBSS. 6 AND 7, ADDED BY 8 GEO. V., C. 20, S. 30—ACTION BY MINING COMPANY — ENFORCEMENT OF CALL ON SHARES—"CONDITIONS" OF SERVICE—RULES 25-30—VALIDITY OF CALL—APPLICATION OF NEW SUBSECTIONS — SPECIAL ACT, 7 EDW. VII., C. 117—VALIDITY OF CALL—GENERAL STATUTORY POWERS—QUESTION FOR TRIAL—JURISDICTION OF COURT—LEAVE TO ENTER CONDITIONAL APPEARANCE.

The Ontario Companies Act, R.S.O. 1914, c. 178, having been amended by s. 30 of the Statute Law Amendment Act, 1918, 8 Geo. V. c. 20 (assented to on the 26th March, 1918), by the addition of subss. 6 and 7 to s. 151, a former action (see Superior Copper Co. v. Perry, 42 O.L.R. 45), between the parties now before the court in this action, was discontinued, and this action was commenced on the 31st May, 1918; the plaintiff company alleged that a call was, on the 18th October, 1917, made on the shares issued by the company, and claimed a declaration that the shares standing in the names of the defendants were not fully paid and were assessable and subject to call, that the call made was valid, and that the plaintiffs were entitled to sell the shares; they also claimed an order for the sale of the shares under the direction of the court. Notice of the writ of summons was served upon the defendant S. out of Ontario, and he moved to set aside the service. The added subs. 6 authorised service upon a shareholder out of the jurisdiction "in the same manner and subject to the same conditions as process is permitted to be

served out of the jurisdiction in cases provided for by the Consolidated Rules:"—Held, that each clause of r. 25 names, not a "condition" of permitting service, but a case in which service may be allowed; the "conditions" are to be found elsewhere, e.g., in rr. 26 to 30; the subss. 6 and 7 of s. 151 add a new case to the cases mentioned in r. 25, and make the procedure laid down in the later rr. applicable to the new case. Quære, whether the new subss. were applicable to the plaintiff company. [Toronto & Niagara Power Co. v. North Toronto, 25 O.L.R. 475, [1912] A.C. 834, distinguished.] Held, that the question whether the call sought to be enforced was one which could be supported apart from the company's special Act, 7 Ed. VII., c. 117 (O.), was one which could not be determined until all the facts were brought out at the trial of the action; and, therefore, the service should not be set aside; but the defendant S. should have leave to enter a conditional appearance, so that he might not be precluded from questioning, at the trial, the jurisdiction of the court. Although it is generally desirable that such questions should be determined at the earliest possible moment, the leave ought to be given in this particular case.

Superior Copper Co. v. Perry, 44 O.L.R. 24.

SERVICE ABROAD—JUDGE'S DISCRETION—REVIEW.

The Act in its scope and purpose is intended to affect procedure only and enacting in subs. 2, of s. 55, that the repeal effected thereby should not affect any jurisdiction, established or confirmed by or under any Act repealed thereby, the words "for any other matter" in clause (h) of O. 11, r. 1, must be construed to include any matter not covered by the preceding clauses of the rule in which the court had jurisdiction at the passing of the Act, and as by C.S.N.B. 1903, c. 111, ss. 52, 53, service abroad might have been authorized in an action such as the one in question, the judge had jurisdiction to make the order and the appeal should be dismissed. Where under clause (h) a judge in the exercise of his discretion on the facts decides that it is in the interest of justice that jurisdiction should be exercised and service abroad authorized, the court on appeal will not interfere with the exercise of such discretion.

Roy v. St. John Lumber Co., 44 N.B.R. 88. Appeal quashed in 29 D.L.R. 12, 53 Can. S.C.R. 310.

OF STATEMENT OF CLAIM—PARTIES OUTSIDE OF JURISDICTION—LEAVE.

Where the defendants without the jurisdiction are necessary or proper parties under clause (G) of r. 204, the plaintiff should issue a statement of claim, serve the defendants without the jurisdiction (see clause (G)), then apply for leave to serve the defendants without the jurisdiction and, having obtained an order, issue a concurrent statement of claim or claims on which the time for defence, or demand of notice as shewn by the endorsements thereon, is that prescribed in the order, and serve the defendants out of the jurisdiction. In the case of a sole defendant or all the defendants residing out of the jurisdiction a statement of claim should be issued and an order then obtained for leave to serve the defendant or defendants out of the jurisdiction and fixing the time for defence or demand of notice, and after obtaining the order, the time for defence or demand of notice and the date of the order should be inserted in the endorsement thereon. In a case in which there is a defendant residing north of the 55th parallel of north latitude and a defendant residing south thereof, the times for defence or demand of notice as fixed by the rule differing, a concurrent statement of claim should be issued.

Parker v. Holloway, 9 W.W.R. 286.

SERVICE OUT OF JURISDICTION—RENEWAL—NEW AVERMENTS.

If a material representation upon which the leave to serve out of the jurisdiction was obtained in the first instance turns out to be unfounded, the plaintiff ought not to be allowed, when an application was made by the defendant to discharge the order for the issue of the writ and service, to set up another and a distinct cause of action which was not before the judge upon the original application.

Boyd v. Dean, 22 D.L.R. 676, 7 W.W.R. 1307, reversing 7 W.W.R. 1208.

INSUFFICIENT AFFIDAVIT—SETTING ASIDE.

In an action by a liquidator of a company, which is being wound up, s. 22 of the Winding-up Act does not prevent a defendant from moving to set aside a concurrent writ of summons and the service thereof. [Mersey Steel & Iron Co. v. Naylor, 9 Q.B.D. 648, applied.] The affidavit filed in support of an application for a concurrent writ of summons for service out of the jurisdiction must shew a good cause of action, otherwise the order may be set aside. [Dickson v. Law, [1895], 2 Ch. 65; Fowler v. Barstowe, 20 Ch.D. 240; Shore v. Hewson, 1 S.L.R. 74, followed.]

Frid Lewis v. Holmes, 8 S.L.R. 182, 31 W.L.R. 918, 8 W.W.R. 1195.

M.R. 62—ENDORSEMENT ON WRIT—SERVICE IN FOREIGN COUNTRY.

Where notice of writ is served on defendant, not a British subject, in a foreign country, endorsement on writ under marginal r. 62 is not necessary.

Lyall Shipbuilding Co. v. Van Hemelryck, [1919] 3 W.W.R. 317.

APPLICATION TO SET ASIDE STATEMENT OF CLAIM FOR SERVICE EX JURIS—PLAINTIFF TO PROVE JURISDICTION.

An order for issue of a statement of claim for service ex juris (and the statement of claim and other proceedings) should be set aside on an application for such purpose unless the plaintiff prove in

the clearest possible manner that the court has power to try the action. To dismiss such application upon plaintiff merely undertaking to prove at the trial a cause of action within the province or accept a nonsuit is not good practice as it puts defendant to the trouble and expense of coming to the province to defend an action where there is a doubt as to the jurisdiction of the court to entertain it.

Volansky Clothing Co. v. Bannockburn Co., [1919] 3 W.W.R. 913.

ORDER FOR SERVICE EX JURIS—AFFIDAVIT IN SUPPORT—APPLICATION TO SET ASIDE ORDER—CROSS-EXAMINATION ON SAID AFFIDAVIT NOT ALLOWED ON SUCH SUBSEQUENT APPLICATION.

Lyall Shipbuilding Co. v. Van Hemelryck, [1919] 2 W.W.R. 551.

OUT OF THE JURISDICTION—ORDER PERMITTING—IRREGULARITIES—RULES 26, 28, 32, 298—SETTING ASIDE ORDER AND SERVICE.

Heaman v. Humber, 6 O.W.N. 221.

ACTION FOR DECEIT—TORT COMMITTED IN ONTARIO—RULE 25 (e)—CONDITIONAL APPEARANCE.

Green v. University Estates, 6 O.W.N. 128.

OUT OF THE JURISDICTION—CONDITIONAL APPEARANCE—RULES 25 (G), 48—NATURE OF PLAINTIFF'S CLAIM.

Marshall v. Dominion Manufacturers, 6 O.W.N. 385.

RULE 25 (E), (H)—BREACH OF CONTRACT—TORT—CONDITIONAL APPEARANCE.

Fletcher v. Chalifoux, 7 O.W.N. 122.

DEFENDANT OUT OF THE JURISDICTION—ORDER FOR SUBSTITUTED SERVICE—FORM OF WRIT.

Goodman v. Brull, 11 O.W.N. 175.

SERVICE OUT OF THE JURISDICTION—CONTRACT—PLACE OF MAKING—PLACE OF PERFORMANCE—CODEFENDANT RESIDENT IN JURISDICTION NOT SERVED—RULE 25 (E), (G).

Rock & Power Machinery v. Kennedy Machinery & Engineering Co., 11 O.W.N. 192.

SUBSTITUTED SERVICE ON SOLICITOR—APPLICATION TO SET ASIDE—LOCUS STANDI.

Meldrum v. Allison, 10 O.W.N. 148.

ORDER FOR SERVICE OUT OF JURISDICTION—WRIT NOT CONFORMING TO ORDER—IRREGULARITY—WAIVER—PROOF OF ASSETS WITHIN JURISDICTION.

Richardson v. Allen, 24 O.W.R. 405.

CONTRACT—BREACHES—ASSETS IN JURISDICTION—CONDITIONAL APPEARANCE.

Auburn Nurseries v. McGredy, 5 O.W.N 104, 165, 25 O.W.R. 85, 119.

SERVICE OUT OF JURISDICTION—CONTRACT—PLACE OF PAYMENT—INFERENCE.

Wolseley Tool & Motor Car Co. v. Humphries, 5 O.W.N. 72, 25 O.W.R. 65.

ORDER PERMITTING SERVICE SET ASIDE BY MASTER IN CHAMBERS—APPEAL FROM MASTER'S ORDER—NOTICE OF APPEAL—GROUNDS OF APPEAL—SUFFICIENCY OF STATEMENT—RULE 218—NOTICE SERVED NOT SPECIFYING RETURN-DAY — RULE 505 (2)—EXTENSION OF TIME UNDER R. 176—ABSENCE OF MERITS—CAUSE OF ACTION — CONTRACT — WARRANTY — ASSETS IN ONTARIO—RULE 25 (h).

Alexander v. Alcemo Mfg. Co., 17 O.W.N. 151.

BOTH PARTIES RESIDENT IN ANOTHER PROVINCE—CONTRACT TO BE PERFORMED IN ONTARIO—CONDITIONAL APPEARANCE.

The defendant was allowed to enter a conditional appearance—although it was not necessary.

Russell v. Greenshields, 24 O.L.R. 113, 19 O.W.R. 416, affirming 23 O.L.R. 171.

SERVICE OF WRIT OF SUMMONS—OUT OF JURISDICTION.

Grant v. Kerr, 18 O.W.R. 398.

SERVICE OF WRIT—BAILIFF OF ANOTHER DISTRICT.

When a writ of summons is addressed to a bailiff of one district, it cannot be served by a bailiff of another district; otherwise, the service is an absolute nullity and the action shall be dismissed on an exception to the form, even if there be no prejudice.

Maranda v. Dufour, 13 Que. P.R. 4.

(§ II A—18)—SERVICE OF PROCESS ON INFANTS—APPOINTMENT OF TUTOR.

A minor sued in his own name and served as a defendant is not thereby made a party to the action under Quebec law; and where there was during his minority no service on any person capable of being served on his behalf (e.g., as his tutor) and before he attained his majority the time for serving the writ had run out, there was no action any longer existing even in an inchoate state.

Levine v. Serling, 19 D.L.R. 108, [1914] A.C. 659, 111 L.T. 355, 23 Que. K.B. 289, reversing 7 D.L.R. 266.

(§ II A—19) — SUBSTITUTED SERVICE OF WRIT OF SUMMONS—SERVICE BY MAILING—SERVICE EFFECTIVE FROM DATE OF MAILING — JUDGMENT — REGULARITY MORTGAGE ACTION—STAY OF PROCEEDINGS UNDER MORTGAGORS AND PURCHASERS RELIEF ACT, 1915—CONDITION OF PAYMENT OF NOMINAL SUM FOR COSTS.

Creasor v. Bonstelle, 8 O.W.N. 558.

(§ II A—23)—TIME OF SERVICE OF WRIT.

An application to set aside a default judgment on the ground of irregularity in service of the writ of summons will not be entertained where it appears that the writ was given to the defendant's wife and that she gave it to her husband on the same day. [Phillips v. Ensell, 1 C.M. & R. 374, followed.]

Vidito v. Veniot, 3 D.L.R. 179, 10 E.L.R. 292.

ORIGINATING SUMMONS — RETURN DAYS — FILLING IN BLANKS—JURISDICTION OF COURT.

C.N.P.R. Co. v. Byng Hall, 28 D.L.R. 751, 33 W.L.R. 741, 10 W.W.R. 11.

B. ON CORPORATIONS.

(§ II B—25)—"OFFICE"—NOTICE OF LIBEL ACTION AGAINST NEWSPAPER—SERVICE ON REPORTER — LIBEL ACT, C.S.N.B. 1903, c. 136, s. 4.

Carter v. The Standard, 30 D.L.R. 492, 44 N.B.R. 1.

ASSOCIATION—REPRESENTATIVE SERVICE.

In an action for liquidated damages against an unincorporated voluntary association an order should not be made for class or representative service on the association under r. 211 (Man.). [Kingston v. Salvation Army, 7 O.L.R. 681; Walker v. Sur, [1914] 2 K.B. 930, followed.]

Friesen v. Mennonite Mutual, 34 W.L.R. 356, 10 W.W.R. 814.

ACTION AGAINST FOREIGN CORPORATION — SERVICE ON AGENT IN ONTARIO—RULE 23.

O'Grady v. Pullman Co., 12 O.W.N. 158.

OFFICERS RESIDENT ABROAD AND NOT BRITISH SUBJECTS.

Gilpin v. Hazel Jules Cobalt Silver Mining Co., 5 O.W.N. 518, 25 O.W.R. 417.

(§ II B—26)—ON OFFICER OF CORPORATION.

Where a corporation officer (competent generally under the terms of the statute to accept service of process), in a suit against the company, is himself the plaintiff, or bears such a relation to the plaintiff or to his claim as to make it to such officer's interest to suppress the fact of service, the court will authorize some other and proper method of service. In an action upon a promissory note against an incorporated company in which the plaintiffs are four directors, one of the four being the secretary-treasurer, of the defendant company, the secretary-treasurer (although a competent officer generally to be served with process) is not, while a party plaintiff, a competent or proper person upon whom to serve the writ of summons, and such service will be set aside.

Crawford v. Calville Ranching Co., 6 D.L.R. 375, 22 W.L.R. 50, 2 W.W.R. 926.

SERVICE ON OFFICER OF FOREIGN CORPORATION—MOTION TO SET ASIDE—ASSETS IN ONTARIO—CON. R. 162—LEAVE TO ENTER CONDITIONAL APPEARANCE.

Rainy River Navigation Co. v. Ontario & Minnesota Power Co., 3 D.L.R. 870, 3 O.W.N. 1314, 22 O.W.R. 221.

DEFENDANT—SERVICE ON PERSON IN ONTARIO—MOTION BY PERSON SERVED TO SET ASIDE—AFFIDAVIT DENYING CONNECTION WITH COMPANY—INSUFFICIENCY.

Powell-Rees v. Anglo-Canadian Mortgage Corp., 1 D.L.R. 920, 3 O.W.N. 844.

ACTION AGAINST FOREIGN CORPORATION—SERVICE ON AGENT IN ONTARIO—RULE 23—TRANSACTING BUSINESS FOR COMPANY—"TRAFFIC SOLICITING REPRESENTATIVE."

Wagner v. Erie R. Co., 6 O.W.N. 386, 26 O.W.R. 381.

SERVICE ON FOREIGN RAILWAY COMPANY.

Gillis Supply Co. v. Chicago, Milwaukee & Puget Sound R. Co., 16 B.C.R. 241.

(§ II B—28)—Under the Execution Act, 9 Edw. VII. (Ont.), c. 47, a sheriff can seize shares in an incorporated company only (1) if the head office of the company be within his county, or (2) if the company have, within his bailiwick, a place at which service of process may be made. Where the directors of a company passed a resolution authorizing a transfer of its head office to another place and appointed a representative there to receive legal notice addressed to the company and went no further, failing to pass the by-law required by s. 88, Ontario Corporation Act, and to comply with other requirements of that section, there was no place in the bailiwick of the sheriff of the district to which the head office was attempted to be moved at which service of process could be made under the Ontario Execution Act, 9 Edw. VII., c. 47, providing that upon an execution being directed against the shares in a company owned by a debtor a notice that the shares are to be seized thereunder must be given by the sheriff if the company has within his bailiwick a place at which service of process could be made.

Malouf v. Labad, 3 D.L.R. 755, 3 O.W.N. 1235, 22 O.W.R. 99, affirming 2 D.L.R. 226, 21 O.W.R. 575.

ON AGENT—SERVICE ON FOREIGN CORPORATION—REGISTERED ATTORNEY.

Reinhorn v. Knetchel Furniture Co., 8 D.L.R. 1047, 22 W.L.R. 605, 3 W.W.R. 235.

AGENT—CARRYING ON BUSINESS—LEAVE TO APPEAL.

An action was brought in the Supreme Court of Ontario against a railway company and a foreign steamship company for breach of duty in or about the carriage of goods. The writ of summons was served upon B., in Toronto, Ontario, as representing the steamship company. B. was the agent or representative in Toronto of a Canadian company, having its head office in Montreal, and that company was the agent in Canada of the foreign steamship company. Neither B. nor the Canadian company had anything to do with the arrangements for the shipping of the goods in respect of which the action was brought. It appeared that the agency of the Canadian company for the steamship company was of a limited kind: It did not make contracts with shippers or passengers except on specific instructions, but received requisitions and forwarded them to the steamship company in New York:—Held, by Masten, J., in Chambers, that the Canadian company,

through B., transacted or carried on some business in Ontario for the steamship company, within the meaning of r. 23, and therefore the service upon B. for the company was good service. Difference between r. 23 and the English Order IX., r. 8, pointed out. [Okura & Co. v. Forsbacka Jernverks Aktiebolag, [1914] 1 K.B. 715, distinguished.] Held, by Riddell, J., in Chambers, refusing a motion (under r. 507) for leave to appeal from the order of Masten, J., that there was no good ground to doubt the correctness of the decision.

Ingersoll Packing Co. v. N.Y.C.R. Co. et al., 42 O.L.R. 330. [See 13 O.W.N. 481, 14 O.W.N. 134.]

C. By publication; substitutional service.

(§ II C—30)—Absence from province.

Recourse can only be had to service by publication in a newspaper when the defendant is actually absent and has neither domicile nor residence nor place of business in the province.

Carrier v. Dubé, 51 Que. S.C. 528.

Substitutional service — Publication of notice by advertisement.

Howard v. Lawson, 19 Man. L.R. 223. Griffin v. Blake, 21 Man. L.R. 547.

(§ II C—34)—Substitutional service — when order may be granted.

An application for an order for service ex juris of a writ of summons is properly made on the affidavit of the plaintiff's solicitor, if it appears that he is in as good a position to know the facts upon which the application is based as the plaintiff himself.

O'Neil v. O'Neil, 11 D.L.R. 440, 24 W.L.R. 84, 4 W.W.R. 478.

Where the end aimed at in an order for substituted service is service upon defendant's brother, service upon a brother other than the one designated in the order may be confirmed and allowed as sufficient.

Wallace v. Potter, 7 D.L.R. 114, 22 W.L.R. 281, 2 W.W.R. 1085.

Under Consolidated R. 938 (a), Ont. C. R. 1897, giving an executor right to serve a notice for the determination without the administration of the estate of any question affecting the rights or interests of the persons claiming to be crediting devisee, legatee, next-of-kin or heir-at-law or cestui que trust, the court will not grant leave to serve substitutionally one who has a claim upon certain land of the estate as the rule is not intended to enable a determination whether certain property belongs to an estate or not.

Re Turner, 5 D.L.R. 731, 22 O.W.R. 543.

D. Privilege—Exemption.

(§ II D—45)—Soldiers—Statutory preliminaries — Affidavit — Actions in rem.

Section 144 of the Imperial Army Act 1881, c. 58, as applied to Canada by the Militia Act, c. 41, R.S.C., s. 74, which provides that no process may issue against a soldier without the preliminary filing of an affidavit under subs. 4, applies only to proceedings, but not to an action for the foreclosure of an agreement for the purchase of lands, in which case it may be done by a notice in writing.

Gale v. Powley, 24 D.L.R. 450, 22 B.C.R. 18, 32 W.L.R. 65, 8 W.W.R. 1312.

(§ II D—49) — Suspension of actions against liquor licensees because war—Setting aside service.

A proclamation during a state of war, prohibiting the taking of any action against liquor licensees during the proclaimed period, does not deprive creditors from issuing the writ; but service of the writ, if arising out of an action in connection with the business as liquor licensees, will be set aside and the action continued to all other claims.

Imperial Elevator & Lumber Co. v. Kuss, 25 D.L.R. 55, 8 S.L.R. 360, 9 W.W.R. 606, 32 W.L.R. 941, varying 9 W.W.R. 164, 32 W.L.R. 378.

Setting aside service—Actions against liquor licensees — Suspension because war.

Miller v. Kuss, 25 D.L.R. 816, 9 W.W.R. 763, 32 W.L.R. 957.

Faits et articles—Default of defendant.

Klipstein v. Eagle Mining Co., 20 Que. K. B. 239.

III. Return; proof; setting aside writ or service.

(§ III—55)—Crown practice—Motion to quash.

Where r. 37 of the Crown Office Rules is adopted, then, on return of the summons, counsel may move to quash on the return without further order and no recognizance may be entered into, r. 36 not applying.

R. v. Dhana Singh, 25 Can. Cr. Cas. 251, 7 W.W.R. 1101.

Fixing return day.

The return day of an originating summons may be fixed at Chambers.

C.P.R. Co. v. Hall, 10 W.W.R. 11.

Amendment of return—Law firm.

Service of a motion on a firm of lawyers, in which there has been, after the appearance, a change as to one member in the composition and name of said firm, and made on the firm as newly composed, is irregular and null; a motion to amend the bailiff's return of service will be dismissed, sauf a se pourvoir, s'il y a lieu.

Dougan v. Montreal Tramways Co., 18 Que. P.R. 64.

Return—Saturday—Extension of time.

If the delay of 3 days given to the plaintiff by art. 154, C.C.P., to obtain permission to return a writ of summons which has not been returned on the day fixed, expires on a Saturday, permission should be asked for within such 3 days; the delay is not extended to Monday.

Duval v. Wade, 19 Que. P.R. 177.

CONTEST OF RETURN—PRACTICE—CERTIFICATION.

The return by a bailiff is authentic and all statements therein are presumed true, so far as they are not contested with the permission of the court in the manner laid down in art. 236, C.C.P.; and this procedure is imperative. Unless the defendant has suffered injustice or grave prejudice, from a copy of a writ not having been duly certified, such omission or irregularity does not give rise to an exception to form, especially if the defendant has appeared within the legal delays.

Quebec Heights v. O'Byrne, 20 Que. P.R. 238, 55 Que. S.C. 32.

EXCEPTION OF LIS PENDENS—SECOND ACTION SERVED AND RETURNED BEFORE A FIRST ACTION — TWO ACTIONS IN BOUNDARY C.C.P. 173, 1059—C.C. (QUE.) 504.

A court is not seized of a case until the writ and declaration are returned; but upon the action being returned the court becomes seized of the case from the date of the service, the return having a retroactive effect to that date. If an action in boundary has already been taken by the defendant, the latter may demand the dismissal of a second action taken by the plaintiff to the same effect.

Gignac v. North Shore R. Co., 15 Que. P.R. 395.

(§ III—58)—SETTING ASIDE—ANNULMENT.

In the absence of fraud and prejudice mere irregularities in the service of process will not give rise to cancellation, and such irregularities should be raised by intervention or opposition and not by petition to annul.

Savoie-Guay Co. v. LesLauriers & De-Briére Rose v. Savoie-Guay Co., 7 D.L.R. 205, 21 Que. K.B. 560.

IRREGULARITIES IN WRIT AND SERVICE THEREOF.

An objection on the ground that the address for service of the plaintiff endorsed on the copy of the writ served on the defendant was not within three miles of the place where the writ was issued as required by statutory rules, should be raised by a motion to set aside the writ itself and copy for service as well as the service and not by a motion to set aside the service alone which can be made only for irregularity in the method of service. [Anon, 1 Dow. Prac. Cas. 654, applied.]

Hilborn v. Reilly, 9 D.L.R. 671, 23 W.L.R. 147, 3 W.W.R. 858.

SERVICE ON FOREIGN COMPANY-DEFENDANT —SERVICE ON MANAGER WHILE TEMPORARILY IN ONTARIO — COMPANY NOT CARRYING ON BUSINESS IN ONTARIO—RULE 23 — ISSUE OF WRIT WITHOUT LEAVE—ORDER SETTING ASIDE SERVICE ON COMPANY.

Macklin v. Imperial Warehouse Co., 16 O.W.N. 141.

FALSITY OF RETURN—PETITION IN REVISION OF JUDGMENT.

If an action has not been duly served, defendant may, by petition in revision, obtain relief without alleging or establishing that he has a good defence to the action. As in the case of an exception to the form, it is sufficient to allege nullity of service and falsity of the bailiff's return.

Grant v. Taylor, 12 Que. P.R. 315.